

ANNOTATED AGENDA
COUNCIL ON COURT PROCEDURES

Saturday, February 8, 2020, 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 January 11, 2020, Minutes (Ms. Gates) **(ATTACHMENT A)**
- III. Old Business
 - A. Follow-Up on Suggestions from Survey
 - 1. ORCP 4 (Ms. Gates)
 - B. Committee Reports
 - 1. ORCP 7 (Ms. Weeks)
 - 2. ORCP 15 (Ms. Payne) **(ATTACHMENT B)**
 - 3. ORCP 23 (Ms. Gates)
 - 4. ORCP 23 C/34 (Mr. Andersen) **(ATTACHMENT C)**
 - 5. ORCP 27/Guardians Ad Litem (Judge Norby) **(ATTACHMENT D)**
 - 6. ORCP 31 (Mr. Goehler)
 - 7. ORCP 32 (Mr. Crowley)
 - 8. ORCP 55 (Mr. O'Donnell)
 - 9. ORCP 57 (Ms. Holley)
- IV. New Business (Ms. Gates)
- 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, January 11, 2020, 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*
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
Barry J. Goehler
Drake A. Hood
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby*
Scott O'Donnell
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky*
Hon. Douglas L. Tookey
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Jennifer Gates
Hon. Norman R. Hill
Meredith Holley
Hon. David E. Leith
Hon. Thomas A. McHill
Margurite Weeks

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
ORCP 15 ORCP 23 C/34 ORCP 27 ORCP 31 ORCP 32 ORCP 57	Discovery ORCP 7 ORCP 15 ORCP 23 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 9 ORCP 10 ORCP 17 ORCP 22 ORCP 36 ORCP 39 ORCP 41	ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 62 ORCP 69 ORCP 79	

I. Call to Order

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

II. Administrative Matters

A. Approval of December 14, 2019, Minutes

Mr. Crowley asked if anyone had corrections or changes to the draft December 14, 2019, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Judge Bailey moved to approve the December 14, 2019, minutes; Judge Wolf seconded the motion, which was approved unanimously by voice vote.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Judge Peterson stated that he was aware that Ms. Gates had called attorney Dallas DeLuca for more information on his comment regarding Rule 4. Mr. DeLuca stated that he could not recall the specifics of his comment. Mr. DeLuca was going to think about Rule 4 further and let the Council know of any specific suggestions for improvement.

2. ORCP 31

Judge Peterson informed the Council that he had successfully communicated with attorney Mark Cottle, who had raised concerns regarding ORCP 31 (Appendix B), Oregon's interpleader rule. Mr. Cottle's situation was that his client, an elderly person receiving Social Security Income (SSI), had money deposited into his bank account through fraud and was going to lose his SSI benefits because the wrongful deposits placed him over the asset limit. His client deposited money representing the wrongful deposits into court, but his client was not the plaintiff. Ms. Payne stated that she was confused as to the details and wondered whether his client was the defendant because someone interpleaded them in.

Judge Peterson stated that he had compared Rule 31 to Federal Rule of Civil Procedure (FRCP) 22 on interpleader, which is short and succinct. Unlike the federal rule, Oregon's rule also allows the interpleading party to get out of the case, and provides for attorney fees for the interpleading plaintiff as well. Judge Peterson stated that he did not have an opinion on whether or not it should. He

noted that, while Oregon's rule does allow interpleader to be used by both plaintiffs and defendants, it gives procedural advantages to plaintiffs that are not provided to defendants.

Mr. Goehler also expressed confusion. He stated that the rule refers to the plaintiff as the interpleading party who files the complaint in interpleader. He noted that he has used the interpleader rule in the insurance coverage context where there is one policy with multiple claimants, and his insurance client is paying out the entire policy limit but does not know who is the correct claimant, so he puts the funds into the court as the plaintiff and serves all of the main claimants and moves to get out of the case. He stated that the plaintiff in interpleader is always the person with the bucket of money. Judge Roberts posited a situation where a potential claimant sues an insurance company by counterclaim, thereby making the claimant the counterclaim plaintiff. She stated that the attorney fee provision bothers her because the right to attorney fees is substantive. It is also bothersome because there are circumstances where a party might interplead, but that party might not be blameless. However, the attorney fee provision puts them in a position to get attorney fees because they received money they knew was not theirs and decided to lie low until they were caught. This is unfair. Judge Roberts opined that the Council should not be casual about saying that the plaintiff is always entitled to attorney fees when a plaintiff might not have taken the initiative they should have. She stated that it seems that there should at least be some discretion as to whether that is appropriate.

