

ANNOTATED AGENDA
COUNCIL ON COURT PROCEDURES

Saturday, October 12, 2019, 9:30 a.m.

Oregon State Bar

16037 SW Upper Boones Ferry Rd, Tigard, Oregon

AGENDA

- I. Call to Order (Ms. Gates)
- II. Introductions (all) **(ATTACHMENT A)**
- III. Approval of September 14, 2019, Minutes (Ms. Gates) **(ATTACHMENT B)**
- IV. Old Business
 - A. Informational Reports
 - 1. ORCP 17 (Judge Peterson)
 - 2. Guardians Ad Litem (Judge Norby)
 - B. Committee Reports
 - 1. ORCP 7 (Ms. Weeks)
 - a. New Suggestion Regarding Rule 7 **(ATTACHMENT C)**
 - 2. ORCP 15 (Ms. Payne)
 - 3. ORCP 23 (Ms. Gates)
 - 4. ORCP 23 C/34 (Mr. Andersen)
 - C. ORCP/Topics to be Reexamined Next Biennium
 - 1. Discovery (Ms. Gates)
- V. New Business (Ms. Gates)
 - A. Potential amendments received by Council Members or Staff since Last Biennium
 - 1. ORCP 4 **(ATTACHMENT D)**
 - 2. ORCP 10 **(ATTACHMENT E)**
 - 3. ORCP 39 **(ATTACHMENT F)**
 - 4. ORCP 54 **(ATTACHMENT G)**
 - 5. ORCP 57 **(ATTACHMENT H)**

*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

- 6. ORCP 68 (**ATTACHMENT I**)
 - B. Potential amendments received from Council Survey (**ATTACHMENT J**)
- VI. Appointment of committees regarding any items listed in IV or V
- VII. Adjournment

Oregon Council on Court Procedures
Roster (Revised 10/7/19)
2019-2021 Biennium

Kelly L. Andersen

Kelly L. Andersen PC
1730 E McAndrews Rd Ste A
Medford OR 97504
Telephone: (541) 773-7000
Fax: (541) 608-0535
E-mail: kelly@andersenlaw.com
Term Expires: 8/31/21

Travis Eiva

Zemper Eiva Law
101 East Broadway, Suite 303
Eugene OR 97403
Telephone: (541) 636-7480
E-mail: travis@zempereiva.com
Term Expires: 8/31/21

Hon. D. Charles Bailey, Jr.

Washington Co Circuit Court
145 NE 2nd Ave
Hillsboro OR 97124
Telephone : (503) 846-4403
E-mail : d.charles.bailey@ojd.state.or.us
Term Expires: 8/31/21

Jennifer Gates

Pearl Legal Group PC
529 SW 3rd Ave Ste 600
Portland OR 97204
Telephone : (971) 808-5666
Fax : (503) 445-1270
E-mail: jgates@pearllegalgroup.com
Term Expires: 8/31/21

Troy S. Bundy

Hart Wagner LLP
1000 SW Broadway Ste 2000
Portland OR 97205
Telephone: (503) 222-4499
FAX: (503) 222-2301
E-mail: tsb@hartwagner.com
Term Expires: 8/31/23

Barry J. Goehler

Goehler & Associates
4000 Kruse Way Pl Bldg 1 Ste 135
Lake Oswego OR 97035
Telephone: (503) 534-4518
FAX: (855) 827-7901
E-mail: bgoehler@travelers.com
Term Expires: 8/31/23

Hon. R. Curtis Conover

Circuit Court Judge
125 E 8th Ave
Eugene OR 97401
Telephone : (541) 682-4497
Fax: (541) 682-6660
E-mail: curtis.conover@ojd.state.or.us
Term Expires: 8/31/21

Hon. Norman R. Hill

Circuit Court Judge
Polk County Courthouse
850 Main St
Dallas OR 97338
Telephone: (503) 623-5235
E-mail: norm.r.hill@ojd.state.or.us
Term expires: 8/31/21

Kenneth C. Crowley

DOJ Trial Division Civil Litigation
1162 Court St NE
Salem OR 97301
Telephone : (503) 947-4700
FAX: (503) 947-4791
E-mail: kenneth.c.crowley@doj.state.or.us
Term Expires: 8/31/23

Meredith Holley

Attorney at Law
2852 Willamette St., #351
Eugene, OR 97405
Telephone: (485) 221-2671
E-mail: meredith@freedomresourcecenter.com
Term Expires: 8/31/21

Drake A. Hood

Brisbee & Stockton LLP
139 NE Lincoln St
Hillsboro OR 97123
Telephone: (503) 648-6677
FAX: (503) 648-1091
E-mail: dah@brisbeeandstockton.com
Term Expires: 8/31/23

Hon. David Euan Leith

Marion County Circuit Court
100 High St NE
Salem OR 97309
Telephone : (503) 588-5160
Fax: (503) 588-5117
Email : david.e.leith@ojd.state.or.us
Term Expires: 8/31/23

Hon. Thomas A. McHill

Linn County Circuit Court
PO Box 1749
Albany, OR 97321
Telephone: (541) 776-7171 x162
FAX: 541-967-3848
E-mail: Thomas.A.McHill@ojd.state.or.us
Term Expires: 8/31/23

Hon. Lynn R. Nakamoto

Oregon Supreme Court
Supreme Court Bldg
1163 State St
Salem OR 97301
Telephone: (503) 986-5701
E-mail: lynn.r.nakamoto@ojd.state.or.us
Term Expires: 8/31/21

Hon. Susie L. Norby

Circuit Court Judge
Clackamas Co Courthouse
807 Main St Rm 301
Oregon City OR 97045
Telephone: (503) 650-8902
Fax: (503) 650-8909
E-mail: susie.l.norby@ojd.state.or.us
Term expires: 8/31/21

Scott O'Donnell

Keating Jones Hughes PC
1 SW Columbia St Ste 800
Portland OR 97258
Telephone: (503) 222-9955
FAX: (503) 796-0699
E-mail: sodonnell@keatingjones.com
Term Expires: 8/31/23

Shenoa L. Payne

Shenoa Payne Attorney at Law PC
805 SW Broadway Ste 470
Portland OR 97205
Telephone: (503) 517-8203
E-mail: spayne@paynelawpdx.com
Term Expires: 8/31/21

Hon. Leslie Roberts

Multnomah County Circuit Court
1021 SW Fourth Ave
Portland OR 97204
Telephone: (503) 988-6760
E-mail: leslie.m.roberts@ojd.state.or.us
Term Expires: 8/31/23

Tina Stupasky

Jensen Elmore Stupasky & Lessley PC
199 E 5th Ave Ste 25
Eugene OR 97401
Telephone: (541) 342-1141
FAX: (541) 485-1288
E-mail: tstupasky@jeslaw.com
Term Expires: 8/31/23

Hon. Douglas L. Tookey

Oregon Court of Appeals
1163 State St
Salem OR 97301
Telephone: (503) 986-5423
E-mail: douglas.l.tookey@ojd.state.or.us
Term Expires: 8/31/21

Margurite Weeks

HKM Employment Attorneys LLP
1607 NE 41st Avenue
Portland OR 97232
Telephone: (503) 389-1130
E-mail: margyweeks@gmail.com
Term Expires: 8/31/21

Jeffrey Sherwin Young

Lindsay Hart Neil Weigler
1300 SW 5th Ave Ste 3400
Portland OR 97201
Telephone: (503) 226-7677
FAX: (503) 226-7697
E-mail: jyoung@lindsayhart.com
Term Expires: 8/31/23

Hon. John A. Wolf

Circuit Court Judge
Wasco County Courthouse
511 Washington Street
P.O. Box 1400
The Dalles, OR 97058
Telephone: (541) 506-2717
E-mail: john.wolf@ojd.state.or.us
Term Expires: 8/31/21

Council Staff**Mark A. Peterson**

Executive Director
10015 SW Terwilliger Blvd
Portland OR 97219
Telephone: (503) 768-6505
E-mail: mpeterso@lclark.edu

Shari C. Nilsson

Executive Assistant
10015 SW Terwilliger Blvd
Portland OR 97219
Telephone: (503) 768-6505
E-mail: nilsson@lclark.edu

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, September 14, 2019, 9:00 a.m.

