

ANNOTATED AGENDA
COUNCIL ON COURT PROCEDURES

Saturday, September 14, 2019, 9:30 a.m.

Oregon State Bar

16037 SW Upper Boones Ferry Rd, Tigard, Oregon

- I. Call to Order (Mr. Keating)
- II. Introductions (all)
 - A. Guests
 - B. Welcome new members
 - C. Hand out current roster and note corrections (ATTACHMENT A)
- III. Approval of December 8, 2018, Minutes (Mr. Keating) (ATTACHMENT B)
- IV. Annual election of officers per ORS 1.730(2)(b) (Mr. Keating)
 - A. Chair
 - B. Vice Chair
 - C. Treasurer
- V. Council Rules of Procedure per ORS 1.730(2)(b) (Judge Peterson)
 - A. Review (ATTACHMENT C)
 - B. Council Timeline (ATTACHMENT D)
- VI. Reports Regarding Last Biennium (Chair)
 - A. Promulgated Rules (Judge Peterson)
 - B. Staff Comments (Judge Peterson) (ATTACHMENT E)
 - C. 79th and 80th Legislative Assembly's ORCP Amendments Outside of Council Amendments (Judge Peterson) (ATTACHMENT F)
 - 1. Rules Amended: ORCP 69 C
 - 2. New Statutory Mention of Rules
- VII. Administrative Matters (Chair)
 - A. Set Meeting Dates for Biennium

*Items received too late for inclusion in this packet will be e-mailed prior to the meeting if there is time. Otherwise, they will be photocopied and distributed at the meeting.

Call-In Information

Teleconference number: 1-888-355-1249
Passcode: 497303

Shari's cell phone number: 503-267-9692
Mark's cell phone number: 503-544-7022

- B. Funding (Judge Peterson)
- C. Council Website
- D. Results of Survey of Bench and Bar: Generally (Judge Peterson)
(ATTACHMENT G)
 - 1. Suggestions to the Council Regarding General Improvement
(ATTACHMENT H)

VIII. Old Business (Chair)

- A. ORCP/Topics to be Reexamined Next Biennium
 - 1. ORCP 7 (ATTACHMENT I)
 - 2. ORCP 15 (No Attachment - Committee Suggested Reconsideration)
 - 3. ORCP 17 (ATTACHMENT J)
 - 4. ORCP 23 C/34 (No Attachment - Committee Suggested Reconsideration)
 - 5. Discovery (Standing Committee)
 - 6. Guardians Ad Litem (ATTACHMENT K)

IX. New Business (Chair)

- A. Potential amendments received by Council Members or Staff since Last Biennium
 - 1. ORCP 10 (ATTACHMENT L)
 - 2. ORCP 39 (ATTACHMENT M)
 - 3. ORCP 54 (ATTACHMENT N)
 - 4. ORCP 57 (ATTACHMENT O)
 - 5. ORCP 68 (ATTACHMENT P)
- B. Potential amendments received from Council Survey (ATTACHMENT Q)

X. Appointment of committees regarding any items listed in VII or IX

XI. Adjournment

Oregon Council on Court Procedures
Roster (Revised 8/17/19)
2019-2021 Biennium

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DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, December 8, 2018, 9:00 a.m.

Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Jay Beattie
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Hon. Timothy C. Gerking
Hon. Norman R. Hill*
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts*
Derek D. Snelling*
Hon. Douglas L. Tookey
Margurite Weeks*
Hon. John A. Wolf*
Deanna L. Wray

Members Absent:

Troy S. Bundy
Jennifer Gates
(1 vacant position)

Guest:

Brenda Tracy

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 23 C/34 ORCP 38 ORCP 44 ORCP 55 ORCP 65	ORCP 23 C/34	ORCP 7 ORCP 15 ORCP 16 ORCP 22 B ORCP 38 ORCP 44 ORCP 55 ORCP 65	Discovery Guardians Ad Litem ORCP 7 ORCP 15 ORCP 17 ORCP 23 C/34

I. Call to Order

Mr. Keating called the meeting to order at 9:37 a.m.

II. Administrative Matters

A. Approval of September 8, 2018, Minutes

Mr. Keating asked whether any Council members had any amendments to the draft September 8, 2018, minutes (Appendix A). Judge Bailey and Mr. Eiva noted that they were absent from the meeting but that the minutes reflected that they were present. A motion was made and seconded to approve the September minutes as amended to reflect the appropriate attendance. The amended minutes were approved unanimously by voice vote.

Ms. Nilsson noted that Judge Tookey wished to make an amendment to the previously adopted June 8, 2018, minutes. Judge Tookey explained that he wished to change a sentence in the second paragraph on page 24 for clarification. He stated that he would prefer the sentence in question to read, "Judge Tookey suggested that the Council should be careful with lead lines, as lawyers will sometimes rely on them for guidance when they also need to read the text of the rules." Judge Leith made a motion to approve this amendment to the June 8, 2018, minutes. Judge Norby seconded the motion. The amended minutes were approved unanimously by voice vote.

B. Election of Legislative Advisory Committee

Judge Peterson explained that Oregon statutes require the election of a Legislative Advisory Committee (LAC) each biennium; however, the Legislature does not often call on the LAC for counsel. The LAC's purpose is to answer questions for any legislative committee chair and to provide any needed testimony before the Legislature. Judge Peterson stated that the LAC has traditionally been made up of the chair, the vice chair, and one or two judges, usually those who are located in Salem to make travel to the Legislature easier.

Judge Gerking, Judge Bailey, Judge Leith, and Mr. Keating volunteered to be on the committee. Judge Norby volunteered to join if Rule 55 is promulgated. Mr. Keating suggested that Ms. Gates should be on the LAC since she is the vice chair, and also suggested that the LAC be increased to six members.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Crowley moved to nominate the suggested slate of six volunteers. Judge Bailey seconded the motion, which passed unanimously by voice vote. Mr. Crowley then moved to elect the six nominated volunteers. Ms. Payne seconded the motion, which passed unanimously by voice vote.

C. Council Membership

Ms. Nilsson listed the Council members with terms expiring at the end of the current biennium who are not eligible for reappointment: Mr. Beattie, Mr. Keating, and Judge Gerking. The Council thanked them all for their dedicated service over the years.

Ms. Nilsson then listed the Council members with terms expiring at the end of the current biennium who are eligible for reappointment: Mr. Bundy, Mr. Crowley, Mr. Snelling, Judge Leith, and Judge Roberts. She asked them to contact her or Judge Peterson to indicate whether or not they wish to be reappointed.

Judge Norby asked whether there are term limits for serving on the Council. Ms. Nilsson stated that two consecutive terms are the limit, although there is nothing in the statute that precludes a member from serving again after a hiatus.

D. Set First Council Meeting for September of 2019

Judge Peterson explained that Council tradition has been to set the first Council meeting for the upcoming biennium at the final December meeting of the current biennium. The first meeting is traditionally held on either the first or second Saturday of September in odd-numbered years. Judge Peterson stated that there are no federal or religious holidays on the first two Saturdays of September, 2019. He noted that there is a home game for the Ducks, but that it is a non-conference giveaway. The Beavers are playing an away game. Ms. Payne asked if choosing this meeting would commit the Council to either the first or second Saturday for the rest of the biennium. Judge Peterson stated that the new Council would make that determination during the first meeting.

After consulting their calendars, the Council decided to schedule the first meeting of the 2019-2021 biennium for September 14, 2019, at 9:30 a.m. at the Oregon State Bar offices.

E. Communication with Legislators

Judge Peterson admitted that he has not done a good job in getting draft emails to the Council for Council members to send to their legislators. He noted that, if he can get a draft promptly to Council members after this meeting, it will be useful and will serve to prepare them for the transmittal letter that Mr. Keating will sign. Judge Peterson

explained that, typically, the transmittal letter is written in less “lawyerly” language and is used to show how the Council’s work has improved the Oregon Rules of Civil Procedure to work better for the people.

III. Old Business

A. Committee Reports

1. ORCP 23 C/34 Committee

Ms. Wray explained that Mr. Andersen, Judge Leith, and Ms. Payne had planned to work on a suggestion to the Legislature for improving ORCP 23 but that they had not yet gotten to the point of drafting that language. Judge Peterson stated that the issue can be put on the agenda for next biennium. Ms. Payne observed that the point is that the Council decided that it was not appropriate for the Council to take action, so it was going to ask the Legislature to do so. Mr. Keating asked for a refresher on what the issue was. Ms. Payne reminded the Council that the issue had to do with defendants who quietly pass away prior to a case being filed against them, and shortly before the statute of limitations bars an action against the estate. Judge Peterson noted that the Council agreed that the issue is a trap for the unwary, but that there is not a procedural rule fix.

Ms. Wray asked whether the language forwarded to the Legislature would have to be approved by the Council. Judge Peterson stated that, if it is a recommendation from the Council, yes. Ms. Wray agreed that there is not time for the language to be sent to the Legislature this biennium because there are no remaining Council meetings. Mr. Andersen observed that the consensus was that the suggestion would have more impact if it came from the Council, but a suggestion could be submitted by anyone. Judge Peterson stated that the transmittal letter goes to house and senate leadership and officers of the judiciary committees. Judge Norby wondered whether a suggestion could be included in the transmittal letter this biennium. Judge Peterson stated that he does not believe so unless it is a proposal that the entire Council agrees on, and there is no time for the entire Council to review such a proposal.

B. Discussion/Voting on Amendments Published September 8, 2018

Judge Gerking asked for clarification on the promulgation process. He wondered whether the published rules will receive up or down votes only, or whether they can be changed at this time. Judge Peterson stated that the Council published the rules and that the bench and bar have had opportunity to look at them. If there is a plain typographical error between publication and promulgation, or something that needs to be clarified, the Council can fix it. In terms of changing a rule to be vastly different, he stated that he does not believe that is permissible because there would be no opportunity for comment at

that point (although the Council always republishes any rule to which a minor change is made, as required by statute). Judge Norby asked what the point of republishing is if there is no chance for comment. Judge Peterson explained that it is to put everyone on notice that a small change occurred after publication.

1. ORCP 7

Judge Norby stated that no comments from the bench or bar regarding the published amendment to Rule 7 (Appendix B) had been received. Judge Peterson noted that he had a conversation with Holly Rudolph, the forms manager for the Oregon Judicial Department. She mentioned that the change requiring amendment of the certificate of service if electronic alternative service turns out to have been delivered to someone other than the defendant will require her to create a new document. Judge Conover wondered how significant this concern is. Judge Peterson stated his conversation with Ms. Rudolph was enlightening in that he learned about the process she uses when creating new forms such as this new amended certificate of service. Ms. Rudolph did wonder why the Council was also approving mail as a form of alternative service when mail is already an approved method of service. Judge Peterson explained to her that sometimes mail comes back unclaimed or refused and a plaintiff will ask the court for leave to serve by alternative means to avoid the defendant attacking the judgment using Rule 71. He noted Judge Roberts' position that, if one is using alternative service, it is a good practice to also serve by mail. He observed that, often, people are not receptive to being served, so careful lawyers sometimes want to use both the belt and the suspenders.

Judge Peterson explained that, during his conversation with Ms. Rudolph, she mentioned that she looks at the rule as a sort of flow chart when creating her documents. This led Judge Peterson to examine the rule in a similar way, and he noticed that, in subsection D(6), the sentence structure in the three sentences regarding the follow-up mailing that is required if the plaintiff is using alternative service is not parallel. He expressed concern that this could cause students of statutory construction to wonder why the sentences are worded differently, and pointed out that it was not the Council's intention to indicate any difference between the sentences with different language. He stated that he and Ms. Nilsson had drafted some language to improve the subsection's clarity. Ms. Nilsson read the suggested language and Council members made suggestions to improve the word flow. The final language agreed upon was:

If the plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of any defendant, the plaintiff must mail true copies of the summons and the complaint by the methods

specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

Judge Norby made a motion to adopt the amended language. Ms. Payne seconded the motion, which passed unanimously by voice vote.

- a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 7

Judge Norby made a motion to promulgate the amendment to Rule 7, as amended above. Mr. Beattie seconded the motion, which passed by roll call vote with 19 votes in favor and one opposed.

2. ORCP 15

Judge Gerking apologized for not attending the September meeting. He thanked Mr. Bundy for his summary of Rule 15 at that meeting and for the Council's thorough discussion. He noted that the Council had received no comments regarding the published amendment of Rule 15 (Appendix C). He opined that the amendment has been thoroughly vetted and suggested that the Council approve the promulgation.

- a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 15

Judge Gerking made a motion to promulgate the amendment to Rule 15. Judge Bailey seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

3. ORCP 16

Mr. Crowley observed that the Council had received many comments about the published amendment to Rule 16 (Appendix D). He noted that most comments were supportive, and that the majority appeared to follow a form response. As far as he could tell, there were two comments opposed to the amendment. One comment was from Judge James Hargreaves, which did not appear to be entirely opposed, as the judge seemed resigned to the idea that the change was going to be approved. However, Judge Hargreaves appeared to be still of the opinion that there is no legal support for the type of change that the Council published.

Attorney David Paul suggested that things are fine as they are right now and did not think the rule change was necessary.

Mr. Crowley stated that one of the things that struck him about the many comments in support of the rule change is that there seemed to be a belief that the rule change gives support to the idea that there is judicial discretion to allow pseudonyms be employed. He stated that he is not sure that was the Council's intent. Rather, the intent of the language of the amendment itself is to provide a procedure for litigants to make an application to the court to allow the use of pseudonyms but the motion needed to be supported by existing law. In other words, the rule change is merely a procedural way for litigants to make that application and it is the court's decision based on the applicable law whether it is appropriate for pseudonyms to be used. He noted that the Council's language is very straightforward, but suggested that there perhaps needs to be a staff comment to clarify that the rule change is not intended to be a substantive change. Mr. Crowley observed that much of the support of the rule change came from organizations, such as the association of district attorneys and victims' rights groups.

Mr. Crowley introduced a guest to speak in favor of the amendment of Rule 16, Brenda Tracy. Ms. Tracy explained that she is a rape survivor who was drugged and gang raped in 1998 by a group of football players, two of whom attended Oregon State University. In 2014, she came forward with her story publicly in the Oregonian. She stated that she came before the Council to support the amendment because she is most concerned about the safety and privacy of survivors of crime. She noted that it is really hard to come forward and say that you are a survivor, and that it is really hard to pursue justice. She stated that anything the Council can do to support survivors and to empower them to come forward is important. Ms. Tracy observed that survivors often do not come forward in our culture, and one reason is fear of backlash. She stated that she endures this backlash every day, as she is bullied, called names, called a liar, and receives death and rape threats. She stated that she deals with it, but it is not easy. There are days she wants to quit but she does not because she knows how important it is for other survivors to see her coming forward and pushing back on this hatred. She stated that she knows that survivors of stigmatizing crimes are going to endure some backlash no matter what, but some of it can be mitigated in the beginning of a case by allowing survivors to use pseudonyms. She stated that she does not want to discourage survivors from coming forward, because we all deserve the right and opportunity to pursue justice. Ms. Tracy stated that the Oregon Legislature has already done a great job in supporting survivors and, while this change seems small, it is really big to someone like her and to other survivors. Ms. Tracy thanked the Council for allowing her to come today, and

stated that she had rearranged her schedule to be here. She urged the Council to adopt this amendment. Mr. Keating thanked her on behalf of the Council for a very powerful and moving statement.

Judge Peterson noted that Mr. Crowley had mentioned that the Council is not creating substantive rights with this amendment, and he agreed that such a disclaimer should probably be included in the staff comments. He observed that this clarification is not a big stretch because the Council's enabling statute does not allow it to make substantive law changes. In other words, the Council is neutral on whether Oregon law permits pseudonyms to be used, and that decision is up to individual judges.

Judge Peterson stated that a good part of the discussion during the September meeting had to do with concerns about an ethical trap of ex parte contact. There was some comment that this amendment would allow plaintiffs to go in ex parte and not be concerned about this ethical trap. He does not think that it would. Rule 3.5(b) of the Oregon Rules of Professional Conduct prohibits ex parte contact with a judge, and Rule 3.9 of the Oregon Code of Judicial Conduct also prohibits a judge from having ex parte contact on a matter. He noted that some counties do not have a regularized time for hearing ex parte motions and, if a plaintiff is going to ask to proceed under a pseudonym, the plaintiff would likely ask at the beginning of the case, not later. Multnomah County has a Supplemental Local Rule (SLR) that allows for fictitious names to be used, and Clackamas County has a similar rule. In those rules, a motion seeking leave to proceed using a fictitious name is required to be presented in person at ex parte, rather than filed electronically. For ex parte motions in Multnomah County, one day's judicial notice is required to be given to the other side unless it is a motion for a temporary restraining order. So, unless a local jurisdiction writes into a SLR that this can be an ex parte contact that does not require advising the other side, Judge Peterson believes that advising the other side is necessary.

Mr. Eiva observed that there is no other side until you have filed the case. Judge Peterson disagreed. He recalled that he once needed to sue a mental health facility, and the Illinois Secretary of State did not have a website to tell him who to designate as the proper party defendant, so he called the facility. The person at the other end of the telephone conversation asked why he wanted to know. His response was, "Because we are suing you." Judge Peterson pointed out that a plaintiff is required to contact the other side unless a SLR says that such contact is not required, because otherwise the other side does not have an opportunity to be heard. Mr. Eiva noted that the defendant can object after a plaintiff files. Judge Peterson stated that does not think that this amendment avoids the ethical requirement to not have ex parte contact with a judge. Judge Gerking asked

whether that rule applies to prospective litigation that has not yet been filed. Judge Peterson recalled that there was a fairly beefy discussion at the Council's September meeting as to whether the amendment would give a free pass to approach a judge ex parte. Mr. Eiva explained that this is commonly done in conservatorship cases where a party is given a new name through a conservator without letting anyone on the other side know. Judge Norby observed that conservatorship proceedings are not adversarial proceedings in the same sense as other lawsuits. Mr. Eiva stated that, if plaintiffs are allowed to file cases under a pseudonym, of course the other side can be heard by a motion. He opined that notifying the party being sued would create a delay in the process by turning it into a contested procedure. Judge Peterson stated that it is a telephone call. Mr. Andersen and Judge Gerking wondered who a plaintiff would call. Ms. Payne stated that it is not always so easy to pick up the telephone and get a hold of an individual. Mr. Andersen noted that this would be a lawyer contacting an unrepresented party, which could present its own ethical problems.

Ms. Holley noted that the Council does not have to solve this problem with this rule, but she stated that if the motion and complaint are filed at the same time, using a pseudonym and the other side objects, a party could amend the complaint to use the plaintiff's name. She stated that rules such as the UTCR will likely solve these issues. Mr. Andersen observed that the real change is that right now people sometimes file a lawsuit using a pseudonym without asking a court – they just do it. Other than Judge Hargreaves, he does not know if any judge is having a problem with it. He stated that the defense can ask for disclosure of the name. He noted that the amendment states that a party "may" seek a court order, and that "may" saves the amendment in his opinion. If the Council were to say that a party must give notice to the other side before seeking an ex parte order, it is problematic. Often the other side cannot be located or the statute of limitation is about to run, and there could then be a new body of litigation as to whether the notice was sufficient, the problem of ex parte contact with the unrepresented individual, and potentially alerting the other side that something is coming that may help the defendant evade service of the summons and complaint. These problems magnify, compared to the status quo where plaintiffs just file the case under a pseudonym.

Judge Peterson stated that the discussion from the September meeting seemed to indicate that the amendment removed ex parte contact as a problem. However, just as the amendment does not give a right to file using a pseudonym but, rather, puts in place a procedure to request permission to do so, he does not think that the Council should weigh in on whether a plaintiff has a duty to communicate with the other side beforehand. It will be each attorney's problem to deal with those issues. Judge Bailey stated that this sounds like a good subject for an advisory letter to the Oregon State Bar. Judge Roberts noted that, under Multnomah

County rules, even if it is at ex parte, a party is still required to give a day's notice if possible to the other side. So, the fact that the motion is made at a time reserved ex parte motions does not mean that the motion is actually ruled on ex parte; the other side can come. She observed that motions that are handled in that manner are often not contested.

Mr. Keating stated that his experience has been that, when he has received a complaint filed under a pseudonym, he would call the adverse attorney and ask for the name of the patient so that he could get the medical records. He believes that this is the way that filing under a pseudonym is commonly being done: that most lawyers go ahead and file the case without asking first. He noted that the Council's discussions have concluded that there is nothing in the ORCP that supports this current practice, so the Council is trying to address that concern. Mr. Keating observed that he has never seen a pseudonym case contested. In his experience, the plaintiffs' bar exercises very good discretion in selecting cases where the use of a pseudonym is appropriate.

Mr. Crowley stated that he thinks that this amendment is about developing a procedure, and that it is a starting point. If the subject matter Judge Peterson raised turns into an issue, the next step will be how to address that issue. The place to address it is probably in the UTCR, where there are already rules that address confidentiality.

Judge Peterson explained that he did not mean to throw a wrench in the machinery, but just wanted to make clear that the rule change is neutral. It just provides a procedure while remaining neutral on whether there is authority to grant the order as well as on the ethics of ex parte contact. He noted that practitioners will have to make a decision on what is appropriate under the circumstances.

Judge Conover asked for clarification about comments regarding the discretion of the court. Mr. Crowley stated that many of the comments that the Council received in support of the amendment seemed to have the idea that the published amendment supports the long history of discretionary actions by judges allowing the use of pseudonyms, but it was not the Council's intent to provide support necessarily for this or even to suggest that this is the case. The Council's intent is to provide a procedure for these issues to be addressed.

Judge Peterson stated that he will write a staff comment regarding this.

