

ANNOTATED AGENDA
COUNCIL ON COURT PROCEDURES

Saturday, January 11, 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 December 14, 2019, Minutes (Ms. Gates) **(APPENDIX A)**
- III. Old Business
 - A. Follow-Up on Suggestions from Survey
 - 1. ORCP 4 (Ms. Gates)
 - 2. ORCP 31 (Judge Peterson) **(APPENDIX B)**
 - B. Committee Reports
 - 1. ORCP 7 (Ms. Weeks)
 - 2. ORCP 15 (Ms. Payne) **(APPENDIX C)**
 - 3. ORCP 23 (Ms. Gates)
 - 4. ORCP 23 C/34 (Mr. Andersen)
 - 5. ORCP 27/Guardians Ad Litem (Judge Norby) **(APPENDIX D)**
 - 6. ORCP 32 (Mr. Crowley)
 - 7. ORCP 55 (Mr. O'Donnell)
 - 8. ORCP 57 (Ms. Holley)
- IV. New Business (Ms. Gates) **(APPENDIX E)**
- 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, December 14, 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.
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Barry J. Goehler
Meredith Holley*
Drake A. Hood
Hon. Thomas A. McHill*
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Scott O'Donnell
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky*
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Troy S. Bundy
Hon. Norman R. Hill
Hon. David E. Leith
Hon. Douglas L. Tookey
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/Guardians Ad Litem ORCP 32 ORCP 58	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 32 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 9:34 a.m.

II. Administrative Matters

A. Approval of November 9, 2019, Minutes

Ms. Nilsson explained that Judge Tookey was unable to attend today's meeting, but had asked for a change to the draft November 9, 2019, minutes (Appendix A). In the discussion on Rule 27, he asked to modify two sentences to read as follows:

Judge Tookey 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 without defining the term guardian ad litem.

Mr. Andersen made a motion to amend the minutes as requested by Judge Tookey. Ms. Payne seconded the motion, which was approved unanimously by voice vote. Judge Norby made a motion to approve the minutes as amended. Mr. O'Donnell seconded the motion, which was approved unanimously by voice vote.

B. Council Continuing Legal Education (CLE) Credit

Judge Peterson explained that Council members did not receive CLE credit for Council service prior to 2019. He contacted the Oregon State Bar's Minimum Continuing Legal Education (MCLE) Department and lobbied for Council members to get credit. He told the MCLE Department that it would be helpful for Council members to be eligible for two credits in odd-numbered years and three credits in even-numbered years because the Council is asymmetrically biennial, with fewer meetings in odd-numbered years. However, the Department adopted a rule that requires attendance at nine hours of regularly scheduled Council meetings per year in order to receive three hours of CLE credit in both odd-numbered and even-numbered years. Those regularly scheduled Council meetings do not include committee meetings. Because the Council has been holding efficient meetings, it likely will not meet the 9-hour threshold in 2019. Judge Peterson stated that the Council might want to ask the MCLE Department to change the rule so that Council members can get some credit in both years.

C. Council Travel Reimbursement

Judge Peterson noted that the Council receives \$4,000 per year from the Oregon State Bar (OSB) for travel reimbursement, and those funds do not carry over from year to year. Again due to the Council's asymmetrically biennial nature, there has been less demand for reimbursement this year because there are fewer meetings in odd-numbered years. There is a large balance remaining for 2019. Judge Peterson asked Council members who have traveled for meetings to submit reimbursement forms. Reimbursement request forms are available on the Council's website and Ms. Nilsson can assist with any questions. Judge Peterson asked members to return the forms to Ms. Nilsson as soon as possible.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Ms. Gates was not present at the meeting at the time this topic was discussed. Judge Peterson stated that he was not aware of the status of Ms. Gates' follow up with the person who suggested an amendment to ORCP 4. This topic is carried over to the next meeting.

2. ORCP 31

Judge Peterson stated that he had attempted to contact attorney Mark Cottle to get more detail on why Rule 31 is confusing. He left a voice mail, but did not get a call back. Judge Peterson will call again and follow up with an e-mail. This topic is carried over to the next meeting.