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

ATTENDANCE

Members Present:

Kelly L. Andersen*
Troy S. Bundy
Kenneth C. Crowley*
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Jeffrey S. Young

*Appeared by teleconference

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. R. Curtis Conover
Travis Eiva
Meredith Holley
Hon. Thomas A. McHill
Scott O'Donnell
(1 vacant position)

Guest:

Robert Keating, Outgoing Council Chair
Amy Zubko, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 9 ORCP 10 ORCP 15 ORCP 17 ORCP 23/34 ORCP 36 ORCP 39 ORCP 43 Discovery			

I. Call to Order

Mr. Keating called the meeting to order at 9:36 a.m.

II. Introductions

All present and on the telephone introduced themselves. A roster (Appendix A) was distributed that includes all current Council members. Judge Peterson asked for members to provide any corrections to Ms. Nilsson.

III. Approval of December 8, 2018, Minutes

Mr. Keating asked whether any Council members had any amendments to the draft December 8, 2018, minutes (Appendix B). Hearing none, he called for a motion to approve the minutes. Judge Norby made a motion to approve the December 8, 2018, minutes. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

IV. Annual election of officers per ORS 1.730(2)(b)

Mr. Keating asked Council members to nominate members as chair, vice chair, and treasurer. Ms. Payne made a motion to nominate Ms. Gates as chair. Ms. Stupasky seconded the motion. Mr. Keating made a motion to nominate Mr. Crowley as vice chair. Mr. Bundy seconded the motion. Ms. Gates made a motion to nominate Ms. Weeks as treasurer. Mr. Bundy seconded the motion. All motions passed unanimously by voice vote.

Mr. Keating noted that, while he was not always successful in convincing the Council to vote to promulgate amendments that he felt strongly about, he appreciated the great collegiality and conversations he had during his time on the Council. Ms. Gates thanked him for his time on the Council, and particularly for his calm and steady presence as chair during these past two years. The Council presented Mr. Keating with a plaque in appreciation for his service. Mr. Keating thanked the Council and left the meeting.

V. Council Rules of Procedure per ORS 1.730(2)(b)

A. Review

Judge Peterson explained that the Council has Rules of Procedure (Appendix C) that were created pursuant to Oregon Revised Statute 1.730(2)(b), and that Council members might want to review them. The rules were revised a few years ago because they were out of date.

B. Council Timeline

Judge Peterson stated that the Council timeline (Appendix D) is the work of Ms. Nilsson. It is a helpful tool to know where we are in the biennium. The only thing that may change is that the monthly meetings are currently scheduled for the second Saturday of each month. If the Council decides to meet on the first Saturday of the month, the timeline would need to be updated.

VI. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson explained that the Council had sent its promulgated rules to the Legislature, which did not hold any hearings nor contact the Council with any questions. Therefore, the promulgated rules will go into effect on January 1, 2020. He noted that this is fairly typical. Judge Peterson explained that the amendments to Rule 7, Rule 16, and Rule 55 involved a substantial amount of work. Regarding Rule 22, only the non-controversial amendments passed.

B. Staff Comments

Judge Peterson stated that he would appreciate the input of Council members about the draft staff comments to the promulgated rules from the 2017-2019 biennium (Appendix E). He noted that, as usual, there will be a caveat at the beginning of the comments noting they are staff comments and they have not been voted on by the Council. However, feedback from the Council regarding any errors or omissions would be appreciated before the October Council meeting. The staff comments are helpful to practitioners and often save them from having to wade through the minutes in attempting to determine the reason that the Council made a change to a rule. Judge Peterson reminded members that the Council decided to resume drafting staff comments in the 2013-2015 biennium after a previous break from issuing them.

C. 79th and 80th Legislative Assembly's ORCP Amendments Outside of Council Amendments and other Legislation Regarding the Rules

1. Rules Amended - ORCP 69

Judge Peterson explained that the Legislature made one change to the ORCP: a change in the citation to the Servicemembers Civil Relief Act in Rule 69 C on default judgments. This was done in a so-called "revisor's bill" that is typically used to fix minor errors in the Oregon Revised Statutes (ORS) and Oregon Rules of Civil Procedure (ORCP).

2. New Statutory Mention of Rules

Judge Peterson stated that he had looked at all of the bills that mention the ORCP (Appendix F), as it is useful to see when the Legislature puts references to the rules into the statutes. The Legislature did not do anything substantive with regard to the ORCP.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Ms. Gates asked whether any Council member had any problem with setting the meeting dates for the second Saturday of each month. No member expressed a problem with that schedule. Ms. Gates explained that the Council does attempt to have a meeting or two outside of the Portland congressional districts, and asked anyone outside of the Portland area who would like to volunteer to host a meeting to please let her know. She observed that it is good for the public outside of the metro area, as well as members who live outside of the metro area, to have the opportunity to attend meetings elsewhere.

Judge Peterson explained that the Council's authorizing statute once said that the Council should endeavor to meet in all congressional districts, but that it no longer does. However, he agreed with Ms. Gates that it is a good practice. Judge Tookey suggested a meeting in Salem, at Willamette University or at the courthouse. Judge Leith stated that there is a meeting room on the fifth floor of the Marion County Courthouse that would accommodate the Council, but wondered whether that is far enough away from Portland to make sense. Ms. Nilsson noted that Salem is in a different congressional district than Portland.

Ms. Gates stated that she would work with Council staff to propose a few dates and reach out to members to see who can host outside of Portland.

B. Funding

Judge Peterson explained that the Council receives general funds from the Oregon Legislature, plus travel funds of \$4,000 per year from the Oregon State Bar (OSB). Those travel funds typically get used to reimburse the Council's public member and judge members. Many of the lawyer members of the Council live in the metro area and most meetings are held there so, while the Council will try to accommodate lawyer requests for travel reimbursement, the priority is to take care of the public member and judges.

With regard to the general funds from the Legislature, the Council was just appropriated about \$52,000 for the 2019-2021 biennium. Judge Peterson stated that this amount is a

little frustrating because he had asked for an increase in the Council's budget this year, but instead the amount was decreased. He explained that Ms. Nilsson is the highest paid hourly employee at Lewis and Clark College, as is appropriate, but that when his stipend is broken down into an hourly wage, he is paid less per hour than Ms. Nilsson. He noted that, at some point, he will leave the role of Executive Director, and he does not believe that another candidate would be willing to take on the role for just \$1,000 per month. He stated that he would like to work on an increase in funding with the Council's liaisons from the Oregon State Bar (OSB). While the Council has enough funds for now, this amount is not ideal for the future.

Ms. Stupasky asked whether the Council can pay the Executive Director more in years where there is a budget surplus. Judge Peterson stated that the Council does not lose any budget surplus; there is a restricted fund at Lewis and Clark College where the money resides. He noted that the Council has a small surplus that has accumulated over the past few years, and that some of that money was used to upgrade the website. Ms. Stupasky asked whether the Council can vote to give the Executive Director a bonus if there are extra funds left over at the end of biennium. Judge Peterson stated that he is not comfortable with that. Ms. Gates stated that she did not see anything in the Council's rules that would prohibit that. She asked whether there is usually money left over each biennium. Judge Peterson stated that the Council usually does spend the money it is allocated each year.

C. Council Website

Ms. Nilsson explained that the Council had recently had its website converted to a Wordpress platform. She gave a brief visual demonstration of the new site and showed some of the new features, including improved navigation. She stated that the new platform will allow for faster and easier editing, which will save time for her and for future Council staff.

D. Results of Survey of Bench and Bar: Generally

Judge Peterson informed Council members that, during a time when the Council was under the umbrella of Legislative Counsel for purposes of funding, the Legislature required the Council to meet key performance measures and, as part of that process, to find out from its stakeholders where improvements could be made. Although that is no longer a requirement, the Council has found a biennial survey to be a helpful practice and a good source of information about what rules are not working correctly and efficiently.

Last biennium, Council staff changed the survey with help from our former public member, a person with experience with surveys and data analysis. The changes made the survey more specific. The results of this biennium's survey appear to show that, In terms

of the rules promoting the just determination of every action, the Council is not doing a bad job. In terms of promoting the speedy determination of every action, it does not appear to be doing as well. And, in terms of facilitating the inexpensive determination of every action, it appears to be doing even less well. Judge Peterson remarked that all Council members should pay attention to whether any potential rule changes will make the disposition of cases more prompt and less expensive in order to serve the public good. He noted that it is lawyers and judges who were polled and are saying that the rules are not doing the best job they could be doing.

Judge Peterson noted that, in terms of familiarity with the composition of the Council, it appears that the bench and bar are not familiar. In terms of rating the quality of the Council's work, many respondents said "fair," although he himself believes that the Council does a good job. In terms of responsiveness to the needs of litigants, more respondents agreed that the rules work to the favor of litigants than to the favor of lawyers. The lawyers and judges who did respond seem to think that the Council is doing a good job for them. About two thirds of the respondents had never visited the Council's website, and those who had were not completely pleased with it in terms of usefulness, which is frustrating.

