

**ANNOTATED AGENDA**  
**COUNCIL ON COURT PROCEDURES**

Saturday, November 9, 2019, 9:30 a.m.  
Oregon State Bar  
16037 SW Upper Boones Ferry Rd, Tigard, Oregon

**AGENDA**

- I. Call to Order (Ms. Gates)
- II. Administrative Matters
  - A. Approval of October 12, 2019, Minutes (Ms. Gates) **(ATTACHMENT A)**
  - B. Staff Comments (Judge Peterson)
- III. Old Business
  - A. Follow-Up on Suggestions from Survey **(ATTACHMENT B)**
    - 1. ORCP 4 (Ms. Gates)
    - 2. ORCP 31 (Judge Peterson)
  - B. Committee Reports
    - 1. Discovery (Mr. Goehler) **(ATTACHMENT D)**
    - 2. ORCP 7 (Ms. Weeks)
    - 3. ORCP 15 (Ms. Payne) **(ATTACHMENT C)**
    - 4. ORCP 23 (Ms. Gates)
    - 5. ORCP 23 C/34 (Mr. Andersen)
    - 6. ORCP 27/Guardians Ad Litem (Judge Norby) **(ATTACHMENT E)**
    - 7. ORCP 55 (Mr. O'Donnell)
    - 8. ORCP 57 (Ms. Holley)
- IV. New Business (Ms. Gates)
- V. Adjournment

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\*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

**DRAFT MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**

Saturday, October 12, 2019, 9:00 a.m.

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

**ATTENDANCE**

**Members Present:**

Kelly L. Andersen\*  
Hon. D. Charles Bailey, Jr.\*  
Kenneth C. Crowley  
Jennifer Gates  
Barry J. Goehler  
Meredith Holley  
Drake A. Hood  
Hon. Thomas A. McHill  
Hon. Lynn R. Nakamoto\*  
Hon. Susie L. Norby  
Scott O'Donnell  
Hon. Leslie Roberts  
Tina Stupasky  
Hon. Douglas L. Tookey  
Hon. John A. Wolf

\*Appeared by teleconference

**Members Absent:**

Troy S. Bundy  
Hon. R. Curtis Conover  
Travis Eiva  
Hon. Norman R. Hill  
Hon. David E. Leith  
Shenoa L. Payne  
Margurite Weeks  
Jeffrey S. Young

**Guest:**

Matt Shields, Oregon State Bar

**Council Staff:**

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

ORCP/Topics Discussed this Meeting		Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery	ORCP 41	Discovery	ORCP 1	ORCP 46		
ORCP 1	ORCP 43	ORCP 7	ORCP 4	ORCP 47		
ORCP 4	ORCP 44	ORCP 15	ORCP 9	ORCP 54		
ORCP 7	ORCP 45	ORCP 23	ORCP 10	ORCP 62		
ORCP 9	ORCP 46	ORCP 23/34C	ORCP 15	ORCP 69		
ORCP 10	ORCP 47	ORCP 27/GAL	ORCP 17	ORCP 79		
ORCP 15	ORCP 54	ORCP 55	ORCP 22			
ORCP 17	ORCP 55	ORCP 57	ORCP 32			
ORCP 22	ORCP 57		ORCP 36			
ORCP 27/Guardians	ORCP 62		ORCP 36			
Ad Litem	ORCP 69		ORCP 39			
ORCP 31	ORCP 78		ORCP 41			
ORCP 32			ORCP 43			
ORCP 36			ORCP 44			
ORCP 39			ORCP 45			

I. Call to Order

Ms. Gates called the meeting to order at 9:36 a.m.

II. Introductions

All present and on the telephone introduced themselves. An updated roster (Appendix A) was distributed that includes all current Council members

III. Administrative Matters

A. Approval of September 14, 2019, Minutes

Ms. Gates asked whether any Council members had comments or corrections to the September 14, 2019, minutes (Appendix B). There were none. Ms. Stupasky made a motion to approve the minutes. Ms. Holley seconded the motion, which passed unanimously by voice vote.

B. Staff Comments

Ms. Gates reminded the Council that, at the conclusion of the 2017-2019 biennium, Judge Peterson had created staff comments for the promulgated rules and had asked Council members for input on whether those comments accurately reflect the Council's discussions. Ms. Gates noted that Ms. Payne, who was unable to attend today's meeting, had raised two concerns about the comments by e-mail earlier in the week.

Judge Norby asked how much the staff comments influence how people interpret the final rule: is it similar to legislative history? She pointed out that the staff comments regarding an amendment should be taken as background and context and not part of that rule. She wondered how the comments are used or cited. Judge Peterson explained that there is a preface to the comments that explains that they are not written by or voted on by the Council but, rather, represent simply a bystander's report made by staff who do not vote on whether to promulgate the rule amendments. He stated that he had sent them to the Council mainly in case there were any glaring typographical errors but also to make sure that he got them right.

Judge Peterson stated that he would take Ms. Payne's comments regarding Rule 15 into consideration and dial the comments down a bit; however, he wanted to include a red flag to practitioners to not count on being able to enlarge the time necessary to file every motion under the ORCP or they will be disappointed. Ms. Holley stated that she agreed with Ms. Payne's comments regarding Rule 16. Judge Peterson also agreed that Ms. Payne has a point regarding her comments about Rule 16. Judge Roberts opined that Council

staff should not get into the weeds or have the Council vote on the staff comments or they will just be understood to become rules. She noted that she is happy if lawyers even read the rules, let alone the comments. Ms. Gates agreed with Ms. Payne's thoughts on Rule 16, and noted that the Council had a lot of discussion on what the burden is and who would bear it. Judge Peterson stated that he may have gone overboard, but pointed out that he had been given a lot of direction, including from the chair of the Rule 16 committee, that the Council had created a pathway, not a right. He stated that he appreciates the feedback and that he would like to have the comments finished soon so that they can be included on the website.

Ms. Gates asked for clarification on whether the Council actually votes to approve on the staff comments. Judge Peterson replied that, when the Council decided to resume writing staff comments, the idea was that they were just to act as an aid to people. This does not mean that they do not have currency but, If anyone wants to take umbrage with a staff comment, they can go the minutes for the legislative history. He stated that the preface to the comments indicate that the comments are intended to provide an idea as to why the Council did something, not what the rule change means. He also remarked that someone citing a staff comment should be trumped every time by someone who cites the minutes.

Ms. Gates asked the Council to take another look at the draft staff comments over the next few weeks and to get any feedback to Council staff as soon as possible.

#### IV. Old Business

##### A. Informational Reports

##### 1. ORCP 17

Judge Peterson reminded the Council that former Council chair Brooks Cooper had suggested that Rule 17 D(3) is the only part of Rule 17 that will allow a safe harbor and exonerate the party but not the attorney (Appendix C). At the September meeting, the Council had wondered if providing the safe harbor to the client but not the attorney was by intent or otherwise, so Council staff researched the history of Rule 17. Rule 17 has been amended five times by the Council and five times by the Legislature. In 1986, the Council put in the sanctions provision, but the particular subsection in question, 17 D(3), was added by the Legislature in 1995 in Senate Bill 385. Judge Peterson stated that he had not read the committee reports for detail, but the safe harbor language was not in the introduced bill; rather, it was added in the senate amendments and that language got carried through pretty much without change for the rest of the bill's legislative history to enactment. Looking at the rest of the rule, it seems like omitting the words "or

attorney” may have been an oversight. Judge Peterson observed that subsection 17 D(3) is already a little long, but it could certainly be redrafted to say “party or attorney.”

Judge Peterson noted that the only other part of Rule 17 that is specific to attorneys and not parties is subsection 17 C(3) where, if an attorney is making an allegation or argument, the attorney must certify that it is founded in good faith on existing law or a reasonable modification or reversal of existing law. He observed that it is probably not appropriate to have a lay person make that judgment.

