

ANNOTATED AGENDA
COUNCIL ON COURT PROCEDURES

Saturday, December 14, 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 November 9, 2019, Minutes (Ms. Gates) **(ATTACHMENT A)**
 - B. Council CLE Credit (Judge Peterson) **(ATTACHMENT B)**
- III. Old Business
 - A. Follow-Up on Suggestions from Survey
 - 1. ORCP 4 (Ms. Gates)
 - 2. ORCP 31 (Judge Peterson)
 - B. Committee Reports
 - 1. ORCP 7 (Ms. Weeks)
 - 2. ORCP 15 (Ms. Payne) **(ATTACHMENT E)**
 - 3. ORCP 23 (Ms. Gates)
 - 4. ORCP 23 C/34 (Mr. Andersen) **(ATTACHMENT F)**
 - 5. ORCP 27/Guardians Ad Litem (Judge Norby) **(ATTACHMENT G)**
 - 6. ORCP 55 (Mr. O'Donnell)
 - 7. ORCP 57 (Ms. Holley)
- IV. New Business (Ms. Gates) **(ATTACHMENT C; ATTACHMENT D)**
- V. Adjournment

*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, November 9, 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.
Troy S. Bundy*
Kenneth C. Crowley
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Meredith Holley*
Drake A. Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Shenoa L. Payne
Tina Stupasky*
Hon. Douglas L. Tookey
Margurite Weeks*
Hon. John A. Wolf

Members Absent:

Hon. R. Curtis Conover
Travis Eiva
Hon. Lynn R. Nakamoto
Scott O'Donnell
Hon. Leslie Roberts
Jeffrey S. Young

Guest:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

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 7 ORCP 15 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 7 ORCP 15 ORCP 23 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 41 ORCP 1 ORCP 43 ORCP 4 ORCP 44 ORCP 9 ORCP 45 ORCP 10 ORCP 46 ORCP 15 ORCP 47 ORCP 17 ORCP 54 ORCP 22 ORCP 62 ORCP 32 ORCP 69 ORCP 36 ORCP 79 ORCP 39		

I. Call to Order

Ms. Gates called the meeting to order at 9:30 a.m.

II. Administrative Matters

A. Approval of October 12, 2019, Minutes

Ms. Nilsson explained that Judge Norby had e-mailed her with two suggestions for corrections to the October 12, 2019, minutes (Appendix A) as follows:

Page 24, paragraph 3, edit to read, “some judges enter discovery orders months before the trial starts that require expert information exchange prior to the first day of trial.”

Page 28, paragraph 1, edit to read, “a chapter on stipulations in the revised Civil Litigation CLE publication....”

Judge Peterson also suggested specifying that the CLE publication was published by the Oregon State Bar. Judge Wolf made a motion to approve the October 12, 2019, minutes with the amendments made by Judge Norby and Judge Peterson. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

B. Staff Comments

This item is carried over to the December meeting.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Ms. Gates explained that she had not yet contacted attorney Dallas DeLuca, who had made the suggestion regarding Rule 4, to get more information. This item is carried over to the December meeting.

2. ORCP 31

Judge Peterson explained that he had not yet contacted attorney Mark Cottle, who had made the suggestion regarding Rule 31, to get more information. This item is carried over to the December meeting.

B. Committee Reports

1. Discovery

Mr. Goehler explained that the committee's two tasks were to examine the issues of privilege logs and the production of expert materials. He referred the Council to the committee's report (Appendix B). He stated that he had done research on privilege logs and that he could not find a jurisdiction with a rule that requires them. He examined Ninth Circuit case law, Washington case law, and Washington rules. The federal case law and the Washington case law puts the burden for proving a privilege on the party asserting it. A privilege log is not required, but a judge can order one. The case law says that a privilege log is useful to prove the privilege.

Oregon is unique because the burden is the opposite; the burden is on the party contesting the privilege to prove that the privilege does not apply, which makes a better case for not having a privilege log than in other jurisdictions. The committee discussed this and also talked about the fact that discovery orders can require a privilege log as well as expert production. The consensus of the committee was to not create a rule dealing with privilege logs but, rather, to have the courts deal with the issue through case management.

Regarding the issue of production of the expert file, Mr. Goehler could find no case law dealing with that. He could not find a case in Oregon talking about production of an expert file, but he noted that it is something that happens commonly in practice. His understanding is that production of the expert file is a function of cross-examination, so it is produced to aid the cross-examination of the expert witness. How that is handled is a also trial management issue. The consensus of the committee was not to amend the discovery rules regarding expert files.

Mr. Goehler stated that the committee feels that the prudent thing to do is to disband the committee at this time. Council members agreed that the committee is no longer needed at this time.

2. ORCP 7

Ms. Weeks presented an informal, oral report of the committee's work thus far. Committee members reached out to various groups within the state, including the Oregon State Bar's Litigation Section and Family Law Section. The committee received some limited feedback, but not as much as they wanted. Most groups contacted were very much in support of adding a waiver provision to Rule 7

similar to that in Federal Rule of Civil Procedure (FRCP) 4 D, with the exception of the family law section. Members of that section were concerned about not wanting to add a waiver because it would add a layer of confusion to an already emotionally tense experience on the family law side. The committee decided that it should bring the feedback it had received to the Council and see whether Council members thought that it was wise for the committee to move forward and start working on an amendment to the rule, or whether more discussion was warranted about whether such an amendment is worthwhile.

With regard to the new issue raised by Aaron Crowe from Nationwide Process Service, who suggested adding the term “clerk” to the section on service upon a public body in Rule 7, Ms. Weeks stated that Mr. Young had researched the term “clerk” and why it was not included in the subsection of the rules that pertains to public bodies. He went through Council meeting minutes on the website and discovered that the term was originally in the rule but been removed because it was considered to be ambiguous. Ms. Weeks explained that the committee had discussed the level of ambiguity and whether the term could potentially be added back into that subsection to make it comport with the rest of the rules where a clerk is an acceptable service contact for service of process. She stated that the committee had determined that language such as "a clerk in the office of the attorney" would probably satisfy the request without making it too ambiguous for everybody else reading the rule.

Ms. Weeks stated that the committee should probably also have a conversation relating to waiver of service. She noted that the committee can likely have proposed language regarding adding "clerk" back into the rule by the next Council meeting.

Judge Peterson expressed surprise that the family law bar would be opposed to a waiver of service because it is a cost-saving measure and, in divorce cases, the parties are usually in agreement about the marriage needing to be dissolved. Judge Norby noted that people can file as co-petitioners and avoid service altogether. Judge Peterson asked how many divorce cases are filed by co-petitioners. Judge Norby stated that quite a few are. Judge Wolf stated that more than he would like are filed that way, and that it can lead to confusion later in the case. He stated that he assumed that the family law bar would be on board because they sometimes deal with reluctant spouses who do not want to accept service, and this might be able to persuade those reluctant parties to be more cooperative. Judge Leith noted that it might also be helpful in cases where people want to avoid the embarrassment of having someone show up to serve them at their place of work.

Mr. Crowley wondered about where the committee is considering inserting the word "clerk." Judge Leith explained that the word "clerk" would be inserted right after the word "attorney." Mr Crowley wondered who could be served in that case. Judge Wolf stated that the committee believes that the rule used to just say "or clerk," and it was not clear whether that meant the officer's clerk or the director's clerk. He pointed out that the other parts of the rule that use the word "clerk" indicate which clerk it is. He stated that, if the Council adds the word "clerk" back into this part of the rule, it needs to specify in some fashion which clerk it is. Judge Peterson stated that the Council should recognize that some public bodies are very small and informal. Mr. Crowley noted that the other side of the coin is that some bodies are huge and a myriad of clerks.

Ms. Weeks stated that some of the people whom the committee had reached out to for feedback, especially on the waiver of service issue, were adamant that they

would want a 60-day extension, similar to that in FRCP 4, as the cost savings was not quite as much of an impetus as the extra time was. The committee had some questions about how that would fit into current court calendars and how that might change things on the circuit court side. She noted that this was really the only other major comment that the committee received.