Ms. Nilsson noted that part of the comments about the website may be a function of the Internet age, where users are accustomed to having everything readily at their fingertips. She pointed out that some comments spoke about the need for the website to be easier to search and for documents to be easier to find. One respondent even suggested that the Council should "get with the 21st century" and get an app. Ms. Nilsson agreed that this would be a worthwhile goal for some time in the future but noted that, at present, the Council has two very part-time staff members without those skills, and not a lot of extra funding to hire someone to create such an app. She stated that she is continually trying to improve the searchability of the website; however, the Council's history is based on old paper documents that must be saved and stored on the website in PDF format. There are certain built-in limitations when dealing with documents in this format.

Ms. Payne asked whether there has been any thought to the fact that the survey's data may not be statistically significant because of the small number of responses. Judge Peterson stated that this is absolutely a fair point, as some people took the survey, but many ignored it. He posited that it may be those who feel strongly about certain issues, perhaps in a negative way, who have a greater interest in responding. He stated that he is not sure how the Council can encourage a broader response but that he is open to hearing ideas. Judge Norby noted that she was a bit concerned when she read a comment that stated that the Council should have practitioners working on the rules. It gave her pause that someone with no idea about the composition of the Council was commenting on its composition.

Judge Peterson observed that many of the respondents specifically asked for staff comments, which were done away with before his tenure on the Council, partly because of *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), but which have been back since 2013. Judge Peterson noted that a few of the survey comments are outside of the Council's purview, including one suggesting continuing legal education seminars for judges. Judge Hill pointed out that judges would actually find it very helpful to have trained, effective advocates who could teach the court the rule they would like to be applied. He stated that it is always surprising to him when attorneys complain about a judge's knowledge about an issue, since it is an attorney's job to teach the judge about that issue. Judge Wolf agreed, and noted that it would be even better if these advocates could cite the applicable rule.

Ms. Gates asked whether it would be indicated in the survey data if the same person made comments about different topic headings. She specifically wondered whether the different comments regarding family law had been made by the same person, and stated that it would be nice to have a member of the family law bar on the Council. Judge Peterson observed that the attorney Council members appointed by the OSB are supposed to be evenly split between the plaintiffs' bar and the defense bar, so family law practitioners do not really have a spot, and the Council relies on the expertise of the judge members in that area.

Judge Norby wondered whether it would make sense to distribute the survey differently. Since there are so many organized bodies with different areas of specialty, she asked whether the Council should distribute the survey to the leaders of those organizations, perhaps to have them review the survey at one of their meetings to give the Council better feedback. Judge Hill stated that this is an interesting idea, because it would allow the Council to track responses based on practice areas. For example, the OSB's section on Real Estate and Land Use might have a different perspective than the Family Law or Litigation sections. Ms. Payne suggested allowing five minutes at a convention or annual meeting for every member to fill out a survey.

Judge Roberts observed that the bar is composed of lawyers with varying degrees of involvement and experience in litigation. If a survey respondent says that the rules are difficult to understand but has only been in court once, she does not see that as a significant comment that would require the Council to make a change.

Ms. Gates asked Council members if they wanted to ask the staff to work on a new way of distributing the survey. Judge Norby asked whether the OSB keeps a list of leadership positions in different sections. Ms. Zubko stated that it does, and that she or Matt Shields, the Council's OSB liaison, could assist the Council. Ms. Payne suggested that the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) could encourage members on each side to fill out the survey. Ms. Weeks suggested that

having a Council member personally attend a section's annual meeting and discuss what the Council does and the importance of the survey could potentially have a greater impact. She stated that she was not aware that the Council existed until she attended a CLE with Judge Peterson as a presenter. Discussing the work of the Council in person might increase the buy-in, especially with younger generations of lawyers. Having the impetus presented where it cannot be ignored makes it easier for someone to follow through. She stated that it might be worth the extra work to get better comments and feedback over time.

Judge Peterson stated that he happened to be invited to the consumer law section's meeting with the Attorney General and he announced the upcoming survey there, but he was not sure if it made a difference. He stated that it would probably not be too difficult to distribute the survey a bit differently. He observed that most Council members are probably members of some of the most appropriate organizations and could discuss the survey with members of those organizations. He asked that any Council members with polling and survey interest or expertise contact staff before the next survey in two years.

Ms. Gates asked whether Council members are allowed to ask the OSB for contact lists for sections and annual meeting information. Ms. Zubko stated that annual meetings happen mostly in the fall. She stated that she can provide a list of section chairs, which is also available on the OSB's website. In terms of scheduling, section meetings are public meetings and the OSB can get that information to the Council as well. Judge Norby suggested that this might be a project for the Council during the slower part of the odd-numbered year of the biennium. Ms. Zubko pointed out that the section chairs switch every year, and that some sections are litigation-focused and some not. She noted that she and Mr. Shields are happy to help the Council determine which sections to contact. Judge Peterson noted that the Council has been sending the survey to selected sections, including Litigation, Business Litigation, Family Law, and Probate. He stated that the goal has been to target section members that might walk into a courtroom once in a while, plus all judges. He stated that this might be a mistake, although he thinks that the number of uninformed comments will not be improved if the survey is sent to sections whose members virtually never go to court.

Mr. Andersen stated that, by his calculations, just .02% of the entire bar had responded to the survey. He noted that many respondents skipped question 12 regarding the website, as well as questions eight and nine on responsiveness. Mr. Andersen pointed out that a survey is not of any value unless the participants approach a fairly weighty number. He does not believe that the Council should adjust its practices as a result of this survey, because participation was so small and so many questions were skipped.

Judge Peterson stated that the cost of the survey to the Council is virtually \$0, as the OSB assists with design and helps with distribution at no cost, while Council staff assembles

and tabulates the results. He noted that the survey does provide the Council with suggestions for rule changes, many of which are valuable. And he also mentioned that, as one former Council chair wisely pointed out, one of the most important functions of the Council is to take bad suggestions and make sure they never come to light. Judge Roberts stated that, if the chief value of the survey is to solicit suggestions, it might be better to simply periodically send to the bar an explanation of what the Council does and request that bar members contact the Council with suggestions for improvement.

Judge Peterson also suggested that the percentage of responses may not be as bad as it appears because the survey did not go out to the whole bar, but only selected sections whose members typically use the ORCP. He agreed with the suggestion that it could be helpful to prepare the bench and bar for upcoming surveys and offered Council staff assistance with that process. Ms. Gates stated that she would talk more to staff about trying to set up a timeline on contacting OSB sections. She also asked Council members who want to join in that conversation to let her know.

VIII. Old Business

A. ORCP/Topics to be Reexamined Next Biennium

1. ORCP 7

Judge Peterson stated that the Council had received a suggestion regarding Rule 7 from Holly Rudolph, who drafts forms for the Oregon Judicial Department (OJD). He explained that she is the person who creates forms for self-represented litigants in the court's Odyssey online case management system. She was happy that the Council modernized alternative service, but she believes that a plaintiff or petitioner should be able to complete substitute or office service by handling the follow-up mailing. Judge Peterson stated that he has explained to Ms. Rudolph that this is not what the rule says, but he told her that the Council did change the rule last biennium to make it clear that an attorney may complete substitute or office service by mailing and also service to a mail tenant.

Judge Peterson stated that Ms. Rudolph also had a concern about whether limitations in Rule 7 E impact alternative service. He observed that Ms. Rudolph made the good point that, in cases of where a plaintiff attempts to serve by social media or text message, the respondent may block an unknown number. However, he explained that the change to Rule 7 D(6) states that alternative service is under the direction of a judge, so the plaintiff needs to tell the judge why he or she believes it will be effective if service is from the plaintiff, and the judge will decide on a case-by-case basis. He stated that he believes that the Council solved this aspect of Rule 7 last biennium, unless other issues arise.

Ms. Gates asked whether there were any other issues regarding Rule 7 that need to be addressed. Ms. Nilsson pointed out that some additional suggestions regarding Rule 7 had come in on the survey. Because suggestions for amendment of different rules were received by the Council from various sources and were listed by source on the agenda rather than grouped by rule, she suggested that the Council examine all suggestions for amendment of a specific a rule, regardless of source, as soon as the first reference to that rule comes up on the agenda.