Ms. Gates asked whether Judge Peterson was proposing forming a committee to examine the issue. Judge Peterson noted that this is a small matter, but that there are other things in Rule 17 that could be polished a little bit. He thought that the language difference in the treatment of attorneys in subsection 17 D(3) is partly because different bodies worked on the rule at different times. However, he opined that, even if there was a policy reason for treating parties and their attorneys differently, if the Council thinks that the language does not promote efficient litigation, the Council could make a change. Ms. Gates stated that she is not convinced that the difference was not intentional nor that it should have been. She had no strong feelings about forming a committee. The Council did not form a committee regarding this matter.

## 2. Guardians Ad Litem

Judge Norby reminded the Council that the Oregon Judicial Department’s policy group on the Oregon Rules of Civil Procedure had commented (Appendix D) on the fact that the phrase "guardian ad litem" is confusing to many because it sounds like it must have some connection to a guardian proper and it does not. She noted that the term has even caused confusion to new judges on the Clackamas County bench. Judge Norby had volunteered to try to find a way to insert a simple definition into the ORCP. She stated that she had looked through all of the rules and had not located a place for central definitions, so reorganizing the first section of Rule 27 seemed to make sense. She drafted some preliminary language (Appendix E) that could possibly be added to Rule 27.

Judge Roberts stated that Judge Norby’s definition looks fine. She suggested that a lead line could be placed in subsection 27 A(2) because that is the only part of the section that includes a definition. Judge Norby noted that the existing subsections are not preceded by lead lines. Judge Roberts suggested that “definition of guardian ad litem” could also be included in the lead line of section A. Judge Norby felt that, if someone was scanning the rule and looking for the definition, this

might be the way to attract their attention to it. Ms. Stupasky suggested that the definition should perhaps be placed in subsection 27 A(1) instead of 27 A(2), because definitions usually precede everything else. Judge Tookey felt similarly, and also wondered whether the word “means” should be used instead of “is defined as.” He stated that, typically, definitions use the word “means” for a restrictive definition or “includes” for a descriptive definition. He suggested phrasing such as, “guardian ad litem means a party’s legal surrogate in the lawsuit whose duties and obligations exist only within the lawsuit.” He pointed out that a definition is a definition and noted that the Council does not want to introduce substance into a definition. Judge Norby agreed that “means” might be a better option.

Judge Peterson stated that, from the discussion, it appears that a committee may be warranted. He wondered whether the definition should also indicate that a guardian ad litem is appointed by the court so that nobody attempts to self-appoint themselves as one. Judge Norby pointed out that subsection A(1) already states that a guardian ad litem is appointed by the court. Judge Peterson agreed that there could be several places to locate the definition. Mr. Crowley suggested that the definition could also be placed in section 27 B which is all about the appointment of guardians ad litem. Ms. Gates agreed with Judge Peterson that a committee seems appropriate. She suggested that, since the Council is so heavily reliant on its judicial members regarding family law and probate matters, it might be worth having the committee consult with one or more practitioners familiar with this area of law.

Mr. Andersen observed that the phrase “ad litem” from the Latin means “for the lawsuit.” He stated that, to him, that seems like explanation enough, and he did not feel that any further explanation was necessary. He opined that there is no reason for people to be confused. Judge Norby pointed out that not everyone learns Latin. Judge Peterson reminded the Council that the original suggestion was to change the term completely because it is confusing. He noted that the phrase appears many times in the Oregon Revised Statutes, as well as in the statutes of a lot of other states, so that suggestion is not feasible. However, adding a definition might solve some of the confusion.

Judge Norby, Judge Peterson, Judge Tookey, and Judge Wolf agreed to serve on a Rule 27 committee. Judge Norby agreed to chair the committee.

B. Committee Reports

1. ORCP 7

a. New Suggestion Regarding Rule 7

Judge Wolf reported that the committee had met and assigned members various tasks. The committee will add the new suggestion regarding Rule 7 (Appendix F) to its charge. Ms. Nilsson stated that she would forward a copy of the new suggestion to all Rule 7 committee members.

2. ORCP 15

Judge Roberts reported that the committee had not met, but would do so before the next Council meeting.

3. ORCP 23

Ms. Gates reported that the committee had not met, but would do so before the next Council meeting.

4. ORCP 23 C/34

Mr. Andersen reported that the committee had not met, but would do so before the next Council meeting.

C. ORCP/Topics to be Reexamined Next Biennium

1. Discovery

Ms. Gates reminded the Council that she wanted to revisit this topic after some discussion at the September meeting. She noted that the Council did not have time to review all of the suggestions regarding discovery, particularly the one regarding privilege logs. She noted that this topic is somewhat intriguing to her because it comes up frequently in her type of practice; however, she stated that she was not certain that she feels strongly enough about the issue to press for a committee. If anyone would like to join her in a committee she would be happy to form one.

Mr. Crowley, Ms. Gates, Mr. Goehler, Ms. Holley, Mr. O'Donnell, and Ms. Stupasky agreed to form a discovery committee. Mr. Goehler agreed to chair the committee.

V. New Business

A. Potential amendments received by Council Members or Staff since Last Biennium

1. ORCP 4

Ms. Gates explained that the Council had received a suggestion from attorney Dallas DeLuca (Appendix G) regarding his concern that ORCP 4 G was limited to "domestic corporations." She stated that she is not aware of the rule's history. Ms. Holley noted that domestic limited liability corporations (LLC) are not included.

Judge Peterson stated that the Council had not made changes to Rule 4 in quite some time but, if there is a problem that someone is experiencing because personal jurisdiction could be expanded, he has no objection to finding out whether it is really a problem. Judge Roberts pointed out that she is not sure that the Council can expand or contract the jurisdiction of the courts. Judge Peterson agreed that the Council does not want to extend its reach too far. Mr. Goehler stated that there is also overlap because there are many bases for personal jurisdiction so, even though being a member of an LLC is not specified, there may be personal jurisdiction in some other way. He stated that he did not know if it is really a problem.

Ms. Gates noted that comments received by the Council are sometimes the result of just one or two instances where people are having a problem and there is nothing the Council can do. She stated that she was curious as to whether Mr. DeLuca had encountered a situation where a judge had ruled that he was out of luck because an LLC is not a corporation. She stated that she would reach out him to see if he had a bad experience and whether it might be a judicial education issue or something that needs to be changed.

The Council did not form a committee regarding this matter at this time. Ms. Gates will report back to the Council regarding Mr. DeLuca's response.

2. ORCP 10

Ms. Gates stated that the Council had received a plea from attorney Mary Johnson (Appendix H) to clarify and unify rules for service of and submission of judgments between UTCR 5.100 and ORCP 10 B. She observed that it might be that the UTCR is creating an issue rather than the ORCP. Judge Peterson recalled a past Council discussion (that could only have taken place between lawyers) about how four days is actually a longer period of time than seven days under Rule 10 B. He stated that the Council can make a suggestion to the UTCR Committee, but cannot do



anything about this inconsistency. He did point out that item 23 on the survey results is related, which is a suggestion to do away with the three-day rule for e-mail service and add five days for United States Postal Service. Judge Peterson noted that his experience with the postal service is that he gets one-day delivery almost everywhere within Oregon. He stated that almost every biennium there has been a suggestion to get rid of the three-day rule; however, not everyone is sitting and waiting for e-mail delivery, and the three-day rule provides an extra cushion so that, for example, a lawyer does not come back after a short vacation and find they missed a deadline.

Judge Roberts wondered whether the three days really make that much of a difference. Judge Wolf observed that, if three days are really that critical, the party could just hand the document to the opposing party. Judge Norby noted that a party would still have to attest to a court that they waited the appropriate amount of time. Judge Wolf noted that the party would just have to wait the time required by UTCR 5.100, not the added three days, because it was delivered personally. He stated that the three days only get added if the document is mailed.