Judge Peterson observed that the rule says "shall," which seems a little odd. He stated that it seems troubling that a party would be awarded attorney fees, even if that party is not blameless. However, in this case, the elderly person appeared to be blameless. Ms. Payne pointed out that it appears that the rule did not prohibit Mr. Cottle's client from getting fees. Judge Roberts agreed and stated that the court seems to have dealt with it as if he were the plaintiff. Mr. Andersen stated that he could not think of a situation in which anyone interpleads other than a plaintiff who has money that does not belong to them and wants to turn it in to the court. Mr. Goehler noted that the attorney fee provision is nice because, since the attorney fees and costs come out of the funds deposited with the court, and it is a dwindling pie, the longer the plaintiff stays in, the smaller the portion of pie will be left for the claimants. Thus, it provides incentive for other parties to not oppose the removal of the plaintiff from the case and to focus on dealing with the funds.

Mr. Goehler explained that, as a defense lawyer, he has encountered situations where the plaintiff sues his client but lien holders or the Department of Human Services are also involved. When the plaintiff receives an award, his client deposits

funds with the court and walks away. This is not an interpleader; it is a deposit of judgment funds, so that the plaintiff and whoever is claiming a stake in the money can deal with it with the court.

Judge Peterson observed that Rule 31 does make interpleader available for plaintiffs and defendants. However, he pointed out that the last statement in section B is, "Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto." It says "the plaintiff," but not "the defendant." He stated that it seems like blameless defendants and even less blameless defendants should be allowed to get out of the case if they take all of the money and deposit it. Mr. Young asked when a defendant would have blame in that situation, since the whole idea is that they are depositing the money so that people who have some kind of right, title, or interest in the money can appear and litigate their respective claims. If one does not have an interest, one should not appear. If the Council starts opening up attorney fees to defendants, how is the court going to determine which defendant has more of an ability to recover attorney fees than another defendant who is trying to assert a claim?

Judge Peterson noted that Judge Roberts has made the point that adding attorney fees for defendants may be beyond the Council's purview. However, he reiterated that the rule currently seems to limit the right to dismissal from the case to the plaintiff. He wondered whether defendants who are blameless and have deposited money into the court should be allowed to be dismissed because they do not have an interest in the case. Mr. Andersen asked when the defendant is ever going to be the one coming forward with the money. Judge Peterson stated that it would be with a counterclaim or a cross-claim. Mr. Goehler stated that he does not believe that Mr. Cottle was in an interpleader situation but, rather, a liability or some other situation. The situation he envisions is one where a plaintiff has claims from multiple claimants and interpleads the money, and one of the defendants has claims owed to one of the other defendants and wants to get out of the case, so they dump more money into the interpleader fund. So, it is only dealing with an interpleader action where the defendant would be one of the prospective claimants to the fund.

Judge Peterson posited a situation where an elderly person on SSI had money deposited into their account that came from five victims of fraud. If one or more victims sues the elderly person, the elderly person might wish to respond by interpleader. Mr. Goehler stated that you could confess judgment or file a separate interpleader action within that action. Judge Roberts noted that the person would still be the defendant. Mr. Goehler suggested that the person would be the plaintiff in a separate interpleader action. Judge Peterson pointed out that

the rule states that one can file a cross-claim or counterclaim in interpleader. Mr. Goehler countered that it has to be an interpleader action. If it is a regular liability or fraud case, it would not be an interpleader suit. He stated that this is a really narrow issue to a particular type of action. Mr. Andersen agreed that the plaintiff is always the one who deposits the money into the court.

Mr. Eiva discussed a situation in his practice that involved a denial of life insurance benefits. The insurance company ultimately decided they did not know who to give the benefits to, so they interpleaded the money while Mr. Eiva was preparing to file a breach of denial of insurance benefits case with the right to attorney fees in favor of his client, their beneficiary. The insurance company interpleaded the money in and, all of a sudden, the longer he kept the insurance company in with his counterclaim, the more likely it would be that his client would have to pay their attorney fees out of the insurance benefits. Mr. Eiva expressed frustration that the insurance company declined to do its job by figuring out who was the true beneficiary. He was entitled to attorney fees, but the interpleader got in the way of that. Rather than do their job, the insurance company got their attorney fees out of the policy and shrank the amount of funds available. Mr. Goehler asked what an insurance company should do if there are three or four other claimants, all making multiple claims against them. Mr. Eiva stated that perhaps they should interplead in that case, but stated that he did not believe that an insurance company should get to take money out of the pool because they are supposed to do their job and identify the appropriate beneficiary. Judge Roberts agreed that this is kind of troubling. She noted that, if the insurance company only had one claimant and that claimant sued and won, that single claimant would get attorney fees. She wondered why it should be different if there are multiple claimants. Judge Bailey pointed out that Mr. Eiva could have also sued the insurance company on a breach of contract on the same theory and, if he did, he would get to put the money back into the pie under the attorney fees provision.

Mr. Crowley asked if the Council wanted to examine the issue further. Judge Peterson stated that it seems like Mr. Goehler is suggesting that a defendant can only be involved if it is an existing interpleader action or if the defendant files a separate interpleader action; however, he believes that both the FRCP 22 and ORCP 31 A indicate that a defendant can transform the case into an interpleader action. Mr. Andersen stated that it is a separate action. Judge Peterson responded that the rule says that it can be done as a counterclaim. Judge Wolf quoted the rule: "A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." Mr. Goehler stated that this would not be an interpleader but, rather, a confession of judgment.