Ms. Weeks stated that, in the practice where she works, lawyers and staff often have longstanding relationships with opposing counsel and request that they accept service. Rule 9 partially governs that, but there are no specifications as to when service is deemed completed unless or until an acceptance of service is received. In effect, opposing counsel can control the date of acceptance. She stated that legal staff would love to see a clarification specifically relating to acceptances. She stated that it does not necessarily relate to extending or shortening timelines on service, but it would be nice to have an authority that can be cited regarding when service was effective. Judge Peterson asked whether she was referring to an acceptance of summons. Ms. Weeks stated that she was. Judge Peterson observed that this is similar to the last suggestion from the survey regarding Rule 7, “adopt waiver of service rules similar to FRCP 4 D.” He stated that he believes that this already exists in Rule 7 F(3), but noted that the federal rule is longer. Judge Leith asked whether the federal rule also includes a provision about shifting the costs if the request for a waiver is unreasonably withheld. Judge Peterson stated that it does.

Judge Roberts observed that the Council just made some very significant changes in parts of Rule 7, and it would be nice to have some time go by to see how the bench and bar react to those changes. She stated that service is not easy and it takes a while for the bar to learn what is there and to apply it well. She opined that to keep tinkering and requiring everyone to go back to school every two years on service is not beneficial. Mr. Crowley agreed with Judge Roberts that the Council made some pretty big changes last biennium. While he likes the federal rule, he wondered whether Oregon really needs to adopt something similar at this time.

Judge Peterson noted that there were several suggestions regarding Rule 7 from the survey and asked that Council members review them. He pointed out that a few had already been resolved by the Council’s amendments to Rule 7 last biennium. Judge Leith felt that the suggestion regarding adding a waiver of service provision like the federal rule is worth discussing. Ms. Payne stated that she thought that it would be helpful to form a committee on Rule 7. Ms. Weeks, Justice Nakamoto, Judge Leith, Judge Wolf, Mr. Young, and Ms. Stupasky agreed to

join the committee. Ms. Weeks agreed to chair the committee.

2. ORCP 15

Judge Peterson explained that, last biennium, there was an unresolved question regarding what Rule 15 covers. He stated that he believes that it covers responses to pleadings, but noted that there are many motions throughout the ORCP and that Rule 15 D clearly does not relate to all of those motions, like a motion for a new trial or a judgment notwithstanding the verdict. He stated that a party cannot move to extend those timelines but, in terms of responding to a complaint with an answer or motion, a party can move to extend those timelines. Many hard timelines exist in the rules that are not obvious, and there are some that are movable.

Ms. Payne pointed out that Rule 15 does apply to attorney fee statements. Judge Peterson noted that this is now spelled out specifically in Rule 68. Ms. Payne brought up the Oregon Court of Appeals case, *Ornduff v. Hobbs*, 273 Or App 169, 359 P3d 331 (2015), that ruled that Rule 15 does apply to attorney fee statements. Judge Peterson opined that this opinion was perhaps not very well considered, and that the Council's 2013-2015 biennium amendment had remedied the absolute inflexibility of Rule 68's time limits, but he agreed that Ms. Payne had a point. He stated that his concern is that a party may move to extend some timelines but not others, but Rule 15 D seems to say that a party may ask to extend any timeline. He explained that, last biennium, he had compiled a list of hard v. not hard timelines in the ORCP. Some rules, like Rule 63 or Rule 64, do not specify that their timelines are fixed. A few rules indicate that their timelines are flexible. However, in many rules that include a deadline within the rule, flexibility or the lack thereof is not specified. He stated that it would be a challenge to rework Rule 15 to cover them all.

Mr. Goehler posited that such situations would be covered in Rule 15 D, which allows any other motion after the time limited by the procedural rules. He stated that he would think that the inflexible times are not procedural. He asked whether Judge Peterson's issue is already covered if it is parsed that way. Judge Peterson stated that Mr. Goehler may be right. He did express concern that, for those who are not learned in the law, like self-represented litigants, this issue could be problematic. A self-represented litigant could simply rely on Rule 15 D and move for an extension of time, and it would be unlikely for them to be able to figure out if it is procedural or substantive. Ms. Payne pointed out that there is frequently case law and that people have to educate themselves on what the case law is. She did not believe that the language needs to be inserted right into Rule 15 and expressed concern about changing it. She stated that, if a committee is formed,

she would like to be a member. Judge Leith stated that he was also disinclined to make such a change. Mr. Goehler stated that he would also volunteer to join the committee.

Judge Roberts asked what rules are being referred to. She noted that ORCP 68 involves the time for an attorney fee statement, which is governed entirely within the scope of that rule. She stated that there are statutory jurisdictional limitations, and that those are not in the scope of the rules. She wondered what instances exist where there is an invisible inflexibility. Judge Peterson stated that, in terms of Rule 63 and Rule 64 with new trials and judgments notwithstanding the verdict, the case law is pretty clear that they are inflexible timelines. Judge Roberts stated that those limits are statutory. Judge Peterson wondered whether they are based in statute, because they are now stated in the rule. Judge Roberts stated that she believes that they come from the statute. Judge Peterson also reminded the Council that former member Jay Beattie had raised the issue last biennium of a statute containing a statute of limitations that was repealed but incorporated into one of the ORCP and, therefore, that rule's timeline would probably not be flexible.

Judge Wolf asked about the survey suggestion regarding Rule 15. He stated that the suggestion seems to conflate Rule 15's 10 days to respond to a pleading with the Uniform Trial Court Rule (UTCRC 5.030) allowing 14 days to respond to a motion, which are technically different things although people use them interchangeably. Judge Peterson agreed, but explained that the Council had resolved the apparent concern raised in the suggestion last biennium when it amended Rule 15 A regarding cross-claims. In reworking section A, the Council found the last sentence to be confusing. The Council examined the history of the rule, and, before 1994, it appeared that a reply to a counterclaim was due within 10 days. In 1994, the Council amended section A, specifying 30 days in which to reply to a counterclaim; however, the last sentence in section A retained the same 10 day language. The only thing the last sentence could refer to was a reply to an affirmative defense, when appropriate. The Council came to a consensus that replies to any pleading should be due within 30 days.

Ms. Payne stated that she knows that the Council amended Rule 68 to address the timeline issue, but she again pointed out that the *Ornduff* case states that a statement for attorney fees is a pleading because it is a written statement by the parties of the facts constituting their respective claims and defenses, and that is why it falls under ORCP 15 D. Judge Peterson agreed that there is existing case law that widens the scope of Rule 15 and that there are surprises buried in there for those who think that they can extend some timelines.

Judge Hill asked Ms. Payne why she felt that this is not something that needs to be clarified. Ms. Payne stated that she does not know whether it needs to be clarified. Judge Hill pointed out that the plain wording of Rule 15 D refers to pleadings and motions, and stated that the distinction between a pleading, a motion, and a petition would be lost on most practitioners. Until 30 seconds ago, he himself would not have thought to parse it that carefully. In fact, he would have assumed he could have extended any timeline if he could show good cause, which is in the spirit of Oregon's rules generally: in Oregon, we do not play "gotcha." He opined that the bench and bar would be served by making the rule explicit and clear.

Judge Peterson suggested that, if the Council could determine what the inflexible deadlines are, it could add a section to Rule 15 to say that the deadlines in certain rules cannot be extended. Ms. Payne stated that she believes that it is a bad idea to enumerate other rules within the ORCP because it is easy to leave some out. Plus, they are generally statutory, so the Legislature has control over it, not the Council. Judge Peterson pointed out that the rules are the purview of the Council. Judge Roberts agreed that the rules are the purview of the Council, but noted that they cannot conflict with the statutes. Judge Hill wondered what ORCP 15 even means, then. Judge Roberts stated that pleadings are defined. Judge Hill asked why the Council does not reference that in that rule. Judge Wolf stated that Rule 15 D refers to both pleadings and motions, whereas Rule 15 A only deals with pleadings, so there is a difference. He stated that he sees what Judge Hill is saying, that it looks like a party can extend the deadline for any pleading or motion. He agreed that there are apparently traps, although one such trap has been unsprung by the Council's changes to Rule 68.

Judge Hill stated that he would be happy to serve on a Rule 15 committee. He did not necessarily agree that there is a clear definition of pleadings. Rule 13 states that pleadings are "the written statements by the parties of the facts constituting their respective claims and defenses." He noted that this is clearly a complaint and answer, but wondered why it does not include a statement for attorney fees. Judge Wolf stated that section B does enumerate other documents, such as third-party complaints and cross-claims, but not statements for attorney fees. Ms. Payne observed that, according to the Court of Appeals, a statement for attorney fees is a pleading.