Judge Peterson observed that it appears that Ms. Johnson is making the additional days allowed for service under Rule 10 C and the additional days for the other side to object under UTCR 5.100 consecutive, but asked whether they would actually be consecutive or concurrent. Judge Roberts replied that they must be consecutive, since Rule 10 defines what it means to be served (adding three days for mail or e-mail) while UTCR 5.100 allows three days, or seven days, for the non-movant to make known any objections. Rule 10 is used to determine how to compute the three days.

Judge Norby pointed out that the Council had just made big strides trying to move forward with the rules of serving by technology in Rule 7, yet the rule still presumes that people are using paper and the postal service methodology. She stated that it resonates with her that perhaps Rule 7 also might deserve some modification in recognition that e-mail tends to be the form of mail that people use now and it does not require three extra days for transmission. She stated that she does not want to further complicate the rule but, if the Council is trying to bring the rules in line with new technology, perhaps this is a place that it should also be happening. However, she does not feel strongly about it.

Judge Peterson asked whether Mr. Goehler has any insight since he practices in both Oregon and Washington. Mr. Goehler stated that the practice in Seattle is to always use messenger service. The attitude is to give one's opponent as little time as possible to respond. He stated that he is trying bit by bit to improve things by not using messenger service when he practices in Washington, and suggested that

Oregon does not want to go down that kind of road where a party will be trying to limit the time for the adversary. He stated that there should be enough time allowed for a reasonable response. Judge Norby agreed philosophically but stated that she thought that more time is added for mailing because that is how long mailing takes, not just to give people extra time and pretend it is for mailing. If it is indeed to give people extra time, she is all for it but, if the three days were in fact added because the postal service used to take more time than it does now, the Council is being inconsistent.

Judge Roberts observed that the postal service actually used to take less time than it does now. She stated that people who are agonizing about the fact that their adversary gets an extra day makes her concerned that people are looking for new ways to trap their adversary. Mr. Crowley agreed. He stated that the Department of Justice has a pretty active litigation practice and a pretty systematic way of submitting orders to the court; it is very rare for there to be an issue and, if there is one, it seems to him that it is an issue of professionalism, not an issue with the rule. Ms. Holley pointed out that there are extra concerns with self-represented litigants.

Judge Wolf noted that the three-day rule is not just for mailing; it is also for service by facsimile and e-mail. There is a three-day cushion in case someone's computer is off or not working. Judge Norby asked when the three-day rule was written. Judge Peterson stated that it has been amended a number of times. He agreed with Judge Wolf that it was decided it would be better to give people those extra three days. He asked how many have had something faxed to them at 5:00 p.m. on a Friday afternoon. The fact that the fax arrives at the office does not mean that receipt is instantaneous. The idea is to give a cushion so that no one is playing "gotcha." Mr. O'Donnell agreed that, just because something is served to a person's office does not mean that person is immediately there to receive it. So e-mail is essentially not as effective as personal service or office service. The vast majority of the time, people are collegial and, if there is an issue, lawyers extend the time. Oregon is fortunate in that way. He stated that he practices occasionally in Washington and that he is shocked by what happens there. There is not much collegiality.

The Council decided not to form a committee regarding this suggestion. Ms. Gates asked Judge Peterson to suggest that Ms. Johnson approach the UTCR Committee regarding her concern.

3. ORCP 39

Ms. Gates stated that attorney John Kaempf had suggested that ORCP 39 should be amended to make it clear that an attorney cannot be videotaped during a deposition (Appendix I). Ms. Holley disagreed with the suggestion. Ms. Stupasky observed that it is sometimes necessary to have an attorney on video. She stated that there are some attorneys who will not behave unless they are recorded. Mr. O'Donnell wondered how such a rule would be written, since it is discretionary. He stated that many attorneys have probably had a judge order a deposition to take place in a jury room when the parties have not gotten along, in order to preclude such problems. However, he noted that most depositions in Oregon are collegial. Judge Norby wondered why an attorney would be intimidated during a deposition when it is usually the witness who feels intimidated. Mr. O'Donnell stated that he has actually seen attorneys show a judge a video of an opposing attorney as context for intimidation or harassment by that attorney. Judge Peterson noted that one can take up the matter with a judge if any behavior is out of hand.

The Council decided not to form a committee regarding this suggestion.

4. ORCP 54

Ms. Gates explained that Holly Rudolph, the forms manager for the Oregon Judicial Department, had suggested the requirement in Rule 54 A(1) that a party submit a form of judgment is meaningless and that the Council should consider deleting this requirement. (Appendix J). Judge Peterson explained that the Council made a change some time ago so that either party can submit the form of judgment. He stated that Ms. Rudolph is a good source of information because she is where the rubber meets the road, so to speak. However, judgments have independent meaning and, as a judge, he is tired of creating judgments for parties who are too lazy to do so themselves. It is also up to the attorneys to specify the type of relief they are seeking. Judge Roberts pointed out that it is specifically up to attorneys to specify the award of costs, which is discretionary for the judge. Judge Wolf stated that he had checked with his clerk, who stated that she rejects notices of dismissals that are submitted without a judgment. If she misses one, she contacts the attorneys to submit it. And, if none is submitted, she creates it herself and assumes that, if nobody wanted to submit a form of judgment, nobody wanted costs either. Judge Wolf stated that his assumption is that, if an attorney has some dog in the fight with regard to costs or fees, they will submit a judgment.

Judge Norby observed that part of the request from Ms. Rudolph appears to be to put the onus in dismissal cases on the court to create the judgments. She stated that, depending on the court, that is a scary proposition. Ms. Rudolph may not

realize the volume the courts have or how difficult it would be to start tracking creation of judgments with the limited available staff. She stated that she is not sure that this is a burden that can be shifted to the courts at this point based on budget and staff. Judge Wolf pointed out that it is not complicated to create forms of judgment individually but, with a lot of cases, and trying to figure out costs, it becomes burdensome. Judge Norby stated that there are numerous ways dismissals arrive at the court, so it would likely be many different staff members completing the forms of judgment as well.

Judge Peterson opined that this seems to be a solution in search of a problem. The Council decided not to form a committee regarding this suggestion.

5. ORCP 57

Judge Peterson explained that both Multnomah County Circuit Court's Presiding Judge Steven Bushong (Appendix K) and Matt Shields, the Council's liaison from the Oregon State Bar, had brought this issue to his attention. Both Judge Bushong and Mr. Shields pointed out that the Court of Appeals' recent ruling in *State v. Curry*, 298 Or App 377 (2019), appeared to invite the Council to make a procedure for *Batson* challenges [*Batson v. Kentucky*, 476 U.S. 79, 89 (U.S. 1986)] regarding the validity of peremptory challenges in a jury trial. Judge Peterson agreed that the facts of the *Curry* case seem to show that there may be a better procedure that could be crafted for making such challenges. He also noted that Rule 57 applies to criminal cases by statute.

Judge Bailey, Ms. Holley, Mr. Hood, Judge McHill, Justice Nakamoto, and Judge Tookey agreed to serve on a Rule 57 committee. Ms. Nilsson noted that, although Judge Leith was not able to attend the meeting, he had expressed interest in joining any committee that was formed regarding Rule 57. Ms. Holley agreed to chair the committee.

6. ORCP 55

Ms. Nilsson noted that she had accidentally mis-categorized this suggestion on the agenda under Rule 68 when it should have been under Rule 55. Judge Peterson stated that Judge Marilyn Litzenberger had raised the issue of what happens when a non-party gets subpoenaed (Appendix L). He stated that, if a non-party defends their right not to appear, they may have to pay an appearance fee or find a lawyer to make the argument against appearing for them. Mr. Anderson opined that it should be as easy as possible for a non-party to make objections known, even if by letter or by e-mail. He stated that, if the choice is between having to pay a filing fee and/or hire an attorney or ignore the subpoena, people will be encouraged to

break the rule and ignore the subpoena. He noted that he is not sure what the mechanics would be, but the threshold should be very low that the non-party should be able to object in any way that brings it to the attention of the opposing party and the judge.