Judge Peterson posited that it appears that, if a defendant gets sued, they could file an interpleader counterclaim. Mr. Goehler stated that this would not be an interpleader but, rather, a confession of judgment and deposit the funds with the court. Judge Wolf pointed out that a defendant would be saying they owe the money to someone, maybe the plaintiff or maybe not, and that is not a confession of judgment. Mr. Goehler stated that, if it were not an interpleader action, the defendant that has multiple potential claimants within that action can confess judgment and deposit money with the court and say, "you all figure it out." So that does not have an attorney fee remedy as part of it because it is not an interpleader. It is only when they are within the interpleader action and there are claims between defendants that one of those defendants can say "I want out of this, I owe somebody this," and cross-claim and deposit the money. Judge Peterson questioned whether a defendant can confess judgment to the claim but not to any one defendant and assume the court will figure out which defendant you are confessing judgment to. It seems to him that this is interpleader. Mr. Goehler again asserted that it is not an action in interpleader. In Mr. Eiva's situation, if he had sued the insurance company first and the other claimants joined the lawsuit or a separate lawsuit was joined, the insurance company could confess judgment to both of them and deposit the money with the court and be able to walk away. It would not be an interpleader and they would not get attorney fees; they would be saying, "Look, we are liable here, but we are only liable to the extent of our obligation and we do not know who the correct claimant is."

Judge Roberts asked whether Mr. Goehler was stating that a defendant can only cross-claim for interpleader if the case has been initiated as an interpleader. Mr. Goehler stated that this is his understanding. Judge Roberts stated that this is not how she reads the rule, which says, "A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." She stated that it is the multiple liability that allows the defendant to utilize interpleader, not the fact that an interpleader action has already been filed by someone else. Mr. Goehler stated that the context of the rule is interpleader so, because the rule previously talks about a plaintiff that initiates an interpleader, the only defendant it can be talking about in the context of the rule is the interpleader. Judge Roberts disagreed. Judge Bailey stated that, once an interpleader is filed and the filer says, "Here is the money, you guys go figure it out," that person is now the plaintiff in that scenario in section B for the purposes of the interpleader. So that is why the plaintiff can get money if they prevail. A person could be a defendant in the case itself, have liability, file the interpleader and then become the plaintiff for the purposes of the interpleader. The person who files the interpleader will always be the plaintiff.

Mr. Andersen stated that he could not find any cases interpreting Rule 31. To him, the rule means that the defendant can obtain funds deposited into court by the plaintiff. Judge Roberts opined that it means that a defendant can create an interpleader action by cross-claim or counterclaim because what is similar is the potential multiple and conflicting liability that is described above. She stated that she would think that it would very typically be a defensive thing. For example, if a defendant were sued by one claimant but, before the case could be settled informally, another potential claimant sued the defendant on the same claim, the defendant would now want to change that into an interpleader because there is now possible liability to multiple and conflicting claimants, so now the defendant obtains that same relief by filing a counterclaim in interpleader and joining the other known claimants. In the overall suit the defendant is the defendant, but the defendant is the plaintiff for the purpose of the interpleader.

Judge Peterson pointed out that FRCP 22(a)(2) states, "By a Defendant. A defendant exposed to similar liability may seek interpleader through a cross-claim or counterclaim." A defendant does not have to confess judgment but, rather, can use interpleader and become a counter plaintiff in the case. Mr. Hood stated that, if anything, maybe a clarification is needed to say that this is what it means to be an interpleader plaintiff. Judge Peterson stated that perhaps the rule could be changed to allow the counter-plaintiff to get discharged, but perhaps it is clear enough and perhaps that is the way it got worked out in Mr. Cottle's case.

Mr. Crowley asked if the Council had interest in exploring the issue further. Judge Roberts suggested that a committee be formed. Mr. Goehler, Mr. Eiva, and Justice Nakamoto volunteered to serve on the committee. Ms. Payne asked for clarification about what the committee would be exploring. She observed that, if it is giving another party attorney fees, that would be a substantive change. Mr. Eiva stated that he was thinking about exploring whether the court should have discretion in awarding fees to the interpleading plaintiff. Mr. Goehler stated that it is a research project. He noted that there is not a lot of Oregon case law on interpleader and suggested that the committee could look at federal cases and see how they are applying the federal rule. That may be helpful for the Council to see whether we need to leave it alone or clarify some part of it. Judge Peterson stated that, rather than mandating fees or making them discretionary, it would be helpful to make sure that the procedures are clearly even handed so that both plaintiffs and counter plaintiffs in interpleader can leave the suit and avoid additional attorney fees.