Judge Peterson observed that there is both a carrot and a stick here; you can bear the costs but if you accept it you can get extra time. Ms. Stupasky stated that she does not understand why extra time to respond would be necessary just because someone is accepting service. Ms. Gates agreed that it seems like a really big carrot. Judge Wolf stated that the committee is aware that this is an issue. The federal rule gives 60 days from the date it is mailed, so the 60 days does not start with acceptance but, rather, with mailing. So it may not really be an extension of 60 days, since there may be a delay in the mail or in someone deciding whether to sign an acceptance of service. He expressed concern about running into the disposition standards. Mr. Goehler stated that his experience with the federal rule is that it is done because the default procedures are so draconian in federal court whereas they are not in state court with notice and all that. So giving that extra time to respond in federal court makes sense because of the default rules. Judge Peterson stated that, in Oregon, a party has to give notice of intent to take a default, which is a much more civilized process. Ms. Stupasky stated that, as an attorney, one has more time than 30 days because one has to wait 30 days before giving the 10 day ORCP 69 notice, which is usually sent by mail. There is already more time to respond than there used to be.

Ms. Weeks stated that the committee will meet again and that she is hopeful that they will have draft language by December. She stated that it is an issue that she, personally, would like to move forward with.

3. ORCP 15

Ms. Payne referred the Council to the committee's written report (Appendix C). She reminded the Council that, having looked at Rule 15 last biennium, it became a concern that the scope of Rule 15 D, the section that gives the court discretion to enlarge the time to plead or do other act, is not clear. That section currently gives the court discretion to allow or extend time of any pleading or motion. However, just from discussions at the September Council meeting and during the committee's meeting, it appears that some lawyers and judges think that the rule is broader than the language contained within it, and that it gives judges discretion to extend replies and responses to motions. However, the rule does not, in its express language, actually do that. The committee wanted to look at whether the rule needs some clarification in that regard, as well as whether the bench and bar, primarily younger attorneys, need notice that there are exceptions to this rule in certain statutes.

Ms. Payne explained that the committee had discussed the possibility of putting some lead-in language in the rule that does not cite specific statutes but, rather, provides an alert that, even though the rule seems broad, there are some exceptions. She suggested language such as, "Unless otherwise governed by statute or other rule...." She noted that the committee is also considering adding language regarding replies and responses to motions. She reiterated that the current rule is not clear and that it can be a trap for lawyers who are not aware how the rule really works. She stated that the committee plans to meet again before the next Council meeting and come up with proposed language for the Council to consider.

Judge Peterson noted that Mr. Goehler had pointed out that the language "any

other" in section 15 D is a little misleading. He suggested that it could also be retooled a bit. He pointed out that another concern is self-represented litigants, some of whom do try to read the ORCP, and who may not understand the unlisted exceptions in Rule 15. He stated that making the rule a little more accurate seems like a worthwhile endeavor.

Judge Leith wondered whether the language "do other act" could be removed and the current language replaced with language such as, "enlarging time to plead, move, respond, or reply." Judge Peterson stated that he had also wondered what those "other acts" were last biennium, and suggested that there might be a way to rephrase that language. He noted that the language only exists in the lead line, but it seems that it should be part of the cleanup of the rule.

Ms. Gates wondered whether the committee had looked at the history of Rule 15. Ms. Payne stated that it had not, but agreed that it is a good idea to look at the rule history any time the Council amends a rule and stated that the committee would do so. Judge Peterson stated that he had briefly looked at the history and found that much of the language was taken directly from the Oregon Revised Statutes at the time the rules were first promulgated, so many of the words were not crafted by the Council.

4. ORCP 23

Ms. Gates stated that the committee is scheduled to meet soon and will report to the Council at the December meeting.

5. ORCP 23 C/34

Mr. Andersen distributed a committee report to Council members (Appendix D). He stated that the committee had met and discussed the issue at hand, which is the situation in which a plaintiff files a lawsuit within the statute of limitations, the papers go out to be served, and the process server discovers that the defendant is deceased. The plaintiff then wants to amend the complaint to name the personal representative in place of the deceased person; however, there are two decisions by the Oregon Court of Appeals that state that the deceased person is a non-entity so the estate of the deceased person cannot be substituted because it is an entirely new party that does not relate back. Mr. Andersen explained that, last biennium, a committee had attempted to solve the problem by an amendment to Rule 23 and Rule 34, but the consensus of the Council was that this would be a change of substantive law and it was suggested that recommending a statutory change to the Legislature to solve the problem would be more appropriate.

Mr. Andersen stated that the committee had looked at various places where a legislative fix could be made, and they suggest adding the following language at the end of ORS 12.190(2):

However, if the plaintiff does not know of the death of the defendant until after filing the lawsuit, then the plaintiff shall have 60 days from the date of filing to substitute a personal representative for the decedent, and shall have 60 days after such substitution to complete service of summons upon the personal representative, as provided by ORS 12.020(2).

Ms. Payne asked whether the substitution of a party relates back so that there would not be statute of limitations problems. Mr. Andersen stated that a

substitution does not, but a misnomer does. If you sue Jack Jones and his real name is John Jones, and he knows of the case even if he has not been served, that is a misnomer that can be corrected after the statute of limitations that will relate back to the filing. Ms. Payne explained that her concern is that the 60-day substitution does not solve the problem if a plaintiff sued a dead person and the statute of limitations has run. Mr. Andersen stated that he saw Ms. Payne's point. Mr. O'Donnell agreed that it does not solve the relation back issue.

Mr. Goehler pointed out that the case law says that suing a non-entity is a non-case because, if the case is already dead, a new person cannot be substituted into a dead case. Judge Hill noted that this is limited to when the plaintiff does not know of the death of the party, and this is a relatively small extension in just a relatively small number of cases. He suggested that it might be cleaner to write a rule that applies whether the plaintiff knew of the death of the defendant or not. He noted that it would extend the statute of limitations but, since the death adds a level of complexity to the case, there is a fairness to giving a little more time, and it is cleaner because the parties would not be arguing about whether the plaintiff knew or should have known that the defendant was dead. Ms. Gates asked whether that is what the original language in section 2 was trying to do. Ms. Payne stated that she did not believe that section 2 contemplated that the year would run before the filing. Mr. Crowley observed that section 1 and section 2 kind of mirror each other; however, section 2 does not accomplish the whole goal.

Mr. O'Donnell stated that having a contested issue about whether a plaintiff knew or should have known that someone died would be a difficult process to have adjudicated. Mr. Andersen pointed out that there is absolutely no practical way to protect against this issue. Judge Leith asked whether there is some possibility in some cases that this new language would unintentionally shorten the extended

period provided by the first sentence of section (2), since the first sentence gives a whole year but the new language gives just 120 days total. Ms. Payne suggested adding a "whichever period is longer" clause and making sure that the relation back issue is solid. Judge Wolf opined that the relation back needs to be expressed instead of a reference back to ORS 12.020(2). He stated that it is not clear what the reference back does when there is a case that was not a case that someone is somehow relating back.

Mr. Andersen read the language of ORS 12.020(2):

If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed.

Ms. Payne opined that ORS 12.020(2) does not provide for relation back against a deceased party. Judge Peterson pointed out that, if the right person has been sued but service has not been completed, the case can be filed; however, if the right person was not originally sued, he does not believe it solves the problem. Judge Wolf stated that any new language has to somehow refer back to the original errant service date.

Judge Leith stated that he believes that the Legislature will decide whether they want to do something about the issue that the Council presents to it and, if so, they will send the issue to Legislative Counsel, which prefers concepts over language. He suggested that perhaps the committee needs to explain the concept

in the letter to the Legislature, rather than attempting to craft language. Judge Peterson agreed that Legislative Counsel has its own way of doing things. However, he stated that having this kind of discussion about language and where it might fit into the statute can be helpful in formulating exactly how to express the issue to the Legislature. Judge Norby asked whether the Council has ever sent such a suggestion to the Legislature before. Judge Peterson stated that it had, and that the Legislature had acted on the suggestion.

Mr. Andersen stated that he understands the feedback from the Council to be that substitution is a problem because one cannot substitute for a non-entity, and relation back needs to be spelled out in the statute. Judge Wolf agreed and stated that, if you relate back to the errant filing, that covers the substitution issue as well. Judge Peterson suggested that perhaps a whole new section of the statute is needed.