Ms. Gates observed that Judge Litzenberger had given examples of what happens when a non-party is subpoenaed, which she has also encountered, but she was uncertain of the exact problem. Judge Roberts stated that the lack of clarity about what happens next is the issue. If the objection is only raised orally, is it effectively raised? She opined that it is a significant enough problem that a committee should be formed. Judge Norby asked whether Judge Litzenberger was saying that non-parties were objecting to having received a subpoena. Judge Roberts explained that it is more that a non-party objects to *responding* to a subpoena. The question then becomes whether a non-party simply saying, "I don't want to be involved," is enough of an objection, and what happens next.

Judge Bailey, Mr. Crowley, Judge Norby, Mr. O'Donnell, Judge Peterson, and Judge Roberts agreed to form a committee. Ms. Gates suggested that Mr. Eiva, who was not present at the meeting, would be a good addition to the committee. Mr. O'Donnell agreed to chair the committee.

**B. Potential amendments received from Council Survey**

Ms. Gates noted that the Council had gone through suggestions 1 through 20 from the survey (Appendix M) during the September meeting. She suggested reviewing the remaining items one at a time and deciding whether to form a committee on each.

**Item 21:**

*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.*

Judge Peterson noted that Rule 17 C(1) would also need to be changed if this change were made to Rule 1. Mr. Crowley observed that such a change might cut down on litigation. The Council decided not to form a committee regarding this suggestion.

**Item 22:**

*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.*

Judge Peterson stated that small claims are covered by chapter 46 of the ORS and cannot be changed by the Council. The Council decided not to form a committee regarding this suggestion.

**Item 23:**

*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.*

Judge Peterson stated that it seems to him that this issue is covered by Rule 9 and, if more than a year has passed, one effectively has to serve the opposing party with a summons. Judge Norby stated that she has had motions to show cause years later where no party had ever done a QDRO, so they made a motion to show cause to get everyone back, which seemed effective. Judge Wolf wondered how the Council could fix a "can't locate a party" problem. Judge Peterson noted that the Council had done what it could about that issue with Rule 7. The Council decided not to form a committee regarding this suggestion.

**Item 24:**

*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.*

Judge Peterson noted that the Council had already discussed the three-day rule and determined that it should not be changed. The Council decided not to form a committee regarding this suggestion.

**Item 25:**

*ORCP 22 C "Third Party Practice" should be changed to enable a defendant to assert third-party claims more easily. The rule requires a defendant to assert a third-party claim within 90 days of being served. To assert a third-party claim after 90 days requires both consent of all parties AND court approval. The rule should be amended to require consent of all parties OR court approval. It is unrealistic in most civil litigation for the defendant to know within 90 days the parties against whom it may have third-party claims. Allowing one party to "veto" the litigation of the third party claim is unfair and deprives the trial judge of the chance to efficiently resolve matters against all potential defendants.*

Ms. Gates stated that the Council had spent significant time on this issue last biennium and was unable to promulgate a rule. The Council decided not to form a committee regarding this suggestion.

**Item 26:**

*Edit ORCP 27 to make it more clear - that an unemancipated minor must always have a GAL, and who should be appointing the GAL*

Judge Peterson pointed out that Rule 27 already states that a minor *shall* appear by a guardian ad litem appointed by the court. Ms. Gates asked the Rule 27 committee to add this suggestion to its charge.

**Item 27:**

*Interpleader statute is confusing to everyone including judges ORCP 31.*

Ms. Goehler stated that the suggestion that ORCP 31 is confusing was not very specific. Judge Peterson offered to contact attorney Mark Cottle to see if he has more specific information about what is confusing and/or suggestions for improvement. The Council did not form a committee at this time, but will keep ORCP 31 on the agenda for October.

**Item 28:**

*ORCP 32H and I should be eliminated. At the least, 32I should have a strict timeline for compliance.*

Judge Roberts observed that the suggestion appeared to want a change that would not require members of a class to be notified. Ms. Holley stated that this would be inappropriate. Ms. Nilsson noted that the Legislature has made significant amendments to Rule 32 regarding class actions, and that it might affect the substantive rights of litigants if the Council were to make a change like this. The Council decided not to form a committee regarding this suggestion.

**Item 29:**

*Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.*

Ms. Gates asked the Discovery committee to add this suggestion to its charge.

**Item 30:**

*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.*

Ms. Gates noted that there is already a process for sanctions for failure to produce documents. After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 31:**

*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.*

Judge Roberts stated that she does not understand what is vague. Ms. Gates stated that the defending attorney may only object as to the form of question and privilege. Mr.



Andersen stated that this issue comes up with some attorneys who make speaking objections during a deposition and, in the course of making the objection, actually instruct the client what to say, essentially giving an objection that is coaching the witness. He stated that he is not sure that a rule to prevent speaking objections is necessary, because he thinks that they are objectionable already. Judge Roberts pointed out that most counties' Supplemental Local Rules (SLR) do not allow speaking objections. She suggested going to the court if this happens.

Ms. Holley wondered whether the person who made the suggestion simply wants the two rules to have the same language. Ms. Stupasky noted that Rule 39 D(3) essentially says that speaking objections are allowed. Ms. Holley stated that Rule 41 C says what those objections can be. Ms. Stupasky stated that she believes that the rule is clear, but that it just needs to be enforced. Ms. Gates stated that she believes that the commenter is saying that, under Rule 39 D(3), there can be more than just objections to form and privilege, as long as those objections are made concisely, so the two rules are not consistent. Judge Roberts stated that nowhere does the rule say that counsel defending a deposition cannot make an objection; the rule just says what objections are waived if they are not made, but no objections are prohibited. The local rules talk about form of objections. Judge Peterson noted that sometimes lawyers will want to make objections just to break up a deposition and throw off the witness. Judge Roberts stated that there are some lawyers who will object to every single question as being vague, and the opposing attorney just plows on regardless.

Judge Norby observed that the balance between having rules be vague enough that they can apply in a variety of situations but specific enough that they have value is a balance the Council is always trying to strike. Judge Roberts stated that the rule just says what things are not waived if objections are not made. A lawyer is not required to make any objection and a lawyer is not prohibited from making any objection.

The Council decided not to form a committee regarding this suggestion.

**Item 32:**

*Parties should provide a date no more than 30 days after the deadline to respond to RFPs by which they will provide actual documents.*

Ms. Gates noted that the Council has received similar suggestions before, and stated that she understands the frustration. Ms. Stupasky stated that there is a remedy: the right to file a motion to compel. Judge Roberts agreed, if the Council wants to encourage many more motions. Judge Wolf stated that the parties have hopefully conferred as required under UTCR 5.010(2). Judge Roberts observed that what is most maddening to parties,

and sometimes to judges, is when a lawyer says they will provide the documents, then keeps stringing the other lawyer along. Ms. Holley stated that some lawyers will make the opposing attorney do all of the work on a motion to compel, then just provide the documents as soon as the motion is filed. Judge Norby asked whether there is an argument against giving a 30-day deadline. Mr. Crowley observed that discovery is getting bigger and bigger in the electronic age. Ms. Holley noted that it is sometimes reasonable to take longer than 30 days. Judge Peterson noted that sometimes the lawyer just does not have the documents for reasons out of the lawyer's control.

Mr. Goehler noted that the rule requires production by the date required, so this would be an extra 30 days and would require the rule to be amended internally. The rule already requires the documents to be labeled and organized. With Oregon's collegiality, his experience is that people will usually produce; perhaps they will not do it right away, but the lawyers confer and it happens. He stated that he has personally never had to file a motion to compel. Ms. Gates stated that she does not like the idea of codifying an extra 30 days. Ms. Holley pointed out that no rule is going to solve the problem of people withholding documents. Judge Norby stated that she thinks that a lot of attorneys would provide the documents but the problem is that the client is not cooperating. This is when a motion to compel can be useful to show the client the penalty for not complying. Mr. O'Donnell noted that one aspect of the problem is technology, especially with health care providers using outside technology companies to store older documents. He stated that hard and fast deadlines are not practical and can cause unforeseeable problems. Mr. Hood agreed that the motion to compel can sometimes be helpful for defense attorneys, particularly in defending companies that have no presence in Oregon. If the company has no office in Oregon and no centralized document depository and they are taking a long time to look for documents in multiple locations, letting them know that a judge has looked at a motion to compel and that there are sanctions for not complying can actually be more helpful than having a deadline in a rule.