Judge Wolf noted that he did not want to add further confusion, but stated that section C does say that in any suit in interpleader filed by any party, the party filing the suit in interpleader shall be awarded reasonable attorney fees. It does not

necessarily say plaintiff, so a defendant who files in interpleader as a cross-claim might be entitled to attorney fees. He suggested that this might need to be clarified. Judge Roberts stated that it should be studied in any case. Mr. O'Donnell agreed that clarification would be helpful for those who do not use the rule very often. He stated that these fact scenarios are unusual, and it would be good to see how they could play out.

B. Committee Reports

1. ORCP 7

Mr. Young explained that the committee is still working on language for a draft amendment to Rule 7. Judge Peterson stated that this language is specifically related to waiver of service and making it easier to serve government entities. Judge Wolf noted that the language is not quite ready for public viewing.

2. ORCP 15

Ms. Payne reminded the Council that, at the last Council meeting, the committee had presented a proposed amendment in draft form. The committee then revised that amendment slightly (Appendix C). The first goal is to alert litigants and the bar that there is case law holding that Rule 15 D does not apply to specific rules, and that this is a malpractice trap. The language "except as prohibited by other rules" was not used because timelines that cannot be extended are not expressly identified in the rules, so the committee decided on, "except as otherwise prohibited by law." She explained that the lead line was also changed from "plead or do other act" because the rule applies to pleadings and motions.

Ms. Payne explained that the second goal was to expand the rule to include all motion practice, because the practice in Oregon has been to also allow extensions for responses and replies to motions. The final new change to section D is to replace the word "such" as part of the Council's ongoing quest to eliminate that word when it is unnecessary. She explained that the word "such" is often replaced with the word "any," but that did not really fit, so the committee chose the word "that." However, the committee is open to comments on this.

Ms. Payne noted that there was some thought that Rule 15 was supposed to be a catch-all rule to allow discretion for extensions on anything that other rules do not expressly allow. She stated that the committee did not make an amendment to allow that due to the possibility of unintended consequences. The amendment limits extensions to pleadings and motions at this time

Judge Bailey suggested the language “enlarging the time” instead of “enlarge such time.” Mr. Goehler stated that he likes the word “that” because it refers back to the time limited by procedural rules. He opined that “the” is too ambiguous, and “any” opens it up to any time. Ms. Payne stated that, in this case, she likes the word “such” and that it seems appropriate. Judge Peterson agreed that there have been occasions when “such” has been retained. Ms. Nilsson noted that, when the word “such” refers back to a specific thing, it may be appropriate. Judge Roberts suggested that the word “that” would be better grammatically. Ms. Payne expressed concern that the word “that” does not accurately reflect the multiple timelines that are involved. Ms. Stupasky agreed. Judge Roberts disagreed.

Justice Nakamoto suggested that, for clarity, the words “enlarge the time limited by the procedural rules” could be used instead of “such time” or “that time.” Mr. Goehler agreed that there would be no mistaking that meaning. Ms. Nilsson noted that clarity is a good thing.

Judge Wolf asked Judge Peterson if he had a chart listing which rules section D applies to and which it does not. Judge Peterson stated that he had compiled such a chart last biennium and that he believes that the chart includes all of the rules, but that he would need to review it. Judge Wolf wondered whether it was included in the Council’s history. Ms. Nilsson stated that she could not recall whether the chart had been included in last biennium’s minutes. Judge Peterson suggested that the committee could at least add the chart to its report. He stated that he would take another look at it and circulate it to the committee.

Judge Conover asked whether the language “by an order” is really necessary. He noted that the beginning of section D indicates that the court has the discretion to allow a motion after the time limited by the procedural rules. Ms. Payne explained that section D refers to two different things. Judge Peterson noted that one is asking for permission beforehand, and one is asking for forgiveness after the time has already run. He stated that this is also included in the change that the Council previously made at Rule 68 D(4)(d)(ii).

Mr. Crowley asked whether the Council has consensus on a draft amendment. Ms. Payne suggested, since the committee is going to meet one more time to review Judge Peterson’s chart, that the committee bring back a clean draft with the edit to section D and report on the exceptions so that the Council can have final discussions and be ready to vote on the draft. The Council agreed.

3. ORCP 23

Ms. Payne gave a status update and explained that the next step is for committee members to check with the Oregon Trial Lawyers Association and the Oregon Association of Defense Counsel regarding this issue. The committee will report those results at the next meeting.

4. ORCP 23 C/34

Mr. Andersen stated that Ms. Payne had made a new suggestion for a change to ORS 12.190 (Appendix D) to solve the problem that occurs when a plaintiff files a lawsuit against a defendant who is deceased but does not discover the defendant's death until after the lawsuit is filed. He noted that the committee had previously proposed various solutions. It was initially felt that relation back would not work because one cannot relate back to a filing that was directed against a deceased person and now would be directed against a different entity – the deceased person's estate. However, he stated that, as Judge Roberts had pointed out, if the Legislature says that it relates back, it can relate back. This is ultimately a decision for the Legislature, not a rule change.