- a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 16

Judge Leith made a motion to promulgate the published amendment. Justice Nakamoto seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

4. ORCP 22

Mr. Beattie explained that the Council had received many comments to the published amendment to Rule 22 (Appendix E). These were mostly objections from the plaintiffs' bar and centered on the published change to subsection C(1) that eliminates the requirement that all parties agree to add a new third-party defendant if 90 days have elapsed from the service of the original summons. He stated that the objections claim that the change is unfair, but stated that the basis of these claims seems somewhat unclear to him.

Mr. Beattie stated that the existing rule is patently unfair to defendants because it restricts their access to justice and their ability to fully litigate a case that involves a defendant who should share the liability, but who was discovered at a later date, more than 90 days after the case was commenced. As the rule is currently constituted, when a defendant discovers another defendant who needs to be brought into the case to have that potential defendant's fault compared, the defendant currently in the case has to get agreement from every other party and, in a single plaintiff and single defendant case, that means agreement from the plaintiff, before that potential defendant can be brought in. The court has no supervision or discretion to bring in that potential defendant if the plaintiff objects; therefore, the plaintiff has a unilateral veto right in third-party practice. There is no such veto right in the federal rules or any state procedural rule that he is aware of that gives either party the right to unilaterally veto an activity by the other party without any sort of oversight by the court. Third-party practice is merely an aspect of pleading and practice. It is adding a defendant, it is handled by an amendment, and amendments are historically and throughout the ORCP allowed at the discretion of the court. Defendants do not have the right to prevent a plaintiff from amending his or her complaint; that does not appear in the rules. Defendants do not have the right to prevent the plaintiff from bringing in another defendant, or bringing in another plaintiff, for that matter.

Mr. Beattie admitted that bringing in new and different parties can create some prejudice, but stated that amending a complaint to add a claim can also cause prejudice. Judges figure out whether the prejudice is so overwhelming that the amendment should be denied. He opined that the published amendment simply places third-party practice on the same footing as other amendment practice and leaves it up to the court's discretion. He stated that it conforms the rule somewhat

to the federal rule [FRCP 14(a)(1)] that allows amendment as a matter of right for 14 days, after which the authority of the court is required. It creates the same kind of fairness in our rule for all parties. Mr. Beattie stated that he strongly supports the amendment.

Judge Gerking stated that, on the drive to the Council meeting, he was not sure what side he was going to take regarding this amendment. He stated that he does not agree with the 90 day period because he thinks it is unreasonably short. On the other hand, he thinks that, if a defendant wants to amend to add a third-party defendant after six to eight months of litigation where depositions have been taken, that should not be allowed because that would be clearly prejudicial. But to him, it is all beside the point. He noted that Oregon trial judges were reminded recently that it is the court that has ultimate responsibility to make sure a case is properly administered from the standpoint of efficiency, timeliness, and obtaining a just disposition. This is the court's responsibility and the court's alone. In this particular rule, one of the parties has veto power over what the court might otherwise believe to be an appropriate motion. Because that party's veto power is embedded in Rule 22 and that interferes with the court's ultimate responsibility for the administration of that case, he has no other choice but to support the amendment to the rule. Without a change, the rule does interfere with the court's discretion to control a case.

Judge Bailey agreed with all of Judge Gerking's comments. He stated that when he presides over construction defect cases in Washington County, one of the first things he does is to set a cutoff date for the parties to get their third-party defendants in, with the understanding that the case is subject to bifurcation if any parties are brought in later. He stated that he believes that this is where the discretion should be. He noted that courts know the timely disposition standards that the Chief Justice just adopted where courts are expected to get 90% of their cases done in a year and a half period of time, and he stated that it is incumbent upon judges to exercise their authority to get these cases done. Judge Bailey observed that, if the defendant had the right to veto the use of a pseudonym under Rule 16, the plaintiffs' bar would be getting up in righteous indignation about it, and rightfully so, because that would be absolutely wrong. He stated that, if one really believes the court system is about fairness, he cannot understand how anyone would oppose this change.

Ms. Payne pointed out that it is important to understand where a rule came from and its history. She stated that the rule at one time allowed 10 days to have third-party practice by right. There was then a compromise between the plaintiffs' bar and defense bar to change the rule to its current form. The defense bar wanted the 90 days and the plaintiffs' bar agreed, but only if there was an agreement

among the parties to add any third-party defendants after the 90 days. Ms. Payne opined that now the defense bar is wanting to have its cake and to eat it too. She noted that the federal rule is 14 days, and that Oregon's rule used to be 10. The 90 day period is to allow the extra time that the defense wanted, but it is important to remember the compromise and not to take away what was given in exchange for that extra time.

Mr. Beattie stated that this compromise occurred in the 1979-1981 biennium. He pointed out that, since then, Oregon's tort law has been completely rewritten and has eliminated joint and several liability, and noted ORS 31.600, which has specific third-party practice built into it. He pointed out that the world has changed.

Mr. Eiva stated that we are dealing with the controversies and claims that one party brings. He suggested taking a step back with regard to the idea that this is what the plaintiffs' bar wants. He stated that, in the 1999-2000 biennium, the idea to remove the post-90 day agreement of the parties rule came up. Prof. Maury Holland, who was no great friend of the plaintiffs' bar, actually suggested shortening the time because we should know who the parties are early in the litigation. Judge Richard Barron disagreed and said that 90 days is enough.

Mr. Eiva stated that the way this request is being sought is all from the perspective of counsel. However, the plaintiff's bar is dealing with the perspective of their clients, who have a duty to know what they have been through and who caused the harm. Plaintiffs and defendants can be identifying the appropriate parties early on. If a defendant engaged in some kind of conduct, they should have knowledge. The suggestion that third-party defendants are a bolt from the blue is generally not the case. Mr. Eiva opined that there is framing that is calling it a "plaintiffs' veto," but there is another side – are we going to give defendants some authority to change the chess board after 90 days? He stated that he is not worried about day 91 but, rather, he is worried about month 10. He observed that this problem can occur on the eve of trial, and some counsel are far more persuasive in getting these motions through. Mr. Eiva also noted that there are more and more judges on the bench with less experience who may not be familiar with the complexity of multi-party litigation. He expressed concern that adding third parties at the last minute is driving up costs and compromising principles of efficiency. He stated that it will create unnecessary motion practice if we give defendants the authority to seek to change the chess board late in the game.

Mr. Eiva also pointed out that the Council did not receive a request from the bar saying that it needed to change Rule 22 in this regard. He stated that the Council was looking at Rule 22 because there was a request from the bar regarding making a cross claim to a party that was already in the case, and Mr. Beattie stated that he

hates the veto. Mr. Eiva claimed that there is no giant record of injustices and that no one has brought forward a single case to try and prove that this horrible thing is happening.

Mr. Beattie noted that he can state on behalf of his firm that there are often late-discovered defendants in multi-party cases where the courts recognize the injustice of Rule 22 and allow parties to bring a separate claim and join that case with the case where adding the third-party defendant was disallowed. In other words, the courts are doing an “end around” on this rule already. What about plaintiffs adding defendants after 90 days, in terms of fairness? Mr. Eiva stated that the statute of limitations prevents plaintiffs from adding defendants most of the time. Mr. Beattie wondered about newly discovered defendants, where a plaintiff did not even know that a defendant was involved, and the plaintiff wanted to bring them in. What if there were a 90 day rule that said you cannot bring them in without permission of the defendant? That is why we have good judges.

Mr. Andersen stated that Mr. Beattie is correct that tort law has changed over the years, with one such change being eliminating joint and several liability. He stated, however, that the mischief of this amendment is the clever defendant who discovers that they can add additional defendants, no matter how nebulous the claim may be. Post-1990, with the rules of joint and several liability being eliminated, there can be a defendant who recognizes that, the more people on the verdict form, the more the potency of the main claim against that defendant is diminished. If there is a true meritorious third-party defendant, plaintiffs will also want them in the case. However, if a defendant wants to add a third-party defendant after 90 days, a plaintiffs’ lawyer’s first suspicion is about diluting the verdict form. As far as the plaintiff being able to add a third-party defendants at any time, that cannot be done without court approval. Oregon made the compromise, rather than following the federal rule, giving the defendant 90 days as a complete freebie, with the trade off being, after 90 days, the defendant has to have the plaintiff’s permission because the litigation is in progress and discovery has occurred. If it is a meritorious defendant, the plaintiff will agree.

Mr. Beattie posited a situation where plaintiff’s counsel is unreasonable and dislikes him for reasons beyond the litigation. He noted that this is why we have judges. Judge Roberts stated that, as a judge, she feels that judges generally make decisions in a reasonable way. She noted that the supposition of the plaintiffs’ bar seems to be that judges will be putty in the hands of unscrupulous parties but, on the other hand, if a plaintiff asks to add a party late, judges will never allow that. She stated that this is unrealistic and not the way that Oregon judges behave. She also pointed out that this debate has already taken place and does not need to be rehashed. Mr. Beattie agreed. Mr. Eiva noted that the change had been rejected in

1992 and in 1999. Mr. Beattie noted that the United States used to have slavery, which it also eventually rejected.

Mr. Keating stated that there is an underlying assumption that 90 days is adequate time to identify other parties that should be involved in the litigation. Things have changed dramatically in the 45 years he has been in practice. The Council has been born, and rules have changed. In the medical malpractice context, in identifying providers who might have liability, changes have been made in policies and rules that affect what a defendant can discover in a timely fashion. It occurs more often than one might believe that service of a summons and complaint is the first notice that a claim exists and then it can take a while to get to the desk of a defense attorney. The defense attorney then must talk to the client and find out what parties might have been involved. After that meeting, the attorney files a request for production for medical records, which takes up to 30 days of the 90 days. In his experience, common responses from the plaintiff are: 1) that they will provide discovery at a later date; or 2) an objection that he is seeking privileged material. If the defendant files a motion to compel after that response, getting the motion argued and heard in a timely manner is very difficult. Assuming that happens and the judge orders the plaintiff to provide the requested records, the 90 days has already passed. The second way to get the records is to notice the deposition of the subsequent treating physicians that you know about because your client can identify them, but that is going to be quashed. The third thing you can do is file a subpoena for the records, but you have to go to the plaintiff's lawyer and there are 14 days before you can serve the subpoena to the doctor or hospital. Within the time to object, the plaintiff makes an objection for privilege, and the only way the plaintiff's counsel will agree is if you issue a subpoena directing the health care provider to provide the medical records to them. Then that also takes a period of time. The reason that plaintiff's counsel objects is to go through and edit the records for privilege. That is also going to take time. When the records come to the defendant's attorney, they need to be reviewed to see if there is a basis for a claim against a potential third-party defendant.

Mr. Keating stated that, as a practical reality, it is impossible to bring in a third-party defendant within 90 days using the procedures and rules in effect. The reason there are not a lot of complaints about subsection C(1)'s 90-day rule is because there are no judicial opinions about whether it would be reasonable to add a third-party defendant after 90 days, because plaintiffs' counsel know how to read the rule. As a practical matter, he does no third-party practice, because it cannot be done in 90 days. If something develops in discovery, he does not have the right he would have in federal court to say, "justice requires that I be allowed to bring this defendant into the case." This has always been the rule in the federal court, and everywhere else of which he is aware.

Mr. Keating stated that he did read the comments that the Council received regarding the amendment to Rule 22. He stated that, of the list of "horrible injustices" that are posited to happen, he has never heard a word about that in trial practice. He stated that all lawyers understand that, if you have a dispute, you go to the judge who is managing the litigation. Every argument in the comments received by the Council is an argument that can be made to the judge. He stated that his understanding is that the current rule was created because of the desire of the plaintiffs' bar to maintain some control over the structure of the litigation. The current rule gives the plaintiffs' bar a significant advantage with regard to the structuring of who the players are going to be. He noted that any concern about a defense lawyer's motives or reasonableness can be brought before a trial judge. Mr. Keating pointed out that the Council has observed frequently that the discretion of the trial court can solve problems, and he stated that Rule 22 is the only rule in the ORCP that restricts the discretion of a duly appointed or elected trial judge.

Judge Norby stated that, if the original language of the rule was a compromise between the plaintiffs' bar and the defense bar, perhaps the amendment should undo the whole compromise, not only half. For example, the time period could be changed back to 10 days. Mr. Keating stated that he looked at the legislative history and that his interpretation was a lot different from Mr. Eiva's. He stated that the Council did not focus on this issue in 1992. Mr. Keating stated that the desire of one side of civil litigation to maintain control of the structure of the litigation should not be something that governs what this Council does. He opined that it really is not a matter of negotiation between the plaintiffs' bar and defense bar but, rather, a matter of what is right and proper. Mr. Keating stated that this is a circumstance that is not fair, that the playing field is tilted, and that all he wants is the opportunity to make a case to the court in light of the context of the specific case.

Judge Gerking stated that he is unaware of any previous compromise with regard to amending Rule 22 but, if there was a compromise, he believes that it was a compromise that had no right to be made because it usurps the authority of the trial court judge to exercise his or her discretion to determine who the parties will be at the time of trial. Judge Norby stated that judges do not have much discretion on over who the parties are. She also noted that many things usurp the discretion of trial court judges, such as sentencing guidelines. She observed that perhaps not all judges are always fair at all times. Judge Norby opined that, ultimately, if there was a compromise, it does have meaning or value. She noted that the Council is a body that requires people who are on very different sides of an issue to meet and try to agree to things, and this is important. Judges do get distanced from discovery procedures over time, whereas practitioners know and have strong

feelings about them. She stated that, if both sides were able to meet in the middle, that agreement should be honored.

Judge Hill noted that the Council has plowed this ground before, but that he keeps coming back to what Mr. Beattie said at the beginning. There is already a workaround that courts frequently use. He stated that he is hearing from the plaintiffs' bar that their primary objection is additional motion practice, but the rules already allow for that by filing a direct action and then filing a motion to consolidate. The exact same discretionary rules are used by the judge in deciding whether the case should be consolidated. The amendment would simply allow to be done in a more streamlined way what is currently being done in a more complex way. Judge Norby stated that the current workaround requires that the defendant not be a strategic ploy type of defendant, which seems like a good check and balance.

Mr. Beattie wondered why a defendant would bring a non-legitimate third-party defendant into the case. Mr. Andersen stated that it is to get such a defendant on the verdict form. Mr. Beattie noted that he has no reason to put someone on the verdict form to whom the jury will not allocate liability and damages. He stated that, with ORS 31.600 and the elimination of joint and several liability and active/passive indemnity, as well as the potential elimination of contribution actions because of *Eclectic Investment, LLC v. Patterson* [357 Or 25, 346 P3d 468, *aff'd on rehearing*, 357 Or 327, 346 P3d 468 (2015)], a defendant can actually be in the position of losing their contribution rights if they do not bring in someone as a third-party defendant who should be paying some part of a loss. While they may not be not a defendant who is attractive to the plaintiff, and they might add to the plaintiff's burden in the case, nonetheless they should be paying part of the verdict. Mr. Eiva stated that *Eclectic Investment* was carefully worded and did not necessarily strike that right. Mr. Beattie stated that It remains to be seen whether Oregon will go this way, but he pointed out that Arizona has virtually the same statute as Oregon and its courts have interpreted its statute as eliminating claims for indemnity and contribution and requiring the defendant to bring defendants in at trial so the same jury can compare the fault of all of the defendants. Mr. Eiva stated that he thought that Oregon is far away from any court ruling that a newly discovered defendant post 90 days will eliminate the indemnification claim that has always been there since 1856. Mr. Beattie stated that he would again like to dispel the notion that defendants want to bring in phony third-party defendants. Mr. Keating agreed that there is no reason to do that.

Mr. Andersen stated that most of his work is medical malpractice and that he has never seen a fact situation where it was not pretty evident who the defendant should be. As far as a defendant in a medical malpractice case, it is not necessary

for all of the discovery to come in to determine who might be an appropriate third-party defendant. It is pretty clear and, if there are negotiations before, the defendant sometimes identifies who the third-party defendant should be and the plaintiff will add that party to the complaint. Mr. Andersen stated that Judge Gerking recently addressed the Jackson County bar about the need to get every case tried within one year. He opined that adding third-party defendants more than 90 days after service of the summons will lead to no trials being completed in a year. On the plaintiffs' side, every open case is a case that is costing money in terms of time and expenses for the plaintiff's attorney and emotion for the client. Justice delayed is justice denied. Judge Bailey stated that he rarely hears that sentiment from plaintiffs because they are frequently the ones asking to go past the one year mark. Judge Roberts reiterated that she resents the implication that all judges are so utterly feckless that they will allow any motion.

Judge Peterson stated that he is assuming that the case law behind Rule 23 is in effect. He appreciates from the many comments that one half of the bar does not want to be bothered with these motions on the eve of trial and is concerned about getting to justice. He stated that he believes that the case law is pretty clear that, the closer you are to trial, the more this motion is disfavored and the more havoc that it causes in terms of discovery having occurred. This motion is also disfavored to the extent that the defendant should have known about the party and come forward earlier. Mr. Eiva opined that the way the amendment is written it is standardless and expressed concern as to whether judges would make the right decision. Judge Peterson noted that it is the Rule 23 standard. Mr. Eiva asked if there has ever been a Court of Appeals decision where a judge erred by granting an amendment to a pleading, rather than denying one. He stated that the power is only one way, and the judicial review is only based on whether amendments are denied. He fears such pure judicial power and discretion with no parameters, since nothing in the rule even requires that the defendant has to show that they could not have identified the third-party defendant within 90 days. Judge Roberts opined that it is of course an appealable issue.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 22

Mr. Beattie made a motion to promulgate the published amendment to Rule 22: Judge Bailey seconded the motion, which failed by roll call vote with 11 votes in favor and 9 opposed.

Mr. Keating pointed out that, aside from the change to subsection C(1), there is also an amendment to Section B and staff amendments to sections B, C, and D that appear to be noncontroversial. Prof. Peterson stated that

the change to section B is a law improvement amendment that was suggested by a member of the Council. He asked whether the Council would like to vote on promulgating only these amendments to sections B through D. Judge Gerking made such a motion. Judge Norby seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

5. ORCP 43 - Legislative Counsel Recommendation

Judge Peterson reminded the Council that, when Rule 43 was amended last biennium, the first section did not read well. On recommendation from Legislative Counsel, the Council staff made a change in wording without a change in substance. Section A was broken into subsections: one for documents and things, and one for entering property. Changes were also made to change the word "shall" to "must" or "may" or "will" as appropriate. Judge Peterson noted that the amendment was put on the Council's publication docket early in the biennium and that no comments were received from the bench or bar on the published amendment to Rule 43 (Appendix F).

Ms. Payne stated that the change of the word "shall" to "may" on line 25 of subsection B(2) seems substantive to her. Judge Peterson explained that the word "shall" is disfavored because it means different things in different contexts. Ms. Payne stated that she understands changing a "shall" to a "must," but that she believes that changing it to "may" has a very different meaning. Judge Leith stated that "may not" does mean that it is forbidden. Ms. Payne stated that she did not see the word "not." Judge Peterson stated that the intent was to indicate what the word "shall" actually meant. Judge Leith asked whether "must" is better. Judge Peterson stated that "must not" are words of command, whereas "may not" are words of permission. Judge Bailey opined that either phrase would have the same meaning.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 43

Mr. Crowley made a motion to promulgate the published amendment to Rule 43. Ms. Payne seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

6. ORCP 55

Judge Gerking noted that he was not at the September meeting when Rule 55 was discussed comprehensively. He stated that he appreciated that Ms. Nilsson lead

the discussion. He read the minutes carefully regarding suggested changes and did not disagree with any of them. Mr. Andersen stated that he was on the Rule 55 committee with Judge Gerking and Judge Norby. The committee's task was to make order out of what had been chaos without making any substantive changes, and he believes that was accomplished. He stated, however, that Richard Lane, an accomplished attorney in legislative matters, offered some last-minute comments to the published amendment to Rule 55 (Appendix G) that suggested some items he flagged as potential substantive changes. Mr. Andersen stated that he believes that only one of those items may be an unintended substantive change. Current subsection H(2) reads as follows:

Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

However, the language in the amendment at subsection D(3) reads as follows:

A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks.

Mr. Andersen agreed with Mr. Lane that the current language in subsection H(2) invites some discussion between the health care provider and attorneys, whereas the amendment's language in subsection D(3) appears to give the health care provider unilateral discretion to disregard the subpoena. Mr. Andersen suggested that the problem can be fixed by putting the existing language in the new sentence as follows:

If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena unless the requesting party has complied with the appropriate law.

Judge Norby stated that, to her, the current language in subsection H(2) is just a softer and more vague version of subsection D(3) in the amendment. She explained that she wanted the new version to be crystal clear so that, ultimately, next biennium, the Council could decide whether the rule needed to be further modified. While she believes that the new language in subsection D(3) says the same thing, she was not opposed to the change. Mr. Beattie opined that the

language may be structural and wondered to what degree it can be changed at this point. Judge Peterson observed that he was surprised that Mr. Beattie did not say that the decision to make records available is really up to the health care record holder, so it does not make a dime's worth of difference what our rule says. Mr. Beattie agreed that it does not matter because the record holder is following the Health Insurance Portability and Accountability Act (HIPAA) and could not care less about Oregon's court rules. However, he asked whether the minor language change was procedurally appropriate. Judge Norby thought it was appropriate. Judge Gerking agreed, but suggested changing the word "unless" to "until."