The Council agreed to form a committee on Rule 15. Ms. Payne, Mr. Goehler, Judge Hill, Judge Roberts, and Judge Peterson agreed to serve on the committee. Ms. Payne agreed to chair the committee.

3. ORCP 17

Ms. Gates explained that former Council chair Brooks Cooper raised a concern with regard to Rule 17 D(3). He notes that there is a time period during which a party can withdraw language from an allegation or pleading they filed and avoid sanctions, but the subsection applies only to a party and not to an attorney. However, the language regarding sanctions in the remainder of Rule 17 applies to both parties and attorneys. The question is whether the rule can be changed to allow attorneys the same opportunity to withdraw allegations or pleadings and avoid sanctions. Judge Peterson stated that he had looked at other parts of Rule 17 and he could not determine whether it was intentional to leave off attorneys in Rule 17 D(3) or not, because most other parts of the rule say “party or attorney.”

Ms. Gates read the relevant language from the rule: “Notwithstanding any other provision of this section, the court may not impose sanctions against a party if, within 21 days after the motion is served on the party, the party amends or otherwise withdraws the pleading, motion, document or argument in a manner that corrects the false certification specified in the motion.” She noted that this does not create the same 21-day opportunity to withdraw and correct for an attorney certification as is allowed for a party’s statement.

Judge Peterson stated that it seems to him that, if a party is represented and they withdraw the document or allegation that provoked the Rule 17 motion, then the attorney would be absolved also, but the attorney cannot do it without the party’s permission. However, he stated that he did notice that Rule 17 D(2) and Rule 17 D(4) use the term “party or attorney,” so he is not sure if the difference was intentional or an oversight. Ms. Gates stated that she could see it being intentional out of concern about allowing an attorney to make a false certification and then just pull it back. Judge Hill agreed that it appears that the rule creates a safe harbor for a client or self-represented litigant, but keeps attorneys on the hook. He stated that he had never thought of it that way before.

Ms. Nilsson suggested that she and Judge Peterson look at the history of Rule 17 to try to determine whether the difference in language was intentional or not. They will report their findings at the next Council meeting.

Mr. Bundy posed a question about Rule 17 D(3). He stated that he deals with it from time to time when lawyers file lawsuits against physicians or other professionals. As he reads the rule, if he were to file a motion challenging an allegation and the plaintiff does not withdraw that allegation within 21 days after he serves the motion, and he loses, he pays fees. However, if he wins, he does not

get fees. He stated that he does not understand why that would be. Ms. Gates suggested that it may be to discourage filing motions for sanctions except those motions that are most likely to succeed. Ms. Payne asked whether Mr. Bundy would get fees if he succeeded on his motion for sanctions, because Rule 17 D(4) includes reasonable attorney fees for sanctions. Mr. Bundy stated that perhaps Ms. Payne is correct, that it goes a little bit farther. Ms. Payne pointed out that, according to Rule 17 D(4), sanctions must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, so it seems that the rule contemplates that fees would be awarded if a party is successful. Judge Wolf noted that this is an additional amount; a party can be awarded reasonable attorney fees for the motion and for whatever the false certification cost them and, if the party can show wanton misconduct, the party gets an additional amount sufficient to deter that conduct in the future.

Judge Hill stated that it makes sense in the first scenario that a party would have to pay fees because that party created a new motion and there will be evidentiary hearings, and that party has nothing to lose. He stated that it makes sense to build in a penalty. Mr. Bundy stated that this satisfies his concern.

Mr. Bundy explained that another issue that comes up from time to time involves experts. He stated that the assumption in the practice of professional negligence is that there must be an appropriate expert who is certifying that the allegations in the complaint are accurate, and he is not so sure that everyone sees it that way. He stated that there are occasions where, if a party does not have an expert at that point in time, they can certify under Rule 17 C(4) that they do not, and then they have an additional period of time in which to obtain an expert opinion. He stated that he does not know if that is the consensus, and that he has had rulings in the other direction. He wondered what the consensus of the Council is: does Rule 17 C(4) require an attorney who files a claim that requires an expert's opinion to file a statement that they do not have an expert along with the complaint, as that party would under Rule 47 E if he were to file a summary judgment motion?

Judge Hill stated that the substantive statute requires an attorney to put the certification in the complaint. And, if it is not true because the attorney does not have the expert, it seems to him that it now falls within this rule. If they do not have an expert, the safe harbor gives them the opportunity to say that they will get one and avoid the sanction. Whether that makes the pleading subject to another motion for failure to state ultimate facts is another question, but it seems to him that it would take it out of that subsection.

Mr. Andersen stated that, when representing plaintiffs in medical malpractice cases, the test is ORCP 47. If the defense feels that the plaintiff does not have an expert or feels that there are grounds for summary judgment, the defense can move for summary judgment and the plaintiff must certify that the plaintiff has an expert. He stated that there is no other requirement anywhere in any of the ORCP that requires the plaintiff to certify that they have an expert. On the plaintiff's side, that has been resisted for years because plaintiffs do not want to disclose who the expert is for fear of discouraging experts from testifying. He opined that Mr. Bundy may be trying to read more into Rule 17 than exists. Mr. Bundy explained that there is some belief in the plaintiff's bar that expertise is required in order to even support a specific allegation of negligence such as the failure to use a medical device appropriately. If a plaintiff is going to make those allegations, they need to have that expert opinion at the time they file the pleading.

Judge Hill pointed out that this is a different question. He stated that he is not well versed in medical malpractice cases, but noted that construction defect design professionals and realtors have lobbied for specific statutes that say that, before a party files a case, they need to have an expert and state in the complaint that they have an expert. Ms. Stupasky pointed out that there is no specific statute for medical malpractice that says that. Judge Hill noted that the existence of that statutory requirement puts Rule 17 in play. In the absence of such a statutory requirement, Rule 17 does not necessarily come into play unless the statement is not factually accurate. Judge Hill observed that Mr. Bundy's question seems to be whether it is enough that the statement is true or whether the plaintiff is required to have evidence that they are prepared to put on before the case is filed. Mr. Bundy agreed that this is the question, and stated that he believes that Rule 17 C(4) requires a factual assertion that a party is making in a pleading and, if the party does not have the evidence to support it, he believes that the party has to say that or say that they do not have an expert but will get one.

Judge Hill stated that Mr. Bundy is essentially asking what "supported by evidence" means: does it mean that there is a witness who is prepared to testify? Mr. Goehler observed that he has always looked at Rule 17 C(4) as requiring that a party plead what they have evidence of, and everything else is "upon information and belief," i.e., is based on inference or something that will eventually be supported. Mr. Bundy stated that "information and belief" is the key phrase, because you can have a belief in something but that does not mean that you are qualified to have an opinion on it. He posited that the plaintiffs' bar and defense bar just read Rule 17 C(4) differently. His argument has been that Rule 47 E spells out specifically what is needed. Why have Rule 47 E at all if an expert is not needed? Why is it up to the defense to file a Rule 47 motion demanding an affidavit to get rid of a case that should not have been filed in the first place if

there was not an expert to support it? He stated that there are many negligence cases that get filed without expert support, and doctors and nurses must report to their board, insurance company, and hospitals, and their credentialing comes into question. He stated that the filing of the lawsuit alone is an allegation that they have not met the standard of care and have behaved unprofessionally. Mr. Bundy argued that, when plaintiffs file cases without support and argue that they do not need to put in a Rule 17 C(4) certification attesting to the fact that they do not have an expert, it does not wash with ORCP 47 E.

Mr. Andersen opined that the answer to Mr. Bundy's concern is not for the Council to write into ORCP 17 a requirement that is not there. It is up to the Oregon Medical Association to go to the Legislature and ask for a statute similar to what real estate agents have obtained in real estate transactions. He noted that there can be good faith reasons to file a case, such as someone who comes in on the eve of the statute of limitations or the rare case where expert testimony is not required. Mr. Andersen noted that the real test has always been ORCP 47. He stated that he has never encountered a request by any defense attorney to put in a certification under ORCP 17 C(4).