B. Committee Reports

1. ORCP 7

Ms. Weeks was not able to be present at the meeting. Mr. Young explained that the committee is currently working on proposed language for an amendment and that they hope to have it ready by the next meeting.

Judge Peterson explained to the Council that Ms. Nilsson had provided an electronic version of the current base text of the rule for Ms. Weeks to work with. He recommended that any committee that is ready to work with a rule ask Ms. Nilsson for the correct base text to ensure that the committee does not

accidentally start with incorrect text. Judge Wolf noted that Ms. Weeks had already incorporated some of the committee's proposed language into the text that Ms. Nilsson had provided, so it has been helpful.

2. ORCP 15

Ms. Payne stated that the committee had met in December and presented the committee's report to the Council. (Appendix B). One issue with the current rule is that it, in its literal text, applies to pleadings and motions, and the committee wants to clarify that it includes all motion practice, including responses to motions and replies to responses.

Judge Peterson explained that he and Ms. Nilsson had researched the origin of the language in Rule 15 D all the way back to Deady's Code, and the lead line used to say "etc." rather than "do other acts." Other than that, the language in Rule 15 D has remained virtually unchanged from the 1860s to the present, with the exception that it also used to be combined with the language on relief from judgments that is currently located in Rule 71 B. Ms. Payne stated that she was under the impression that the language was broader and included all acts and at some point was changed to motions and pleadings, and that the committee also wanted to look at why that was done. At this point, if the rule is going to stay limited to pleadings and motions, the committee wants to make sure it includes all motion practice.

Ms. Payne stated that the committee had also talked about whether documents that most lawyers and judges think that the rule applies to, but that are not specifically included, such as petitions and responses, should be added to the rule. She stated that the committee could not think of anything that is not already specifically addressed in other statutes or rules. The committee believes that everyone thinks that Rule 15 is a catch-all rule so that, if timelines are not covered in a statute or another rule, Rule 15 D allows an extension, and that seems to be the purpose of the rule, despite its plain language that it only applies to pleadings and motions. Unless the Council thinks otherwise, the committee feels like it wants to lean toward an amendment that would make it that catch-all rule. Other than expanding it to include all motion practice, the committee also wanted to ask the Council if there is something that might be missing from the rule that is not already covered.

Ms. Payne stated that the other issue the committee discussed is putting something in the rule to alert newer members of the bar that this rule has been construed by the court to not apply to some rules because those timelines have been deemed to be jurisdictional. The committee is not in agreement on that.

Some members feel like adding language to the rule is not appropriate because it is an educational issue for the bar and adding such language may change the substance of the rule or create unintended consequences. Others members feel that something needs to be done because it is a malpractice trap since there is nothing in the text of other rules with hard deadlines that would alert anyone that Rule 15 would not allow extending those deadlines. The committee has been struggling as to what the Council's role is in helping practitioners to be aware that those cases are out there and that Rule 15 D does not apply to every other rule, because some of the timelines are jurisdictional. The committee discussed perhaps including a staff comment to let practitioners know of these cases, and this is her preference. Judge Peterson's preference is to include something in the rule itself, perhaps language such as "unless prohibited by statute or other rule," but Ms. Payne's concern is that the statute or rule does not prohibit it but, rather, judicial construction of the statute or rule does. The committee wanted to get the Council's perspective on this.

Judge Norby asked whether the staff comment would be located at the end of the rule. Judge Peterson noted that the staff comments do not appear in the Oregon Revised Statutes and that, at this time, they only appear on the Council website and only those who are aware enough to find them there will know about them. He stated that Legislative Counsel might eventually publish a book that contains them, but that is not definite.