Judge Norby asked Mr. Andersen to restate his suggested language. He stated that, with Judge Gerking's suggested change, it would read as follows:

If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Mr. Snelling asked if the word "protected" could be inserted before the term "CHI." He stated that his concern is that the existing subsection H(2) seems to suggest that records custodians would only be able to withhold protected information; however, the amended language in subsection D(3) seems to imply that, if there is one technical flaw with the subpoena, the whole thing is null and void and the holder of the records does not have to provide anything. Judge Gerking stated that he likes Mr. Andersen's suggested language. He stated that it does not matter to him if the word "protected" is there. Judge Peterson noted that "CHI" (confidential health information) is already defined. Judge Norby suggested that adding "protected" would be a substantive change because the current law says the record holder does not have to provide anything. Mr. Snelling stated that the current rule says that the protected records shall not be disclosed. Judge Peterson asked whether the definition of CHI in subsection D(1) takes care of it. Judge Norby stated that it does because it cites to statutes that define those words. Mr. Snelling stated that, to him, referring to other state and federal protections looks like a pretty big change from the existing rule that states that, if compliance requirements have not been met, then those records that are protected by state and federal rules would not be disclosed. He stated that it appears that the published amendment makes a change that, if there is one bit of that request that is protected by a state or federal law then, even if the remainder of the records are not protected, the entire request is going to be denied. He admitted that he might not be reading it correctly. Judge Norby stated that he is reading it correctly, and that inserting the word "protected" does make sense. Ms. Holley noted that this clarifies that it means versus all other records.

Mr. Beattie asked whether the amendment can be changed and promulgated, because it seemed to him that this would be a substantial modification. Judge Norby stated that her rewrite is different from the existing rule. Ms. Payne agreed that this is an instance of going back to the language in the original rule rather than changing the language of the amendment in any substantive way. Judge Peterson stated that, in this context, the principal author of the amendment seems to argue that the proposed amendment is for clarification. He noted that the Council is simply trying to clarify to say that this is what we meant. Judge Leith observed that one way to test is whether there is any possibility that there is a person who exists who would object to the rule with the change as opposed to without the change. He does not think that there is, but the Council is trying to be clear in our intent of not making a substantive change. Judge Norby made a motion to amend with the addition of the word "protected" as suggested by Mr. Snelling. Judge Bailey suggested taking the changes one at a time because some people might not agree with the structural change or the word "protected." Judge Norby stated that Mr. Andersen was trying to come up with a way to say what the existing rule already said, and Mr. Snelling was trying to help him to add a word that he had inadvertently missed. Mr. Andersen agreed.

Mr. Andersen proposed the following language:

If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Ms. Payne made a motion to amend the published amendment to Rule 55 as suggested by Mr. Andersen. Judge Gerking seconded the motion, which passed by unanimous voice vote.

Judge Norby pointed out that Mr. Lane had also suggested that the language in the amendment's paragraph D(6)(b) would authorize recovery of the expense for inspecting records, not just for copying them. This is different from the existing rule. Judge Norby suggested changing deleting "the inspection or copies" and inserting "the copies." Judge Norby made a motion to amend accordingly. Mr. Andersen seconded the motion, which passed unanimously by voice vote.

Judge Norby stated that Mr. Lane had also pointed out that, in the amendment's subsection D(11), the language used is "notwithstanding any other provisions this section does not expand the scope of discovery," whereas the existing language in subsection H(6) is "notwithstanding any other provisions this rule does not expand the scope of discovery." She noted that, at the time this language was originally added to the rule, the word "rule" was used, which meant that nothing in the

entirety of Rule 55 should expand the scope of discovery. She stated that she does not believe it was an issue before the question of individually identifiable health information came up, as people historically did not assume that any subpoena process could expand the scope of discovery so there was no need for any comment about it. Her understanding of why the language was kept is to advise people not to get too haughty about CHI and to let them know that the fact that they are subpoenaing it does not override any other limitation on the scope of discovery. Ms. Payne asked whether there is anything else in Rule 55 that expands the scope of discovery. Judge Norby stated that there is not, and she believes that leaving the existing language causes no harm, whereas the change could potentially cause harm. Ms. Payne stated that she prefers to keep the language the same to avoid unintended consequences.

Judge Norby pointed out that, because section D only applies to CHI, the only way to keep the existing language is to move it to section A in order to make it apply to the whole rule. Judge Tookey suggested making a new section E. Judge Norby opined that having a whole section for one item that could have gone into section A would be odd. Ms. Holley agreed with creating a new section E. Judge Gerking also agreed with Judge Tookey that the language should be in a separate section, as a concluding, stand-alone statement about the impact. Mr. Andersen agreed. Mr. Eiva stated that he liked that positioning for ease of finding it.

Judge Norby reiterated that everything that applies to the entire rule is in section A, so it would be odd to put this in its own section. Mr. Eiva stated that he can support loyalty to that principle. Ms. Payne made a motion to amend to move subsection D(11) to a new subsection A(8) to read:

Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

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

Mr. Andersen congratulated Judge Norby for her enormous undertaking. Judge Leith stated that, since it was such a huge undertaking that is intended to be non-substantive, there will inevitably be something that someone can point to that will have an unintended consequence. He stated that is he nervous about the possibility that the amendment has inadvertently done something to affect the discoverability of confidential health information. Judge Norby noted that Mr. Lane is nervous about that too, and that it is a natural reaction. She pointed out that the committee and staff had spent hundreds of hours of work on this, and that Legislative Counsel had also reviewed it. Judge Leith clarified that, while it is almost inevitable something will come up that the Council will need to fix, the

purpose of fixing the rule warrants the risk and he supports the change.

- a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 55

Judge Norby made a motion to promulgate the published amendment to Rule 55, as amended above. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

7. ORCP 38, 44, 65

Judge Peterson reminded the Council that Rule 38, Rule 44, and Rule 65 were only amended because there are references to Rule 55 in them. Staff also made a few minor stylistic changes. He suggested a joint motion to promulgate all three published amendments (Appendix H).

- a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendments of ORCP 38, 44, 65

Judge Bailey made a motion to promulgate the published amendments to Rule 38, Rule 44, and Rule 65. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

IV. New Business

- A. Potential amendment to Rule 7, Rule 17, and regarding Guardians Ad Litem

Mr. Keating noted that these potential amendments are information items only and require no discussion today. They will be placed on the docket for next biennium.

- B. UTCR Committee Workgroup on E-Signatures for Declaration of Parties and Witnesses

Judge Peterson stated that the UTCR Committee had requested that the Council have one of its members participate in its Workgroup on E-Signatures for Declaration of Parties and Witnesses. He had previously reached out to the Council for volunteers, and Judge Conover agreed to participate.

- C. Budget and Website

Judge Peterson stated that a budget person from Oregon Judicial Department (OJD) typically calls him each biennium and asks for the Council's budget needs. He usually

replies that whatever biennial increase allotted to other agencies will suffice. The OJD representative suggested that the Council should ask for a higher amount this biennium. Judge Peterson pointed out that his Executive Director stipend is \$1000 a month, and it has probably been at that level since the inception of the Council. At some point, he will pass the job off to someone else, and that low stipend is not a big incentive for anyone to take the job. The OJD representative suggested doubling the stipend, and he put in a request for that increase. Someone from the Council may have to testify regarding the budget request.

Judge Peterson also reported on some changes regarding the Council's website. He reminded the Council that the site is a creation of Ms. Nilsson, who also has a day job at the Campaign for Equal Justice (CEJ). CEJ has recently changed to a Wordpress platform for its website, which makes editing the site much easier and more streamlined. The Council also decided to hire a contractor to convert the site to Wordpress, and the new site should be ready by the fall of 2019. Mr. Keating asked whether this is just an informational item or whether the Council needs to vote on it. Judge Peterson stated that it is just informational.

V. Adjournment

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

COUNCIL ON COURT PROCEDURES RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). These rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in ORS 1.725-1.760.

- I. MEETINGS.** Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Council. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of any such meeting shall be given personally, by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of that meeting except when a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called. All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

- A. **Officers.** The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a term of one year. Officers for the succeeding year shall be elected at the September meeting of the Council each year and shall serve until a successor is elected. The powers and duties of the officers shall be as follows:
1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.
 2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.
- B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and shall perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to the meeting and provide reasonable notice to Council members of the agenda.
- C. Committees. The Chair may appoint any committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. All committees shall report to and recommend action to the Council.
- D. Legislative Advisory Committee ("LAC").
 1. Definitions. When used in this section, the phrase "LAC" means the committee elected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).
 2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:
 - a. the Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or
 - b. the LAC, after a request by a legislative committee, has presented any proposal to the Council and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the

Council on Court Procedures. The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless that position has been submitted to the Council and approved by a super majority. Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and who has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that the member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

- A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of all required notices of meetings of the Council; preparation and distribution of Council meeting agendas; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, the Chair, or the Executive Committee.
- B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.
- C. Control and Disbursement of Funds. Funds of the Council appropriated by the Legislature shall be retained by the Lewis and Clark Law School and funds authorized for the Council by the Oregon State Bar shall be retained by the Bar. All such funds shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.
- D. Administrative Office. The Council shall designate a location for an administrative office for the Council. All Council records shall be kept in that office under the supervision of the Executive Director.

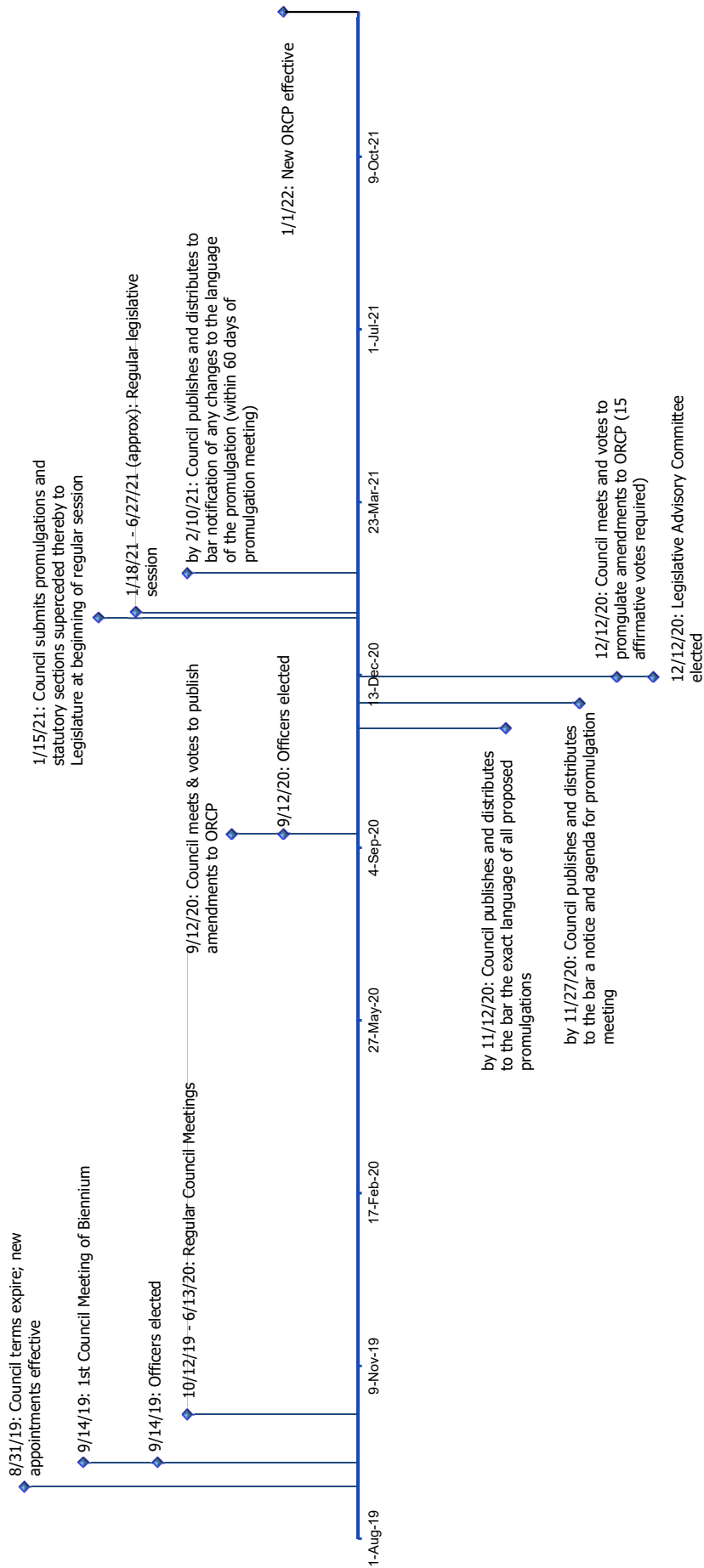
IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE.

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

- A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.
- B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.
- C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, to the Legislature before the beginning of the regular session of the Legislature.
- D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this 3rd day of December, 2016.

Council on Court Procedures: 2019-2021 Biennium Timeline (some dates approximate)



Council on Court Procedures
2017-2019 Biennium
Draft Staff Comments

Rule 7

The significant change to Rule 7 relates to service by alternative means [ORCP 7 D (6)], often referred to as service by publication or service by posting. When the defendant or respondent cannot readily be found so that personal service, substitute service, office service, or service via other procedures spelled out in ORCP 7 D can be effected, the plaintiff or petitioner may file a motion to allow service of the summons and complaint or petition on the defendant by use of an “other method.” It should be noted that seeking an order to serve the summons and complaint by use of an “other method” is not appropriate unless the defendant cannot be served “by any method otherwise specified in these rules [the ORCP] or [any] other rule or statute.” Further, the “other method” proposed should meet the ORCP 7 D(1) constitutional standard, i.e., that the “method or combination of methods [chosen] . . . under the circumstances is the most reasonably calculated to apprise the defendant of the existence and pendency of the action” so as to afford the defendant a reasonable opportunity to appear and defend.

It also should be noted that a successful motion that gains a court’s approval to serve by an “other method” does not protect the plaintiff from a collateral attack, typically under ORCP 69 or ORCP 71, alleging that the plaintiff’s attempts to locate or to serve the defendant, or the “other means” of service chosen, were inadequate and that any judgment is void, personal jurisdiction never having been established. *See, In re Marriage of Dhulst*, 61 Or App 383, 657 P2d 231 (1983).

The previous version of the rule, [ORCP 7 D(6)(a)] described publication, posting, and mailing as “other methods” of obtaining service. Although some direction was provided regarding the requirements for publishing and for mailing the summons for the purpose of service, oddly, subsection 7 D(6) offered no guidance as to how service by posting should be accomplished.

The tools for service by alternative means described in the previous version of Rule 7D have proven to be inadequate. Publication is an established alternative method of service, despite the relatively high cost. However, Council members expressed the view that service by publication has little likelihood of providing actual notice to a defendant. Council members essentially agreed with the sentiments expressed in *Dickenson v. Babich*, 213 Or 472, 476, 326 P2d 446, 448 (1958): “Service of process by publication is at best a harsh and technical substitute for personal service of summons . . . even being described as a ‘miserable substitute’ for personal service” Some Council members did believe that service by publication might be more effective in rural counties.

Alternative service by mail (first class and another mailing, e.g., certified, that requires a signature from the recipient) is uncertain, as the mailing requiring a signature is often unclaimed or refused. Even when a recipient signs a return receipt, the signature is often undecipherable. Therefore, service has been effected but the plaintiff cannot be confident that a subsequent attack on the validity of that service will not ensue. That said, the primary shortcoming of mailing as an alternative service method is that a reliable address for the defendant often cannot be located.

Although subsection 7 D(6) of the previous version of the rule offered no direction as to where and how to serve by posting, such service is generally understood to be accomplished by posting a copy of the summons and complaint at the local courthouse or at a specific location where the posting might attract the defendant's attention. The amendment provides better direction on where the summons and complaint are to be posted and includes posting at the courthouse in all cases. If the plaintiff knows of no physical address where the defendant might be found, posting at the courthouse likely provides only the form of service, not the substance.

The Council's rewrite of subsection 7 D(6) authorizes, if approved by the court, service of the summons and complaint by the methods provided in the previous version of the rule and, also, by e-mail, text message, facsimile transmission, or posting to a social media account. This array of methods of alternative service by electronic means is believed to be the most comprehensive codification that has been put into effect in any jurisdiction in the United States. The inclusion of alternative service by electronic means in the amendment is considered to represent a reliable improvement over the current rule.

The inclusion of alternative service by electronic means was undertaken due to suggestions from the bar. Some defendants have historically been difficult to locate and that problem has been exacerbated by changes in communications and technology. Geography – where a person is physically located – may be less relevant to getting notice to a defendant than is the defendant's location in cyberspace. For example, many households have abandoned their traditional "land line" telephones and rely solely on cellular telephones.

In addition to providing guidance as to the content of an affidavit or declaration seeking an order to allow alternative service by electronic means, subparagraphs 7 D(6)(b)(i) and 7 D(6)(b)(ii) of the amendment provide direction on the content and placement of the information to make it more likely that the recipient will be notified that he or she is being sued. Finally, paragraph 7 D(6)(b) requires that the certificate of service in cases of alternative service by electronic means must be amended if, subsequent to that service, "it becomes evident that the intended recipient did not personally receive the electronic transmission."

It should be noted that alternative service by electronic means would essentially foreclose establishing ORCP 4 personal jurisdiction based on the defendant's presence at a geographical location at the time of service. *See, Pennoyer v. Neff*, 95 US 714, 24 LeD 565 (1877).

An additional requirement is made applicable to all methods of alternative service. If the plaintiff has knowledge of or can ascertain a current or last-known address for the defendant, the alternative service by mail method must also be used, e.g., the summons and complaint must be mailed to the defendant by both first class mail and by certified mail or another mailing that requests a return receipt.

The amendment's subsection 7 D(6) as a whole provides practical measures for providing notice of the filing of actions to defendants while satisfying defendants' constitutional rights to receiving notice: 1) alternative service is only available when the primary forms of service enumerated in subsection 7 D(2) through subsection 7 D(5) are not possible; 2) alternative service is directed by a judge; 3) safeguards for service by electronic means are written into the amendment; and 4) judge members on the Council are currently using text messages and other forms of electronic communication to communicate future proceedings in cases, e.g., notifying criminal defendants of upcoming hearings.

The reorganization of subsection 7 D(6) resulted in paragraphs 7 D(6)(e), 7 D(6)(f), and 7 D(6)(g) of the previous version of the rule being re-designated as paragraphs 7 D(6)(c), 7 D(6)(d), and 7 D(6)(e). In cases where alternative service was made by publication, paragraph 7 D(6)(f) of the previous version of the rule authorized a defendant (or a defendant's personal representative) to, on motion with sufficient cause, appear and defend in a case at any time prior to entry of a judgment and, as allowed by the court's discretion, to be allowed to defend after entry of judgment for a further period of one year. Oddly, the same right to appear and defend after a default or after entry of judgment did not extend to cases where the service was by some other alternative means, e.g., posting, that would generally be thought to be at least as unreliable as service by publication. The amendment, in new paragraph 7 D(6)(d), affords any defendant served by any of the alternative service methods the same opportunity to seek leave to defend after default and after entry of judgment.

An amendment, in section 7 E, clarifies that a plaintiff's attorney, in addition to being authorized to mail the summons and complaint to effect service by mail as authorized in paragraph 7 D(2)(d), is authorized to complete service for substituted service [paragraph 7 D(2)(b)], office service [paragraph 7 D(2)(c)], and service on a tenant of a mail agent [part 7 D(2)(a)(iv)(B)] by mailing copies of the summons, complaint, and a statement detailing the earlier delivery to the defendant.

There are other amendments to Rule 7 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- A lead line is added for section 7 C to improve uniformity and add clarity.
- An internal reference in subsection 7 C(2) is amended to direct the reader to the correct subparagraph of the substantially amended subsection 7 D(6).
- A correction, from "section" to "paragraph," is made in subparagraph 7

D(2)(d)(i).

- The numbers, relating to days or years, in subparagraph 7 D(2)(d)(ii) and paragraph 7 D(4)(b) are now Arabic numerals, in an effort to make such information more searchable.
- Text that was a part of part 7 D(3)(a)(iv)(B) but was incorrectly separated by a line break and indentation, is now included with the preceding text for clarification and to simplify citation. Text in part 7 D(4)(a)(i)(C) was similarly included with the preceding text.
- The word “shall” is replaced by “will” twice in paragraph 7 D(6)(c) and twice more in paragraph 7 D(6)(d), in keeping with current legislative drafting norms.
- In paragraph 7 D(6)(e), a colon is deleted to conform with Council standards, and a comma is added to better convey a series of three conditions. Also, “applicable” is substituted for “authorized” and “the plaintiff” is added to improve clarity.
- In section 7 E, the list of persons not authorized to serve a summons is rewritten to improve clarity.

Rule 15

The primary impetus for an amendment to Rule 15 was to clarify and to correct the previous version of the rule’s deadline [at section 15 A] for filing an answer to a cross-claim. That previous language was expressed as the time to respond to a summons. As a cross-claim is not accompanied by a summons, it seemed appropriate to specify the deadline for an answer to a cross-claim as 30 days from the date of service. The clarification was suggested by the Oregon State Bar’s Procedure and Practice Committee.

In revising the deadline for responding to pleadings, the time specified for filing a motion or an answer to a complaint or to a third-party complaint is 30 days as specified in the accompanying summons. Rule 7 C(2)’s deadline for responding when the summons is served by publication is restated in section 15 A.

An answer to a cross-claim or motion directed against a cross-claim is required within 30 days of service of the cross-claim. The same is true for a reply to (or a motion responsive to) a counterclaim.

The section’s last amendment [the 1994 promulgation] intended to clarify that replies to counterclaims were due within 30 days, not 10 days as the then-existing section seemed to specify. However, the 10-day deadline remained in the section for “any other motion or responsive pleading.” In light of Rule 13, that would by default apply only to a “reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer,” i.e., a reply to an affirmative defense. A reply to an affirmative defense is not automatically appropriate in every case and the Council was persuaded that the deadline for responding to all pleadings

should be uniform – 30 days. Accordingly, the last sentence of section 15 A referring to a 10-day deadline for “any other motion or responsive pleading” is deleted.