Mr. Crowley asked whether this would basically just extending the statute of limitations 60 days if it is discovered that a person has died and a personal representative needs to be sued instead. Mr. Goehler agreed and stated that it might just be a new discovery rule that can cover it; since discovery rules are fact specific, perhaps a new discovery rule that extends the statute of limitations would work. Judge Peterson noted that he had heard some discussion that using language such as "knew or should have known" is a bad idea. It may be better to just state as an objective fact that, if the defendant is deceased, this is the new rule that is used. Judge Hill observed that the Council does not want to unnecessarily create a malpractice trap for people. If a plaintiff does not understand that they have to sue a personal representative and instead sues the dead person, they may end up in an argument about "knew or should have known." Mr. Goehler stated that it would put a level of investigation before

naming any party and it might create a level of inequity before even filing a suit. Judge Bailey noted that the flip side would be a plaintiff who really knew that the defendant was dead, and wondered whether anyone really cares. Judge Hill stated that this is his point, that creating a special category of cases where the statute of limitations has been extended because of this complexity, and adding a discovery rule might make sense, but he is not sure the juice is worth the squeezing. He stated that clarity and simplicity should weigh more heavily than going into that.

Judge Tookey also emphasized giving the Legislature a good description of what the problem is. He stated that, while it does not hurt to propose language, that is not the most important thing. Judge Norby asked whether it would be possible to include in the letter that the Council considered several approaches and landed a favorite approach. Judge Peterson suggested including by reference a final committee report that outlines the issues and why a particular method is recommended. Judge Bailey noted that the current committee report sets forth the problem very well.

Judge Hill synthesized the discussion into two analytical approaches: 1) add a discovery rule to allow it; or 2) come up with a separate procedure that creates a safe harbor. He stated that he does not know which one is best, and it may make sense for the committee to flesh that out and ultimately recommend one over the other. Judge Tookey reiterated that, when he was working for Legislative Counsel, it was always helpful to have the problem described, not so much the language. Ms. Stupasky stated that she does not understand why more information to the Legislature about what the Council considered is a problem. More information is helpful, and the Legislature can always decide what they want to do. She opined that the Council should not be afraid of putting all alternatives and language in a letter to them.

Mr. Andersen asked whether the consensus is that the committee rework the report with some proposed language without spilling too much ink on the language, or come back to the Council with another statute draft. Judge Norby asked whether the committee considered the safe harbor approach. Mr. Andersen stated that it had not. Judge Norby suggested including that in the committee's next discussion. Ms. Gates also suggested adding some of the Council's discussion to the report. Judge Peterson pointed out that sometimes concepts can be nebulous but, when he see draft language, he can see issues that are unclear or whether a proposed change may create more issues than it fixes.

Mr. Andersen stated that the committee would draft a report describing this discussion, both approaches, and another pass at the language. Mr. Crowley noted that those who brought this issue to the Council last biennium did contemplate that it would be discussed vigorously.

6. ORCP 27/Guardians Ad Litem

Judge Norby reminded the Council that it had received an anonymous suggestion to make ORCP 27 more clear that an emancipated minor must always have a guardian ad litem. The rule was also brought to the Council's attention by Holly Rudolph and the Law and Policy Workgroup of the Oregon Judicial Department (OJD), who suggested that the phrase "guardian ad litem" be eliminated because it is confusing. She stated that the committee is looking at whether the rule can and should be changed. The committee met on November 6, 2019 (Appendix E). The crux of the conversation was basically that the Council is at the crossroads of where lawyers understand clarity one way and lay people another way. There are particular rules getting flagged that highlight that conflict. She sought the input of her probate coordinator, who is not a lawyer, regarding whether she spends any

time and effort helping people understand both the term guardian ad litem and they need to use one. Her probate coordinator stated that she encounters people every week who do not understand the term, particularly in identity change cases. Her coordinator stated that she tries to point them to ORCP 27 B that says that a minor must have a guardian ad litem, but then people ask "why"?

Judge Norby stated that, in this day and age, people want to know why the rule exists and why they have to follow it. Staff people who are not lawyers are trying to explain the rules to lay people. She opined that, if the Council can elegantly, simply, and more clearly state ORCP 27 A to help lay people better understand the rule in totality, that would be a worthy pursuit. She stated that it may be possible, but that the committee did not want to make that strong suggestion before seeking the input of the Council.

Mr. Bundy stated that he is not really fond of starting a process of explaining to younger generations why things are happening. It seems to him that the courts could provide some kind of explanation sheet rather than modifying the rules so that lay people understand everything in them. Judge Tookey stated that he tends to agree with Mr. Bundy. He stated that he looked in the ORS and the phrase "guardian ad litem" appears there about 80 times and is not defined. He wondered whether there is another way to be helpful to people. Judge Norby stated that she does not believe that the Council is being asked by younger generations to do a rewrite of the whole ORCP. On the contrary, the Council is receiving questions about certain rules that are particularly time-intensive for non-lawyer court staff, and the Council is being asked to lighten their load since the Council is supposed to be good with words.

Judge Leith stated that he thinks that the rule is pretty clear. However, if it is not

clear, the most he would be comfortable adding would be a parenthetical after the term “guardian ad litem” that says something like “a guardian for purposes of the litigation” to explain it. Judge Norby stated that her probate coordinator stated that she is frequently asked why lawyers think that minors are incapacitated. People are confused by this because they feel that their children are smart and capable. Despite the fact that the Council considers this to be simple, it still needs to be explained.

Judge Hill expressed frustration with the theme of the proposed change. He stated that it seems ludicrous to try to modify well-established rules that everyone understands because someone cannot get an attorney. He stated that he has seen this happen with a whole host of things, and wondered why the trend is to try to make it so people do not need attorneys, rather than trying to get them attorneys. It would be a better system to try to allow people to get qualified representation so that these questions can be explained to them. He noted that the gist of the conversation so far has been how to make it so the rule explains what the law is so that they do not need somebody to explain what the law is. He observed that this is what lawyers have done as a profession over thousands of years. Judge Hill acknowledged that the approach is well meaning, but opined that it is going in the wrong direction.

Judge Norby noted that identity changes have been an area of increased case filings but, with the new guide and serve process that encourages people do to it themselves, the court staff is left holding the bag. She stated that it is not just a question of whether the Council can do a better job with its clarity (and she noted that even new judges do not understand guardians ad litem), but a question of overburdened court staff. She agreed that, philosophically, Judge Hill has an interesting point, but her focus is the practical one of saving court staff time and

not making court staff who are constantly cautioned that they cannot give legal advice walk a fine line in translating things that the Council refuses to translate. Judge Leith asked whether Judge Norby would want to do more than add the parenthetical he suggested. Judge Norby stated that she would like to have that conversation within the committee. She has more ideas than that, but she understands that the Council may ultimately reject those ideas. She pointed out that today is not the day to decide what to do but, rather, whether to allow the committee to go forward.

Judge Peterson pointed out that part of the problem with guide and serve is that the Oregon Judicial Department (OJD) is doing a great deal of work in terms of creating forms, but the OJD is not completely aware, particularly with regard to name and identity changes, that the fact that someone is the parent of the person who is filing does not necessarily mean that they are qualified to file the lawsuit. For example, the minor's other parent may have a very different opinion. There is a reason for the rule requiring a guardian ad litem. The forms are not draconian and mandatory. In some counties the guardian ad litem form was optional, and it should not be. Ms. Payne stated that she does not understand why anyone is still using the court system for name changes, since they can now do it directly with the Secretary of State without going through the guardian ad litem process. Judge Norby stated that she is not sure why, but many people still do use the court system.

Judge Hill stated that it makes sense for the committee to keep working on the issue. However, he is philosophically resistant to changing rules to solve problems that are educational problems and training problems for court staff and judges. He thinks that the rule is clear on its face and that there is no ambiguity. He stated that, when it tries to make changes to accomplish this objective, the Council runs

the risk of taking a clear and unambiguous rule and making it ambiguous.

Mr. Goehler noted that, as to the “why” of the rule, that is a substantive issue: the law is that minors do not have the capacity to file a lawsuit, just like they do not have the capacity to enter into a contract. The Council cannot change that, but the procedural rule just implements how minors can appear through a guardian ad litem. What the committee is discussing is purely procedural and, if the Council tries to get into the why of it, it would be putting a restatement in there, and that is not the right function of the Council.