Mr. Bundy replied that the question is not whether you certify that you have an expert, but whether you use Rule 17 C(4) to say that you do not have one but that you expect to have one on information and belief. If there is a concern about filing up against the statute of limitations, this falls under Rule 17 D(3), which states that, if the complaint is filed within 60 days of the running of the statute of limitations, a plaintiff has 120 days to back up the case. He stated that he is not saying that the rule *should* require a certification that a plaintiff has an expert, but that the rule *already* says that: when you sign your name on a document you are attesting to the fact that you have an expert who has backed up the particulars of negligence alleged in your complaint. Mr. Andersen disagreed that Rule 17 C(4) says that; nowhere does it say that a plaintiff must have an expert to back up every detail of the case at the time the case is filed. He stated that reading the rule that way creates a different test or standard for professional negligence cases than for any other case, and Rule 17 C(4) applies to every case. He stated that he does not believe that the Council can read the rule to have a different requirement for medical malpractice cases than for other cases.

Justice Nakamoto asked whether the defense bar has ever litigated the application of Rule 17 C(4). Mr. Bundy replied that he has filed motions based on it and had a judge make a determination that he was incorrect about the rule and that the plaintiff did not need to have an expert at the time they filed. This surprised him because of the devastating consequences that it can cause when an attorney files a claim and does not have a reasonable belief that the claim can be proven. Justice

Nakamoto agreed that there seems to be a fundamental difference in the reading of the rule, and wondered why Mr. Bundy had not taken the issue up to the appellate courts.

Judge Roberts stated that it seems significant that the design professionals' lobbyist got busy and got a specific statute passed. If the Legislature wants that, they can take it up. It is not just doctors who are harmed by the filing of a lawsuit against them, and they do not need special protection. The rule requires that the allegations should be based on some factual background but does not require a particular kind of evidence. It does not even require that the evidence be admissible, just that there is a substance to it. If your family doctor says that they would never get involved in litigation or testify, but that the doctor they referred you to was negligent, there is nothing under Rule 17 that would suggest that filing a lawsuit based on this information is filing in bad faith. A defendant can file for summary judgment if that defendant does not think it is a worthy case.

Mr. Bundy observed that there is no lawyer in the world who would know if a Caesarian section was performed or ordered in a timely way. Judge Hill stated that he understands the expert distinction that Mr. Bundy is making, but suggested that it leads the Council astray. He agreed with Judge Roberts that the issue is larger than that. It turns on question of what the phrase "evidence" means in Rule 17 C(4): does it mean admissible evidence? He does not believe that the Council needs to clarify this issue because the Court of Appeals is going to deal with this in the appropriate case. Judge Hill suggested that it is better to leave Rule 17 alone in this aspect.

Judge Peterson noted that, if Mr. Bundy's concern is simply that the plaintiff does not include "on information and belief" at the beginning of the challenged allegation and should be sanctioned for that, that is one thing. But if the concern is that a plaintiff must have that evidence, that is not a procedural change; that is a substantive change. That means that there is a class of plaintiffs who might not have a case because of a rule change that the Council makes. Ms. Stupasky stated that, in her more than 30 years of practice in medical malpractice cases, she has never had a defense attorney argue that she must somehow include in her complaint a specific allegation that she has the experts that she needs. It is new to her that this is something that the defense bar needs. She agreed that this would clearly be a substantive change, and the Council cannot make substantive changes.

Judge Leith stated that it seems like the Council is trying to resolve the issue today; however, the question today is whether to create a committee. He pointed out that the Council will not resolve any of the issues on the agenda today. Ms. Gates thanked Judge Leith for helping the Council move along. The Council decided not

to form a committee to investigate Mr. Bundy's issue.

4. ORCP 23 C/34

Ms. Gates explained that there was both a comment from the survey regarding Rule 23 as well as a carry-over item from last biennium. Judge Peterson stated that the Council had determined last biennium that there was a problem with Rule 23 that needed to be addressed, but that it was not appropriate for a rule change because it was substantive. The issue involves defendants who die quietly before the statute of limitations passes, so a plaintiff unknowingly files a lawsuit against a deceased defendant rather than against the estate, and the statute of limitations runs before the error is discovered. It is a trap for the unwary and hard to defend from a public policy perspective. He stated that the Council felt like a recommendation needs to be made to the Legislature from the Council, perhaps in the Council's transmittal letter to the Legislature. However, the Council did not have time to complete this task last biennium.

Ms. Stupasky agreed that this is really a terrible trap for everyone. Mr. Goehler asked whether the change would basically be like a tolling statute to give time for an estate to be set up. Judge Roberts suggested that amending the case to substitute the personal representative for the defendant could relate back. Judge Leith noted that the Legislature prefers concepts, not draft language. Judge Tookey agreed and suggested that the Council describe the problem and propose a solution, but not specific language.

The Council formed a committee to draft a proposal to the Legislature. Mr. Andersen, Judge Roberts, and Mr. Crowley agreed to be on the committee. Mr. Andersen agreed to chair.

Ms. Gates then addressed the survey suggestion, which requested that the Council amend ORCP 23 to require a defendant to seek leave from the court in order to add new defenses when responding to an amended complaint. Mr. Goehler stated that, as he understands the law, every new pleading erases any previous pleading. Even if the amendment to a pleading just changes a typographical error, his answer to the amended complaint is a new pleading and can assert new defenses. He also believes that this is a substantive issue. Ms. Gates stated that, as a plaintiff's lawyer, she definitely contemplates whether she should amend, and when, in order to avoid that issue. Mr. Bundy agreed with Ms. Gates' sentiment and opined that he does not have to wait for an amended complaint to allege a new defense. He stated that the plaintiff has the right to challenge whether he is raising the new defense at the correct time, and a judge will make that determination. Judge Hill and Judge Peterson pointed out that this is not the case

if the other side files an amended pleading; the defendant has an absolute right to respond.

Judge Leith asked whether the court has discretion to prevent the defendant from going beyond answering the new amendment. Ms. Payne stated that she believes this is the question. Ms. Gates observed that the plaintiff could make a motion. Judge Hill asked what the legal basis for such a motion would be. Ms. Gates replied that the basis could be that it is too late and that discovery has been closed. Judge Hill stated that he is not very sympathetic to a plaintiff in this case, because they amended the pleading right before trial. If the plaintiff is going to amend the complaint to include a new claim or change the claim, that opens the door to let the defendant do what they want. If a plaintiff does not want to take that risk, they should not amend their complaint. Judge Leith pointed out that, frequently, the amount of damages is not determined completely until the eve of trial and is addressed with a very simple amendment. Judge Hill noted that this can be done by interlineation. Judge Leith opined that the fact of that amendment does not create a no-holds-barred situation. Judge Hill stated that perhaps adding new defenses would not be allowed in this context because it is done by interlineation, merely to change the amount of damages. Ms. Stupasky observed that, if any amendment opens the door, even an amendment by interlineation to change the amount of damages would allow the defendant to now say, for example, that they are not liable for the crash. Judge Hill agreed, and stated that the plaintiff would then have to decide whether to ask for a continuance. He stated that he struggles with the notion that one side can change the terms of the discussion but the other side cannot.

Ms. Payne pointed out that the plaintiff has to ask for leave to amend the complaint, but the defendant is allowed to do so freely in any manner. She stated that this is where the injustice is felt, that the defense now has a free-for-all to add any claim or to change defenses because the plaintiff was allowed to amend with leave of court. Judge Hill stated that, to carry that even further, if the defense files an amendment and amends their affirmative defense or counterclaim, the plaintiff has an unlimited right to file a reply. Ms. Stupasky replied that the plaintiff only has the right to respond to that defense because that is what a reply is. Judge Hill posited the following scenario: the plaintiff files a claim, the defendant files a response, the plaintiff files a reply, the defendant amends the answer, and the plaintiff gets to file an amended reply that is not just limited just to the thing that was changed in the answer, but could be anything. Mr. Andersen pointed out that replies are rarely filed. He stated that this is like a situation where one out of a thousand people in a room has an infection, but we insist on giving antibiotics to everyone in the room. The commenter is that one person in a thousand and the Council does not need to change the whole process because one person has

encountered an abnormality.

Judge Roberts suggested that there is enough concern to form a committee. Ms. Gates, Mr. Bundy, Ms. Payne, and Judge Leith agreed to be on the committee. Ms. Gates agreed to chair.

5. Discovery

Ms. Gates explained that it has been a tradition of the Council to have a standing committee relating to discovery matters, and that there were also several suggestions made by survey respondents regarding discovery matters. The Council began to examine those suggestions.

The suggestions from the survey included several encouraging Oregon to adopt Interrogatories. Judge Peterson noted that there is a strong sentiment among Oregon practitioners that interrogatories increase cost. Mr. Goehler discouraged the Council from pursuing this suggestion. Council members agreed. Ms. Gates observed that there were also suggestions regarding expert discovery. She stated that Oregon practice versus federal practice has also been discussed many times and that there has been no strong sentiment for this. There was a general consensus among Council members that there is still not a strong sentiment for it.