It should be noted that Rule 15 specifies the deadline for filing pleadings or motions responsive to pleadings and does not govern the many other time limits for other motions available to the parties throughout the ORCP.

There are other amendments to Rule 15 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word “shall” is replaced with “must” twice in section 15 B and once in section 15 C, in keeping with current legislative drafting norms.
- The word “such” is replaced with “that” in section 15 B and with “any” in section 15 D, in the first instance to modernize the language and in the second instance for clarity.

Rule 16

An amendment was made to Rule 16, adding a new section B and re-designating the previous section 16 B, section 16 C, and section 16 D as section 16 C, section 16 D, and section 16 E, respectively. The amendment was in response to a comment from a judge noting that supplemental local rules in Multnomah County (SLR 2.035) and in Clackamas County (SLR 2.016) appeared to authorize known parties to engage in litigation under fictitious names. The comment noted that Rule 26 A appears to prohibit the practice: “Every action shall be prosecuted in the name of the real party in interest.” The comment observed that Rule 16 A also appeared to require the use of the parties’ names. (ORCP 20 H authorizes the use of fictitious names “[w]hen a party is ignorant of the name of an opposing party”; such parties are generally designated as “John Doe” or “Jane Doe.”) Further, Article I, Section 10, of the Oregon Constitution seems to mandate open courts: “No court shall be secret, but justice shall be administered openly” The judge’s comment observed that, contrary to the rules, litigants are seemingly filing and litigating cases using identifiers other than their true names, particularly when the subject matter of the cases is of a personal or embarrassing nature.

The Multnomah and Clackamas counties’ supplemental local rules, nearly identical, allow parties to litigate cases under fictitious names, but only on motion. Council members noted that, when parties file cases using a name other than their true name, they frequently simply file the case and serve the complaint.

The Council determined that, if litigants are filing civil actions using names other than the plaintiffs’ true names, and if the practice is not clearly prohibited by Article 1, Section 10, of the Oregon Constitution, there should be a procedure for the practice. The Council, in part based

on Appellate Rule 2.25(4), determined that the practice is not strictly barred by Article I, Section 10. (Also, ORCP 26 A appears to be directed more as a prohibition on the use of proxies in litigation.) Therefore, the Council addressed the issue as procedural. If a party wishes to commence and litigate a case under a name other than his or her true name, a motion seeking leave to proceed under a pseudonym is appropriate. (The Council elected to refer to the practice as the use of a pseudonym, not a fictitious name; fictitious names are for unknown parties.)

Presumably such a motion would be presented ex parte, contemporaneously with filing the action. Section 16 B creates a procedure for seeking leave to litigate using a pseudonym; it does not create a substantive right to litigate using a pseudonym. It will be the litigant's responsibility to establish in the motion and in any supporting affidavits or declarations a factual and a legal basis to be granted leave to proceed using a pseudonym. The amendment likewise is neutral as to whether a plaintiff is required under Rule 3.5(b) of the Oregon Rules of Professional Conduct and Rule 3.9(A) of the Oregon Code of Judicial Conduct to give notice to the opposing party prior to presenting a motion to proceed using a pseudonym.

There are other amendments to Rule 16 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "will" twice in section 16 A, four times in section 16 B, and once in section 16 D, in keeping with current legislative drafting norms.
- A comma in section 16 D is relocated to improve clarity.

Rule 22

One clarifying amendment was made to subsection 22 B(3). Council members observed that instances had occurred where a cross-claim seeking additional relief had been filed by a co-defendant but not served on the opposing defendant because the opposing defendant was in default. Such a failure to serve appears to be based on a misreading of ORCP 9 A: "[n]o service need be made on parties in default for failure to appear" Indeed, the balance of the sentence reads: ". . . except that pleadings asserting new or additional claims for relief against them shall be served . . . in the manner provided . . . in Rule 7." The amendment to subsection 22 B(3) makes clear that, if a cross-claim seeks relief against another defendant, it must be served on that defendant, even though that party is in default for the party's failure to appear and defend.

There are other amendments to Rule 22 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "must" two times in section 22 B and two times

in section 22 C, and “shall” is replaced with “will” in section 22 D, in keeping with current legislative drafting norms.

Rule 38

Rule 38 was amended in subparagraph 38 C(2)(c)(i) to make the reference to the completely revised Rule 55 more specific.

There are other amendments to Rule 38 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- In section 38 B, numbered designations to emphasize a series of three in a long paragraph are separated into three subsections for clarity and to simplify citations to the relevant part of the section.
- In paragraph 38 C(2)(c), the existing subparagraphs are more completely identified to be consistent with ORCP format.

Rule 43

Section A is amended by moving the phrase “Any party may serve any other party” from immediately following the section lead line and inserting it at the beginning of each of the two subsections to improve clarity and readability.

There are other amendments to Rule 43 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word “shall” is replaced with “must” seven times in section 43 B and with “will” one time in section 43 E, in keeping with current legislative drafting norms.

Rule 44

Rule 44 required an amendment in section 44 E to replace “individually identifiable health information” where that phrase appeared three times with “confidential health information,” to reflect the concurrent rewrite of Rule 55. Also, two references to “Rule 55 H” are amended to read “Rule 55 D” to be an accurate reference to the completely redrafted Rule 55.

Rule 55

Rule 55 has been the subject of criticism as being overly long, organizationally deficient, and lacking in clarity. Rule 55 is completely rewritten in an effort to remedy its flaws while maintaining, to the degree possible, its operation and meaning.

The previous version of the rule was made up of eight sections; the new rule contains four. Section 55 A is an introductory guide to the basics of all subpoenas: 1) the form and contents of a subpoena; 2) from what court a subpoena may be issued; 3) who may issue a subpoena; 4) who may serve a subpoena; 5) how proof of service is made; and 6) the duties of a recipient of a subpoena.

Section 55 B governs subpoenas that require an appearance and testimony. Subsection 55 B(1) describes the kinds of proceedings to which a witness may be subpoenaed to provide testimony. Subsection B(2) specifies particular requirements for service on individuals and organizations as well as offering or tendering a witness fee. Subsections 55 B(3) and 55 B(4) specify requirements for subpoenaing peace officers and prisoners.

Section C specifies timing and service requirements for subpoenas that require only the production of records (other than confidential health information) and things. Section 55 D replaces section 55 H of the previous rule and details the particularized requirements when confidential health information is the subject of a subpoena.

The Council endeavored to redraft Rule 55 in a manner that would not change the rights, obligations, and procedures contained in the previous version of the rule. It was thought that a change to those rights, obligations, or procedures might adversely impact successfully promulgating a much-improved rendering of those rights, obligations, and procedures. However, with the improved organization, some inconsistencies became apparent. At least one correction was made in paragraph 55 C(3)(a) and paragraph 55 D(6)(a) to make clear that, in accord with ORCP 9 A, copies of subpoenas need not be served on parties who are in default.

Rule 65

Rule 65 required an amendment in subsection 65 D(2). A reference to “Rule 55 G” is amended to “Rule 55 A(6)(d)” to be an accurate reference to the completely redrafted Rule 55.

**COUNCIL ON COURT PROCEDURES
MEMORANDUM**

To: Council Members

From: Mark Peterson, Executive Director

Re: 79th and 80th Legislative Assemblies' ORCP Amendments Outside of Council Amendments

Date: September 3, 2019

Rules amended:

- ORCP 69 C in a lengthy reviser's bill to change and make current the reference to the Servicemembers Civil Relief Act

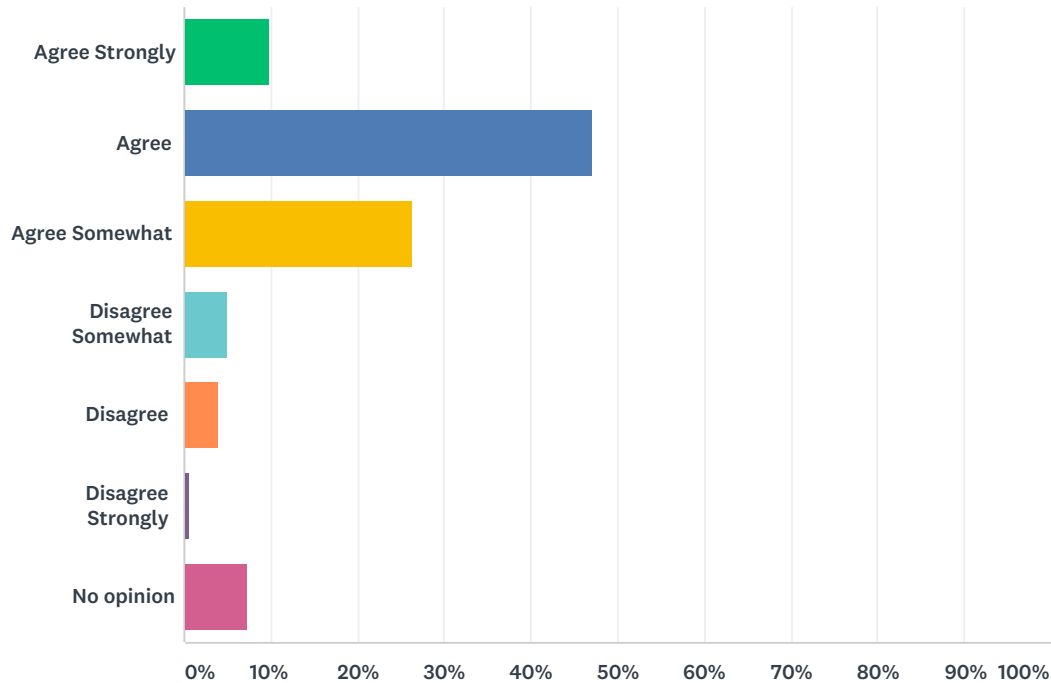
Bills enacted that mention the ORCP:

- HB 2096 amending ORS 244.400 providing for discretion in awarding attorney fees in Oregon Government Ethics Commission cases but otherwise using ORCP 68
- HB 2285 amending ORS 105.430 providing for notice in building/housing code violation cases with receiverships and adding ORCP 7 D and ORCP 9 C standards
- HB 2286 amending ORS 131A360 and 131A.365 defining costs and fees in forfeiture judgments and using ORCP 68 A
- HB 2400 amending ORS 19.255 and softening the filing deadlines for appeal for the person adjudged to be mentally ill but otherwise using ORCP 64, ORCP 64 F and ORCP 63 and ORCP 63 D
- HB 2480 amending ORS 40.450's definition of hearsay and retaining a reference to ORCP 39 I
- HB 2530 amending ORS 105.113 and requiring new information in notices of termination of tenancy and notices of foreclosure and the ORS 105.113 summons and maintaining the longstanding exception that the summons in these summary proceedings is different from ORCP 7
- HB 2592 amending an earlier session law (Sec. 149, ch 750, OR laws 2017, as further amended) and continuing use of the ORCP 1 E standard in declarations for rebates for zero emission vehicles
- HB 2598 amending ORS 130.045 and using the ORCP 7 F standard in notices of filing of settlement agreements for noncharitable business trusts
- HB 2601 amending ORS 125.325 relating to restricting the protected person and using the ORCP 1 E standard in declarations in the guardians's annual report
- HB 4024(2018) amending ORS 98.302 regarding the escheat of U.S. savings bonds and using the ORCP 1 E standard for a petition to claim the funds
- SB 360 amending ORS 65.207 and assigning priority (but not over ORCP 79 B(3) cases) to

- litigation over nonprofit corporations' meetings and amending ORS 65.224 using ORCP 79 and ORCP 82 A standards for undertakings in litigation over membership lists
- SB 364 amending ORS 107.135 and using ORCP 7 standards in serving orders for enforcement of child support orders
- SB 376 amending ORS 125.325 and using the ORCP 1 E standard for guardian's reports
- SB 385 amending ORS 107.434 and using ORCP 1 E standards in motions for expedited parenting time hearings
- SB 454 amending ORS 113.105 using the ORCP 82 D-G standard for the personal representative's bond in will contests and amending ORS 116.253 using the ORCP 1 E standard for the declaration in a petition to recover an escheated estate and amending ORS 98.386 deleting a reference to ORCP 1 E in cases of escheatment of U.S. savings bonds (see HB4024)
- SB 608 amending ORS 105.124 and using the ORCP 17 standard for an attorney signing an FED complaint
- SB 708 amending ORS 20.190 on prevailing party fees, referring to ORCP 32 and continuing to not award such fees in class action cases
- SB 729 amending ORS 124.005 and using the ORCP 1 E standard in declarations in elder abuse cases
- SB 995 amending ORS 163.765 and referring to ORCP 7 D(6)(a) for alternative service in sex abuse cases
- SB 1011 amending ORS 107.135 and referring to ORCP 7 in motions to modify child support or custody

Q1 Do you agree that the Oregon Rules of Civil Procedure promote the just determination of civil court actions?

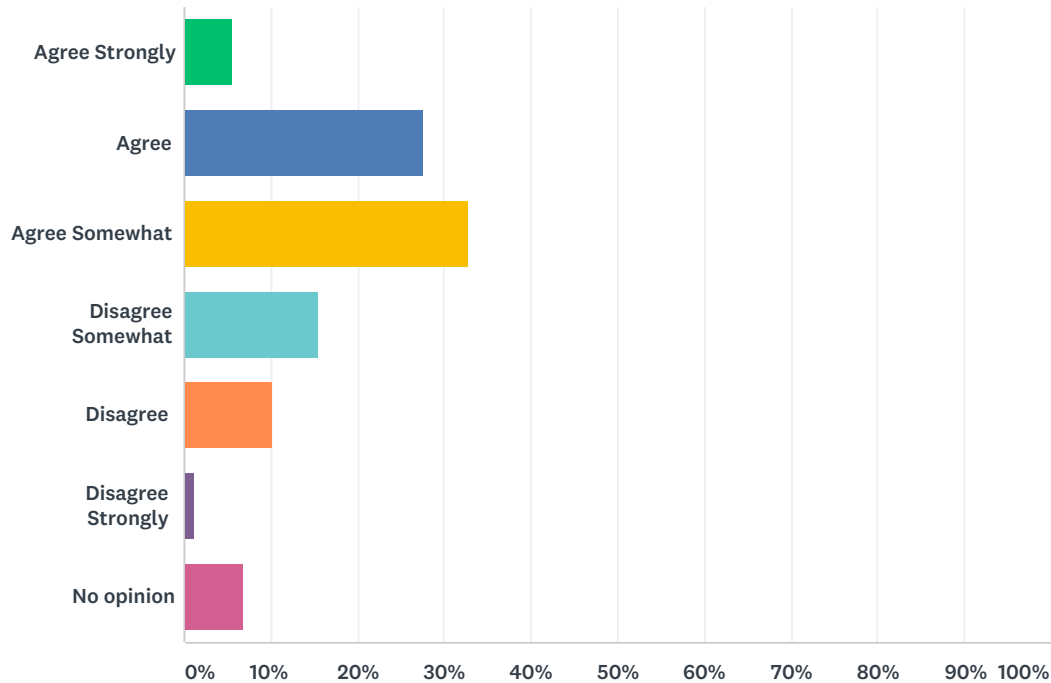
Answered: 304 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	9.87%	30
Agree	47.04%	143
Agree Somewhat	26.32%	80
Disagree Somewhat	4.93%	15
Disagree	3.95%	12
Disagree Strongly	0.66%	2
No opinion	7.24%	22
TOTAL		304

Q2 Do you agree that the Oregon Rules of Civil Procedure promote the speedy determination of civil court actions?

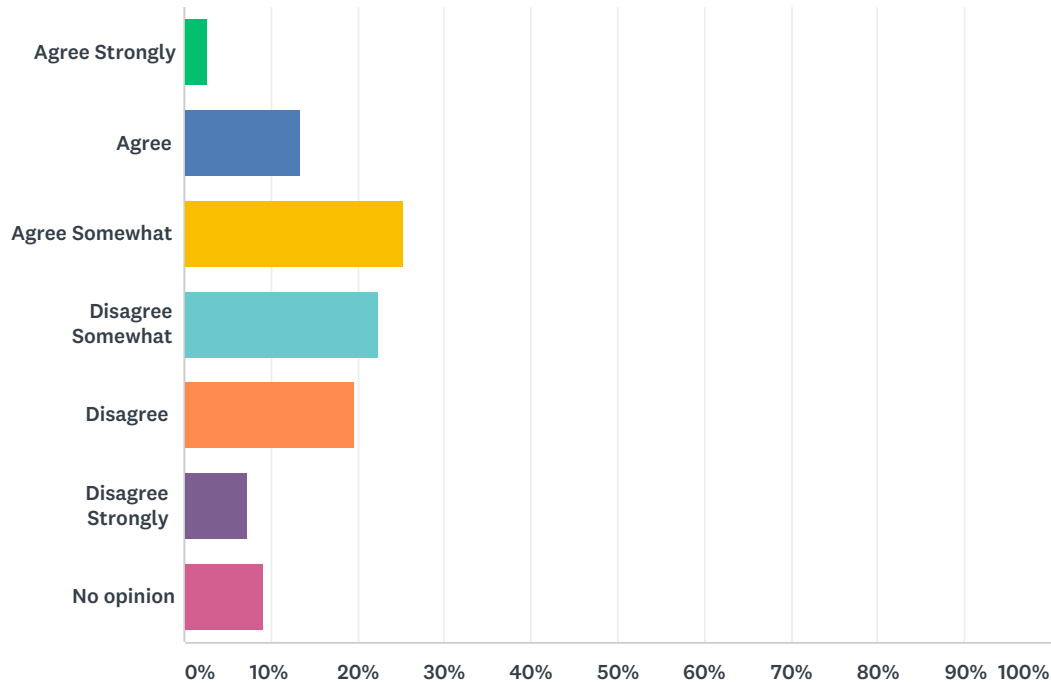
Answered: 304 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	5.59%	17
Agree	27.63%	84
Agree Somewhat	32.89%	100
Disagree Somewhat	15.46%	47
Disagree	10.20%	31
Disagree Strongly	1.32%	4
No opinion	6.91%	21
TOTAL		304

Q3 Do you agree that the Oregon Rules of Civil Procedure promote the inexpensive determination of civil court actions?

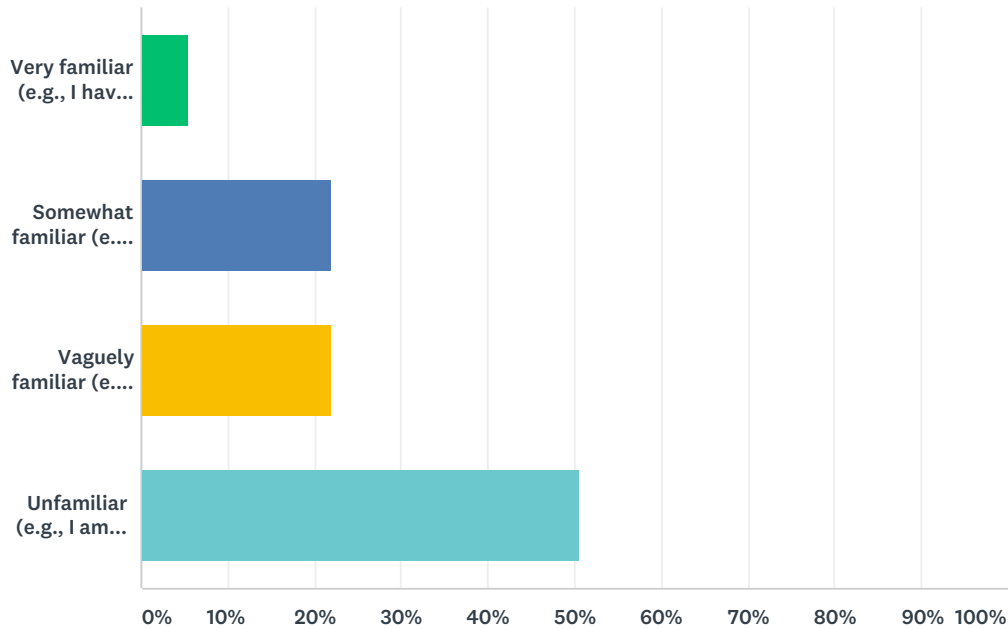
Answered: 304 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	2.63%	8
Agree	13.49%	41
Agree Somewhat	25.33%	77
Disagree Somewhat	22.37%	68
Disagree	19.74%	60
Disagree Strongly	7.24%	22
No opinion	9.21%	28
TOTAL		304

Q4 Please rate your familiarity with the composition of the CCP.