Ms. Gates asked whether the committee can have a discussion about whether a detailed question and answer document can be prepared and attached to the guide and file forms. Judge Norby stated such question and answer documents are being created, but it is the same non-lawyer staff person doing it. Ms. Gates asked whether they can be made by lawyers. Judge Norby replied that there are no lawyers on staff. Ms. Gates opined that, if the issue is important to the Council, perhaps the Council’s time is better spent crafting such documents that the whole group supports rather than having the whole issue shut down because there is a division of philosophy on whether to change a rule. Judge Norby stated that perhaps Council members’ expectations of proposed rule changes are daunting or they believe such changes would be too cumbersome or too invasive in the clarity of the rule. She pointed out that the idea is to make the rule simpler, not more complicated, so she would appreciate the opportunity to try to present such changes.

Judge Bailey asked whether the goal is the explanation of the rule itself, or the explanation of what a guardian ad litem means, because those are two different things. A parenthetical explanation of a guardian ad litem is one thing, but

explaining that a minor by law cannot engage in these activities starts to get to the point of legal advice. Judge Norby explained that the anonymous suggestion asked for it to make clear that an emancipated minor does not need a guardian ad litem, which would seem to be a simple one-word fix. Judge Bailey asked whether that change would clarify the rule enough that the clerks would still have questions. Judge Norby noted that questions can never be eliminated; however, they can be clarified.

Ms. Gates encouraged evaluating alternative action in addition to proposing language. Judge Norby noted that committee member Judge Tookey can very well represent that alternative perspective. She stated that the committee would meet again and report back to the Council in December.

7. ORCP 55

Mr. O'Donnell stated that the committee had not yet met. He noted that the issue raised by Judge Marilyn Litzenberger regards trial subpoenas served on unrepresented people who have an objection and the process by which those people can access the court to get some sort of relief. Mr. O'Donnell noted that, when a non-party receives a subpoena, the idea of getting a lawyer may be unfair or unrealistic. He stated that he had talked to Judge Karsten Rasmussen and asked him how often the issue comes up in Lane County. Judge Rasmussen stated that he does not see it much, but there is a concern that people ignore subpoenas and the parties just live with it and do not bring it to the attention of the court. Mr. O'Donnell stated that the committee will meet soon.

Mr. O'Donnell stated that he also has some other ideas about ORCP 55 issues that he would like to raise with the committee. His experience is that a lot of people

these days are issuing subpoenas right out of the blocks as an easier method for defendants to get medical records, and there are some challenges in terms of objections and accessing the court. If it is early in a case, it is somewhat difficult to brief issues if there has been no meaningful discovery. One of his pro bono clients is often inundated with last-minute subpoenas, and the process is challenging. He does not know if any of the concepts he is concerned about would merit discussion, but he has at least one or two people in his office doing some research. Judge Norby asked whether they have the rule that the Council amended last biennium and that goes into effect in January of 2020. Mr. O'Donnell stated that he believes that they have looked at it. He stated that he will also talk more with Mr. Eiva and discuss the issues from his perspective.

Mr. O'Donnell also noted that it will be good to get the perspective of judges on the issue of lay persons accessing the court, and how often it happens. He stated that it is hard to think how the rule could be changed to address when a fact witness has a problem and needs to access the court. Mr. Andersen stated that it would be a very bad thing if people start to ignore subpoenas, so the Council should keep that in mind when attempting to craft a solution to this problem. Judge Peterson stated that it seems to him that what he heard at the last meeting is that there should be an easy threshold to make a record and that there should be some kind of record so you can find out what happened. He pointed out that, when Rule 55 was rewritten last biennium, the intention was not to change anything but, rather, to make the rule more clear. Mr Crowley stated that, as a matter of policy it is better to give easy access to the court if people have a problem, rather than having them ignore subpoenas. Judge Wolf stated that, right now, judges are just winging it. There is nothing that outlines what they are supposed to do.

Judge Hill observed that a person who receives a subpoena has two choices: either appear or file a motion to quash. Mr. Andersen pointed out that the discussion is about non-party lay persons. Mr. O'Donnell stated that the concern with these non parties is that sometimes they cannot appear and sometimes they will not appear. They could just write on a piece of paper "I move to quash," and file it, but the thinking is that some people do not understand the process very well or are overwhelmed by it. Judge Hill asked why the Council is considering changing the rule to accommodate that. Mr. Andersen stated that, to the lay person who has no stake in the litigation and has other commitment and does not know the law, it is pretty daunting. Judge Hill pointed out that it should be daunting, because it is a command from the court to appear and it is serious. Mr. Andersen raised the scenario of a witness who has a vacation out of the country planned and has to decide whether to give up their ticket and appear in court. If the only solution is to get an attorney and pay money, it tempts them to ignore the subpoena. He opined that there should be a very low threshold, perhaps even something on the subpoena that tells them what to do. Judge Bailey observed that this is potentially giving legal advice. Judge Hill again stated that the person should file a motion to quash or show up in response to a subpoena. He opined that the last thing the Council wants to do is suggest that there is a third alternative. He suggested that this would create an even greater confusion and risk that people will ignore subpoenas.

Judge Bailey asked whether timing is the issue, as in a time limit when non entities can appear, or whether providing a solution for access to the court is the issue. Mr. Andersen posited a situation where an attorney does not anticipate needing a witness, but that witness then becomes important because the other side has raised an issue that the attorney did not anticipate. The attorney calls the witness, who says they are not available, so the attorney subpoenas the witness. If the

witness is represented by an attorney, it is very simple, they file a motion to quash. But if the person is not represented by an attorney it is not as simple. He stated that we want it to be very serious so they obey but not so inaccessible that they flee. Judge Hill stated that there are already consequences for failing to respond to a subpoena, such as being found in contempt and the losing party in civil cases they can sue you for damages for not showing up. He stated that he does not see the problem other than the potential inconvenience that subpoenas sometimes raise for those who are called to testify in court.

Mr. Bundy stated that he does not know anyone who is not aware of what a subpoena is. However, if a person does not, they should call a lawyer. He stated that the rule provides for a remedy already. Mr. O'Donnell noted that, 98% of the time, that is true; however, he has seen instances where people do not plan very well and they are foisting a subpoena on someone where they should have been talking to the person beforehand. If it is a trial subpoena, where the force of law is being used on someone with no interest in the litigation, it puts them in a really unfair position. While he doubts the Council can do anything about it, he acknowledges that it is unfair.

Ms. Gates observed that the Council has given the committee a lot of feedback, including whether the problem even exists, and stated that she looks forward to their report next month.

8. ORCP 57

Judge Tookey explained that the committee had met in October. The committee's charge was to look at *State v. Curry*, 298 Or App 377 (2019) and see if it could amend ORCP 57 D(4) to help ensure that jury selection is free from discrimination,

whether explicit or implicit. He stated that the Court of Appeals decision noted that there is not a lot of guidance in the ORCP about that issue.

Justice Nakamoto was going to contact colleagues on the Washington Supreme Court and see if they have thoughts about their rule that was adopted in 2018. Judge Tookey was also going to check with a former law clerk who works in that court system to see what has happened in response to the Washington state rule and see if that provides guidance to the committee in how to deal with those suggestions. Ms. Holley stated that she is going to look at other jurisdictions as well.

Mr. O'Donnell stated that, when he recently picked a jury in Washington, the judge really emphasized issues of discrimination in the initial questioning of the panel. He noted that he was not even aware of the issue prior to that. The issue was incorporated into the introductory instructions as well, with firm and direct language about implicit bias.

Ms. Payne also suggested encouraging the Uniform Civil Jury Instructions Committee to work on an instruction regarding bias.

IV. New Business

A. Making the Rules More Accessible to Non-Lawyers

Judge Norby asked to take a straw poll of Council members regarding who feels a philosophical opposition to trying to make the rules more accessible to non-lawyers. Judge Hill and Ms. Payne stated an objection to how the question was framed. Judge Norby stated that she did not mean to make the question sound confrontational but,

rather, to try to determine how much support there is for this concept. Ms. Payne stated that she is opposed to amending the rules if they are already clear for the sole reason that self-represented litigants cannot understand them. Judge Peterson noted that, as good lawyers, it is best to take this on a case-by-case basis. He stated that there are different aspects of it, such as whether the Council should put internal references within a rule or whether the rule should be framed so that a new lawyer or a pro se litigant can understand it. He stated that he is really comfortable with making a change to a rule like Rule 15 D where a literal reading of the rule is unclear, which is one extreme. But another extreme is where lawyers understand it and the rule works well, but self represented litigants are unsure of what it means.