Ms. Payne stated that ORCP 23 has requirements for relation back, and that the Council might want to include the language "notwithstanding any other rule or statute." She asked whether the Legislature had enacted any part of ORCP 23, thereby making it a statute. Judge Roberts noted that the Legislature approves all of the ORCP. Ms. Payne asked whether this makes them statutes. Judge Peterson pointed out that the Council's enabling statute says that the Legislature has delegated the drafting rules to the Council, and that the Legislature can amend, reject, or repeal them, or do nothing. If the Legislature does nothing, by law, the rules become effective. Judge Peterson's suggestion, contrary to Justice Jack Landau's concurrence in *State v. Vanorum*, 354 Or 614, 629, 317 P3d 889 (2013), is that, because the Legislature has created this situation, it does not matter if the Legislature made an amendment to Rule 23 at one point and then the Council made a different amendment to it. Whether the Council or the Legislature put forth the last amendment, it is effective because the Legislature looked at it and at least tacitly approved it.

Judge Roberts stated that this does not clarify things, since the suggestion would not be changing an ORCP but, rather, would be changing a statute. She stated that the question is whether the statute has to say within it that an ORCP does not apply when the statute does. She thinks that it is just intrinsic within the hierarchy of things and that it does not need to state this. Ms. Payne asked whether the court would look at the statute and the rule to see which one is more specific.

Judge Roberts asked how a statute could be less specific. Ms. Payne noted that Rule 23 C says that the claim has to arise out of the same facts. She observed that it would not hurt to say “notwithstanding any other provision of law.” Judge Roberts stated that she has no doubt that it does not hurt anything, but that it would be odd. Ms. Payne allowed that the statute is more specific to death, so a court would probably find that it is more specific. Judge Tookey asked whether Ms. Payne’s idea is to say “notwithstanding any other provision of law.” Ms. Payne stated that this is her idea.

Judge Peterson stated that the proposed subsection (b) says “notwithstanding subsection (a),” but he wondered if it should say that, if a plaintiff sues a defendant but that it turns out that the defendant is now deceased, then the complaint relates back. Judge Roberts reminded him that the Council had discussed that and decided against it for fear of raising a discovery of the death issue to be litigated. Judge Peterson explained that he was trying to avoid the word “discover,” but give the reason for the need to name the estate some context. Judge Roberts pointed out that the statute should probably say, “within 90 days after the action is filed,” because the action is not “commenced” until it is served. Mr. Goehler asked whether the thought is that it will be discovered that the defendant is dead within that 90 day period. Ms. Payne stated that this is the thought. There will be 60 days to serve, and that is when a plaintiff should reasonably find out that the defendant is dead, and then there is an extra 30 days in case an estate needs to be opened to file against the personal representative.

Judge Peterson stated that the language does not seem to be clear that the plaintiff has sued the decedent and now is now amending to name the estate. Judge Wolf agreed. Judge Peterson suggested language such as, “after the complaint is filed against a deceased defendant.” Ms. Payne suggested, “Notwithstanding subparagraph (a), if the action has been filed against a deceased defendant, within 90 days after the action is filed the party may amend to substitute the personal representative.” Judge Bailey suggested, “A party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant.” Judge Wolf stated that this sounds like a plaintiff may be able to substitute the personal representative if the defendant dies within those 90 days as opposed to the issue at hand – the defendant was dead when the case was filed. Judge Bailey pointed out that subsection (a) provides the one year period following the defendant’s death to commence an action against the personal representative. The proposed subsection (b) just says that a personal representative can be substituted for the named deceased defendant who could not be served because death had occurred before service.

Judge Roberts suggested: “If a complaint is filed against a defendant who is deceased, notwithstanding subparagraph (a), within 90 days after the action is filed, a party may amend the pleading to substitute the personal representative as the real party in interest. That amendment shall relate back to the date of the original pleading.”

Ms. Stupasky stated that she does not think this captures the scenario where the case is not filed against someone who is deceased when it is filed but dies before service can be effected. Mr. Goehler observed that this is somewhat like trying to work out a law school exam with multiple branches of scenarios. He stated that the first part of it deals with a defendant who dies before the expiration of the statute of limitations. However, what if the defendant is alive when the action is filed, the statute of limitations expires, and the defendant dies before service? The plaintiff cannot serve the deceased defendant and needs to have time to appoint a personal representative once they discover the death. He opined that the statute ought to give the same slush factor or plaintiffs will miss the statute of limitations in this scenario. Ms. Payne stated that the statute of limitations has been met because the case has been filed against the right person. Mr. Andersen pointed out that the plaintiff has not served the defendant. Mr. Goehler stated that the situation may never be encountered but, if it is, by limiting it to defendants who have already died, it is a trap. Judge Roberts suggested this language, “If a complaint is filed against a defendant who is deceased or dies before service is effected within 60 days after filing.”