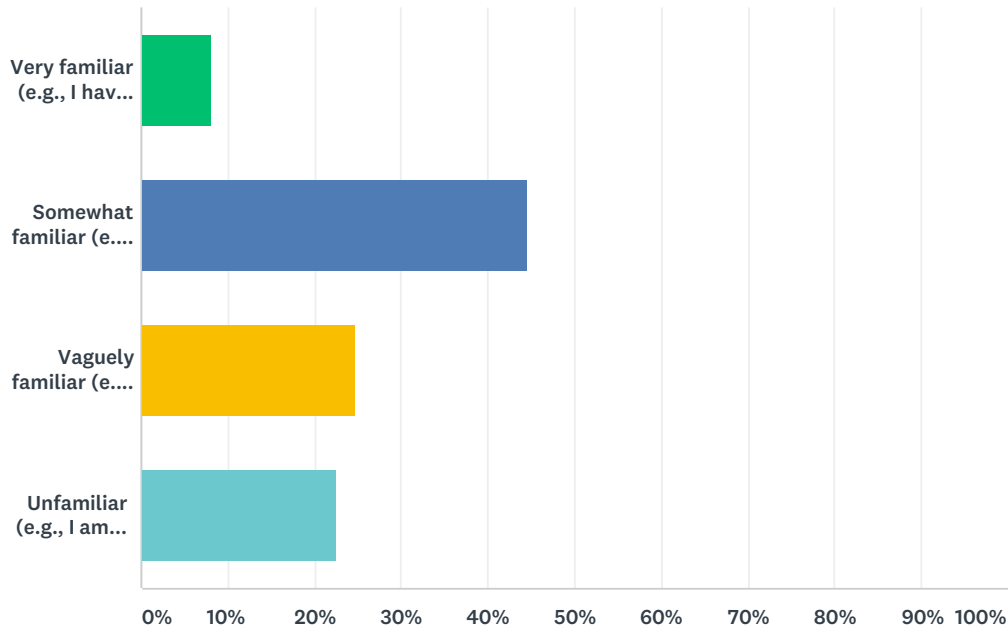
Answered: 296 Skipped: 8



ANSWER CHOICES	RESPONSES	
Very familiar (e.g., I have read the statute that provides for appointments to the Council and its makeup; I have served on the Council)	5.41%	16
Somewhat familiar (e.g., I am somewhat aware of the makeup of the Council; I have a friend or colleague who has served on the Council)	21.96%	65
Vaguely familiar (e.g., I may know someone who has served on the Council)	21.96%	65
Unfamiliar (e.g., I am unsure of who serves on the Council)	50.68%	150
TOTAL		296

Q5 Please rate your familiarity with the work of the CCP.

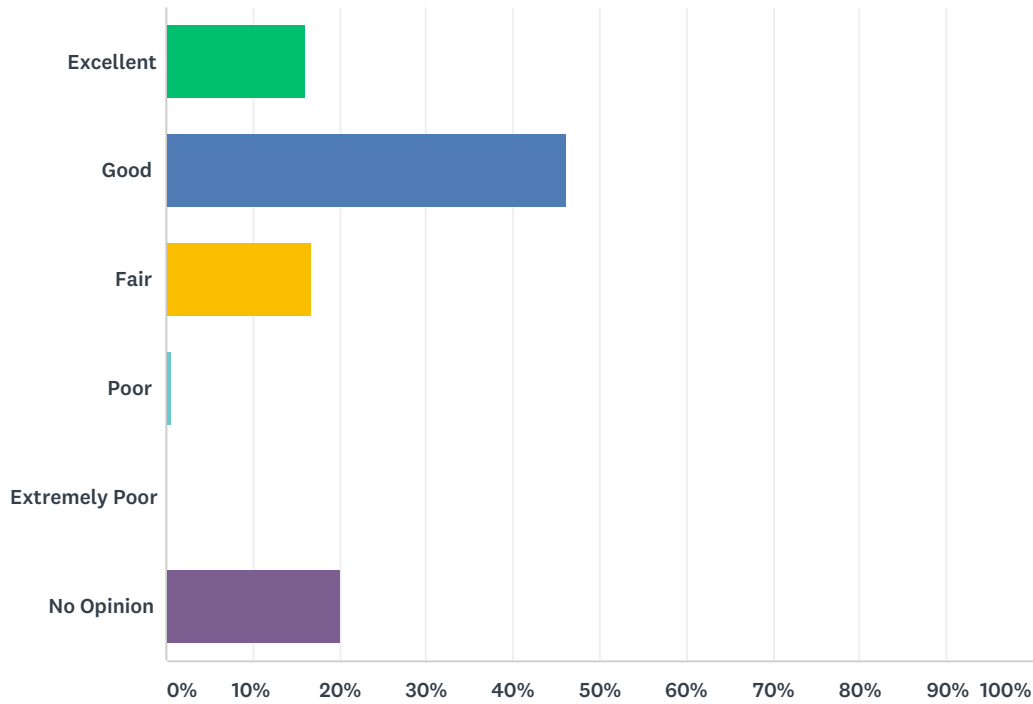
Answered: 296 Skipped: 8



ANSWER CHOICES	RESPONSES	
Very familiar (e.g., I have or a colleague has served on the Council; I have made a proposal to the Council; I regularly follow the work of the Council)	8.11%	24
Somewhat familiar (e.g., I pay attention to when the Council amends the ORCP)	44.59%	132
Vaguely familiar (e.g., I know that the Legislature does not have primary responsibility for the ORCP; I am unsure of when and how amendments are made)	24.66%	73
Unfamiliar (e.g., I am uncertain as to how the ORCP were created; I do not know when or how the ORCP are amended)	22.64%	67
TOTAL		296

Q6 How would you rate the quality of the CCP's work?

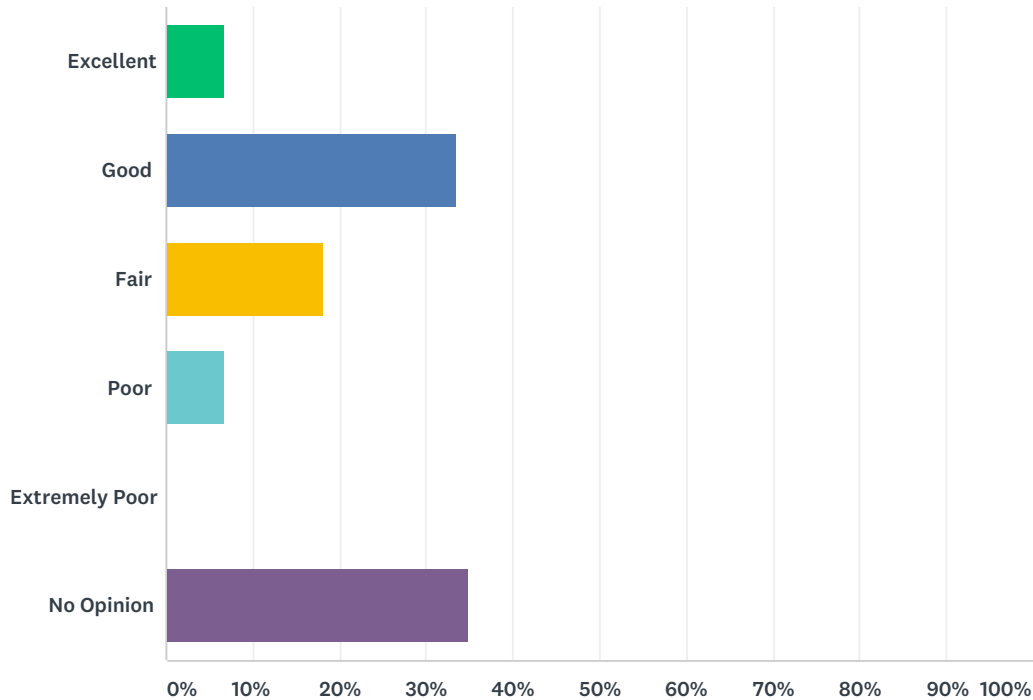
Answered: 149 Skipped: 155



ANSWER CHOICES	RESPONSES	
Excellent	16.11%	24
Good	46.31%	69
Fair	16.78%	25
Poor	0.67%	1
Extremely Poor	0.00%	0
No Opinion	20.13%	30
TOTAL		149

Q7 How would you rate the CCP's responsiveness to the needs of litigants?

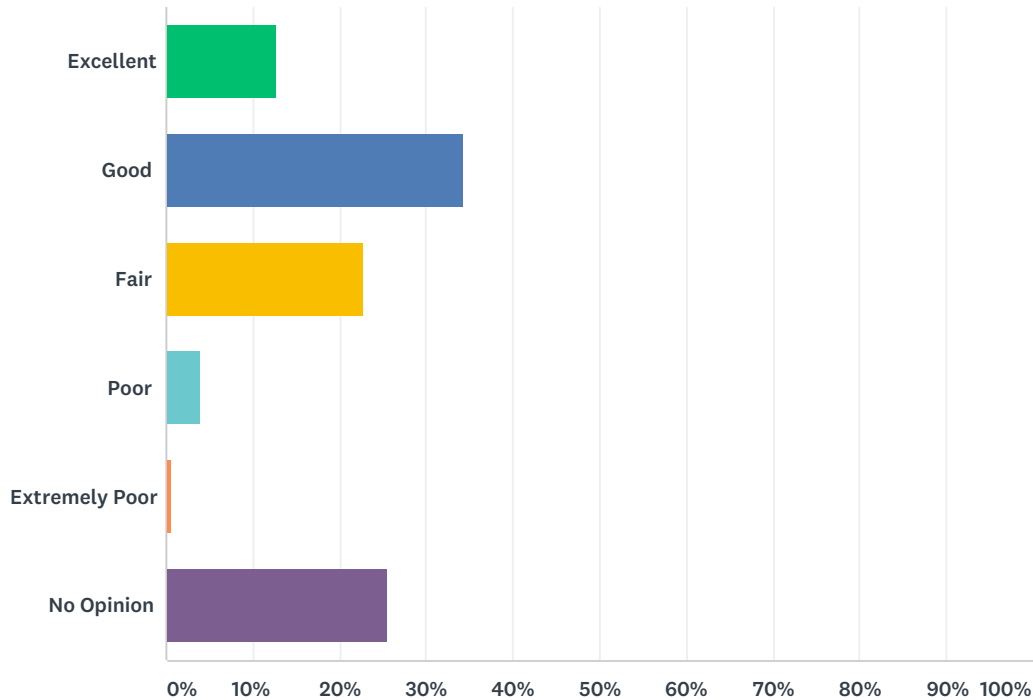
Answered: 149 Skipped: 155



ANSWER CHOICES	RESPONSES	
Excellent	6.71%	10
Good	33.56%	50
Fair	18.12%	27
Poor	6.71%	10
Extremely Poor	0.00%	0
No Opinion	34.90%	52
TOTAL		149

Q8 How would you rate the CCP's responsiveness to the needs of lawyers?

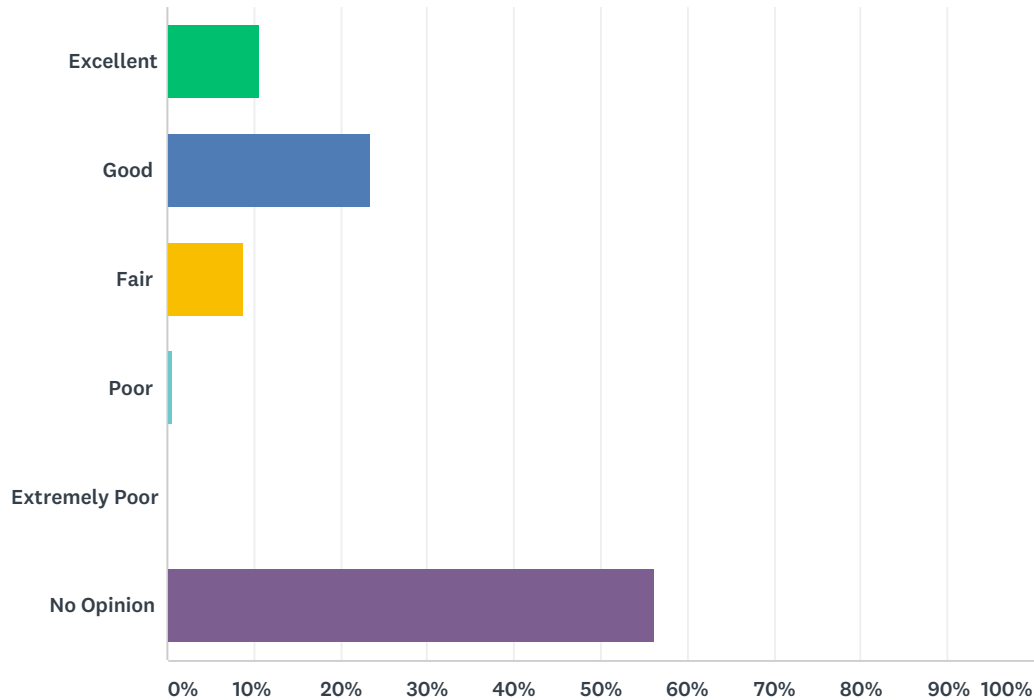
Answered: 149 Skipped: 155



ANSWER CHOICES	RESPONSES	
Excellent	12.75%	19
Good	34.23%	51
Fair	22.82%	34
Poor	4.03%	6
Extremely Poor	0.67%	1
No Opinion	25.50%	38
TOTAL		149

Q9 How would you rate the CCP's responsiveness to the needs of judges?

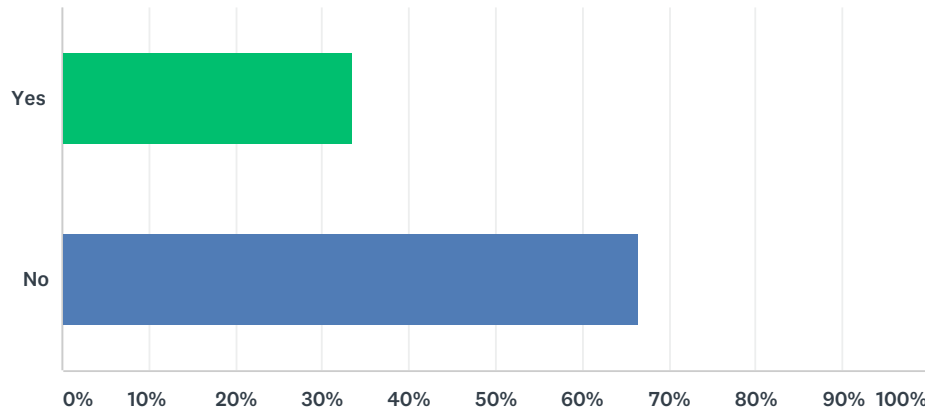
Answered: 149 Skipped: 155



ANSWER CHOICES	RESPONSES	
Excellent	10.74%	16
Good	23.49%	35
Fair	8.72%	13
Poor	0.67%	1
Extremely Poor	0.00%	0
No Opinion	56.38%	84
TOTAL		149

Q10 Have you visited the CCP website?

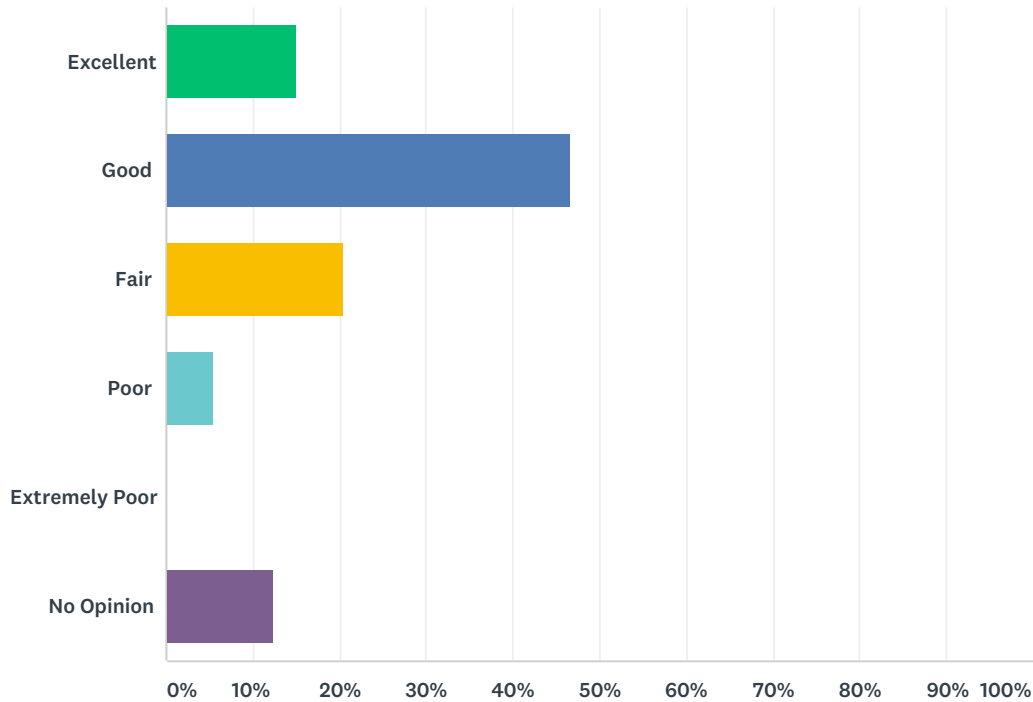
Answered: 221 Skipped: 83



ANSWER CHOICES	RESPONSES	
Yes	33.48%	74
No	66.52%	147
TOTAL		221

Q11 Please rate the CCP website's usefulness in terms of content:

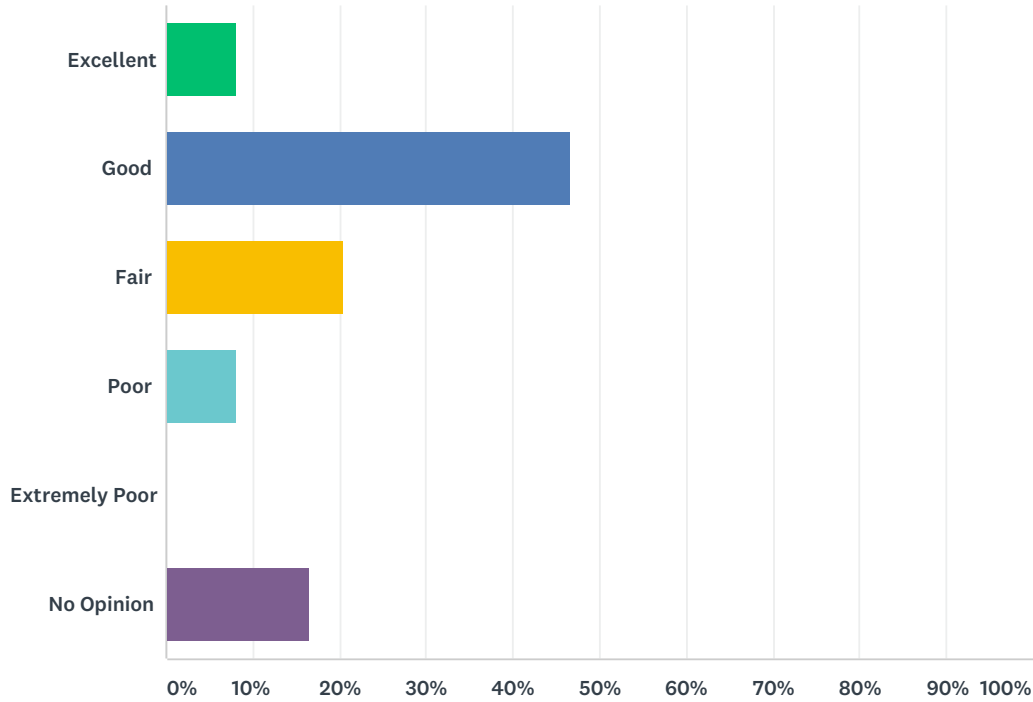
Answered: 73 Skipped: 231



ANSWER CHOICES	RESPONSES	
Excellent	15.07%	11
Good	46.58%	34
Fair	20.55%	15
Poor	5.48%	4
Extremely Poor	0.00%	0
No Opinion	12.33%	9
TOTAL		73

Q12 Please rate the CCP website's usefulness in terms of organization:

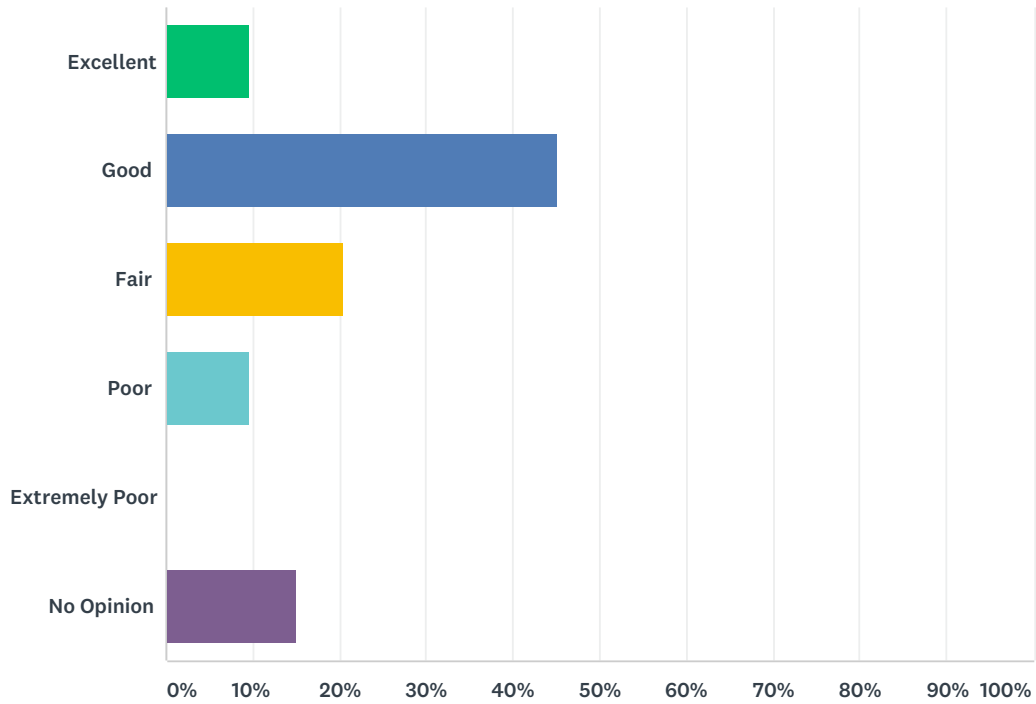
Answered: 73 Skipped: 231



ANSWER CHOICES	RESPONSES	
Excellent	8.22%	6
Good	46.58%	34
Fair	20.55%	15
Poor	8.22%	6
Extremely Poor	0.00%	0
No Opinion	16.44%	12
TOTAL		73

Q13 Please rate the CCP website's usefulness in terms of navigability:

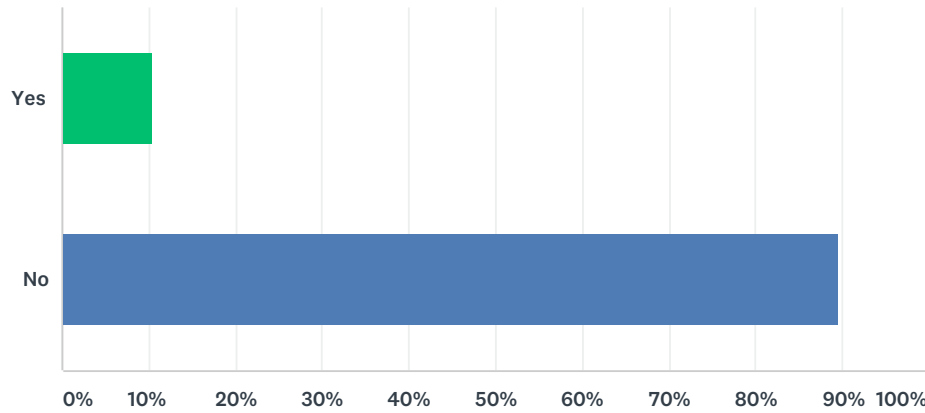
Answered: 73 Skipped: 231



ANSWER CHOICES	RESPONSES	
Excellent	9.59%	7
Good	45.21%	33
Fair	20.55%	15
Poor	9.59%	7
Extremely Poor	0.00%	0
No Opinion	15.07%	11
TOTAL		73

Q14 Have you ever made a proposal to the CCP?