Mr. Crowley stated that his office probably has about 500 open cases with self-represented litigants at any one time, and he is not opposed to clarity within the ORCP. He agreed that it would make things more efficient at times, but we need to look at each rule individually and decide. Judge Bailey agreed that clarity is always good, but it should be universal clarity and not specific to make it more clear for access to justice proposes. If there is a Latin is a term that is defined nowhere, defining it works not only for non-attorneys but for attorneys. Getting back to the heretic idea of changing rules for clarity for folks when they are already clear, he agreed that it should not be done. Ms. Holley stated that, if clarifying a rule makes it more simple for everyone and more accessible for a self-represented litigant, there is no harm, but if it makes it more difficult for attorneys practicing she does not think it is necessary. Mr. Bundy agreed that, if a rule is unclear, the Council's function is to make it more clear, but it is not the Council's job to make it clear so that every lay person understands what lawyers studied in law school. He stated that there are some rules within the ORCP that are more likely to be used by lay people, but he is opposed to changing rules for the sole purpose of making them easy for lay people to understand. Mr. O'Donnell stated that his is experience with self-represented litigants is not that they do not understand the rules but, rather, that they

do not want to follow the rules. In civil cases, he is concerned about encouraging people to enter the system on their own and not have a lawyer.

Ms. Gates stated that she leans further toward supporting self-represented litigants than anyone she has heard speak. She stated that she lives in the real world where people have been saying “we need to get people lawyers” for 50 years and they still do not have them, so clearly that is not working. She prefer to do it by questions and answers and hiring people to do the explaining, but if that is not sufficient we should take steps to clarify rules. This is not a blanket statement, but there are certain instances where issues are coming up frequently and making it a lot more expensive for the represented party to deal with the non-represented party, so if that can be remedied by some slightly greater explanation in some of the rules, she would support that.

Judge Norby thanked Council members for their input.

V. Adjournment

Ms. Gates reminded the Council that the next meeting will be held on December 14, 2019, at 9:30 a.m. at the Oregon State Bar. She adjourned the meeting at 11:05 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

Council on Court Procedures MCLE Credit

2019 MCLE Rules & Regulations Regarding Council on Court Procedures

5.11 Credit for Committee and Council Service. Credit may be claimed for serving on committees that are responsible for drafting court rules or jury instructions that are designed to aid the judicial system and improve the judicial process. Examples include service on the Oregon State Bar Uniform Civil Jury Instructions Committee, Uniform Criminal Jury Instructions Committee, Oregon Council on Court Procedures, Uniform Trial Court Rules Committee, and the Federal Bar Association's Local Rules Advisory Committee.

5.200(i) Oregon Council on Court Procedures Service. Members may claim three general credits for service per year. To be eligible for credit under MCLE Rule 5.11, a member must attend at least 9 hours of regularly scheduled Council meetings during the year.



Shari Nilsson <nilsson@lclark.edu>

FW: ORCP amendments

1 message

Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us>

Sat, Nov 30, 2019 at 9:09 AM

To: Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>

Cc: Stineman Renee <renee.stineman@doj.state.or.us>

Mark and Shari,

Here is a suggestion for possible rule change from DOJ's Special Litigation Unit. The issue is whether court approval should be necessary for settlement's in potential class action litigation prior to certification of the class.

Kenneth C. Crowley

Attorney in Charge | Civil Litigation | Trial Division

Oregon Department of Justice

1162 Court Street NE

Salem, Oregon 97301-4096

503.947.4700

From: Barrett, James M. [mailto:james.barrett@ogletree.com]**Sent:** Thursday, November 21, 2019 2:12 PM**To:** Stineman Renee; Crowley Kenneth C**Subject:** RE: ORCP amendments

Ken and Renee:

Here are my thoughts, which relate to ORCP 32 D, the rule governing dismissals or compromises of class actions:

ORCP 32 D requires court approval of the voluntary dismissal of any action filed as a class action, even when the court has not made a class determination under ORCP 32 C. Further, the rule requires the court to provide notice to "some or all members of the class in such manner as the court directs." There an exception to this notice rule if the voluntary dismissal is against the class representative only and there is a showing that no compensation has passed

COCP Meeting Packet

December 14, 2019

Attachment C-1

to the class representative or his/her attorney (and that there is no promise of such compensation).

After reviewing some authorities, this rule is not as strange as I had initially thought. I now understand that, prior to 2003, the Oregon rule was generally consistent with the prevailing interpretation of what FRCP 23 required for a voluntary dismissal or settlement of class claims. But that is no longer true, and it has not been true for some time. In 2003, FRCP 23(e)(1)(A) was amended to clarify that court approval is required only for a settlement or voluntary dismissal of a certified class. See 5 J. Wm. Moore et al., *Moore's Federal Practice* § 23.160 (3d ed. 2017) (“[T]he 2003 amendments to Rule 23(e) intentionally ... limit[ed] the courts’ supervisory powers over dismissals and voluntary settlements to class actions in which a class has been certified.”); see also 7B Wright, Miller, & Kane, *Federal Practice & Procedure* § 1797 (3d ed. 2017) (“[T]he 2003 amendments make clear that Rule 23(e) only applies to the ‘claims, issues, or defenses of a certified class.’ Thus, settlements or voluntary dismissals that occur before class certification are outside the scope of subdivision (e).”). (In 2018, the rule was slightly modified to require court approval if the parties were proposing that a class be certified for purposes of settlement.)

There are justifications for keeping ORCP 32 D in its current form, just as there were justifications for the pre-2003 FRCP rule. Requiring court approval avoids putting an undue premium on early settlements and provides a disincentive for parties to collude in a way that could prejudice absent class members. On the other hand, in my view, the Oregon rule can be unduly burdensome in requiring parties to seek court approval – and also requiring courts to provide notice to “some or all members of the class” – when the parties hotly contest whether a class even exists, much less what the boundaries of that class should be. In my recent experience, for example, the plaintiff clearly could not state a class action claim, but the parties wanted to avoid expensive motion practice, and there were other non-class action claims that were the focus of the parties’ settlement. Moreover, it would be extraordinarily time consuming (and very expensive) to identify everyone who might be in a putative, disputed class.

Given that the federal courts now have had more than 15 years of experience with the 2003 amendments to FRCP 23, apparently without undue problems – or at least no problems significant enough to consider revisiting court supervision of pre-certification dismissals/settlements – I think Oregon should consider whether to bring ORCP 32 D into closer alignment with FRCP 23 on this issue. Alternatively, I think ORCP 32 D could be improved by making clear that the trial court has broader discretion than it arguably has now – specifically, that the court can decide whether notice to any class members is appropriate, not just whether notice should be provided to “some or all” of the putative class members.

Please let me know if you need anything more than this.

James M. Barrett | Shareholder | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

The KOIN Center, 222 SW Columbia Street, Suite 1500 | Portland, OR 97201 | Telephone: 503-552-2145 | Fax: 503-224-4518

james.barrett@ogletree.com | www.ogletree.com | Bio



Shari Nilsson <nilsson@lclark.edu>

FW: ORCP 58B(7)

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

Wed, Dec 4, 2019 at 3:07 PM

From: Thomas M Ryan
Sent: Wednesday, December 4, 2019 10:19 AM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: ORCP 58B(7)

Mark:

As we discussed, ORCP 58B(7), provides, in part, that closing argument may not be limited to less than 2 hours. It applies to criminal cases via ORS 136.330. See also *State v. Doern* 156 Or. App. 566 (1998).

I believe that part of the rule should be eliminated altogether or amended to 1 hour. Surely those cases deserving of longer argument should get it, I just think we can rely on judges to not unfairly restrict argument in those cases.

Thank you to you and the OCCP for your consideration of this matter.

Tom Ryan

COCF Rule 15 Committee Report
December 5, 2019 5:00 p.m.