The Council decided not to form a committee regarding this suggestion.

**Item 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.*

Ms. Gates stated that she has encountered people not filing requests for admission and that this seems like an easy fix, but noted that perhaps there is a reason it has not been done. Judge Peterson stated that the Council has had the discussion about internal references within the rules before and determined that it is not a viable undertaking. As

has been pointed out numerous times by Council members, lawyers need to read the rules. Judge Roberts stated that perhaps this could be a good use of staff comments. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

Judge Peterson stated that this change is not within the Council's purview. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council determined that these topics have been re-litigated by the Council multiple times over the years and that there is no enthusiasm for such changes. The Council decided not to form a committee regarding this suggestion.

**Item 38:**

*Get rid of Motions for Summary Judgment*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 39:**

*amend setting motions for summary judgment where opposing counsel refuses or unnecessarily delays in agreeing to a date.*

Judge Wolf wondered whether this is an ORCP problem. Judge Roberts stated that the setting of motions is always in the SLR. The Council decided not to form a committee regarding this suggestion.

**Item 40:**

*ORCP 47E needs work. First, it should not [sic] 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.*

Judge Peterson pointed out that the rule already states that it is not applicable to self-represented litigants. A non-represented party cannot file that declaration. Ms. Gates stated that it does appear obvious from reading the rule that it is only the attorney who can do it. The Council decided not to form a committee regarding this suggestion.

**Item 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. (See Appendix M for remainder of comment)*

Judge Peterson noted that this suggestion had come from Multnomah County Circuit Court Judge Eric Dahlin. Judge Roberts stated this is an area that both the courts and the Council have weighed in on, so it has already been vetted. Judge Norby stated that the appellate decision is clear. Judge Peterson noted that there are two parts to the comment: 1) declarations where evidence by an expert *might* be necessary; and 2) if a Rule 47 E declaration is submitted and the case is litigated and the expert has not been produced, should an expert be brought to a hearing to find out who the expert was and what they had to say. Judge Roberts observed that, if a party wants to assert the consequences of filing a false affidavit, the party should move on it and the party has a procedure that they can use. She felt that it should not be written into the rule that this is a procedure that always has to be followed no matter what. Mr. O'Donnell agreed. He stated that he has seen it happen twice that a judge heard argument on this issue. It was not pretty, and in both cases it was the same opposing counsel exhibiting this behavior. That opposing counsel is no longer practicing law.

Judge Peterson stated Judge Dahlin is saying that the rule does not provide a clear opportunity for such a hearing to happen, but he does not know that the rule needs to. Judge Wolf stated that it would come up if a party moved for sanctions under Rule 17. Ms. Gates stated that it could also come up at trial if a party asked to depose the expert. Judge Peterson suggested that it could be done after trial, as a post-trial matter. Mr. O'Donnell stated that someone could move for a directed verdict, asking for an explanation as to why the other party went to trial without an expert.

Judge Bailey noted that this does occur more often than people think. He opined that, if an attorney files a Rule 47 E declaration, goes to trial, and does not use an expert, and uses the declaration to avoid a summary judgment, there should be some sanction if the attorney never really had that expert in the first place. Ms. Gates asked if Judge Bailey is seeing the issue because a party is saying in the middle of trial that they want to pause trial and depose that person. Judge Bailey stated that it usually happens after the trial has

occurred; the attorney never called the witness at trial, the other party believes that they never really had that witness or were never prepared to call that witness, and now they have wasted those resources by having to go to trial, and there should be sanctions. Judge Norby asked why that would not just be considered in the attorney fee and costs analysis. Mr. O'Donnell suggested moving for sanctions under Rule 47 G. Judge Roberts agreed that it is covered under Rule 47 G. Mr. O'Donnell stated that the question is just whether a party chooses to use it. Ms. Stupasky agreed that an aggrieved party has the procedure to do so if they want to pursue it.

The Council decided not to form a committee regarding this suggestion. Ms. Gates suggested sending Judge Dahlin a copy of the minutes from this meeting.

**Item 42:**

*Clarify alternatives for service of subpoenas.*

Judge Peterson noted that significant changes were made to Rule 55 last biennium and that time should be allowed to see how those changes play out. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

Judge Peterson noted that Rule 62 covers requesting findings of fact and conclusions of law, and it has built-in timelines. He wondered whether a party can move to truncate those. If that party is prevailing, can they ask to have the findings and conclusions to the judge in a week and have their responses in a week? Ms. Gates asked whether any judges are encountering this and have created their own timeline to protect the represented person. Judge Norby stated that her understanding is that the different counties have different methods, some of which work more slowly or quickly. The first issue is alerting

the courts, then it is the question of how fast it can be put on the docket. She noted that it is a serious issue that comes up with regularity, but that she is not sure that there is a solution that can be put in the rules. Judge Bailey agreed and stated that it is probably more of a statutory situation where the Legislature needs to look at it.

Judge Peterson wondered how Rule 27 would adversely impact someone in these situations. He stated that it seems like a party could ask the court to make Rule 27's timelines longer or shorter based on the circumstances. Judge Norby agreed that the courts have discretion on timelines on estate and trust matters. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

Ms. Gates stated that it is pretty clear that a party can be in default but can apply for an order of default. Mr. Goehler noted that "in default" does not exist; there is an order of default and a judgment by default, but "being in default" is just a colloquial phrase. Judge Norby pointed out that sometimes when court is in session there is an observation that someone is in default without a motion having been made or filed, but that is not very frequent. Judge Roberts agreed that this is colloquial; the party is subject to default, but certain things need to be shown in order to obtain an order for default. Judge Norby stated that when the trial occurs and the party has not appeared, the judge takes a prima facie case, there is no paper motion and no motion from the party, but the judge just issues a judgment. Judge Roberts pointed out that this is based on the trial. She noted that the only people who she has ever encountered who are confused about this issue are self-represented litigants. As an example, a self-represented litigant could believe that they could file a counterclaim or cross-claim that says that, "plaintiff comes from the moon and therefore cannot sue," and, when they do not see a response to that allegation within the time proscribed, they believe that they do not have to serve anything else on that party and will prevail without making any other gesture. However, the Council cannot really write the rules just for people who have never been to law school.

Judge Peterson noted that a party is not in default until the judge says they are in default. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

Ms. Gates stated that the Council addressed this issue last biennium and specifically opted not to have the Oregon rule follow the federal rule. Judge Peterson explained that he has been on two committees that looked at this rule and the suggested change did not pass out of either committee. The Council decided not to form a committee regarding this suggestion.

**Item 46:**

*Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 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).*

Judge Norby wondered what would be on a list of things that must be included. Ms. Gates posited that perhaps it would be the opposite--things that do not need to be included, such as correspondence with an attorney or drafts of reports. Mr O'Donnell stated that the federal rule includes a list of things that an expert is required to provide, in discovery, such as a list of cases in which the expert has been involved and a list of cases that have been tried where the expert has testified. He observed that there does not seem to be strong momentum among Oregon lawyers to get into federal discovery, and he does not think that the Council should make this one change without making other changes to federalize the Oregon discovery rules. Judge Roberts noted that there is an ambiguity about what an expert's file is because so many records today are electronic, and she has had people say that the expert does not have a file to provide because everything is on their computer. Mr. O'Donnell wondered how a judge would even make a decision on what should be in the file.



Judge Roberts suggested that a committee might be warranted. Mr. O'Donnell agreed but stated that, without any other rules about experts, it would be difficult to compartmentalize this. Judge Norby noted that FRCP 26 (a)(2)(B) does not say what should be in the expert's file but, rather, states that a report must be provided disclosing a statement of the opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; exhibits that will be used to summarize or support them; the witness's qualifications; a list cases in which the witness testified as an expert; and a statement of the compensation to be paid.