Ms. Payne asked whether it is always 60 days. Judge Roberts stated that ORS 12.120 provides that actions are commenced at the time they are filed and served except that, if the complaint is filed within the statute of limitations and service is made within 60 days thereafter, then the action is commenced as of the time the complaint is filed. That is the magic of 60 days; the presumption is that this is prompt service. Ms. Payne suggested, “within the time provided by the procedural rules” instead of 60 days. Judge Roberts stated that there is no procedural rule that says that one must serve. She noted that a plaintiff could file a case and then serve it six months later but, in that case, it is commenced as of six months later.

Mr. Andersen suggested the following language: “if a complaint is filed against a person who dies before the statute of limitations or within 60 days after the lawsuit is filed, then notwithstanding subparagraph (a) within 90 days after the complaint is filed against a defendant who is deceased a party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date of the original pleading.”

Ms. Stupasky stated that she would need to see the language in writing to evaluate it. She posited a situation where a plaintiff files a case six months before the statute of limitations and, for some reason, does not serve the complaint and summons. She asked if the plaintiff attempting to effect service more than 90 days later and finding out that the defendant is now deceased would be barred because the statute is limited to 90 days overall. Mr. Andersen stated that, in theory, it does, but that he cannot imagine filing and waiting six months to serve. Ms. Stupasky pointed out that the reason the Council is suggesting this change is to eliminate a trap. She expressed concern that the Council should not set another trap and effectively limit the statute of limitations. She noted that the case could be re-filed if the statute of limitations has not expired. Judge Wolf stated that one could move to substitute and serve the estate if the statute of limitations had not expired. Ms. Stupasky again stated that she would need to read the suggested amendment. Judge Bailey pointed out that the change would just be for a situation where the statute of limitations has expired to make sure that relation back exists. If a plaintiff is still within the statute of limitations, they can move to amend and they are fine. He observed that, if a plaintiff waits too long to act, that is what the Professional Liability Fund is for. Judge Peterson noted that this suggested change is to bail out the prudent plaintiff who, through no fault of their own, finds out that the defendant has died. Ms. Stupasky stated that she just wanted to make sure that this is all that it does and that it does not limit anything else.

Judge Peterson suggested that the language in subsection (b) track the language in subsection (a), "before the expiration of time limited for its commencement." Mr. Young suggested using the language, "date the complaint is filed," because that is what is used in the relation back statute, ORS 12.020. Mr. Andersen suggested eliminating the second reference to "party who is deceased" because it is already used in the beginning. He suggested the following language: "If a complaint is filed against a person who dies before the time limited for commencement of the action or within 60 days after the action is filed, then notwithstanding subparagraph (a), within 90 days after the complaint is filed, a party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date the complaint was filed."

Judge Tookey asked whether the information sent to the Legislature will include a description of the problem. Judge Peterson stated that it will. Mr. Crowley suggested that the committee meet one more time to look at the language and make sure it is satisfactory, and talk about how to present it to the Legislature. Judge Peterson asked Ms. Nilsson to send a copy of the new language to the committee. She agreed to do so.

5. ORCP 27/Guardians Ad Litem

Judge Peterson stated that the Council had three versions of proposed amendments for its consideration (Appendix E). He noted that the Council has had fairly robust discussions about Rule 27 in past Council meetings. He stated that all three versions include includes changes to the title of the rule and some lead lines. They also make more clear that the rule applies to unemancipated minors and, in section B, that appointment of the guardian ad litem (GAL) is mandatory. Draft A contains a slightly rewritten sentence in section A that tracks the lead line in terms of the order. It also gives a description of what a GAL is (has the authority to act on behalf of that party in that action and for the purposes of that litigation). Draft B also includes the rewritten sentence in section A, but it instead includes a parenthetical describing a GAL (competent adult who acts in the party's interests in the action and for the purposes of the litigation). Draft C makes no attempt to describe a GAL.

Judge Peterson reiterated that the Council has had a lot of discussion about this. He explained that, when he practiced years ago in a southern Oregon county and had a GAL appointed, the clerk of the court sent him a request a year later asking for his guardian report. So, it is clear that it is not just self-represented litigants who are confused about what a GAL is. He reminded the Council that the original suggestion regarding GALs came to the Council from the Law and Policy Work Group of the Oregon Judicial Department. That group had actually asked the Council to replace the phrase because it was confusing. He stated that it would be impossible to replace the phrase, which is included throughout the Oregon Revised Statutes and in statutes and rules throughout the United States. However, it is up to the Council whether it wants to somehow clarify the meaning.