Ms. Gates stated that she understood the suggestion with regard to the timing of receipt of the expert's file but, to her knowledge, there is not a single rule that would guide a practitioner. Judge Hill stated that this is left to the trial court's discretion, depending on the nature of the case. He opined that any rule that the Council would write would simply reiterate that it is up to the court. Mr. Goehler noted that it is more like a rule of evidence in practice.

Judge Peterson stated that there was a suggestion that organizational depositions under ORCP 39 C(6) need less draconian sanctions, but he was unable to determine what those sanctions are. Mr. Goehler stated that the rule requires a lawyer to have the person prepared to answer the specific topics. When they show up with a blank stare on their face because they have not done that preparation, sanctions are already built in as a standard discovery sanction. He stated that he does not think that there needs to be anything more added.

Ms. Gates observed that the subject of proportionality has been discussed extensively by the Council over the last two biennia, but she asked any new members who feel strongly that it needs to be taken up again to please let her know. No Council members appeared eager to revisit the issue. Mr. Goehler asked whether the topic of privilege logs has been addressed before. Judge Peterson

replied that the Council had examined the issue a while ago, but that it had gone nowhere. Ms. Gates stated that, with regard to objections to deposition questions, there appears to be an existing remedy in the Supplemental Local Rules of various counties.

Judge Peterson wondered whether this might be the first biennium that the Council will choose not to form a discovery committee. Mr. Goehler opined that discovery in Oregon is good. Sanctions are rare in Oregon, but are frequent in Washington, which increases the time and cost of litigation and decreases the civility between counsel. He suggested that a committee may not be necessary.

Mr. Crowley stated that he has been one of the strongest proponents of proportionality, but that it has not happened. He thinks that this does have a lot to do with why discovery in Oregon is becoming more and more expensive, and the Council has received comments about that from the bar. However, he does believe that, although the concept is not incorporated into the ORCP specifically, it has been incorporated in practice more and more over the last five or six years. He stated that he has been seeing state judges being more responsive to the concept in light of the increases in cost that e-discovery generates. In practice, it is something that is getting more respect and other progress is being made. It is his feeling that it is not necessary for the Council to have that discussion again right now. Ms. Gates stated that her position is to wait a few years to see how the federal rule change plays out and what Oregon judges might be doing in response to arguments pointing them to that rule.

Judge Peterson observed that it has become pretty clear over the last two biennia that, if there is a rule change that is perceived to benefit one side of the bar over the other, the side proposing the change needs to have unanimity within its six members, plus 80% of the judges and the public member to reach a super majority in order to promulgate a rule change. He suggested that the Council might need to behave a little more like a legislature and have a compromise where both sides can get a change that they want. He suggested that perhaps the Council should wait to take up discovery issues until such time as another issue can be offered by the other side as a compromise. Judge Peterson stated that, while the Council has had some really good discussions regarding discovery, no rule changes have come out of any of the more controversial aspects of it.

Ms. Gates asked if there was interest in pursuing the suggestion that ORCP 44 should allow discovery of a plaintiff's conversations with their treating providers in personal injury and medical malpractice cases. Ms. Payne observed that the Council has had many interesting, but ultimately unproductive, discussions regarding Rule 44. Mr. Young stated that the comment appeared to be in response

to the recent case of *Hodges v. Oak Tree Realtors, Inc.*, 414 P3d 410 (2018), where a plaintiff gave a deposition and talked about their physical condition and the court determined that this was not a waiver of the privilege. He explained that this is a big concern on the defense side because it hamstringing their ability to prepare their defense. He stated that he agreed with the comment that it is a concern, but opined that it seems to be something that needs to be litigated in the appellate courts or resolved by a legislative change. Ms. Payne noted that ORCP 44 was originally a statute and is fairly substantive in terms of the rights it involves. Justice Nakamoto stated that it probably should be a rule change. Judge Wolf noted that it is an issue of privilege, which is not an issue for the ORCP. Judge Roberts stated that, if it shifts the privilege, it is not the Council's bailiwick.

Ms. Stupasky asked when, in practice, has a plaintiff objected to those questions and told their client not to answer them? Mr. Young stated that he has not had this question come up before because most plaintiffs attorneys are aware that, if they do not waive the privilege by deposing his physician client about what thoughts and perceptions they might have had about treatment, then they are really rolling the dice as to what that physician is going to say when they take the stand at trial. However, his partners have been involved in cases where plaintiffs attorneys have elected not to waive the privilege as a strategic tactic. The *Oaktree* case bolsters their ability to do that. In those cases, the plaintiffs had to convene for a discovery deposition every night of trial, after hours, and then call that witness again the next day to give different testimony based on what was said in the discovery deposition. It was really cumbersome and costly.

Ms. Stupasky noted that this is a different issue: whether or not the plaintiff chooses to depose a medical provider and thereby waive the privilege and allow the defendant to depose the treating providers. The issue in the comment is about whether or not the plaintiff has a privilege to say, in a deposition, that they will not disclose what their treating provider said, which is a bigger context. She asked whether Mr. Young has ever had a plaintiff in a deposition not answer the questions about what the treating provider said. Mr. Young replied that he personally has not. Ms. Stupasky stated that, in her practice, defense attorneys always agree that the plaintiff is not waiving the privilege and she lets the plaintiffs answer those questions, so it has not been a problem.

Ms. Gates stated that she would like to think a little more about a committee on the production of documents question, since it comes up a lot. She suggested that the Council take up the discovery issue again at the October meeting.

6. Guardians Ad Litem

Judge Peterson explained that the Council received a suggestion from Holly Rudolph that originally came from the Law and Policy Work Group of the Oregon Judicial Department. He was not aware that such a group existed. In any case, this group suggested eliminating the phrase “guardian ad litem” from the ORCP because it is complicated and confusing. He noted that he had replied to Ms. Rudolph that such a change could raise havoc. “Guardian ad litem” is a term that is ingrained. Judge Norby agreed that the term is used across the board, across the states. She suggested that, if the Council wanted to use the same acronym, another term could be derived using the same initials, but she wondered where it would be appropriate to use it. Judge Peterson stated the concern that the word “guardian” seems to be the problem.

Judge Hill posited that this is a solution in search of a problem. Judge Norby observed that the term can be a significant problem for self-represented litigants, but it would be difficult to fix. She stated that someone in the survey had also asked the Council to amend ORCP 27 to make it more clear that an unemancipated minor must always have a guardian ad litem, and referred to ORCP 27 B(1) through (4). Judge Peterson noted that the rule, as written, says “shall.” Judge Wolf agreed that it is pretty clear. Judge Norby suggested perhaps including a definition in Rule 27 would make it more clear. Judge Hill stated that he sees us tripping over ourselves to make things easier for self-represented litigants, but wondered whether that creates more of an incentive to be a self-represented litigant. He explained that he is sensitive to addressing the needs of self-represented litigants but, at some point, we are making things more difficult. He suggested that perhaps the solution is to help those parties get access to legal services rather than to change the ORCP.

Judge Norby suggested not forming a committee, but maybe looking through the rules to see if there is a place to create some clarity. She stated that she could take a quick, independent look into it and, if she sees such a place, maybe a committee could be formed. Ms. Gates stated that this would be welcome.

IX. Adjournment

Ms. Gates asked whether there is a mechanism for notifying those who had made suggestions to the Council about the status of their recommendations. Ms. Nilsson stated that Council staff reaches out, generally by e-mail, to anyone who left their name with a comment. This is usually done after the committees are set during the first few Council meetings.

Ms. Gates stated that the next meeting will be held on October 12, 2019, at the OSB. She adjourned the meeting at 12 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director



Shari Nilsson <nilsson@lclark.edu>

Suggested Amendment to ORCP 7D(3)(h)

1 message

Zack Holstun <zack@mercurypdx.com>

Tue, Sep 17, 2019 at 1:55 PM

Reply-To: zack@mercurypdx.com

To: ccp@lclark.edu

Cc: Desiree White <desiree@mercurypdx.com>

Hi there,

I am writing to recommend amending ORCP 7D(3)(h), which is for *service upon Public Bodies* other than the State or Federal Government (which does not have a 7D subsection to my knowledge).

ORCP 7D(3)(h) does not mention the phrase "personal service upon any clerk on duty" as you have in 7D(3)(b) for Corporations, nor does it have the wording "by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk", as you have in 7D(3)(g) for service upon the state.