Judge Peterson stated that Ms. Payne had pointed out that the rule does not actually allow for enlarging times for motion practice, despite the fact that the title of the rule is "Time for Filing Pleadings and Motions." It seems like that is not a big stretch and that it is procedural, so that seems like an appropriate thing for the Council to do. He suggested that perhaps the Council can find a more elegant way of saying, "doing other acts." The precursor language to ORCP 15 D said "or other act to be done," whatever that is. He stated that he had also raised this issue last biennium, and wondered if anyone is aware of any acts that people extend the time to do under Rule 15 D. He wondered whether that means motions, which currently seem to be covered, or whether the Council wants to expand the rule to include "documents," since there are things other than motions and pleadings that are filed. Judge Roberts mentioned statements for attorney fees. Ms. Payne pointed out that such statements are pleadings according to the Court of Appeals. Judge Roberts opined that the Court of Appeals is wrong about that. Judge Peterson stated that the Council can at least agree that it is a document, as opposed to an activity. Mr. Crowley asked about discovery requests. Ms. Payne stated that the committee had looked at the discovery rules and found that they seem to include language allowing parties to seek extensions, so the committee did not feel like those needed to be added to Rule 15 D.

However, those are the kinds of things the committee is looking at, because the committee does not want to leave anything out.

Ms. Gates suggested that the committee might want to look at how the rule would apply in a situation where missing a deadline would have an immediate effect. For example, when someone does not submit a response to a request for admission by a deadline, it is deemed admitted. She wondered if someone could use Rule 15 to get an extension of time and get around that. Judge Peterson observed that there is the opportunity to seek relief within the rule on requests for admissions, and that is true in a number of the rules. He stated that a third question is whether there should be a disclaimer. He stated that motion practice should clearly be added in. He again wondered what the "other acts" in the lead line are. He suggested changing the lead line to, "enlarging time to file pleadings and motions," or "enlarging time to file documents," which is more expansive, but he did not know if the Council wants to do that. Judge Norby suggested, "enlarging filing times." Justice Nakamoto stated that this still covers a broad range of activity. Ms. Payne observed that, right now, the rule is limited to pleadings and motions. Judge Norby then suggested, "enlarging some filing times," which could be a clue that the rule does not apply in all cases.

Mr. Eiva asked whether the Council has an example of where this rule has caused a problem. Judge Peterson stated that his concern is a self-represented litigant who asks to enlarge the time to respond to a motion, but the rule does not say they can do that. In terms of a motion for new trial, the rule literally says "any motion," but it really does not mean any motion; that is simply not true. Mr. Hood asked whether the trial court has the inherent power to do that, particularly as it would relate to a reply or response or to a self-represented litigant. In his experience, courts bend over backwards to extend time. Judge Norby stated that judges frequently are able to extend time by stipulation, and many give grace if there was not a stipulation and it happened anyway. She stated that judges know that no one will complain if the problem gets solved. Ms. Payne observed that sometimes there are two rules, one that is broader and one that is more specific, and the court has ruled that there are some rules that are more specific and/or more jurisdictional that conflict with Rule 15 D, and lawyers just have to be aware of that. She observed that the Council is having a conversation about how much it is the Council's role to help new practitioners or self-represented litigants understand the law. She stated that she understands the concern, but there are many instances where statutes and rules are very broad but do not apply in every situation because there are other rules or statutes that govern the specific situations.

Judge Roberts pointed out that it is one thing to say that it is not the Council's role

to make rules to teach people who do not practice law how to practice law, but it is another thing when the rules lay snares for the unwary. She opined that the Council must at least raise the sign that Rule 15 D does not always apply. She noted that statutes very commonly say “unless otherwise prohibited.” Ms. Stupasky agreed. Ms. Payne stated that she is not opposed to that, but she wants to make sure the Council is not creating a substantive exception that does not already exist.

Mr. Eiva asked whether there is a comprehensive list of exceptions to Rule 15. Judge Peterson stated that he created a list last biennium of rules with deadlines in them, rules where no deadlines are mentioned but we know that they exist, and rules that do not have deadlines. He stated that he would provide it to the committee at the next meeting. Judge Norby noted that the concept of “comprehensive” is a moving target, as the Legislature can change things at any time and new court rulings can happen at any time. Ms. Payne stated that she likes the language, “except as otherwise provided by law.” Judge Wolf observed that it at least raises a flag that someone should have looked ahead of time. Mr. Eiva stated that there are certain rules where there is nothing in the rule that suggests a deadline, so using the language “except as otherwise provided by law,” could cause problems. Judge Peterson pointed out that the current rule has some buried language, “after the time limited by the procedural rules.” He suggested language such as, “the time may not be enlarged in violation of a substantive rule.” Ms. Payne suggested, “except as otherwise prohibited by law,” since it would get people to look to see if they are prohibited from extending the timeline in some way by law. Judge Roberts agreed that this seems like a better term. Judge Wolf stated that there are also instances where extensions are only prohibited by case law, not by statute.