Ms. Gates agreed that this is not discovery at all, but pointed out that there is a separate rule that says what does *not* need to be provided, such as expert drafts. However, Oregon does not have any of that; there is no structure whatsoever. Ms. Holley asked whether the assumption in Oregon is that a party will have to make the argument as to why they are withholding something, rather than defaulting to that they do not have to provide it. Ms. Gates stated that this is how she has found it to operate in Oregon, but noted that everything is fair game, which is why lawyers are much more careful about how they communicate with experts in Oregon state court than they are in federal court.

Judge Norby pointed out that, even among judges who take special assignments for complex cases, some judges require that expert information be exchanged months before the trial starts, while other judges do not require that it be produced until the expert has taken the stand. Mr. O'Donnell noted that Judge Charles Carlson in Lane County takes the position that he does not have the authority to require that files be provided the day before, or even on the morning of, trial because, just because there is an expert, it does not mean that the expert is going to be called. The only way that the file comes into play is when the expert takes the stand.

Judge Norby noted that judges have the authority to control the proceedings as they unfold, but they also have to think about a jury who may potentially have to be sent away for days while the parties examine an expert. Mr. O'Donnell stated that he absolutely agrees in principle. Judge Norby stated that there is so much variety on how judges are handling expert discovery that it would be awkward to dictate a rule that adopts some judges preferences over others. Mr. O'Donnell posited that there is no authority for the Council to do so.

Ms. Gates suggested that the Discovery committee add this issue to its charge.

**Item 48:**

*ORCP's should disincentivize obstructive behavior by lawyers and clients.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 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.*

Judge Peterson noted that this is an ongoing mission of the Council, and specifically pointed out the reorganization of Rule 55 last biennium. After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 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*

Ms. Gates stated that adding internal references to other rules seems like kind of a nightmare. Judge Norby stated that it is a grand concept, and agreed that everyone would prefer to have their research made easier. However, once those internal references are

added, it becomes a nightmare for staff to continually update and locate those cross-references and monitor changes in other rules. She also expressed concern that adding these cross-references could make it too simple and that, over time, lawyers would come to rely on the Council as their only source of research. She did suggest that, if the Council were to move in this direction, it should not be to include internal references within the rules themselves. She instead suggested a table at the beginning or end of the rule with those cross-references.

Mr. Goehler suggested that this might be a good subject for an Oregon State Bar or other publication to go through and create a roadmap for the practitioner. He opined that it is not the rules that should be that roadmap. Judge Norby noted that Bar publications are not updated that often, so they likely would not keep current with the different rule changes.

Judge Peterson pointed out that the SLR and UTCR are not adopted in the same time frame as the ORCP, so the ORCP would need to be updated at different times of the year to be current. The Council does not have the staff resources for such an undertaking. Ms. Nilsson stated that, by statute, the Council works on a biennial schedule and submits the promulgated ORCP to the Legislature every other year, so continual updates would not work functionally. Mr. Shields agreed and noted that the Legislature only prints the rules in January of even numbered years.

The Council decided not to form a committee regarding this suggestion.

**Item 52:**

*ORCPs should generally be more fair to unrepresented/self-represented parties.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

**Item 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.*

Judge Peterson noted that a statute should specify whether there is a procedure that is outside of the ORCP and, otherwise, the rules should apply. Judge Wolf stated that it would make sense that the Legislature should say whether the ORCP apply in certain situations or whether they do not, not that the Council would choose that. Judge Peterson stated that he believes that it is a default; unless the statute says that the ORCP do not apply, they apply.

Judge Norby stated that she does a lot of probate cases and that she is on the e-mail listserv for the Uniform Laws Commission Probate Modernization Group mentioned in the suggestion. She stated that she would be happy to be the intermediary between the Council and the group. Judge Peterson stated that he would reach out to attorney Heather Gilmore, who made this suggestion, and let her know that Judge Norby will be the group's point of contact. Judge Norby stated that she will pay particular attention to e-mails from the group.

**Item 55:**

*create a form for protective orders. feds have them.*

Ms. Holley noted that this comment is regarding discovery protective orders, which is not the Council's purview. Judge Norby stated that she helped update a chapter on a CLE publication coming out this year and that this publication includes a form protective order they received from the state. This may be helpful to practitioners.

The Council decided not to form a committee regarding this suggestion.

**Item 56:**

*Certificates of readiness are a waste of time in dependency law*

After a brief discussion, the Council determined that this is a UTCR issue and not within the Council's purview. The Council decided not to form a committee regarding this suggestion.

**Item 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.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

**Item 58:**

*Simplify the calculation of time and update for electronic filing*

Judge Peterson stated that the Council has already made some changes in this area. He noted that the word "simplify" is very generic. He wondered whether there are a lot of mistakes coming before the court. Judge Roberts pointed out that e-filing is covered by the UTCR. The Council decided not to form a committee regarding this suggestion.

VI. Adjournment

Judge Peterson asked any committees who have draft language for a rule amendment to send it to Ms. Nilsson, who will put it into Council drafting format for ease of reading.

Ms. Gates asked any Council members who have not signed up for a committee, but who wish to join one, to contact Council staff and the committee chair to express their interest.

The next Council meeting will take place on November 9, 2019, at 9:30 a.m. at the Oregon State Bar.

Ms. Gates adjourned the meeting at 11:25 a.m.

Respectfully submitted,

Hon. Mark A. Peterson  
Executive Director

	Result	Rule(s)	Suggestion	Staff Summary of Comment	Suggestion By
27	November agenda	31	Interpleader statute is confusing to everyone including judges ORCP 31.	Interpleader "statute" confusing to all	Mark Cottle
29	Discovery committee	36	Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.	Codify whether responding party must prepare privilege log for each assertion of privilege	Joseph Arellano
47	Discovery committee	Discovery	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).	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
16	Rule 7 committee	7 9 10	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.	Simplify and shorten times for service	Mary Johnson
17	Rule 7 committee	7 9?	Add flexibility in notice procedures to achieve actual notice.	Add flexibility to achieve actual notice	Anonymous
18	Rule 7 committee	7	Rule 7 is needlessly complex and requires parties to frequently pay 2 servers. If personal service is not accomplished, many (or most) sheriffs will either not serve at all or will only perform the primary substitute service but not the required 1st class mailing. There's no reason the party can't put a copy of the documents in the mail without having to find or pay a second qualified server to drop an envelope in the mail. The rule would benefit from far fewer exceptions and special party designations. The new email service option is great, but includes repetitive and conflicting thresholds and should be treated as just another substitute service method.	Rule 7 needlessly complex. Shouldn't have to find second server for follow-up mailing after substitute or office service. Fewer exceptions and special party designations. E-mail service great but should just be another alternative service method without repetitive/conflicting thresholds.	Anonymous
19	Rule 7 committee	7	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.	Streamline Rule 7. With e-court, confusion on means of service and timelines for each	Anonymous
20	Rule 7 committee	7 F(3)	Adopt waiver of service rules similar to FRCP 4(d)	Have FRCP 4(d) waiver of service provision	Scott Gowgill
15	Rule 23 committee	23 A 19	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.	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
26	Rule 27 committee	27 B(1) through (4)	Edit ORCP 27 to make it more clear - that an unemancipated minor must always have a GAL, and who should be appointing the GAL	Make mandatory that minor must have GAL, who appoints	Anonymous
1	No committee	36 C	I would like to see Oregon adopt the "proportionality" language from the FRCP that cover the scope of discovery.	Adopt FRCP proportionality language	Matthew Colley
2	No committee	Discovery	Allow interrogatories similar to FRCP 33.	Provide for interrogatories like FRCP 33	Scott Gowgill
3	No committee	Discovery	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.	Add smart interrogatories	Michael Stevens
4	No committee	Discovery	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.	Federalize rules on expert discovery to promote settlement and just trials	James Rice
5	No committee	Discovery	Very limited interrogatories to parties.	Very limited interrogatories	Michael Hallas
6	No committee	36 C	ORCP 36 should add language requiring proportionality in discovery, similar to FRCP	Require proportionality in discovery, like FRCP	Anonymous
7	No committee	36 C	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.	Allow incorporating proportionality in civil discovery	Anonymous
8	No committee	39 C(6)	Organizational depositions under 39(c)(6) need less draconian sanctions.	Less draconian sanctions for organizational depositions	Anonymous
9	No committee	43 B(2)	ORCP 43 should have a requirement that production be made forthwith--there is too much dinking around.	Require production of documents forthwith	Anonymous