Ms. Nilsson explained that Draft A and Draft B are staff suggestions that she and Judge Peterson had crafted after the last Council meeting. The description of a GAL in Draft A came from Judge Roberts' attempt at a definition at the last Council meeting. The description in Draft B was taken partially from the parenthetical that Judge Norby had previously written and partially from Ms. Nilsson's idea of what a GAL is from her understanding as a lay person. Ms. Nilsson stated that the drafts are there for the Council's consideration. She stated that she understands that there are Council members who feel strongly that a GAL should not be defined at all, because the term is self-explanatory. She stated that, if she did not work in the legal profession, she would not understand what a GAL is, and that she feels for the self-represented litigants who cannot get lawyers and who are trying to interpret these rules on their own. She stated that she does understand the concept of not wanting to change the rules solely for the purpose of making the rules understandable for people who have not gone to law school, and she is

sensitive to that balance.

Mr. Goehler stated that he does not actually think that the staff drafts change anything as they are written. He stated that, as he reads the drafts, they are done in a way that is not defining, creating, or scoping all of the duties of a GAL but, rather, just are explanatory. There are other obligations for a GAL, but the draft language just says that this is what a GAL is and this is the minimum that we expect for the rule.

Ms. Payne observed that the very last part of the new language in Draft A says “appointed by the court in which the action is brought,” but she noted that there are circumstances where the action is not brought in the same court in which the guardian or conservator has been appointed. Judge Roberts stated that the language to which Ms. Payne refers applies only to the GAL. Judge Norby noted that the comma placement in Draft A may make the language appear to apply to other parts of the sentence. Ms. Payne asked whether this could be more clear if it were a separate sentence. She stated that she was worried about someone reading the rule and thinking that they have to appoint the guardian or conservator in the same court. Judge Norby noted that the rule was originally written that way, with just a comma that separates it. To avoid the problem, Judge Roberts suggested changing the beginning of the sentence in both Draft A and Draft B to read, “In any action, a party who has a guardian or conservator....”

Judge Peterson asked whether any Council members preferred the description of a GAL from Draft A or Draft B. Judge Roberts stated that she preferred Draft B, as it seems slimmed down and reads better, but she does not feel strongly about it. Mr. Goehler stated that he likes Draft B better too. This was the Council’s general consensus.

Judge Norby thanked Judge Peterson and Ms. Nilsson for putting so much effort into these staff suggestions. Judge Peterson stated that staff will bring Draft B back to the Council in clean, final form next month. Mr. Crowley asked whether the Council would review that refined Draft B as a proposal for publication at the next meeting. Judge Peterson agreed.

6. ORCP 32

Mr. Crowley reminded the Council that this issue was brought to the Council’s attention by the Department of Justice and it regards class action settlements by a single plaintiff in cases where the class has not yet been certified. Rule 32 D requires court approval as well as notice to the class. The federal rule was similar to Oregon’s rule in this regard until 2003, but no longer contains the class notice

requirement. The concern that was raised is that the language in Rule 32 D is a disincentive to settlement. Mr. Crowley stated that the committee took a first look at the issue and that Ms. Gates provided some background information, including an article from New York, which had a similar state rule. The article expressed similar concerns, including that New York's rule could lead to more class action lawsuits.

Mr. Crowley stated that the committee is not sure how Rule 32 is affecting the Oregon bar or whether it is an isolated incident. Committee members will talk to constituency groups over the next month and come back with a report at the next meeting.

Judge Peterson noted that the Council has occasionally formed work groups where non-Council members have been brought in to provide additional perspectives. He stated that this is something the committee might consider. Mr. Crowley stated that the first step is to poll constituency groups, but a work group might be a possibility further down the line.

7. ORCP 55

Mr. O'Donnell stated that the committee has not yet met, but should have a meeting within the next week and a half. He reminded the Council that the committee was formed to investigate a question raised by Judge Marilyn Litzenberger about the manner in which an unrepresented witness can quickly and not necessarily formally get before a judge to be heard about a trial subpoena. He noted that he has had some informal discussion about other ideas on Rule 55 with Mr. Eiva, but some of those may be substantive law issues. Judge Peterson stated that he had also submitted an issue to the committee. He asked that Mr. O'Donnell copy the committee on the issues that he and Mr. Eiva had discussed. Mr. O'Donnell agreed to do so.

8. ORCP 57

Judge Wolf stated that the committee had begun to look at Rule 57 regarding discrimination in jury selection, in significant part due to the Court of Appeals ruling in *State v. Curry*, 298 Or App 377 (2019). He stated that Judge Tookey had sent to the committee a report on the Washington work group that put together that state's new rule. He explained that Ms. Holley had found six states that specifically prohibit discrimination in jury selection, either by rule or by statute, but the rest rely on case law. Washington is the only state that has a procedural method for how to analyze it.

Judge Wolf stated that he had sent the committee draft language that incorporates some information from the opinion from *Curry*. He noted that some portions of the Washington General Rule 37 are substantive, but his idea is that the committee can look at the procedural portions and see whether any of them would be something Oregon should adopt. The committee will meet again and hopefully have some language for the Council's review at the next meeting.