Mr. Goehler wondered about the word, “prohibited,” as he does not know if there are specific prohibitions within some of the substantive cases and rules. Judge Norby suggested the word, “precluded.” Mr. Goehler was also concerned about a ripple effect. Rule 15 deals with enlarging time, which happens before the deadline runs, and also allows for late filing. Rule 45 allows enlargements (or contractions) within such longer or shorter time as the court would allow, but the rule does not allow for a late filing of answers to a request for admissions. However, he has seen attorneys point to Rule 15 to say that does allow for a late filing in responding to a request for admissions. Whether that is good or not good, that is an argument that can be made now. If the Council says that Rule 15 does not apply if there is something else that does apply, the time for requests for admissions can be enlarged before the 30 days runs, but afterwards there is no time to avoid the admission. He kind of likes that, but worried that there might be ripple effects. Ms. Payne stated that she does not believe that, under the current

language of Rule 15 D, a response to a discovery request is a pleading or motion or motion practice, so she does not believe that Rule 15 can be used. Mr. Goehler opined that the Rule 45 response is an answer because one answers a request for admission. Ms. Payne disagreed that it is a pleading. Judge Peterson pointed out that Rule 13 defines what a pleading is. Mr. Hood asked whether a change to Rule 15 could affect the case law rulings that have been made and whether a change by the Council would create a substantive expansion in some way. Judge Peterson stated that it could not; the Council's enabling statute states that the Council cannot affect substantive law, only procedural law.

Ms. Payne noted that, if the Council added documents to Rule 15, the case law saying that Rule 15 is limited to motions and pleadings would change. Judge Peterson agreed that it would change with regard to procedural processes. He noted that the rule now says "any pleading," which is defined by Rule 13, or allow any motion, so it would seem to be limited to pleadings and motions and not to the many other documents that are filed during the course of litigation.

Judge Roberts noted that the Council seems to be trying to conform Rule 15 to present practice because, in present practice, courts allow extensions unless the law prohibits them. She thinks judges generally believe that they have the ability to give the time to reply to a motion, a summary judgment motion, etc., so she opined that the Council would not actually be changing anything by making Rule 15 conform to what is working in practice. She suggested that the Council just needs to be careful to not go beyond that.

Ms. Payne pointed out for clarification that the change to "any pleading" would be made because the Council feels that the current language left out cross claims and counterclaims. Judge Peterson stated that this would apply to pleadings or motions, but he asked whether anyone knows of anyone who has used Rule 15 to extend times for anything other than pleadings or motions. Mr. Crowley stated that it seems like that language is intended for miscellaneous things that could happen in litigation. Judge Peterson wondered if there are any that of these things that this rule needs to continue to talk about. Judge Bailey noted that, in his experience as a judge, if you are not sure what it is, it is usually entitled "motion to do acts." So if motions are included in the rule, that should take care of it.

Ms. Nilsson explained that the research that she and Judge Peterson had done was interesting. The "do other act" language and other language in Rule 15 D has existed since before Oregon was a state. In the 1855 Oregon law there was a preface that indicated Oregon's respect for the New York laws that had recently been revised and adopted and, until Oregon created its own code, it was going to adopt the New York code in its entirety. She stated that additional research could

be done into the old New York code to try to determine what the “other acts” might be.

Judge Roberts stated that there are objections sometimes, which are not responses or motions. Judge Bailey asked whether the rule could be changed to include motions, pleadings, and objections. Judge Wolf suggested motions, pleadings, or other filings. Mr. Eiva stated that it is motions, responsive documents, and objections. Ms. Payne asked if Mr. Eiva meant to include declarations and affidavits along with motions. Mr. Eiva asked whether declarations or affidavits are ever filed without being attached to motions. Ms. Payne stated that they are not.