Present: Hon. Norman R. Hill, Shenoa L. Payne (Chair), Hon. Mark Peterson,

Not present: Barry J. Goehler, Hon. Leslie M. Roberts

After the last meeting, the committee agreed that Rule 15 D needed to be amended or clarified in some manner, in particular, to expand the rule to ensure it is truly a "catchall" rule and to clarify that it included all motions practice (i.e. not only motions, but also responses and replies), and to add some sort of "disclaimer" or "notice" to alert the bench and bar that some timelines may not be extended due to case law interpreting statutes or rules as jurisdictional.

Expanding the rule to ensure it is a catchall rule:

The committee discussed the following proposed amendment:

ORCP 15. Time for filing pleadings or motions

D Enlarging time to plead or do other act. Unless prohibited by statute or other rule, [T]he court may, in its discretion, and upon any terms as may be just, allow **any pleading, [an answer or reply] to be made, or allow any [other pleading or] motion, **or response or reply to a motion**, after the time limited by the procedural rules, or by an order enlarge such time.**

The committee agreed that this amendment accomplishes the goal of expanding the rule to include all motions practice. The committee further discussed whether the rule needed further expanding to make it a catchall rule. Other areas discussed were family law petitions and responses, which the committee believed were covered either by statutes or were "pleadings" covered by this rule. The committee would like the council to weigh in to make sure that there are not areas that the committee is not thinking of.

The committee also discussed changing the language "Or do other act" in the lead line but have not yet come up with appropriate language.

Disclaimer or notice language

The committee initially discussed an amendment along the lines of "**Unless prohibited by statute or other rule . . .**"

However, during this discussion, it became clear that the committee is not in complete agreement about whether a disclaimer or notice language is appropriate.

Judge Peterson is of the position that some sort of language is necessary to put practitioners on notice that Rule 15 does not apply to all timelines in the procedural rules.

Judge Peterson suggested possibly adding language along the lines of: "Time limitations that are considered to be substantive may not be expanded or enlarged by this section."

Shenoa Payne had concerns about adding express language in the rule that really didn't change anything but could have unintended consequences. The appellate cases already hold that certain timelines in certain rules cannot be extended by Rule 15 D. Nothing we add in Rule 15 D will change that; however, if we are not careful, we could potentially create more limitations on judicial discretion. Shenoa believes attorneys have the obligation to keep updated on appellate opinions and know which rules are exempt. If it is an education issue, it is not our job to notify the bar of those rulings. Shenoa would suggest, if anything, alerting the bar through a comment to the rule and not changing the rule itself.

Judge Hill was undecided and stated that it could be a malpractice trap but adding language also could cause issues we do not intend.

The committee would like the council to weigh in on this issue.

1 **TIME FOR FILING PLEADINGS OR MOTIONS**

2 **RULE 15**

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

12 **B Pleading after motion.**

13 B(1) If the court denies a motion, any responsive pleading required must be filed within
14 10 days after service of the order, unless the order otherwise directs.

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

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

22 **D Enlarging time to plead or do other act.** *[The]* Unless prohibited by statute or other
23 rule, the court may, in its discretion, and upon any terms as may be just, allow *[an answer or*
24 *reply]* any pleading to be made, or allow any *[other pleading or]* motion, or response or reply
25 to a motion, after the time limited by the procedural rules, or by an order enlarge such time.
26

REVISED REPORT ON ORCP 23 AND 34

The Problem: Occasionally after filing a lawsuit a plaintiff learns that the defendant has died, usually discovering this fact during the 60 days allowed for service of summons under ORS 12.020 (2) when the process server finds out about the death and reports it to the plaintiff. There is no reasonable way for a plaintiff to avoid this trap, except by filing and attempting to serve well before the statute of limitations. This is not always an option, since sometimes plaintiffs come to an attorney just before the expiration of the statute and many attorneys do not know of the trap until they are caught in it.

The problem is highlighted by two decisions of the Court of Appeals. In *Wheeler v. Williams*, 136 Or. App. 1 (1995), plaintiff was injured April 3, 1991. She filed her lawsuit against the other driver, Ira. O. Williams, on March 31, 1993, not knowing that Mr. Williams had died on April 26, 1992 (11 months earlier), and that a small estate had been opened and closed shortly after his death. After the statute of limitations had passed, plaintiff attempted to substitute a personal representative for Mr. Williams's estate, claiming that this was merely an amended pleading under ORS 23C, and that the new filing should relate back to the date of the original filing. The court held that the suit against a non-entity (a deceased person) had no validity and hence the amended pleading could not relate back.

In *Worthington v. Estate of Davis*, 250 Or. App. 755 (2012), the plaintiff was injured December 10, 2007. She filed suit on December 9, 2009, not realizing that the other driver, Milton Davis, had died in September 2008, 14 months earlier. As in *Wheeler*, plaintiff attempted to substitute a personal representative in place of the decedent, claiming this was simply a correction of a name under ORCP 23C. The court distinguished between misnaming a party (a "misnomer"), which enjoys the benefit of the "relation back" doctrine, and suing the wrong party (a "misidentification"), which does not. Finding that plaintiff had sued the wrong party (a deceased person) instead of incorrectly naming an existing party, the court held that substituting the personal representative after the statute of limitations would not save the case.

When this Council studied this problem in March 2018, we agree this was a problem that needed to be solved, but felt that doing so would require a substantive change of law, and that we should recommend a change to the Legislature.

After studying the problem further, our committee recommends the following words (set forth in bold and enhanced font) be added to ORS 12.190.

ORS 12.190 Effect of death on limitations.

(1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement, an action may be commenced by the personal representative of the person after the expiration of that time, and within one year after the death of the person.

*(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person. **However, if the plaintiff does not know of the death of the defendant until after filing the lawsuit, then the plaintiff shall have 60 days from the date of filing to substitute a personal representative for the decedent, and shall have 60 days after such substitution to complete service of summons upon the personal representative, as provided by ORS 12.020(2).***

NOTE: THE COUNCIL HAD THE FOLLOWING CONCERNS WITH THE ABOVE LANGUAGE:

1. A KNOWLEDGE REQUIREMENT ("IF THE PLAINTIFF DOES NOT KNOW OF THE DEATH...") WOULD SPAWN NEEDLESS LITIGATION.
2. "RELATION BACK" UNDER ORS 12.020(2) WOULD NOT WORK SINCE THERE CANNOT BE RELATIONBACK TO A NON-ENTITY (I.E. A DECEASED PERSON).
3. LEGISLATIVE COUNCIL WILL LIKELY DO ITS OWN WORD-SMITHING, SO WE SHOULD TRY TO EXPRESS THE PROBLEM AS CLEARLY AS POSSIBLE WITHOUT DEVLING TOO DEEPLY INTO THE EXACT WORDING TO BE USED.

ORS 12.190 Effect of death on limitations.

(1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement, an action may be commenced by the personal representative of the person after the expiration of that time, and within one year after the death of the person.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person.

(3) The time to commence an action against a person described in subsection (2) is extended 60 days beyond the time otherwise limited for its commencement.

NOTE: THIS VERSION GETS RID OF ANY KNOWLEDGE REQUIREMENT AND AVOIDS ANY RELATION BACK PROBLEMS.



Shari Nilsson <nilsson@lclark.edu>

RE: Council of Court Procedures

Kelly Andersen <kelly@andersenlaw.com>

Thu, Dec 12, 2019 at 3:03 PM

To: Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us>, "Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)"

<Leslie.Roberts@ojd.state.or.us>

Cc: Shari Nilsson <nilsson@lclark.edu>

Ken,

Good suggestion. I am passing this on to Shari, but it might be too late to get it into her packet for this Saturday's meeting.

Shari,

Please see Ken's suggestion below.

Kelly L. Andersen

Andersen Morse & Linthorst

1730 E. McAndrews Road, Suite A

Medford, OR 97504

Telephone: (541) 773-7000.