	Result	Rule(s)	Suggestion	Staff Summary of Comment	Suggestion By
10	No committee	43 B(2) Discovery	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.	Align discovery rules with FRCP - strict review of objections and produce documents contemporaneously with response	Anonymous
11	No committee - addressed last biennium	7 D(6)	Will anything be done to address service by email?	Will anything be done to address service by e-mail?	Cynthia Domas
12	No committee	44	ORCP 44 needs amended to allow discovery/inquiry into plaintiffs' conversations with their treating providers in personal injury/medical malpractice cases.	Allow discovery of plaintiffs' conversations with treating healthcare providers in PI and medical malpractice cases	Anonymous
13	No committee - addressed last biennium	7 D(6)	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.	Allow service by social media, e-mail, etc., not just newspapers.	Anonymous
14	No committee - addressed last biennium	15 A	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?	10 days to respond to "motion" in conflict with UTCR's 14 days, so eliminate the second sentence	Anonymous
21	No committee	1 E Declarations	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.	Require personal knowledge, not knowledge and belief, like OEC 602	Charles Markley
22	No committee	1 A	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.	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
23	No committee	9	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.	How to serve opposing party in (Q)DRO cases, sometimes years after divorce judgment	Stacey Smith
24	No committee	10 B	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.	Additional time to respond - eliminate for e-mail, increase to five (5) days for USPS	Paul Sundermier
25	No committee	22 C	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.	Allow third-party claims to be filed more than 90 days after service if approved by all parties <u>or</u> court	Dan Keppler
28	No committee	32 H & 32 I	ORCP 32H and I should be eliminated. At the least, 32I should have a strict timeline for compliance.	Eliminate prior demand requirement for money damages class actions. Eliminate or strict timelines for ID of and notice to class members requirement	Anonymous
30	No committee	36 B(2)	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.	\$10K penalty for failure to produce requested insurance information	Anonymous
31	No committee	41 C(1) and 41 C(2)	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.	Effect of errors and irregularities in deposition questions and objections thereto, vague and unhelpful	Peter Bunch



	Result	Rule(s)	Suggestion	Staff Summary of Comment	Suggestion By
32	No committee	43 B(2)	Parties should provide a date no more than 30 days after the deadline to respond to RFPs by which they will provide actual documents.	Provide date no more than 30 days after deadline to produce actual documents	Sonia Montalbano
33	No committee	45 B 9 C	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.	Add reference in Rule 45 B to remind responding party of need to file responses	Anonymous
34	No committee	46	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.	Attorney fees mandatory on first motion to compel	Mary Johnson
35	No committee	46	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.	Motions to compel should provide for automatic sanctions for failure to provide discovery	Anonymous
36	No committee	46 A	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.	Monetary penalty if fail to produce documents 15 days prior to hearing	Sonia Montalbano
37	No committee	Discovery	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.	Add interrogatories to discovery tools. Allow discovery of experts' reports.	Barry Siegel
38	No committee	47	Get rid of Motions for Summary Judgment	Eliminate motions for summary judgment	Anonymous
39	No committee	47 C	amend setting motions for summary judgment where opposing counsel refuses or unnecessarily delays in agreeing to a date.	Amend setting Rule 47 motions where non movant causes delays	Anonymous
40	No committee	47 E	ORCP 47E needs work. First, it should not be made clear that it is not applicable to pro se litigants who are not admitted to the Bar and who are not subject to discipline. Second, it needs further refinement because there can be differences of opinion as to the scope of permissible expert testimony and whether such testimony relates to the summary judgment issue in play.	Section E needs work. Allow expert affidavits only for attorneys. Confusion as to scope of expert testimony and whether relates to the issue before the court on Rule 47 motion.	Stephen McCarthy
41	No committee	(continued)	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		

	Result	Rule(s)	Suggestion	Staff Summary of Comment	Suggestion By
	No committee	47 E	fact based and expert testimony seemingly would have had no relevance, and the plaintiff did not even attempt at trial to prove those claims using lay testimony) but opposing counsel claimed this was protected by the work product doctrine and the attorney client privilege. I argued this could not be privileged because the lawyer had previously represented that the expert would be testifying at trial so this could not have been expected to remain confidential for all times, and I also argued that the work product doctrine should not apply with respect to this particular issue after trial. The trial judge denied the motion to compel on the grounds that the work product doctrine and the attorney-client privilege prohibited disclosure, and my client decided not to appeal. I suggest that the CCP consider modifying the rule to make clear that in the event the expert does not testify at trial that the opinion is not privileged or otherwise protected from disclosure, and that the attorney would also need to explain why the attorney changed his/her mind to go with a different theory at trial than the attorney was using at the summary judgment stage. Otherwise, an attorney could effectively use an ORCP 47E affidavit in bad faith to avoid summary judgment even without having an expert, knowing that in the unlikely event that the case went to trial the lawyer could avoid sanctions for the bad faith conduct by invoking the work product doctrine or the attorney-client privilege and there would be no way to prove that the lawyer did not have an expert. This is particularly important considering that the Oregon Supreme Court in <i>Two v. Fujitec Am., Inc.</i> , 355 Or. 319 n.5 (2014) contemplated attorneys using an ORCP 47E affidavit at the MSJ stage but not using an expert at trial ("Therefore, a party may submit a ORCP 47 E affidavit on summary judgment but rely on non-expert evidence at trial, contending that expert testimony is unnecessary. In that circumstance, at least, and perhaps in others, the fact that a party submitted an ORCP 47 E affidavit but did not call an expert to testify will not necessarily establish that the affidavit was not made in good faith"). I am not suggesting that ORCP 47E should be abolished or that pretrial expert testimony be allowed - the expert affidavit rule is the result of an informed policy decision to decrease the cost of litigation by not having expensive expert discovery - but considering how ripe the rule is for potential abuse by an unscrupulous attorney who uses an expert affidavit without actually having an expert and then hides that misconduct by invoking work product or attorney-client privilege, I would think eliminating the possibility of invoking work product or privilege would provide more fairness and accountability to the rule.	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	No committee	55	Clarify alternatives for service of subpoenas.	Clarify alternatives for service of subpoenas (Done?)	Anonymous
43	No committee	62 C 27 E, F	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.	Clarify procedures for trust and estate cases. Timelines can result in harm to incapacitated person.	Anonymous
44	No committee	69	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.	Unclear when in default, after deadline has passed or after court order	Anonymous
45	No committee	79 A(1)(a) and 79 A(1)(b)	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.	Use federal standard for preliminary injunctions or at least refine to one Oregon standard	Rachel Lee
46	No committee	Discovery	Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.	Too many litigators game the discovery rules.	Paul Sundermier
48	No committee	General	ORCP's should disincentivize obstructive behavior by lawyers and clients.	Disincentivize obstructive behavior	Anonymous
49	No committee	General	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.	Since some judges expect pro se litigants to know the ORCP, clarify them better	Anonymous
50	No committee	General	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.	Clearer and more organized rules	Anonymous
51	No committee	General	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	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