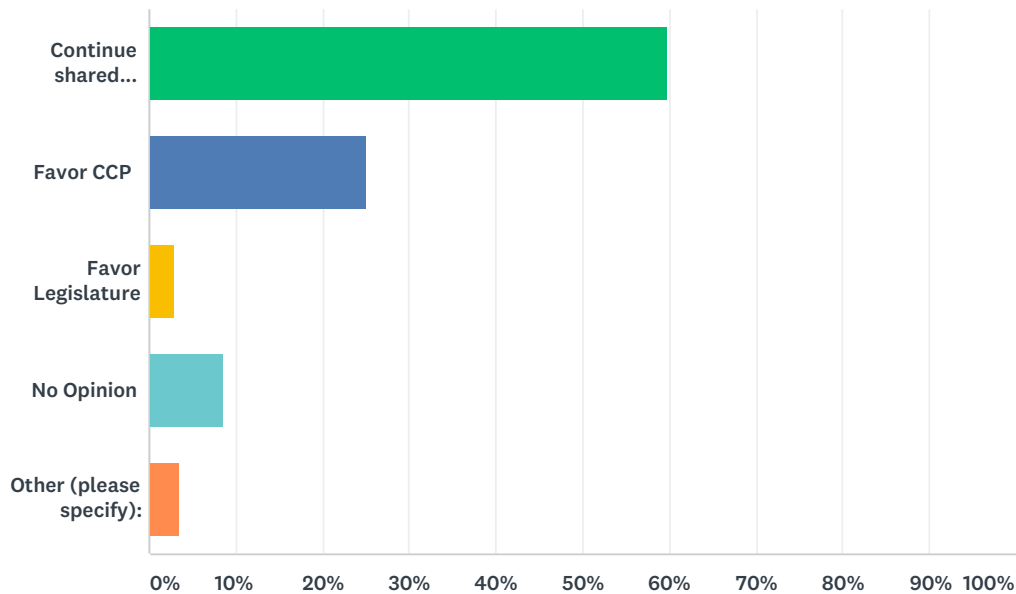
Answered: 219 Skipped: 85



ANSWER CHOICES	RESPONSES	
Yes	10.50%	23
No	89.50%	196
TOTAL		219

Q15 Prior to 1979, most civil trial procedures were found in statutes enacted by the Legislature. The ORCP were drafted by the CCP and can be amended by the CCP, subject to a review by the Legislature, which can amend or reject the CCP's promulgated changes (i.e., the authority is now shared between the Legislature and the CCP). Who do you think should have the authority to draft and amend Oregon's civil trial procedures?

Answered: 282 Skipped: 22



ANSWER CHOICES		RESPONSES
Continue shared authority		59.93% 169
Favor CCP		25.18% 71
Favor Legislature		2.84% 8
No Opinion		8.51% 24
Other (please specify):		3.55% 10
TOTAL		282

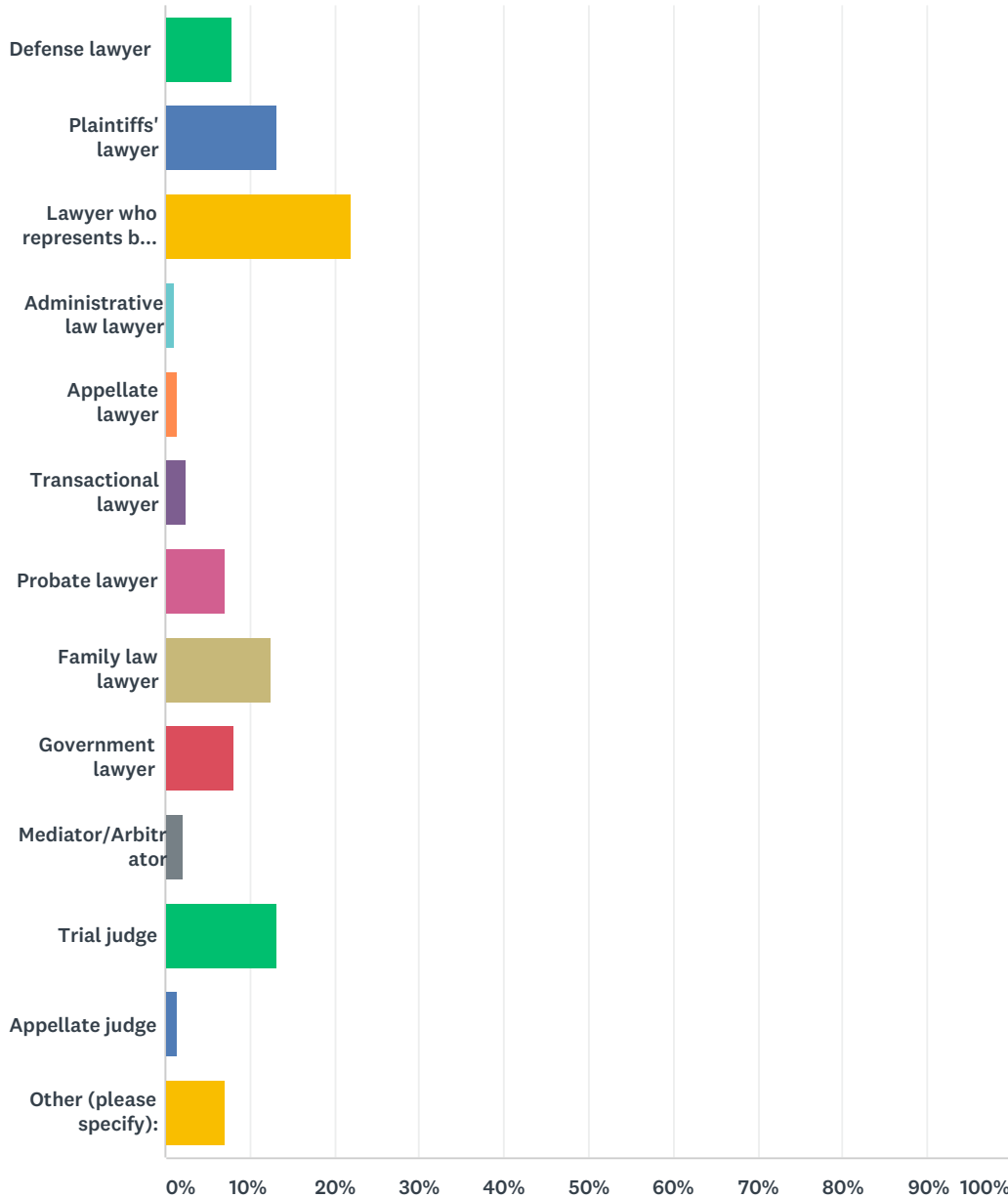
#	OTHER (PLEASE SPECIFY):	DATE
1	CCP should draft; legislature should be required to approve rules and amendments.	8/2/2019 2:30 AM
2	Oregon Supreme Court	7/29/2019 6:01 PM
3	should include practitioners since often I have the sense that neither the ORCP nor the legis.ature understands the issues.	7/29/2019 2:01 PM
4	ORCPs have gotten too complicated over time and are routinely not enforced by the courts.	7/29/2019 10:29 AM
5	e-file coders should help draft	7/29/2019 9:50 AM

Council On Court Procedures Survey 2019

6	A more neutral body, somewhat like Carter's judicial selection committees from the 1970s, working to get the best product instead of people fighting over the interests of the "group" they are designated to represent	7/29/2019 7:56 AM
7	Oregon Supreme Court	7/29/2019 7:03 AM
8	Supreme Court should propose changes, considered by the legislature	7/29/2019 6:57 AM
9	Oregon Supreme Court (or a committee of judges to whom the task is delegated)	7/29/2019 6:35 AM
10	State Supreme Court, like Washington	7/29/2019 6:23 AM

Q16 The following best describes my practice area:

Answered: 279 Skipped: 25



ANSWER CHOICES	RESPONSES	
Defense lawyer	7.89%	22
Plaintiffs' lawyer	13.26%	37
Lawyer who represents both plaintiffs and defendants	21.86%	61
Administrative law lawyer	1.08%	3
Appellate lawyer	1.43%	4
Transactional lawyer	2.51%	7

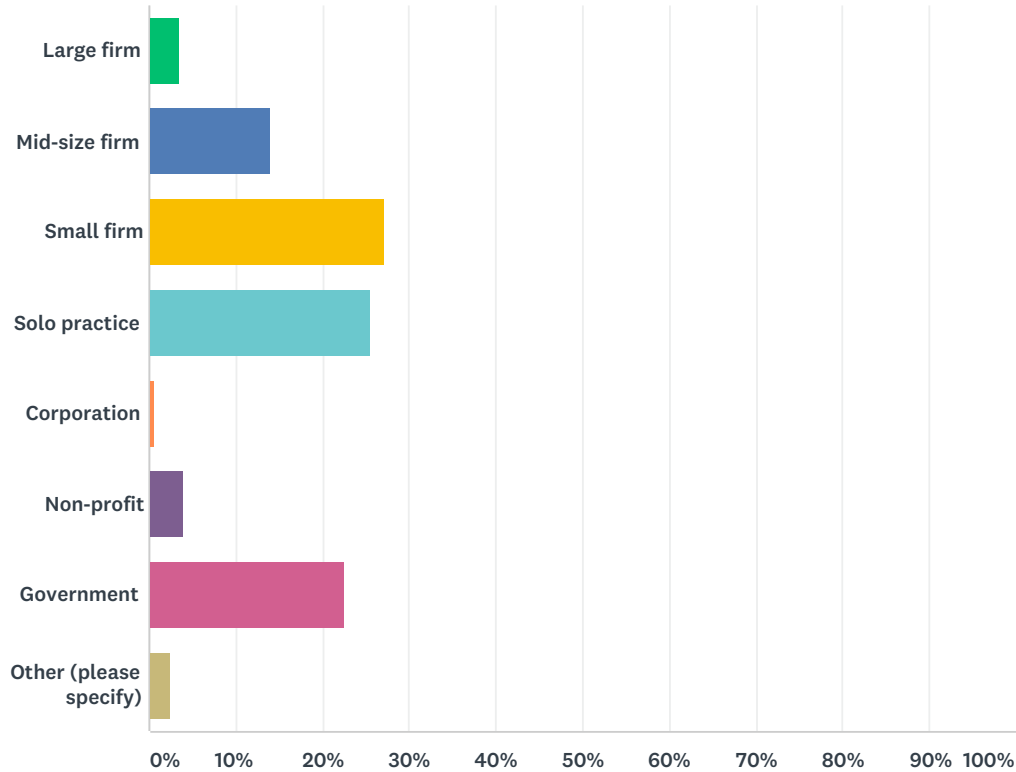
Council On Court Procedures Survey 2019

Probate lawyer	7.17%	20
Family law lawyer	12.54%	35
Government lawyer	8.24%	23
Mediator/Arbitrator	2.15%	6
Trial judge	13.26%	37
Appellate judge	1.43%	4
Other (please specify):	7.17%	20
TOTAL		279

#	OTHER (PLEASE SPECIFY):	DATE
1	Legal aid lawyer	8/9/2019 6:00 AM
2	I am a government lawyer, but my practice are is plaintiff civil	8/5/2019 6:28 AM
3	Estate Planning	7/30/2019 9:33 AM
4	General Practice Lawyer	7/30/2019 7:13 AM
5	environmental/administrative	7/30/2019 3:57 AM
6	do both Plaintiff and Defense work and am former pro tem	7/29/2019 2:02 PM
7	Federal trial judge (ret.)	7/29/2019 1:41 PM
8	Family Law Attorney	7/29/2019 7:48 AM
9	In-House Counsel	7/29/2019 6:53 AM
10	general practice	7/29/2019 6:52 AM
11	general practice	7/29/2019 6:43 AM
12	(Q)DRO lawyer (post divorce division of retirement benefits)	7/29/2019 6:38 AM
13	Mixed, Civil, Probate and Family	7/29/2019 6:33 AM
14	Probate Court Litigation and Mediation	7/29/2019 6:30 AM
15	Estate planning and elderlaw	7/29/2019 6:30 AM
16	Previously did Civil Defense, but now do Transactional work	7/29/2019 6:22 AM
17	I have been both a plaintiff and a defense atty and am now retired from litigation serving as an arbitrator/mediator	7/29/2019 6:21 AM
18	Several of the above: general litigation, transactional, probate	7/29/2019 6:20 AM
19	bankruptcy	7/29/2019 6:19 AM
20	estate planning and probate law	7/29/2019 6:11 AM

Q17 The following best describes my office:

Answered: 279 Skipped: 25



ANSWER CHOICES	RESPONSES	
Large firm	3.58%	10
Mid-size firm	13.98%	39
Small firm	27.24%	76
Solo practice	25.45%	71
Corporation	0.72%	2
Non-profit	3.94%	11
Government	22.58%	63
Other (please specify)	2.51%	7
TOTAL		279

#	OTHER (PLEASE SPECIFY)	DATE
1	Trial Judge	8/4/2019 7:56 AM
2	2-person law firm	8/1/2019 6:20 AM
3	Legal Aid	7/30/2019 2:50 AM
4	Retired; part time law professor	7/29/2019 1:41 PM
5	Judicial Branch	7/29/2019 10:30 AM
6	In-House private company	7/29/2019 6:53 AM

Council On Court Procedures Survey 2019

7	retired from active litigation; serve as an arbitrator/mediator now	7/29/2019 6:21 AM
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Suggestion	Subject Matter	Suggestion By
CCP should have appointees who are dedicated to neutrality in the rules, not just representing their constituent group, and people who are dedicated to the speedy, just, cost-effective resolution of civil disputes (not maximizing gains for one side or the other or maximizing attorney fees). The CCP, and perhaps lawyers generally, seem to have lost sight of the purpose of the civil legal system.	Council Composition	Anonymous
The CCP is a turf battle between plaintiffs' counsel and defendants' counsel, and nothing seems to get done unless the plaintiffs' bar approves. For the most part, it seems that the CCP is unable to address the significant issues that exist in the rules because of this political divide. The CCP should be a non-partisan group looking out for the best interests of Oregon's judicial system as a whole and the litigants who are involved in it to be sure EVERYONE gets a fair, efficient and cost effective trial--plaintiffs and defendants both.	Council Composition	Anonymous
It is very apparent that CCP does not regularly include family law practitioners, so the rules tend to be vague, incomplete, or problematic in family cases. Please create a fixed post for a family practitioner. A notes or FAQs option would also be helpful in researching rule questions. If there is a repository for questions the committee has already answered. Thank you!	Council Composition	Anonymous
E-court was to speed up the legal processing of civil cases and produce efficiencies. My observation is it has had just the opposite effect. I recently waited for more than 4 months on an uncontested probate order to be signed with no ability to appear at an ex parte time before the assigned judge to get an explanation and move the matter forward. I was stonewalled by fact that the only mechanism to filing was e-file and wait. Inexcusable and impossible to explain to a fee paying client who expects and deserves prompt action. The courts in Oregon have become agonizingly slow in dispute resolution. I practiced more than 4 decades and compared to rules then vs. now, justice was dispensed then swiftly and efficiently. Not so today.	E-Court	John Peterson
I think there needs to be an expectation if you have a rule, that lawyers should be able to avail themselves of it. ORCP 21 motions have been frowned upon, as have many MSJs. I think that is detrimental to the efficient use of court time and client funds.	Following the rules	Anonymous
CLEs for judges would be a good idea	Following the rules	Anonymous
Thanks for asking - just recently looked at the website - had no real prior knowledge.	General	Cindee Matyas
I have only a general suggestion. There used to be only rules in the statutes. Now there are the ORCP, the UTCRs and the SLRs. Judges expect lawyers to have all these rules memorized. It is difficult for a general practitioner (of member of the public) to be aware of all these rules and obey them faithfully. Try not to enact more rules! Keep them simple. Keep them short.	Integration of rules	Charles Williamson
I was not familiar with the CCP, but I use the ORCP every day and it generally works fine, so I see no reason to let the legislature get involved in changing the ORCP since most of them are not lawyers.	ORCP Authority	Anonymous
The shared responsibility has allowed COCP to pass on some issues and "refer" it to legislation. More family law representation would be helpful. Since I have never volunteered, I should just be grateful to those who have and regularly show up for the meetings.	ORCP Authority	Hon. Keith Raines
I think the idea of legislative oversight is a good one, even though it is rarely used. Plus, if a lawyer does not get the CCP to pay attention to an idea, the lawyer can go to a legislator and try to get the rule changed that way. However, the CCP should develop a very clear "legislative history" of the new or changed rule for use in court.	ORCP Authority	Paul Sundermier
I think it is appropriate for lawyers who use the rules, and the courts, to be primarily involved in setting and amending the rules. The legislature has very few lawyers, and, accordingly, is likely unfamiliar with what is practical and what is not.	ORCP Authority	Anonymous

Suggestion	Subject Matter	Suggestion By
I am working on the probate section with Jennifer Todd, Brooks Cooper and Matt Whitman. Someone probably needs to go through ORS 130 and consider some of the same issues for trusts. For the most part, ORS 125 has been addressed, but there are some gaps.	ORS	Heather Gilmore
The just resolution of matters involving pro se litigants should be key to the rules	Pro Se Litigants	Anonymous
I am grateful for the work you all have done to put the history of amendments online. I recently had to argue with opposing counsel that their summary judgment motion was not an "appearance" that allowed them to avoid default. The website's organization of history by rule was very helpful and fairly easy to use. Previously, amendments were issued with comments by CCP. The practice of CCP commenting seems to have fallen out of favor. In order to understand amendments without comment, time must be spent in reviewing the meeting minutes, which is cumbersome. Although resort to the minutes may still be useful, official commentary would have saved me significant research time. I would like to see CCP reinstate the practice of commenting on its amendments.	Staff Comments	Jonathan Dennis
It is my understanding that the current CCP commentary on the ORCP is not available for review. There might be a good reason for that, but that eliminates what might be a helpful resource for litigators.	Staff Comments	Anonymous
Should make comments to ORCP easier to find and access.	Staff Comments	Anonymous
The comments of the CCP are often helpful in explaining the rules to trial judges.	Staff Comments	Dan Keppler
Where's the app? Come on ... get with the 21st Century!	Technology	Anonymous
stay in touch with updated technology	Technology	Anonymous
Anything the CCP can do to encourage uniform application of the rules between counties would be much appreciated. The lack of uniformity makes it very difficult to practice in more than a couple counties because each additional county requires learning a new way of interpreting the rules.	Uniformity between counties	Anonymous



Shari Nilsson <nilsson@lclark.edu>

RE: Rule 7 inquiry

1 message

Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>

Tue, Nov 13, 2018 at 5:22 PM

To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>

Cc: nilsson@lclark.edu

Holly,

Fair enough. In the case of substitute service (7 D(2)(b)), office service (7 D(2)(c)), and service on a mail agent (7 D(3)(a)(iv)) the current wording is that the plaintiff "shall cause to be mailed" (or a variant of that phrase in 7 D(3)(a)(iv)(B)). Service by alternate method is by its nature an effort to secure service when ordinary methods fail and is done under the direction of the court. Securing personal jurisdiction is serious business and having a pro se plaintiff be the only source of evidence that service was completed seems to open up a potential for defaults being undone and judgments being set aside when the evidence on service is evenly balanced. I think that you and I have agreed to disagree on this point. Subsection D(6) is a different form of service and is largely self contained within the subsection. The question for the Council is whether writing an explicit exception for alternate service into section E (or writing a section E exclusion into subsection D(6)) makes the rule more or less clear.

Mark

▼ Holly Rudolph ---11/13/2018 02:49:42 PM---(so then does 7E not apply to alternate service at all?) Holly C. Rudolph, J.D.

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>

To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>

Date: 11/13/2018 02:49 PM

Subject: RE: Rule 7 inquiry

(so then does 7E not apply to alternate service at all?)

Holly C. Rudolph, J.D.