ORCP 7D(3)(h) only mentions "personal service or office service upon an officer, director, managing agent, or attorney thereof."

This phrasing as Office Service triggers the need for a mailing (since personal service of a clerk on duty or leaving true copy with clerk is not mentioned as an option), unless you are lucky enough to get the County/City attorney or other busy officer/higher up to come out and accept personally, which is unlikely due to their schedules.

We do a lot of mailings, and I am no whiner, nor am I just lazy!! It just seems like this may be an oversight/omission of verbiage, as it does not make a ton of sense to me to allow personal service on the receptionist of "Acme Widgets", but not call that manner of service the same thing for service of a Paralegal or Support Staff in the office of a County Official.

If you agree, we would save some time and paper by adding some verbiage allowing personal service to staff at the office for a Public Body!

Thank you for your time and consideration of this.

Regards,

Zack Holstun

President

COCOP Meeting Packet
October 12, 2019
Attachment C-1

MercuryPDX

Office (day)-503-247-8484

Cell (after hrs)-503-793-9150

Remember to email service@mercurypdx.com for general MercuryPDX communications!



Shari Nilsson <nilsson@lclark.edu>

New submission from Contact Form - Dallas DeLuca

1 message

COCP Website Form <info@counciloncourtprocedures.org>

Wed, Sep 4, 2019 at 12:47 PM

Reply-To: dallasdeluca@mhgm.com

To: nilsson@lclark.edu

Name

Dallas DeLuca

Email

dallasdeluca@mhgm.com

Phone

(503) 295-3085

Subject

ORCP 4 G

Message

Hello - Why limit ORCP 4 G to just "domestic corporations"? To be consistent with the original goal of ORCP 4, does ORCP 4 G need to be expanded to members and managers of LLCs, and further expanded to include the officers & directors & partners of all entities that can be served under ORCP 7 D(3)(b), (c), (d), (e) and (f)? I understand that with the "catch-all" in ORCP 4 L that this might not be necessary, but the original Council stated that adding as many examples as possible was needed. See comment pasted below.

Thank you for your review of this question.

Sincerely,

Dallas

ORCP 4 G currently provides, "G Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer."

The original comment to ORCP 4, referred to above, is as follows: "The intent of the Council was to extend personal jurisdiction to the extent permitted by the federal or state constitutions and not foreclose an attempt to exercise personal jurisdiction merely because no rule or procedure of the state authorized such jurisdiction."



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.

COCOP Meeting Packet
October 12, 2019
Attachment E-1

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.

365 Warner Milne RD STE 203

Oregon City, OR 97045

Tel: 503 656-4144

Fax: 503 656-1183

www.NWLegalHelp.com

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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

COCOP Meeting Packet
October 12, 2019
Attachment F-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
Lewis & Clark Law School
[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
October 12, 2019
Attachment G-1

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>

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
Clinical Professor of Law
Lewis & Clark Law School
[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

COCOP Meeting Packet
October 12, 2019
Attachment I-1

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	Result	Rule(s)	Staff Summary of Comment	Suggestion By
1	I would like to see Oregon adopt the "proportionality" language from the FRCP that cover the scope of discovery.	No committee	36 C	Adopt FRCP proportionality language	Matthew Colley
2	Allow interrogatories similar to FRCP 33.	No committee	Discovery	Provide for interrogatories like FRCP 33	Scott Gowgill
3	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.	No committee	Discovery	Add smart interrogatories	Michael Stevens
4	The current rules on expert discovery are far bellow 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.	No committee	Discovery	Federalize rules on expert discovery to promote settlement and just trials	James Rice
5	Very limited interrogatories to parties.	No committee	Discovery	Very limited interrogatories	Michael Hallas
6	ORCP 36 should add language requiring proportionality in discovery, similar to FRCP	No committee	36 C	Require proportionality in discovery, like FRCP	Anonymous
7	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.	No committee	36 C	Allow incorporating proportionality in civil discovery	Anonymous
8	Organizational depositions under 39(c)(6) need less draconian sanctions.	No committee	39 C(6)	Less draconian sanctions for organizational depositions	Anonymous
9	ORCP 43 should have a requirement that production be made forthwith--there is too much dinking around.	No committee	43 B(2)	Require production of documents forthwith	Anonymous
10	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.	No committee	43 B(2) Discovery	Align discovery rules with FRCP - strict review of objections and produce documents contemporaneously with response	Anonymous
11	Will anything be done to address service by email?	no committee - addressed last biennium	7 D(6)	Will anything be done to address service by e-mail?	Cynthia Domas
12	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.	no committee - addressed last biennium	7 D(6)	Allow service by social media, e-mail, etc., not just newspapers.	Anonymous
13	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?	no committee - addressed last biennium	15 A	10 days to respond to "motion" in conflict with UTCR's 14 days, so eliminate the second sentence	Anonymous
14	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.	Rule 23 committee	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
15	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.	Rule 7 committee	7 9 10	Simplify and shorten times for service	Mary Johnson
16	Add flexibility in notice procedures to achieve actual notice.	Rule 7 committee	7 9?	Add flexibility to achieve actual notice	Anonymous
17	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 committee	7	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

	Suggestion	Result	Rule(s)	Staff Summary of Comment	Suggestion By
18	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.	Rule 7 committee	7	Streamline Rule 7. With e-court, confusion on means of service and timelines for each	Anonymous
19	Adopt waiver of service rules similar to FRCP 4(d)	Rule 7 committee	7 F(3)	Have FRCP 4(d) waiver of service provision	Scott Gowgill
20	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
21	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
22	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
23	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
24	ORCP 22 C "Third Party Practice" should 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
25	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
26	Interpleader statute is confusing to everyone including judges ORCP 31.		31	Interpleader "statute" confusing to all	Mark Cottle
27	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
28	Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.	No committee	36	Codify whether responding party must prepare privilege log for each assertion of privilege	Joseph Arellano
29	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
30	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)	Effect of errors and irregularities in deposition questions and objections thereto, vague and unhelpful	Peter Bunch
31	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)	Provide date no more than 30 days after deadline to produce actual documents	Sonia Montalbano
32	ORCP 44 needs amended to allow discovery/inquiry into plaintiffs' conversations with their treating providers in personal injury/medical malpractice cases.		44	Allow discovery of plaintiffs' conversations with treating healthcare providers in PI and medical malpractice cases	Anonymous
33	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	Add reference in Rule 45 B to remind responding party of need to file responses	Anonymous
34	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	Attorney fees mandatory on first motion to compel	Mary Johnson

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35	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	Motions to compel should provide for automatic sanctions for failure to provide discovery	Anonymous
36	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	Monetary penalty if fail to produce documents 15 days prior to hearing	Sonia Montalbano
37	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
38	Get rid of Motions for Summary Judgment		47	Eliminate motions for summary judgment	Anonymous
39	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
40	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.		47 E	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
41	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		(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 attorneyclient 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 <u>is</u> essential to establish a material fact <u>or</u> go with <i>Moore v. Kaiser Permanente</i> , 91 Or App 261 (1988) to say expert <u>may be</u> 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
42	Clarify alternatives for service of subpoenas.		55	Clarify alternatives for service of subpoenas (Done?)	Anonymous
43	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
44	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.		69	Unclear when in default, after deadline has passed or after court order	Anonymous
45	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.		79 A(1)(a) and 79 A(1)(b)	Use federal standard for preliminary injunctions or at least refine to one Oregon standard	Rachel Lee
46	Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.		Discovery	Too many litigators game the discovery rules.	Paul Sundermier
47	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	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
48	ORCP's should disincentivize obstructive behavior by lawyers and clients.		General	Disincentivize obstructive behavior	Anonymous
49	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.		General	Since some judges expect pro se litigants to know the ORCP, clarify them better	Anonymous
50	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.		General	Clearer and more organized rules	Anonymous

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51	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		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
52	ORCPs should generally be more fair to unrepresented/self-represented parties.		General	Make ORCP more fair to pro se litigants	Anonymous
53	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
54	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?	Heather Gilmore
55	create a form for protective orders. feds have them.		Protective orders	Create a form for protective orders, feds have them	Anonymous
56	Certificates of readiness are a waste of time in dependency law		Trial readiness	Certificates are a waste of time in dependency cases	Anonymous
57	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	Require each judge to allocate time for ex parte to get orders/judgments signed, resolve scheduling issues	John Peterson
58	Simplify the calculation of time and update for electronic filing		UTCRC Chapter 21	Simplify calculations of time and update for e-filing	Paul Sundermie