Judge Wolf noted that the Washington rule lists a group of presumptively bad excuses for exercising a peremptory challenge, which is probably a substantive change that the ORCP would not be able to incorporate. Judge Bailey stated that he was offended by many of the things on that list. He opined that presuming that certain minority groups have all had certain experiences is racist. Mr. Goehler wondered whether the rule actually perpetuates such stereotypes by naming those topics. Judge Bailey stated that he also has grave concerns that the Washington rule does not allow an attorney to even ask whether a potential juror has had contact with the police. Judge Wolf pointed out that this list is part of why portions of the Washington rule are substantive, and he stated that his preference is to leave it in the trial judge's hands.

IV. New Business

A. ORCP 55 Inquiry

Judge Peterson referred the Council to an inquiry from a legal software company called Aderant (Appendix F) regarding Rule 55. Apparently the company feels that the 2017-2019 biennium amendment of Rule 55 does not make clear the triggering event for calculating the time period for production of documents pursuant to a summons. Judge Peterson stated that he feels that the date of receipt and the date of service are the same day. The date of issuance of the summons is irrelevant as the 14 days for responding clearly refers to how much time the recipient has to respond. If the 14 days started on the date of issuance, the subpoenaing party could hold the signed subpoena for 13 days before service, therefore affording the recipient only one day in which to respond. He stated that the Rule 55 committee can second guess if he is incorrect, but he feels that the rule as rewritten seems clear. Mr. O'Donnell stated that the Rule 55 committee would look more closely to make sure that this is the case.

V. Adjournment

Mr. Crowley adjourned the meeting at 11:14 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

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,
6 the defendant must appear and defend within 30 days of the date of first publication. A reply
7 to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in
8 an answer, or a motion responsive to either of those pleadings must be filed within 30 days
9 from 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.]* file and serve pleadings and motions. *[The]***
23 **Except as otherwise prohibited by law, the** court may, in its discretion, and upon any terms as
24 may be just, allow *[an answer or reply]* **any pleading** to be made, or allow any *[other pleading*
25 *or]* motion, **or response or reply to a motion,** after the time limited by the procedural rules, or
26 by an order enlarge *[such time]* **the time limited by the procedural rules.**

FINAL REPORT ON ORCP 23 AND 34

During meetings of the Council of Court Procedures in March 2018, in November and December 2019, and in January 2020, the Council addressed the malpractice trap that occurs when a defendant dies within the statute of limitations but the plaintiff is unaware of the death until after the statute has passed. The discovery of death usually occurs during the 60 day period allowed for service of summons under ORS 12.020 (2).

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 legal 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 Williams, on March 31, 1993, not knowing that Williams had died 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 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 a non-existing defendant (a deceased person) instead of incorrectly naming an existing defendant, the court held that substituting the personal representative after the statute of limitations would not save the case.

When this Council first studied this problem in March 2018, we examined ORCP 23 (dealing with amended pleadings) and ORCP 34 (dealing with substitution of parties) as possible ways to fix this problem, but concluded that intended changes

in these Rules would substantively change the law, which would be beyond the powers of the Council. We thus agree to recommend a statutory change to the Legislature.

After many drafts of potential ways to solve the problem legislatively, the Council recommends the following change to ORS 12.190:

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) (a) 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.

(b) If a complaint is filed against a person who dies before the time limited for commencement of the action or within 60 days after the action is filed, then notwithstanding subparagraph (a), within 90 days after the complaint is filed, a party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date the complaint was filed.

The Council recommends this statutory change as the least cumbersome and most effective way to eliminate a hidden and sometimes unavoidable malpractice trap.

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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.]* **In any**
7 **action, a party who has a guardian or a conservator or who is an unemancipated minor shall**
8 **appear in that action either through their guardian, through their conservator, or through a**
9 **guardian ad litem (competent adult who acts in the party's interests in the action and for the**
10 **purposes of the litigation) appointed by the court in which that action is brought.** The
11 appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is
12 made on the court's motion or a statute provides for a procedure that varies from the
13 procedure specified in this rule.

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

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

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

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

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

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

1 answer after service of a summons; or

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

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

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

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

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

1 **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under
2 section H of this rule, no later than 7 days after filing the motion for appointment of a guardian
3 ad litem, the person filing the motion must provide notice as set forth in this section, or as
4 provided in a modification of the notice requirements as set forth in section H of this rule.
5 Notice shall be provided by mailing to the address of each person or entity listed below, by first
6 class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of
7 notice prescribed in section F of this rule.

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

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

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

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

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

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

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

26 E(2)(f) if the person is receiving moneys paid or payable by the United States through the

1 Department of Veterans Affairs, to a representative of the United States Department of
2 Veterans Affairs regional office that has responsibility for the payments to the person;

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

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

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

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

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

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

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

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

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

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

26 **H Waiver or modification of notice.** For good cause shown, the court may waive notice

1 entirely or make any other order regarding notice that is just and proper in the circumstances.

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