OJD Forms Manager

Executive Services Division

holly.rudolph@ojd.state.or.us

503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

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From: Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>**Sent:** Wednesday, November 07, 2018 6:18 PM**To:** Holly Rudolph <Holly.Rudolph@ojd.state.or.us>**Subject:** RE: Rule 7 inquiry

COC Meeting Packet
September 14, 2019
Attachment 1-1

Holly,

You are correct that the existing language relating to mailing copies of the summons and complaint under subsection D(6) places the burden on the plaintiff to actually perform the act of mailing. (It does seem to me that the plaintiff can delegate or contract with another person to perform that duty so long as that other person can provide evidence of the act of mailing.) The language in the proposed amendment (also at subsection D(6)) retains the direction to the plaintiff to mail the copies but uses the currently approved word "must" in place of "shall". One rationale is that the existing language did not require the plaintiff to find another person and "cause" that person to mail the summons and complaint. A better rationale is that alternate service is only available when the court, in its discretion, authorizes such service and, presumably, the court will give adequate direction to the plaintiff, i.e., the service is performed at the direction of the court. I know that when I approve alternate service, I spell out each step that the plaintiff is required to perform. By the way, your observation caused me to look anew at subsection D(6) and I noticed that, for mailing to alternate addresses of defendant, the language goes from active to passive. We may change that.

The amendment's language on electronic alternative service is silent on who is allowed to send the e mail, text, fax, or whatever. Again, the motion and declaration should specify how the plaintiff expects to effect service and the court's order should spell out exactly what is required. The Council had expert input on electronic service and understands that any kind of electronic message or post from an unknown sender is likely to be blocked or screened by privacy settings whereas a message from one's so-to-be former spouse may be received and read. It will be up to the plaintiff to indicate in the motion and affidavit or declaration why electronic service is the most likely method of getting notice to the defendant and that might include an averment that the other party sends and receives communications to and from the plaintiff (or possibly the plaintiff is blocked but another person is in communication with the defendant via the electronic means mentioned in the motion). This whole new approach still causes me concern but, in many cases it is really the best means available to actually get the message to the defendant and almost anything is likely to be more efficacious than is the case with publication in a newspaper or posting the summons and complaint at the courthouse. Finally, the amended paragraph D(6)(d) now gives defendants served by alternate service, not just publication, an opportunity to come late to the litigation or to set aside a judgment that has been entered.

You are not "hounding" me. You have useful insights on the work product of the Council and it would be nice if the ORCP could mesh with the ODJ's forms.

Best,

Mark

▼ Holly Rudolph ---11/07/2018 11:05:13 AM---Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shal

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/07/2018 11:05 AM
Subject: RE: Rule 7 inquiry

Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shall cause to be mailed" – which we kind of wrangled with a few years ago, ending up with 'plaintiff can't actually mail it because of 7E.

However, R7(D)(6) doesn't use that phrase, it says 'plaintiff must mail', and that's retained in the amendments. Does that mean that the party can actually do the mailing that's associated with alternative service themselves?

And finally ... the electronic service section. I had already added an open-ended option to forms for that, so I've given this some thought. I feel strongly that the rule needs to either expressly allow or at least allow discretion for the court to order that the party can perform electronic service themselves. I have reasons.

For any of these methods, it's very common (and wise) for people to set their inbox or phone to screen out unknown numbers or unidentified senders. So the chances of having service blocked by technology is pretty high if 7E still applies and some random person is sending emails or texts. For social media it's even more important since the recipient is likely to have privacy settings in place that would prevent an unknown server from actually contacting them. The 'most reasonably calculated method to apprise recipient' is 100% to allow the party to serve instead of requiring a third party server. This is backstopped by the availability of screenshots to prove what exactly was sent and received, which is an element I included in the instructions. The other-server rule is – as I understand it – a way to insert a neutral party in between litigants to ensure that what NEEDS to be served is what's ACTUALLY served. That factor is negligible in an electronic setting. I advocate for an exception to 7E for service under (new) 7D(6)(b).

Apologies for hounding you – it just so happens that I've been working on the revisions for this packet over the past couple of weeks so it's all front and center for me!

Thank you! I'm excited that electronic service is happening. Going down this little rabbit hole last week made me realize that I don't even know the addresses of some of my best friends! We know how to get to each other's homes, but actual street addresses? No.

Holly C. Rudolph, J.D.
 OJD Forms Manager
 Executive Services Division
holly.rudolph@ojd.state.or.us
 503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

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From: Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>
Sent: Tuesday, November 06, 2018 2:51 PM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu
Subject: Re: Rule 7 inquiry

Holly,

The "time for response" phrase is captured from the headline in subsection 7C(2) and means the time to appear, to file an answer or a motion, or to otherwise defend. That phrase is in the last line of paragraph 7D(6)(a) in the current rule and will be found in paragraph 7D(6)(a) in the proposed amendment that can be found on the Council's [website--counciloncourtprocedures.org](http://counciloncourtprocedures.org). The notice that is required on the summons (see 7C(3) for three versions) is intended to inform defendants as to what they must do to avoid a default. So, the time to respond is the last date before a default may be entered rather than the date on which the 30 days in which to respond begins.

The alternative service provisions as written are likely behind the times and the proposed amendments are intended to be a brave but modest effort to make them more useful in light of current technology and the ways in which many users of the court system communicate. Recall that there is good case law that holds that actual notice of the litigation is not necessarily adequate notice. I take the alternate service amendments to be saying, "If you do not know of a means by which the defendant may be served personally, what method is the most likely process to provide the defendant with notice of the pendency of the litigation and an opportunity to appear and defend. See subsection 7D(1) which is the constitutional standard. One impetus for the amendment is that no one believes that service by publication is at all likely to let a defendant know of pending litigation that is filed against him or her.

Have I made things worse or helped?

Mark

COCP Meeting Packet
 September 14, 2019
 Attachment J-3

▼ Holly Rudolph ---11/06/2018 09:48:09 AM---Hi! What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/06/2018 09:48 AM
Subject: Rule 7 inquiry

Hi!

What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

We think it means the time when alternative service is deemed complete and the statutory response time begins to run against the other party.

That's not what the words say though, so we're confused, because none of the other things we think it could mean make any sense.

I generally want to red-line the living daylight's out of the alternative service rules ... between you and me it's a lot of words that boil down to "any way you can let them know", bracketed by "and as long as they know it's fine". But that's an effort for another time ... perhaps as part of a concerted effort to make guidelines for service by email and social media?

Yes - that noise you just heard was Pandora's box

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

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Shari Nilsson <nilsson@lclark.edu>

Re: An issue for the Council to Consider

1 message

Mark Peterson <mpeterso@lclark.edu>

Fri, Nov 2, 2018 at 3:01 PM

To: brooks@draneaslaw.com

Cc: Shari Nilsson <nilsson@lclark.edu>

Good to hear from you Brooks! Maybe the rule is meant to hang the attorney out to dry. Your suggestion will be placed on the Council's agenda for the September, 2019, meeting when, as you may recall, the Council will take up items and rules to be considered by committees for implementation and amendment.

Hope that you are doing well,

Mark

--

Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
[10015 SW Terwilliger Blvd](#)
[Portland OR 97219](#)
mpeterso@lclark.edu
(503) 768-6505

On Fri, Nov 2, 2018 at 2:51 PM Brooks Cooper <brooks@draneaslaw.com> wrote:

ORCP 17 speaks of sanctions that can be granted against a PARTY or an ATTORNEY.

ORCP D(3) provides a safe harbor of 21 days whereby an alleged false certification can be amended or withdrawn. But it only uses the word PARTY. That could lead to an interpretation that ATTORNEYS facing sanctions motions have no safe harbor to withdraw their alleged false certifications.

I would argue that this is not and should not be a correct interpretation of the rule and that ORCP 17 D(3) should be amended to say "party or attorney" in each place where it now says only "part."

Hi everybody! I miss our council meetings.

NOTE OUR NEW SUITE NUMBER

Draneas & Huglin, PC

[4949 Meadows Road](#)

[Suite 600](#)

[Lake Oswego, OR 97035](#)

COCOP Meeting Packet
September 14, 2019
Attachment J-1

V: 503-496-5500

F: 503-496-5510

D: 503-496-5511



Shari Nilsson <nilsson@lclark.edu>

Re: Request for OCCP re: GAL from LPWG

1 message

Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>

Wed, Oct 31, 2018 at 11:01 AM

To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>

Cc: nilsson@lclark.edu

Holly,

I understand and even empathize a bit with the plain English movement in our profession. On the other hand, maybe we are moving in the wrong direction. Why not require the study of Latin as a part of our basic school curriculum?

Being in the bottom five per cent of the nation in being able to get our children to graduate from high school tells me that we are doing something wrong. If our standards are too low, maybe it's *res ipsa loquitur*.

Nonetheless, I will place your request on the Council's possible projects for law improvement for discussion in the coming biennium. The next biennium's first meeting is in September of 2019. Please keep that time frame in mind for any suggestions that you might want to pass along for the Council's consideration. If I have your suggestions by sometime in the summer, I can put them together with appropriate materials for the September, 2019, meeting packet.

Your observations regarding the occasional confusion with the work "guardian" are certainly fair. On the other hand, I think that we all like the term GAL. I tend to agree that the word "representative" is problematic. The Council can identify unintended consequences with virtually any change that we might make.

Best.

Mark

▼ Holly Rudolph ---10/31/2018 10:06:03 AM---Happy Halloween! I'm ping you with a request from the Law and Policy Workgroup for the ORCPs to r

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>

To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>

Date: 10/31/2018 10:06 AM

Subject: Request for OCCP re: GAL from LPWG

Happy Halloween!

I'm ping you with a request from the Law and Policy Workgroup for the ORCPs to replace the non-English (let alone PLAIN English) "Guardian ad litem" with something English. Preferably plain.

The group doesn't have any specific recommendations, but I would ask that whatever it becomes not use "guardian" so as not to conflict with chapter 125 guardians.

Perhaps party advocate? Anything using 'representative' gets dicey too with probate "personal representatives" and representing attorneys.

It's just a braindrizzle, but 'party advocate' has some tread with the familiar and similar use of CASA.

Not a thing I'm going to chase - just passing along a request.

COC Meeting Packet
September 14, 2019
Attachment K-1

Cheers!

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

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Shari Nilsson <nilsson@lclark.edu>

Re: Inconsistencies between ORCP and UTCR re service and submission of orders and judgments1 message

Mark Peterson <mpeterso@lclark.edu>

Thu, Jun 6, 2019 at 9:27 AM

To: Mary W Johnson <maryjohnson@orlaw.us>

Cc: Shari Nilsson <nilsson@lclark.edu>

Mary,

Thank you for raising this timing concern. The Council works on a biennial schedule and will begin a new round of deliberations and amendments in September. Your suggestion will be included on the agenda for the opening Council meeting where items are considered as possible amendments to the ORCP. A survey will be sent out via e mail from the OSB this summer soliciting potential improvements to the rules but your suggestion will already be on the agenda. You may follow the Council's work at its website: counciloncourtprocedures.org.

Mark

--

Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
[10015 SW Terwilliger Blvd](http://10015%20SW%20Terwilliger%20Blvd)
[Portland OR 97219](http://Portland%20OR%2097219)
mpeterso@lclark.edu
(503) 768-6505

On Wed, Jun 5, 2019 at 12:50 PM Mary W Johnson <maryjohnson@orlaw.us> wrote:

Dear Council on Court Procedures,

I have been a civil litigator in Oregon for 35 years. This is a plea to clarify and unify rules for service and submission of orders and judgments as between UTCR 5.100 and ORCP 10.

UTCR 5.100 requires service on opposing counsel 3 days prior to submission to court. However, under ORCP 10, you have to add 3 days and since the time period is less than 7 days, and you can't count weekends, no order or judgment can be submitted sooner than 9 days after service.

If after service, there is an objection that is resolved, nowhere in UTCR 5.100 does it say whether or not you have to re-serve the order or judgment and wait at least another 9 days.

UTCR 5.100 requires service on a *pro se* opposing party seven days before submission to court under a cover sheet notice instructing that any objection must be made within 7 days of the date of service. That required notice is inconsistent with ORCP 10, which requires an addition of 3 more days, so it is really a 10-day rule.

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No client should have to pay their lawyer to individually calculate days under multiple rules relating to service and submission for each order or judgment.

Some counties require a form of order to be submitted with a motion, say, for postponement of trial, at the time the motion is submitted. UTCR 5.100 does not authorize that method of submitting an order.

The certificate of service and the certificate of readiness should be combined and simplified into a one-page form.

Mary W. Johnson, OSB 843843

Attorney at Law

Mary W. Johnson, P. C.

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Shari Nilsson <nilsson@lclark.edu>

RE: 2019 Council on Court Procedures Survey

1 message

John Kaempf <john@kaempflawfirm.com>
To: "nilsson@lclark.edu" <nilsson@lclark.edu>

Mon, Jul 29, 2019 at 1:18 PM

Please amend ORCP 39 C make it clear that only a party or witness in a deposition can be video recorded, and **not** an attorney. The request to videotape the attorney asking questions is an improper intimidation technique, in my view. Thank you.

John Kaempf
Kaempf Law Firm PC

1050 SW Sixth Avenue Suite 1414

Portland, OR 97204

(503) 224-5006

Bio | Website



This email and any attachments are confidential. If you are not the intended recipient, please delete it.

From: Oregon CCP <surveys@osbar.org>
Sent: Monday, July 29, 2019 1:09 PM
To: John Kaempf <john@kaempflawfirm.com>
Subject: 2019 Council on Court Procedures Survey

COCP Meeting Packet
September 14, 2019
Attachment M-1





Shari Nilsson <nilsson@lclark.edu>

Fwd: Quick ORCP suggestion

1 message

Mark Peterson <mpeterso@lclark.edu>

Wed, Aug 7, 2019 at 5:20 PM

To: Shari Nilsson <nilsson@lclark.edu>

ORCP 54 A original inquiry. I thought my response helped inform the issue

M

--

Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
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[10015 SW Terwilliger Blvd](#)
[Portland OR 97219](#)
mpeterso@lclark.edu
(503) 768-6505

----- Forwarded message -----

From: **Holly Rudolph** <Holly.Rudolph@ojd.state.or.us>

Date: Mon, Apr 29, 2019 at 8:27 AM

Subject: Quick ORCP suggestion

To: Mark Peterson (mpeterso@lclark.edu) <mpeterso@lclark.edu>

Hi!

Rule 54A requires a party to submit a 'form of judgment' on a voluntary dismissal. That form is currently in Odyssey because it's very basic and usually contains no substantive relief. I suggest removing the requirement to submit a form of judgment. If a party wants costs and fees or something else it going on, there's nothing prohibiting it, but if it's just a dismissal, it's simpler to just create a form in Odyssey.

A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court by filing a notice of dismissal with the court and serving the notice on all other parties not in default not less than 5 days prior to the day of trial if no counterclaim has been pleaded, or by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, [~~a party shall submit a form of judgment and~~] {in the alternative -"may submit a form of judgment"} the court shall enter a judgment of dismissal.

Cheers!

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division

COCOP Meeting Packet
September 14, 2019
Attachment N-1

holly.rudolph@ojd.state.or.us

503-986-5400

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Shari Nilsson <nilsson@lclark.edu>

Possible amendment of ORCP 57 D(4)

1 message

Mark Peterson <mpeterso@lclark.edu>

Fri, Jul 5, 2019 at 4:37 PM

To: Oregon Council on Court Procedures <ccp@lclark.edu>

All,

The presiding judge in Multnomah County pointed out State v. Curry, 298 Or App 377 (2019) as an important new case bearing on the mode and procedure for raising, responding to, and deciding Batson challenges when a juror is subject to a peremptory challenge and it is contended that the challenge is impermissibly based on race or gender. Our OSB liaison, Matt, pointed out that the Court of Appeals invited the Council on Court Procedures to provide more guidance as to the procedures to be utilized to determine "when a prima facie case of prohibited discrimination has been rebutted." Id., at 389. ORS 136.230 makes ORCP 57 the applicable rule for criminal cases in Oregon's circuit courts. And, the Curry case reiterates that appeals based on alleged impermissible bias in juror selection apply in the civil context as well. Id., n. 3 at 380.

The Curry case includes in an appendix Washington General Rule 37 as one potential procedure. Personally, I think that Washington's rule is over long and could be improved upon but we have is nicely presented for discussion.

At the Council's September meeting (and possibly October's as well) we will discuss and select those potential amendments to be assigned to committees for consideration this biennium. This is advance notice of an item that will appear on that list.

Mark

Mark A. Peterson
Executive Director
Council on Court Procedures
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[10015 SW Terwilliger Blvd](#)
[Portland OR 97219](#)
mpeterso@lclark.edu
(503) 768-6505



Shari Nilsson <nilsson@lclark.edu>

Fw: Q re ORCP

1 message

Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>

Wed, Jan 16, 2019 at 1:37 PM

To: nilsson@lclark.edu

----- Forwarded by Mark A Peterson/MUL/OJD on 01/16/2019 01:37 PM -----

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 11:58 AM
Subject: Re: Q re ORCP

Thank you Mark, for your insight and for taking time to reply to my question.

Hon. Marilyn E. Litzenberger
Senior Judge, State of Oregon
Multnomah County Courthouse
[1021 SW Fourth Avenue, Rm. 548](#)
Portland, OR 97204-1223
Tel: (503) 988-3365
Fax: (503) 276-0979

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Documents sent to the court must be e-filed as of December 1, 2014. Documents received by the court via e-mail will not be filed in the official court record.

▼ Mark A Peterson---01/16/2019 11:47:17 AM---Thanks Marilyn. I like having enumerated (in Rule 13) pleadings and motions. "Objections" and the

From: Mark A Peterson/MUL/OJD
To: Marilyn E LITZENBERGER/MUL/OJD@ojd
Date: 01/16/2019 11:47 AM
Subject: Re: Q re ORCP

Thanks Marilyn. I like having enumerated (in Rule 13) pleadings and motions. "Objections" and the like without an explanation of any procedure to describe what it looks like and how it is communicated are not helpful. The Council has eliminated some instances of this kind of loose verbiage but there remain many examples of similar non-specific responses that may or may not be a document. I have no problem with requests and objections as used in Rule 43 because what they are, and the procedures involved, are spelled out. Likewise the use of statements, objections, and responses in Rule 68. That said, I favor using the term "motion" when a rule authorizes a party (or a nonparty) to make a request of the court. I suspect that, when the Council revisits Rule 55 to clarify some of the ambiguities that the rewrite exposed, your concern regarding the "objection" will be addressed. While I cannot speak for the Council, it

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seems to me that failing to take some clear act in response to a subpoena is not a reasonable solution if that course leads to having to defend a motion to compel or an order to show cause. And, why should the issuer of the subpoena have to take the extra step (involving time and expense)? Leaving it to another party to seek a protective order seems similarly flawed. Of course, an e mailed "objection" to the party that issued the subpoena that results in a documented response that compliance is not required would resolve the problem.

The short answer to your initial question is that the Council has not addressed your concern in my tenure and, often when concerns about Rule 55 have come up, they have been dismissed as falling within the Rule 55 quagmire. A wealth of information is available on the Council's website: counciloncourtprocedures.org.

Mark

▼ Marilyn E LITZENBERGER---01/16/2019 11:00:30 AM---What I have seen (in more than one case over the years):
1. The nonparty believes simply writing a l

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 11:00 AM
Subject: Re: Q re ORCP

What I have seen (in more than one case over the years):

1. The nonparty believes simply writing a letter or email or making a phone call to the attorney that issued the subpoena is sufficient to "object" as that term is used in ORCP 55, so does nothing further; or
I've been given the impression that the nonparty does not move for a protective order itself because that involves a filing fee (that is incorrect) and a court appearance, retaining an attorney (because the nonparty doesn't have an legal department or the legal department attorneys "do not appear in court")
2. The party issuing the subpoena moves to compel responses by the nonparty; or
In this case, sometimes the party that believes it could be harmed if the nonparty responds to the subpoena steps in to seek a protective order for itself instead of, or in addition to, the nonparty making a "special appearance" in response to the motion to compel.
3. The party issuing the subpoena applies for an Order to Show Cause, initiating a contempt proceeding, against the nonparty because it failed to comply with the subpoena.
When this happens, the nonparty stands on its objections and argues it had no further obligation after the objections were made.

I'm sure there are other examples, and the situation seems to be becoming more frequent, so other judges may have examples to add to what I've mentioned above.

▼ Mark A Peterson---01/16/2019 09:24:57 AM---Marilyn, As you may know, the Council did a complete re-write of Rule 55 that was promulgated in Dec

From: Mark A Peterson/MUL/OJD
To: Marilyn E LITZENBERGER/MUL/OJD@ojd
Date: 01/16/2019 09:24 AM
Subject: Re: Q re ORCP

Marilyn,

As you may know, the Council did a complete re-write of Rule 55 that was promulgated in December and will become

effective on January, 1, 2020. unless the Legislature rejects the promulgation. The rule was poorly written and contained many redundancies. However, the task was to keep the current rule in better form to get a better version passed and then, once the rule is in order and makes sense, to clean up deficiencies next biennium. Is there a reason that a nonparty cannot move for a protective order? Is that what a document entitled "objection" would do? I have other issues on subpoena abuse that I hope to address. In your case, it seems like a nonparty should not have to disobey a subpoena and force the party that issued the subpoena to move to compel? That makes no sense to me. Your thoughts?

Mark

▼ Marilyn E LITZENBERGER---01/16/2019 08:50:17 AM---Good Morning Mark: Can you tell me if the CCP has considered addressing the question of contested su

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 08:50 AM
Subject: Q re ORCP

Good Morning Mark:

Can you tell me if the CCP has considered addressing the question of contested subpoenas to non-parties? Over my years on the bench, there have been several times when the lack of clarity on this subject was raised. Some seem confused as to how a non-party can make an appearance in a case to secure protection from the court with respect to its obligation to respond to, for example, a *subpoena duces tecum* or a notice of deposition. The rule contemplates an objection by a non-party, but provides no specific guidance as to how that objection is to be resolved. The party issuing the subpoena sometimes moves to compel a response to its subpoena, although it seems to me that is not the only procedural vehicle appropriate for the situation. There might be a motion for protective order by the party to whom the subpoena was issued or there might be a motion for an order to show cause why the non-party has not complied with the subpoena. So, I'm just wondering if the CCP has discussed this in the past and, if so, if any minutes reflect that body's discussion. If you don't know, don't worry about it - I don't have a motion pending before me at this time.