	Result	Rule(s)	Suggestion	Staff Summary of Comment	Suggestion By
52	No committee	General	ORCPs should generally be more fair to unrepresented/self-represented parties.	Make ORCP more fair to pro se litigants	Anonymous
53	No committee	General ORS 36.400 - .425	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.	Mandatory expedited jury trial procedures for civil cases less than a specified amount -- limited discovery Eliminate court-annexed mandatory arbitration	Anonymous
54	No committee	Probate, protective proceedings & trusts	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.	Unclear when ORCP apply and when statutory provisions apply - ORCP only when contested?	Heather Gilmore
55	No committee	Protective orders	create a form for protective orders. feds have them.	Create a form for protective orders, feds have them	Anonymous
56	No committee	Trial readiness	Certificates of readiness are a waste of time in dependency law	Certificates are a waste of time in dependency cases	Anonymous
57	No committee	UTCR 5.060	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.	Require each judge to allocate time for ex parte to get orders/judgments signed, resolve scheduling issues	John Peterson
58	No committee	UTCR Chapter 21	Simplify the calculation of time and update for electronic filing	Simplify calculations of time and update for e-filing	Paul Sundermie

**COCP Rule 15 Committee Report**  
**October 23, 2019**

Committee Members Present: Barry J. Goehler, Shenoa L. Payne (Chair), Hon. Mark Peterson,

Not Present: Hon. Norman R. Hill, Hon. Leslie M. Roberts

*Rule 15 (as amended last biennium) is attached.*

**Issue:** At the September Council meeting, Judge Peterson noted that he believed that a question exists as to the scope of Rule 15 D and the rule is unclear. Judge Peterson's concern is that many judges believe that Rule 15 D allows them discretion to extend any timeline, when that is not the case – it is limited only to motions and pleadings. *See Ornduff v. Hobbs*, 273 Or App 169, 176 (2015) (determining that attorney fee statement was subject to Rule 15 D because petition for attorney fees was a "pleading"). Also, some motions simply are not subject to the rule – for example, motions for new trials and motions notwithstanding the verdict.

Other members of the council seemed to believe that the timelines not subject to Rule 15 are not procedural but, rather, jurisdictional or otherwise determined by statute. Thus, a fix to the rule likely is not necessary. These council members expressed the opinion that members of the bar need to be aware of statutory deadlines or caselaw in addition to the statutory rules.

**The consensus of the committee is that Rule 15 needs to be amended or clarified in some manner.**

Judge Peterson initially noted that he would prefer putting all of the substantive (statutory) exceptions in Rule 15 D, but the committee agreed that doing so simply isn't practical. The committee agreed that some language that would alert the bench and bar that the rule doesn't cover *all* motions and pleadings would be helpful. Shenoa suggested some preface language to the rule along the lines of "Unless otherwise governed by statute or other rule," that would provide a hint that there are some aspects not covered by the rule, and there was agreement that language along these lines could help provide clarification.

There also was discussion about what was *missing* from the rule that likely should be added. There was some discussion about the fact that "motions" may not technically include responses or replies to motions. The committee agreed that responses and replies in motion practice are clearly procedural and should be encompassed within the rule. Thus, an amendment likely is needed to added responses and replies to motions.

A question also was raised about whether responses to discovery requests should be added, but it appears that the discovery rules already provide the ability for a judge to extend the deadlines within those rules.

## **ORCP 15. Time for filing pleadings or motions**

**A Time for filing motions and pleadings.** An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must be filed with the clerk within the time required by Rule 7 C(2) to appear and defend. If the summons is served by publication, the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.

### **B Pleading after motion.**

B(1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, that pleading must be filed within 10 days after service of the order, unless the order otherwise directs.

**C Responding to amended pleading.** A party shall respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

**D Enlarging time to plead or do other act.** The court may, in its discretion, and upon any terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited by the procedural rules, or by an order enlarge such time.

**COCF Discovery Committee Report**  
**November 7, 2019**

Committee Members Present: Barry Goehler (Chair), Meredith Holley, Ken Crowley, Jennifer Gates

Not Present: Scott O'Donnell

***Issue:*** The committee was tasked with evaluating whether a rule should be added requiring privilege logs in connection with discovery production.

**The consensus of the committee is that a rule is not warranted.**

Research revealed that there is no appellate case law in Oregon requiring or relating to privilege logs. Review of other jurisdictions did not find any rules requiring privilege logs. Cases from federal jurisdictions and Washington state courts show that privilege logs are not required, but may be helpful in many cases. In these jurisdictions, the burden is on the party claiming a privilege to prove that privilege applies. A privilege log is one useful way to meet that burden. Additionally, a court may order a party to produce a privilege log in connection with a discovery order or to facilitate *in camera* review.

In Oregon, the burden is on the party opposing a privilege, which might be a reason against imposing a privilege log requirement. It was the opinion of the committee that a privilege log could be ordered by the court in a particular case.

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***Issue:*** The committee was tasked with evaluating whether a rule should be added relating to production of a testifying expert's file.

**The consensus of the committee is that a rule is not warranted.**

Research did not find any case law addressing the production of a testifying expert's file. The understanding is that production of an expert's file is a function of cross-examination. As a result, the file is generally produced prior to when cross-examination is to take place. The view of the committee is that how and when an expert's file is produced should be handled by the trial judge, as part of managing the trial.

**CCP Summary – Rule 27 Committee Mtg  
November 6, 2019**

**Members Attending:** Judge Norby, Judge Wolf, Judge Tookey

**Absent:** Judge Peterson

**Summary:**

The impetus for formation of this committee was an anonymous suggestion presented to the CCP asking us to “[e]dit ORCP 27 to make it more clear – that an emancipated minor must always have a GAL, and who should be appointing the GAL.” [At the September council meeting Judge Peterson noted that the rule already says “shall” in ORCP 27 B (1).]

This issue was also flagged by Holly Rudolph and the Law and Policy Work Group of the OJD, which suggested that the phrase “guardian ad litem” be eliminated. (See September 14, 2019 CCP minutes, p. 24.) Judge Wolf recalled that the Council members reacted to this proposal with concern that “Guardian ad litem” as a term is broadly used in many laws and rules in every state. The Council generally disfavored a re-statement of the term, and earnestly questioned whether “Guardian ad litem” is obscure or perplexing enough to justify a rule clarification.

Judge Tookey expressed uncertainty about whether a problem exists that can and should be addressed by clarification of this term.

Judge Norby noted that a problem does exist for self-represented litigants who are unfamiliar with Latin and confused by the similarity of the terms “guardian” and “guardian ad litem.” The court probate coordinator, a non-lawyer, reports that: “I do think the guardian ad litem terminology causes a lot of confusion.” “I am coming from the probate side of things with incapacity/lacking competency. To me as a non-lawyer, the age of minority is very different from incapacity. The part of the phrase ‘for a party who lacks competence’ stands out to me... but from a lawyer’s perspective it may make sense to think that a lack of competence encompasses being a minor.” “I can also tell you that when I help filers with identify record changes it is really common to hear ‘Well, I am already his parent, so why does it matter?’ and ‘I am already his guardian, so I don’t need to file that.’ I hope you are able to create some clarity for these and other probate filings, which are increasingly being pursued by pro se parties.” She also wrote: “Guide and File forms and types of cases that are allowed through that system are expanding. I’m not sure if you are familiar with Guide and File, but it is basically an e-filing system that is free for pro se filers to use (except to pay the filing fee if any), to try to increase access to justice and the courts without someone coming to the courthouse. This type of pro se filing is increasing, and will continue to increase. We are already getting pro se identity record changes through Guide and File. Luckily, we have generic forms online for the guardian ad litem documents, and we have tried to explain what it is in the introduction to those generic forms. But it is still confusing to people.” She reports that she spends time explaining the distinction between guardians and guardians ad litem to folks frequently, but is concerned that she should not be defining legal terms for the public. She would like to refer them to a clearer rule rather than continue conversing about it herself so often.

Judge Wolf said that he also deals with identity record changes and understands the problem the probate coordinator describes.

Judge Tookey suggested that we describe the concern to the Council and gather feedback about whether a simple addition of clarifying language in ORCP 27 is a good idea to address the concern. If so, we can meet to hammer out a proposal.