Facsimile: (541) 608-0535

Web: www.andersenlaw.com

From: Crowley Kenneth C [mailto:Kenneth.C.Crowley@doj.state.or.us]**Sent:** Thursday, December 12, 2019 11:43 AMCOCOP Meeting Packet
December 14, 2019
Attachment F-4

To: Kelly Andersen; Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)

Subject: RE: Council of Court Procedures

Perhaps it would be simpler to modify section (2):

*(2) If a person against whom an action may be brought dies **within** the time limited for its commencement, **the time to commence the action against the personal representative of the deceased person shall be extended by 60 days beyond the time otherwise limited for commencement of the action.***

Kenneth C. Crowley

Oregon Department of Justice

503.947.4730

From: Kelly Andersen [mailto:kelly@andersenlaw.com]

Sent: Tuesday, December 03, 2019 1:08 PM

To: Crowley Kenneth C; Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)

Subject: Council of Court Procedures

Dear Judge Roberts and Mr. Crowley,

Please find attached my attempt at re-working the language to address the concerns raised at our last Council meeting on November 9. We need to present something of this sort at our next meeting on December 14.

Please let me know your thoughts as soon as possible. If we find we need to talk, can we do it sometime early next week?

Thanks so much.

Kelly L. Andersen

Andersen Morse & Linthorst

COCOP Meeting Packet
December 14, 2019
Attachment F-5

**CCP Summary – Rule 27 Committee Mtg
December 9, 2019**

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

Summary:

At our November CCP Meeting, the Council members appeared to remain conflicted over whether ORCP 27 should be amended to clarify the meaning of the phrase “guardian ad litem” or to clarify when appointment of one is mandatory. However, it seemed that many on the Council may not object to insertion of a brief parenthetical to describe the phrase in simple terms. The Committee met to attempt to refine such a proposal.

Judge Tookey suggested that the Committee offer the Council three options. One is the option Judge Norby prepared. The other is an option based on Judge Leith’s suggestion at the November CCP meeting. The third option is to take no action to amend ORCP 27.

First, the Committee discussed the most minor revisions proposed, including the expansion of the term “minor” to be “unemancipated minor,” and the addition of the word “Mandatory” to the lead line of Section B. Judge Peterson reported on the history of Section C, which is a more recent addition to the Rule to cover discretionary appointment of guardians ad litem. He endorsed the suggestion to add “Mandatory” to the lead line of Section B to clarify and emphasize that the appointments under that Section are required, and to illustrate the difference between Sections B and C. Judge Wolf asked Judge Peterson about the CCP’s duty with regard to lead lines in rules. Judge Peterson advised that the CCP is responsible for those components of rules as well as the text.

Judge Norby pointed out that Rule 27 is currently inaccurate because of the absence of the qualifier “unemancipated” in front of the term “minor” throughout. The Committee agreed that it would improve the rule’s accuracy to include “unemancipated” as a descriptor before “minor,” including in the lead line for Section A.

Judge Norby noted that her proposal changed the first sentence to create better parallelism in the grammar, as well as to add “unemancipated” and to include a parenthetical descriptive phrase after “guardian ad litem.” The Committee did not discuss the effort to streamline the grammar. Judges Tookey and Wolf reviewed the minutes of the November CCP meeting and noted that Judge Leith proposed the phrase “a guardian for purposes of litigation” as the parenthetical, if any, to clarify the meaning of “guardian ad litem.” They proposed that the Committee offer that option to the Council, as an alternative to Judge Norby’s proposed phrase “competent adult spokesperson.”

Judge Norby said that she spoke to Judge Leith after the November meeting and learned that his concern with her prior suggestion was that the phrase was at too high a reading level to be a useful translation of the Latin for self-represented court users. So, she drafted a new proposal that would capture the meaning of “guardian ad litem” in plain English without using advanced words. That new proposal is “competent adult spokesperson.”

The Committee expressed concern that a GAL is not exactly a “spokesperson,” and Judge Peterson suggested “representative” instead. Judge Norby worried that attorneys are often referred to as legal representatives, so that could also be confusing. Judge Peterson said that “spokesperson” makes it sound like the GAL does all the talking for the minor. Judge Norby said that the GAL does do all the talking, unless there is an attorney for the minor. People have no confusion about what attorneys do, though, they are only confused about GALs when there are no attorneys. She suggested “stand-in” but the Committee members did not prefer that word.

The Committee decided to submit both Judge Norby’s proposal, and the phrase Judge Leith suggested at the November meeting, to the CCP at the December meeting. Judge Norby lamented the unhelpfulness of defining a phrase by repeating the same word already in the phrase. If judges and attorneys with decades of experience can’t define “guardian ad litem” in plain simple English, that underscores why lay people are confused. Judge Norby said she is intrigued by the challenge to find a way to say plainly what a “guardian ad litem” is -- and how it is different from a “guardian” with more expansive powers -- because professionals with our level of experience ought to know the answer, and ought to be able to express it definitively.

Judge Peterson offered to work with Shari to format the alternative proposals for submission to the Council in December.

1 **[MINOR] UNEMANCIPATED MINORS OR INCAPACITATED PARTIES**

2 **RULE 27**

3 **A Appearance of parties by guardian or conservator or guardian ad litem.** When a
4 person who has a conservator of that person's estate or a guardian is a party to any action, the
5 person shall appear by the conservator or guardian as may be appropriate or, if the court so
6 orders, by a guardian ad litem **(a guardian for purposes of the litigation)** appointed by the
7 court in which the action is brought. The appointment of a guardian ad litem shall be pursuant
8 to this rule unless the appointment is made on the court's motion or a statute provides for a
9 procedure that varies from the procedure specified in this rule.

10 **B [Appointment] Mandatory appointment of guardian ad litem for unemancipated**
11 **minors; incapacitated or financially incapable parties.** When a minor or a person who is
12 incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to
13 an action and does not have a guardian or conservator, the person shall appear by a guardian
14 ad litem appointed by the court in which the action is brought and pursuant to this rule, as
15 follows:

16 B(1) when the plaintiff or petitioner is a minor:

17 B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

18 B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the
19 minor, or other interested person;

20 B(2) when the defendant or respondent is a minor:

21 B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within
22 the period of time specified by these rules or any other rule or statute for appearance and
23 answer after service of a summons; or

24 B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any
25 other party or of a relative or friend of the minor, or other interested person;

26 B(3) when the plaintiff or petitioner is a person who is incapacitated or financially

1 | incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
2 | the person, or other interested person; or

3 | B(4) when the defendant or respondent is a person who is incapacitated or is financially
4 | incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
5 | the person, or other interested person, filed within the period of time specified by these rules
6 | or any other rule or statute for appearance and answer after service of a summons or, if the
7 | application is not so filed, upon application of any party other than the person.

8 | **C Discretionary appointment of guardian ad litem for a party with a disability.** When a
9 | person with a disability, as defined in ORS 124.005, is a party to an action, the person may
10 | appear by a guardian ad litem appointed by the court in which the action is brought and
11 | pursuant to this rule upon motion and one or more supporting affidavits or declarations
12 | establishing that the appointment would assist the person in prosecuting or defending the
13 | action.

14 | **D Method of seeking appointment of guardian ad litem.** A person seeking appointment
15 | of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in
16 | which the guardian ad litem is sought. The motion shall be supported by one or more affidavits
17 | or declarations that contain facts sufficient to prove by a preponderance of the evidence that
18 | the party on whose behalf the motion is filed is a minor, is incapacitated or is financially
19 | incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined
20 | in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
21 | given pursuant to section E of this rule; however, the appointment shall be reviewed by the
22 | court if an objection is received as specified in subsection F(2) or F(3) of this rule.

23 | **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under
24 | section H of this rule, no later than 7 days after filing the motion for appointment of a guardian
25 | ad litem, the person filing the motion must provide notice as set forth in this section, or as
26 | provided in a modification of the notice requirements as set forth in section H of this rule.

1 Notice shall be provided by mailing to the address of each person or entity listed below, by first
2 class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of
3 notice prescribed in section F of this rule.

4 E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years
5 of age or older; to the parents of the minor; to the person or persons having custody of the
6 minor; to the person who has exercised principal responsibility for the care and custody of the
7 minor during the 60-day period before the filing of the motion; and, if the minor has no living
8 parents, to any person nominated to act as a fiduciary for the minor in a will or other written
9 instrument prepared by a parent of the minor.