Mr. Andersen stated that he thinks that Deady had it right: just say “etc.” and it is all covered. Mr. O’Donnell noted that he could not think of a time in which this has come up. He stated that lawyers stipulate to all kinds of things and ask judges to agree to all kinds of things. In looking at the cases under Rule 15, they are things that do not come up regularly, and he is not sure what the problem is that is trying to be solved, except for someone who reads the title and thinks there is something more. Judge Peterson pointed out that the language of the rule reads, “any motion,” but that is literally not true. Mr. Eiva stated that the Council should make sure that everyone knows they can ask for an extension if they want one, and then make sure everyone knows there are rules that this does not apply to. He observed that people who do not know much about the law do not have trouble asking for more time, and judges know this, so he did not feel like that is a problem. He suggested that perhaps “unless prohibited by law,” is the only change that needs to be made to the rule. Judge Peterson stated that this would be a big red flag, which he thinks is a good thing.

Judge Conover asked whether this red flag is directed to the litigant or to the judge. He stated that the judge should already know what is allowed or prohibited, as opposed to what their discretion is. If the red flag is to the litigant, the lead in language talks about the court’s discretion. So, if someone believes they can have an extension to a Rule 71 motion, and the court then says it is going to deny the motion because it is actually prohibited, is that all of a sudden some lightning bolt that the person should not have anticipated? It is still in the court’s discretion. He does not think it is misleading someone to say that, if they file a motion pursuant to Rule 71 and believe that they may be able to get relief, they may be disappointed. Judge Peterson pointed out that the court does not have discretion in certain instances. Judge Norby added that the court also does not always know when it does not have discretion. Judge Conover asked whether there is really a problem with litigants saying they would not have wasted their time filing a motion if they knew it was prohibited by another rule.

Mr. O'Donnell noted that, with the term, "unless expressly precluded by law," the Council may start inviting people to start arguing what is precluded or is not precluded. Mr. Eiva noted that the staff comment could say that the Council changed the rule because it realized that the court does not have discretion for several deadlines, the Council specifically identified certain of those rules, and there may be others out there, but the Council believes that the court has discretion for the rest of the rules. This is just intended to give notice. Mr. O'Donnell stated that this could be a little dicey. Ms. Payne re-emphasized her concern about not wanting to create an exception. She asked whether it really helps anyone to read "except as prohibited by law" when none of the rules the Council is concerned about expressly provide any exception. The phrase alerts them there may be an exception, but does it really help them? Judge Norby stated that she believes it would be helpful. When she was practicing, if the opposing party had asked for more time and she wanted to argue against it, if she had read the rule they referred to in their motion and saw "unless otherwise prohibited by law," she would go do research and see if it was prohibited and make an objection if appropriate. She stated that she thought it would be a helpful thing to practitioners. Ms. Payne again stated that the Council needs to be really clear that it is not creating a new exception by this language, and include in the staff comments that this is only intended to alert to existing laws. Judge Peterson agreed that such a statement would not be intended to change the law in any way, only to alert to the fact that existing law says that some timelines are immovable. He pointed out that the rules are written for judges, as well as litigants and lawyers. There are judges with a strong criminal law background who are now hearing civil cases and could use this guidance.

Mr. Crowley asked whether the Council should vote on whether to move forward on any of these proposals. Ms. Payne suggested that the committee bring formal language next month and the Council can proceed from there.

3. ORCP 23

Ms. Gates stated that the committee had met and discussed the issue of defendants amending their entire answer rather than just responding to the amended portions when an amended complaint is filed. She stated that all of the committee members had been operating as if the amended complaint was a new pleading and that the answer could address everything in the original complaint as well. As a plaintiffs' lawyer, she has thought about this and purposely weighed whether she would seek an amendment or not, knowing that this could affect what would happen in the case. The next steps are for Mr. Bundy to check with the Oregon Association of Defense Counsel and for Ms. Gates to check with the Oregon Trial Lawyers' Association for feedback on the issue. The committee will

report on this feedback at the next meeting.