Thank you.
Marilyn Litzenberger

Suggestion	Rule(s)	Staff Summary of Comment	Suggestion By
Fix ORCP 1 E(2) so that it requires "personal knowledge" as opposed to "knowledge and belief." ORE 602 requires "personal knowledge." Some people have a "belief" that the Moon landings were fake.	1 E Declarations	Require personal knowledge, not knowledge and belief, like OEC 602	Charles Markley
admittedly there are a lot of rules and nuances but you should identify 12 or so that would apply in small claims courts (Rule 1 says that the rules don't apply) which might make the small claims courts more consistent and more justice like. Now each small claims judge does what he wants and sometimes the decisions are horror stories. Plus Washington allows certain appeals which would be nice and would result in a better process for pro se people.	1 A	Identify roughly 12 rules that apply in small claims department to improve consistency/correctness of rulings. Allow some appeals of small claims judgments, as Washington does	Anonymous
Simplify and shorten times for service per ORCP 7, 9 and 10. These changes are necessary to accommodate the shortened disposition standards, or else there will be many stays and no discovery.	7 9 10	Simplify and shorten times for service	Mary Johnson
Add flexibility in notice procedures to achieve actual notice.	7 9?	Add flexibility to achieve actual notice	Anonymous
Rule 7 is needlessly complex and requires parties to frequently pay 2 servers. If personal service is not accomplished, many (or most) sheriffs will either not serve at all or will only perform the primary substitute service but not the required 1st class mailing. There's no reason the party can't put a copy of the documents in the mail without having to find or pay a second qualified server to drop an envelope in the mail. The rule would benefit from far fewer exceptions and special party designations. The new email service option is great, but includes repetitive and conflicting thresholds and should be treated as just another substitute service method.		Rule 7 needlessly complex. Shouldn't have to find second server for follow-up mailing after substitute or office service. Fewer exceptions and special party designations. E-mail service great but should just be another alternative service method without repetitive/conflicting thresholds.	Anonymous
Please streamline the service rules in ORCP 7. With the advent of e-court, everyone seems to be confused about the different means of service and the timelines for each form.	7	Streamline Rule 7. With e-court, confusion on means of service and timelines for each	Anonymous
Will anything be done to address service by email?	7 D(6)	Will anything be done to address service by e-mail? (Done)	Cynthia Domas
service by alternative means. Its almost 2020 and ORCP is making us publish in newspapers no one reads. Please look at service by social media, email, and other methods that reflect the changing way individuals interact with society and one another.	7 D(6)	Allow service by social media, e-mail, etc., not just newspapers. (Done.)	Anonymous
Adopt waiver of service rules similar to FRCP 4(d)	7 F(3)	Have FRCP 4(d) waiver of service provision	Scott Gowgill
Nothing specific. However, I am always at somewhat of a loss as to how to give notice/serve an opposing party with the proposed form of (Q)DRO in cases where it has been many years, sometime decades, since the divorce judgment was entered. Parties often wait YEARS to take care of the QDRO. When I cannot locate an opposing party, or they are not responding or cooperating, I have to get creative... I don't find much direction in the ORCP on this.	9	How to serve opposing party in (Q)DRO cases, sometimes years after divorce judgment	Stacey Smith
Do away with the "extra-3-day" rule for responding to email service. Add 5 days for USPS service. It regularly takes at least 5-6 days for mail between Salem and Portland. I find some lawyers using the USPS only just for that reason.	10 B	Additional time to respond - eliminate for e-mail, increase to five (5) days for USPS	Paul Sundermier
I have always thought the second sentence of ORCP 15A needs to be changed, because the 10 days to respond to a motion appears to conflict with the 14 days in UTCR 5.030(1). Everyone just follows the UTCR anyway, so why not put 14 days in ORCP 15A as well?	15 A	10 days to respond to "motion" in conflict with UTCR's 14 days, so eliminate the second sentence (wrong, but done)	Anonymous
ORCP 22 C "Third Party Practice" should be changed to enable a defendant to assert third-party claims more easily. The rule requires a defendant to assert a third-party claim within 90 days of being served. To assert a third-party claim after 90 days requires both consent of all parties AND court approval. The rule should be amended to require consent of all parties OR court approval. It is unrealistic in most civil litigation for the defendant to know within 90 days the parties against whom it may have third-party claims. Allowing one party to "veto" the litigation of the third party claim is unfair and deprives the trial judge of the chance to efficiently resolve matters against all potential defendants.	22 C	Allow third-party claims to be filed more than 90 days after service if approved by all parties <u>or</u> court	Dan Keppler
Currently a plaintiff must seek leave to amend a complaint. However, once the plaintiff files the amended complaint, there is no rule limiting the defendant from simply answering the amendments. Thus, the defendant will often respond to the amended complaint by adding entirely new defenses without seeking leave from the court, where it would otherwise be required to do so. For example, if a plaintiff amends by narrowing claims for trial, a defendant should not be able to ADD a brand new defense right before trial without seeking leave. ORCP 23 A or ORCP 19 should be amended to address this issue.	23 A 19	Since plaintiffs must seek leave to amend, require defendants to likewise seek leave to amend if they intend to add new defenses in responding to amended complaints	Anonymous
Edit ORCP 27 to make it more clear - that an unemancipated minor must always have a GAL, and who should be appointing the GAL	27 B(1) through (4)	Make mandatory that minor must have GAL, who appoints (current rule?)	Anonymous
Interpleader statute is confusing to everyone including judges ORCP 31.	31	Interpleader "statute" confusing to all	Mark Cottle

Suggestion	Rule(s)	Staff Summary of Comment	Suggestion By
ORCP 32H and I should be eliminated. At the least, 32I should have a strict timeline for compliance.	32 H & 32 I	Eliminate prior demand requirement for money damages class actions. Eliminate or strict timelines for ID of and notice to class members requirement	Anonymous
Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.	36	Codify whether responding party must prepare privilege log for each assertion of privilege	Joseph Arellano
ORCP 36B(2) should have an automatic provision that a party must pay \$10,000 if they do not produce the insurance information when requested unless they have filed for a protected order. Too many lawyers ignore this rule.	36 B(2)	\$10K penalty for failure to produce requested insurance information	Anonymous
ORCP 36 should add language requiring proportionality in discovery, similar to FRCP	36 C	Require proportionality in discovery, like FRCP	Anonymous
I would like to see Oregon adopt the "proportionality" language from the FRCP that cover the scope of discovery. the continuing refusal of the CCP to incorporate a rule addressing proportionality in civil discovery is an embarrassment. It directly results in absurd arguments in court and costs of \$100K in single plaintiff employment disputes. Lack of judicial control over litigation processes directly contravenes equitable, speedy adjudication.	36 C	Adopt FRCP proportionality language	Matthew Colley
Organizational depositions under 39(c)(6) need less draconian sanctions.	39 C(6)	Allow incorporating proportionality in civil discovery	Anonymous
ORCP 41 C should be revised and clarified. For example, ORCP 39 D(3) requires objections to be stated concisely, while many practitioners state that, under ORCP 41 C, the only pertinent objections are to the form of the question and objections on the grounds of privilege. Respectfully, ORCP 41 C(1) and (2) are vague and unhelpful to practitioners.	41 C(1) and 41 C(2)	Less draconian sanctions (?) for organizational depositions	Anonymous
ORCP 43 should have a requirement that production be made forthwith--there is too much dinking around.	43 B(2)	Effect of errors and irregularities in deposition questions and objections thereto, vague and unhelpful	Peter Bunch
Parties should provide a date no more than 30 days after the deadline to respond to RFPs by which they will provide actual documents.	43 B(2)	Require production of documents forthwith	Anonymous
1) The discovery rules should more closely align with the federal rules. This is NOT a proposal for adding interrogatories. This IS a proposal for stricter review of objections (specifically general objections, which just serve to obfuscate and create greater expense to litigants), Discovery rules should also explicitly provide that documents be produced contemporaneously with any response. 2) Judges should be encouraged to strictly apply these rules.	43 B(2) Discovery	Provide date no more than 30 days after deadline to produce actual documents	Sonia Montalbano
ORCP 44 needs amended to allow discovery/inquiry into plaintiffs' conversations with their treating providers in personal injury/medical malpractice cases.	44	Align discovery rules with FRCP - strict review of objections and produce documents contemporaneously with response	Anonymous
Filing of Requests for Admission is discussed in Rule 9(C), but many attorneys do not know that these should be filed with the court. Suggest that ORCP 45 at least refer to rule 9(C) for information on filing.	45 B 9 C	Allow discovery of plaintiffs' conversations with treating healthcare providers in PI and medical malpractice cases	Anonymous
Make an award of attorney fees mandatory under ORCP 46 on the first motion to compel. These changes are necessary to accommodate the shortened disposition standards, or else there will be many stays and no discovery.	46	Add reference in Rule 45 B to remind responding party of need to file responses	Anonymous
Authorize automatic sanctions for failure to comply with discovery after along with a motion to compel. Having to jump through SO many hoops to get basic documents is costly and the attorneys know there is no consequence anyway. IF they produce documents, they are late, subject to a motion to compel, and often the judges even say, "Counsel you should produce the documents but I'm not going to sign an order to do it, just do it." There are no punishments or teeth to the ORCP in this regard. They are just told to provide the documents the ORCP already tells them to provide.	46	Attorney fees mandatory on first motion to compel	Mary Johnson
If someone files a Motion to Compel, documents produced less than 15 days before a hearing should trigger a payment by the producing party of \$500 (or some other amount), unless otherwise agreed by counsel.	46 A	Motions to compel should provide for automatic sanctions for failure to provide discovery	Anonymous
Allow interrogatories similar to FRCP 33.	Discovery	Monetary penalty if fail to produce documents 15 days prior to hearing	Sonia Montalbano
Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.	Discovery	Provide for interrogatories like FRCP 33	Scott Gowgill
Add interrogatories. Every other state and the feds have them. Just because they could be abused in not a reason not to have them, as deposition can be abused but we still have them. Simply enact safeguards to limit the ability to abuse them, and seek input from attorneys who have experience with them in federal court or other states to help craft those rules.	Discovery	Too many litigators game the discovery rules.	Paul Sundermier
The current rules on expert discovery are far below the standard in a 21st Century practice. They do NOT promote settlement nor a just trial. The FRCP are the model that should be incorporated onto ORCP.	Discovery	Add smart interrogatories	Michael Stevens
codify the procedure for the production of a testifying expert's file at trial (timing) and what information must be included (content of expert's "file"). See FRCP 26(b)(4)(B) and (C).	Discovery	Federalize rules on expert discovery to promote settlement and just trials	James Rice
Very limited interrogatories to parties.	Discovery	Codify timing and content of experts' file produced at trial, like FRCP 26(b)(4)(B) and (C) - to protect attorney-client privilege	Joseph Arellano
	Discovery	Very limited interrogatories	Michael Hallas

Suggestion	Rule(s)	Staff Summary of Comment	Suggestion By
I just moved here after 50 years of practicing in NJ & NY. I find the discovery rules anachronistic. Trial by ambush has long been done away with in those two states. Interrogatories should be added as a discovery tool. Discovery of expert's reports should also be added. To do this will assist of the settling of cases.	Discovery	Add interrogatories to discovery tools. Allow discovery of experts' reports.	Barry Siegel
Get rid of Motions for Summary Judgment	47	Eliminate motions for summary judgment	Anonymous
amend setting motions for summary judgment where opposing counsel refuses or unnecessarily delays in agreeing to a date.	47 C	Amend setting Rule 47 motions where non movant causes delays	Anonymous
ORCP 47E needs work. First, it should not be made clear that it is not applicable to pro se litigants who are not admitted to the Bar and who are not subject to discipline. Second, it needs further refinement because there can be differences of opinion as to the scope of permissible expert testimony and whether such testimony relates to the summary judgment issue in play.		Section E needs work. Allow expert affidavits only for attorneys. (Current rule.) Confusion as to scope of expert testimony and whether relates to the issue before the court on Rule 47 motion.	Stephen McCarthy
<p>I suggest the CCP look at ORCP 47E (use of attorney affidavit or declaration when expert opinion required) and recent appellate cases applying the rule. I noticed, while I was in private practice, that appellate decisions, starting with Moore v. Kaiser Permanente, 91 Or.App. 262 (1988) seem to have modified the plain language of the rule by effectively changing the "is required to provide the opinion of an expert ..." language in the rule to a "may or must" standard, which essentially changes the mandatory nature of the rule to a permissive nature. The Moore court stated "Rule 47 E is designed to enable parties to avoid summary judgment on any genuine issue of material fact which MAY or must be proved by expert evidence" (emphasis added). But the court did not explain why it added the "may" language, and this was not in response to an argument that the rule was ambiguous nor was it an attempt to interpret the plain language of the rule; it seemingly came out of nowhere. Decisions subsequent to Moore quote the "may or must" standard without explaining how that is consistent with the plain language of the rule. I express no opinion about whether as a policy matter the rule should be mandatory or permissive, but it does seem concerning that the judicial decisions have effectively re-written the plain language of the rule. Another suggestion I have for ORCP 47E is to make clear that if an expert affidavit is used to defeat summary judgment but the attorney changes his/her mind about how to prove a claim at trial and does not use expert testimony at trial that the attorney nonetheless needs to prove to the court and opposing counsel that the attorney did in fact have an expert lined up and ready to testify at the time the ORCP 47E affidavit was submitted, and in fact was planning on proceeding at trial on that theory. I had a case while in practice where opposing counsel defeated a motion for summary judgment by using an ORCP 47E affidavit, yet at trial did not present any expert testimony. I moved for a directed verdict on the grounds that the attorney had previously represented that expert testimony was required on each of the claims and by not presenting an expert at trial the plaintiff necessarily failed to prove his case. The trial judge denied the motion for directed verdict, though my client subsequently prevailed at trial. After trial, I sought to compel the identity and opinion of the purported expert for a possible sanctions motion because I strongly believed that the attorney did not in fact have an expert retained (especially considering that some of the claims were purely</p>			
(continued)			

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fact based and expert testimony seemingly would have had no relevance, and the Plaintiff did not even attempt at trial to prove those claims using lay testimony) but opposing counsel claimed this was protected by the work product doctrine and the attorney client privilege. I argued this could not be privileged because the lawyer had previously represented that the expert would be testifying at trial so this could not have been expected to remain confidential for all times, and I also argued that the work product doctrine should not apply with respect to this particular issue after trial. The trial judge denied the motion to compel on the grounds that the work product doctrine and the attorney-client privilege prohibited disclosure, and my client decided not to appeal. I suggest that the CCP consider modifying the rule to make clear that in the event the expert does not testify at trial that the opinion is not privileged or otherwise protected from disclosure, and that the attorney would also need to explain why the attorney changed his/her mind to go with a different theory at trial than the attorney was using at the summary judgment stage. Otherwise, an attorney could effectively use an ORCP 47E affidavit in bad faith to avoid summary judgment even without having an expert, knowing that in the unlikely event that the case went to trial the lawyer could avoid sanctions for the bad faith conduct by invoking the work product doctrine or the attorney-client privilege and there would be no way to prove that the lawyer did not have an expert. This is particularly important considering that the Oregon Supreme Court in <i>Two v. Fujitec Am., Inc.</i> , 355 Or. 319 n.5 (2014) contemplated attorneys using an ORCP 47E affidavit at the MSJ stage but not using an expert at trial ("Therefore, a party may submit a ORCP 47 E affidavit on summary judgment but rely on non-expert evidence at trial, contending that expert testimony is unnecessary. In that circumstance, at least, and perhaps in others, the fact that a party submitted an ORCP 47 E affidavit but did not call an expert to testify will not necessarily establish that the affidavit was not made in good faith"). I am not suggesting that ORCP 47E should be abolished or that pretrial expert testimony be allowed - the expert affidavit rule is the result of an informed policy decision to decrease the cost of litigation by not having expensive expert discovery - but considering how ripe the rule is for potential abuse by an unscrupulous attorney who uses an expert affidavit without actually having an expert and then hides that misconduct by invoking work product or attorney-client privilege, I would think eliminating the possibility of invoking work product or privilege would provide more fairness and accountability to the rule.	47 E	Make clear expert affidavit to defeat summary judgment only where the expert is essential to establish a material fact or go with <i>Moore v. Kaiser Permanente</i> , 91 Or App 261 (1988) to say expert may be essential to establish a material fact. Provide procedure to authorize disclosure of expert if expert affidavit is filed but party changes their mind or a theory and produces no expert at trial.	Hon. Eric Dahlin
Clarify alternatives for service of subpoenas.	55	Clarify alternatives for service of subpoenas (Done?)	Anonymous
I recommend additional clarity on the procedure for trust and estate litigation, and especially a change to how Rules 62C(2)(a) and 27 work in that context. There should have an exception if the proceeding is to replace a Trustee who no longer has financial capacity to continue acting as trustee -- jumping through the hoops slows down the replacement process too much and in the times I have seen this occur usually the incapacitated trustee has someone in their life draining funds from the trust without authorization. A similar exemption should probably apply in other situations where the incapacitated person is occupying a fiduciary position with respect to an entity. A delay to a default judgment does not protect the incapacitated person and increases any potential ongoing harm.	62 C 27 E, F	Clarify procedures for trust and estate cases. Timelines can result in harm to incapacitated person.	Anonymous
Please review Rule 69 for terminology and clarity. There is disagreement about whether a party is "in default" once the time to respond has passed or if they are only "in default" after a court grants a motion for default. It would be doctrinally simpler to brief and argue preliminary injunction motions if ORCP 79 tracked the federal standard for injunctive relief, or at least coalesced into a single Oregon standard, rather than having two alternative prongs--ORCP 79 A(1)(a) and (b)--neither of which parallels the federal standard. ORCP's should disincentivize obstructive behavior by lawyers and clients.	69	Unclear when in default, after deadline has passed or after court order	Anonymous
Judges treat pro se people really differently depending on the judge. Many do not seem to know that they can explain the process etc. to these litigants. Many treat them rudely and expect them to know rules they have no way to know. I think you could clarify these rules better. The rules are confusing unless one is very familiar with them. In my practice they mostly don't apply, but when they do I find it difficult to navigate my way through them. I'd like to see them written and organized more clearly.	79 A(1)(a) and 79 A(1)(b) General	Use federal standard for preliminary injunctions or at least refine to one Oregon standard Disincentivize obstructive behavior	Rachel Lee Anonymous
Many ORCPs contain only partial information and it is necessary to locate and review additional statutes, ORCPs, UTCRs or SLRs. It would be very helpful if the rules referenced the other statutes, ORCPs, or UTCRs that interact with the ORCP in question, and that UTCRs and SLRs be minimized or incorporated into ORCPs where appropriate ORCPs should generally be more fair to unrepresented/self-represented parties.	General	Since some judges expect pro se litigants to know the ORCP, clarify them better	Anonymous
	General	Clearer and more organized rules	Anonymous
	General	Include internal references to relevant ORCP, UTCR, SLR, so reader knows to also look at these references. Minimize or incorporate UTCR and SLR by including in ORCP	Hon. Charles Zennaché
	General	Make ORCP more fair to pro se litigants	Anonymous
Implement a non-optional expedited jury trial procedure for cases under a certain amount, that includes limited discovery and a firm trial date. Dispose of the mandatory court-annexed arbitration. Make rules to prevent attorneys from pleading around arbitration/expedited trial.	General ORS 36.400 - .425	Mandatory expedited jury trial procedures for civil cases less than a specified amount -- limited discovery Eliminate court-annexed mandatory arbitration	Anonymous

Suggestion	Rule(s)	Staff Summary of Comment	Suggestion By
The main focus of the committee is litigation not focused on probate or protective proceedings. When changes are made to the general rules, more care and attention needs to be given to the impact on probate/protective proceedings. The committee has really tried to do this, but it is an almost impossible task to make the ORCP's match practice with probate, protective proceedings, and trust proceedings. I think Matt Whitman and others have tried, but the problem is with the probate statutes. Right now I am working on the changes to the Oregon probate code (ORS Chapters 111 to 118) to try and help fix things inside of the Uniform Laws Commission Probate Modernization Group. The committee may be interested in this because we have spent a great deal of time sorting through the concept of when the ORCP's apply and when the probate code provisions apply. There is no direction in the statutes so in practice there is a division. We are trying to define when a matter becomes a contested matter which will then bring in the ORCP's for things like responsive pleadings. We have been working in a small group which includes litigators and lawyers who do the administration and are trying to make it easier for people to understand. It could be helpful to have the CCP's assistance.	Probate, protective proceedings & trusts	Unclear when ORCP apply and when statutory provisions apply - ORCP only when contested? Create a form for protective orders, feds have them	Heather Gilmore
create a form for protective orders. feds have them.	Protective orders	Certificates are a waste of time in dependency cases	Anonymous
Certificates of readiness are a waste of time in dependency law	Trial readiness	Require each judge to allocate time for ex parte to get orders/judgments signed, resolve scheduling issues	Anonymous
Rules should mandate each trial judge allow at least 30 minutes for direct ex parte appearances to secure order and judgment signing and entry, resolve hearing scheduling issues. As things stand now in some counties, there are weeks of delay in securing orders for simple matters or signatures on judgments that are long overdue.	UTCRC 5.060		John Peterson
Simplify the calculation of time and update for electronic filing	UTCRC Chapter 21	Simplify calculations of time and update for e-filing	Paul Sundermier-B56:F60E 24D57:F60A54:F60A5 2:F60A49:F60A48:F6A 1:F60