10 E(2) If the party is 18 years of age or older, notice shall be given:

11 E(2)(a) to the person;

12 E(2)(b) to the spouse, parents, and adult children of the person;

13 E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or
14 persons most closely related to the person;

15 E(2)(d) to any person who is cohabiting with the person and who is interested in the
16 affairs or welfare of the person;

17 E(2)(e) to any person who has been nominated as fiduciary or appointed to act as
18 fiduciary for the person by a court of any state, any trustee for a trust established by or for the
19 person, any person appointed as a health care representative under the provisions of ORS
20 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of
21 attorney;

22 E(2)(f) if the person is receiving moneys paid or payable by the United States through the
23 Department of Veterans Affairs, to a representative of the United States Department of
24 Veterans Affairs regional office that has responsibility for the payments to the person;

25 E(2)(g) if the person is receiving moneys paid or payable for public assistance provided
26 under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a

1 representative of the department;

2 E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided
3 under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a
4 representative of the authority;

5 E(2)(i) if the person is committed to the legal and physical custody of the Department of
6 Corrections, to the Attorney General and the superintendent or other officer in charge of the
7 facility in which the person is confined;

8 E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

9 E(2)(k) to any other person that the court requires.

10 **F Contents of notice.** The notice shall contain:

11 F(1) the name, address, and telephone number of the person making the motion, and the
12 relationship of the person making the motion to the person for whom a guardian ad litem is
13 sought;

14 F(2) a statement indicating that objections to the appointment of the guardian ad litem
15 must be filed in the proceeding no later than 14 days from the date of the notice; and

16 F(3) a statement indicating that the person for whom the guardian ad litem is sought may
17 object in writing to the clerk of the court in which the matter is pending and stating the desire
18 to object.

19 **G Hearing.** As soon as practicable after any objection is filed, the court shall hold a
20 hearing at which the court will determine the merits of the objection and make any order that
21 is appropriate.

22 **H Waiver or modification of notice.** For good cause shown, the court may waive notice
23 entirely or make any other order regarding notice that is just and proper in the circumstances.

24 **I Settlement.** Except as permitted by ORS 126.725, in cases where settlement of the
25 action will result in the receipt of property or money by a party for whom a guardian ad litem
26 was appointed under section B of this rule, court approval of any settlement must be sought

1 and obtained by a conservator unless the court, for good cause shown and on any terms that
2 the court may require, expressly authorizes the guardian ad litem to enter into a settlement
3 agreement.
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1 **[MINOR] UNEMANCIPATED MINORS OR INCAPACITATED PARTIES**

2 **RULE 27**

3 **A Appearance of parties by guardian or conservator or guardian ad litem.** *[When a*
4 *person who has a conservator of that person's estate or a guardian is a party to any action, the*
5 *person shall appear by the conservator or guardian as may be appropriate or, if the court so*
6 *orders, by a guardian ad litem appointed by the court in which the action is brought.]* **When a**
7 **person who is a party to any court action has a guardian or a conservator or is an**
8 **unemancipated minor, the person shall appear in the court action through the guardian,**
9 **conservator, or a guardian ad litem (competent adult spokesperson) appointed by the court**
10 **in which the action is brought.** The appointment of a guardian ad litem shall be pursuant to this
11 rule unless the appointment is made on the court's motion or a statute provides for a
12 procedure that varies from the procedure specified in this rule.

13 **B [Appointment] Mandatory appointment of guardian ad litem for unemancipated**
14 **minors; incapacitated or financially incapable parties.** When a minor or a person who is
15 incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to
16 an action and does not have a guardian or conservator, the person shall appear by a guardian
17 ad litem appointed by the court in which the action is brought and pursuant to this rule, as
18 follows:

19 B(1) when the plaintiff or petitioner is a minor:

20 B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

21 B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the
22 minor, or other interested person;

23 B(2) when the defendant or respondent is a minor:

24 B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within
25 the period of time specified by these rules or any other rule or statute for appearance and
26 answer after service of a summons; or

1 B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any
2 other party or of a relative or friend of the minor, or other interested person;

3 B(3) when the plaintiff or petitioner is a person who is incapacitated or financially
4 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
5 the person, or other interested person; or

6 B(4) when the defendant or respondent is a person who is incapacitated or is financially
7 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
8 the person, or other interested person, filed within the period of time specified by these rules
9 or any other rule or statute for appearance and answer after service of a summons or, if the
10 application is not so filed, upon application of any party other than the person.

11 **C Discretionary appointment of guardian ad litem for a party with a disability.** When a
12 person with a disability, as defined in ORS 124.005, is a party to an action, the person may
13 appear by a guardian ad litem appointed by the court in which the action is brought and
14 pursuant to this rule upon motion and one or more supporting affidavits or declarations
15 establishing that the appointment would assist the person in prosecuting or defending the
16 action.

17 **D Method of seeking appointment of guardian ad litem.** A person seeking appointment
18 of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in
19 which the guardian ad litem is sought. The motion shall be supported by one or more affidavits
20 or declarations that contain facts sufficient to prove by a preponderance of the evidence that
21 the party on whose behalf the motion is filed is a minor, is incapacitated or is financially
22 incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined
23 in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
24 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
25 court if an objection is received as specified in subsection F(2) or F(3) of this rule.

26 **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under

1 section H of this rule, no later than 7 days after filing the motion for appointment of a guardian
2 ad litem, the person filing the motion must provide notice as set forth in this section, or as
3 provided in a modification of the notice requirements as set forth in section H of this rule.

4 Notice shall be provided by mailing to the address of each person or entity listed below, by first
5 class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of
6 notice prescribed in section F of this rule.

7 E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years
8 of age or older; to the parents of the minor; to the person or persons having custody of the
9 minor; to the person who has exercised principal responsibility for the care and custody of the
10 minor during the 60-day period before the filing of the motion; and, if the minor has no living
11 parents, to any person nominated to act as a fiduciary for the minor in a will or other written
12 instrument prepared by a parent of the minor.

13 E(2) If the party is 18 years of age or older, notice shall be given:

14 E(2)(a) to the person;

15 E(2)(b) to the spouse, parents, and adult children of the person;

16 E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or
17 persons most closely related to the person;

18 E(2)(d) to any person who is cohabiting with the person and who is interested in the
19 affairs or welfare of the person;

20 E(2)(e) to any person who has been nominated as fiduciary or appointed to act as
21 fiduciary for the person by a court of any state, any trustee for a trust established by or for the
22 person, any person appointed as a health care representative under the provisions of ORS
23 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of
24 attorney;

25 E(2)(f) if the person is receiving moneys paid or payable by the United States through the
26 Department of Veterans Affairs, to a representative of the United States Department of

1 Veterans Affairs regional office that has responsibility for the payments to the person;

2 E(2)(g) if the person is receiving moneys paid or payable for public assistance provided
3 under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a
4 representative of the department;

5 E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided
6 under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a
7 representative of the authority;

8 E(2)(i) if the person is committed to the legal and physical custody of the Department of
9 Corrections, to the Attorney General and the superintendent or other officer in charge of the
10 facility in which the person is confined;

11 E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

12 E(2)(k) to any other person that the court requires.

13 **F Contents of notice.** The notice shall contain:

14 F(1) the name, address, and telephone number of the person making the motion, and the
15 relationship of the person making the motion to the person for whom a guardian ad litem is
16 sought;

17 F(2) a statement indicating that objections to the appointment of the guardian ad litem
18 must be filed in the proceeding no later than 14 days from the date of the notice; and

19 F(3) a statement indicating that the person for whom the guardian ad litem is sought may
20 object in writing to the clerk of the court in which the matter is pending and stating the desire
21 to object.

22 **G Hearing.** As soon as practicable after any objection is filed, the court shall hold a
23 hearing at which the court will determine the merits of the objection and make any order that
24 is appropriate.

25 **H Waiver or modification of notice.** For good cause shown, the court may waive notice
26 entirely or make any other order regarding notice that is just and proper in the circumstances.

1 **I Settlement.** Except as permitted by ORS 126.725, in cases where settlement of the
2 action will result in the receipt of property or money by a party for whom a guardian ad litem
3 was appointed under section B of this rule, court approval of any settlement must be sought
4 and obtained by a conservator unless the court, for good cause shown and on any terms that
5 the court may require, expressly authorizes the guardian ad litem to enter into a settlement
6 agreement.