4. ORCP 23 C/34

Mr. Andersen presented the committee's report and suggested language for the Legislature to the Council (Appendix C). He noted that the language change to ORS 12.190 previously proposed by the committee was deemed unacceptable by the Council for multiple reasons. He stated that the committee had a new proposal that adds a new subsection to ORS 12.190. Mr. Crowley also had another proposal that is included in the committee report. Mr. Andersen noted that everyone on the Council has agreed that the problem needs to be solved; the question is how to do it, recognizing that Legislative Counsel will probably do it its own draft in any case.

Ms. Payne stated that it seemed that the thought would be that the plaintiff would discover within 60 days that a defendant was dead, but she wondered whether there would be time within 60 days to open an estate and file against that estate. She opined that a 60-day hard deadline seems too short. Ms. Stupasky stated that 90 days seems like a more reasonable time period, because that is 60 days to find out that the party is dead, and then 30 more days to serve them. Judge Roberts noted that 60 days is an echo of the 60 days allowed to serve after filing. She stated that, according to the probate department in Multnomah County, it takes five days to open an estate. She noted that she shares the timing concern and actually prefers an approach where it relates back on service. She noted that, at the last Council meeting, someone said that it would not work because there cannot be relation back, but there can be, because the beauty and wonder of statutory change is that it changes the law. If you have a statute that says it relates back, it sure will relate back. It is simpler to say that, if you serve the estate within 60 days, it will relate back to the original filing, and you do not have to both amend and serve.

Mr. Andersen agreed that the concern at the last Council meeting was that it could not relate back. Judge Roberts pointed out that it could not under current law, but if the law is changed, it will. Mr. Andersen noted that he has no pride of authorship; his goal is a solution to the problem. Ms. Payne stated that the idea was to give the Legislature some options, so she suggested giving them an option with 90 days and an option with relation back and letting the Legislature enact the fix that it determines to be appropriate.

Judge Peterson agreed that Legislative Counsel will write it the way they want to write it, but that the Council will do a lot of thinking so that the Legislature will be well informed and it will be a better law.

Mr. Andersen thought that a letter to the Legislature should probably come from Judge Peterson. Judge Peterson stated that he initially thought that it could be sent with the Council's transmittal letter, but noted that it could be done sooner. He stated that the cover page of the committee's report is a good statement of the substantive problem. Judge Bailey observed that the Legislature has a short session coming up where it could make changes. Mr. Andersen noted that there are now three alternatives: the committee's original suggestion, its new suggestion, and Mr. Crowley's suggestion. Ms. Payne pointed out that there is also the relation back option, which she would be happy to draft. Judge Peterson stated that it sounds like the committee should come back one more time to have the full Council look at the language. He stated that he likes the idea of multiple options, and suggested that the Council's discussion of the discovery of the death of the defendant should also be included in the letter to the Legislature. The Council should not make whether the plaintiff knew or should have known about the death one more thing to litigate. Judge Bailey stated that, if the law is just changed and essentially made a misnomer, you get the relation back anyway. He opined that this is the right approach based on the case law. Mr. Eiva stated that a misnomer is based on the fact that the true defendant would have known of the lawsuit. Judge Roberts pointed out that the Legislature would be changing the law. Judge Bailey agreed that such a change would essentially make this situation fall within the misnomer category.

5. ORCP 27/Guardians Ad Litem

Judge Norby stated that the committee had met and has some suggestions for the Council (Appendix D). The committee had a couple of points of consensus, one of which was that the word "unemancipated" should be inserted to modify "minor." The committee also agreed that it is appropriate to insert the word "mandatory" into section B because of the word "discretionary" in section C, which was a later addition by the Council. At the time section C was added, however, the Council the did not go back and change the lead line to section B, so making that change now makes sense.

Judge Norby explained that she is suggesting rewriting the first sentence of section A. However, since the committee spent so much time focusing on the term "guardian ad litem" (GAL), it did not discuss her suggestion. She still thinks that the rest of the sentence should be re-crafted to be more clear, and her suggestion is included in Draft 1B . Draft 1A contains the parenthetical language

that Judge Leith had suggested be placed after the term GAL to explain that it is a guardian for purposes of the litigation. He made this suggestion at the last Council meeting. Judge Norby explained that she had subsequently spoken with Judge Leith and that he is not wedded to the exact parenthetical language in Draft 1A, but he does agree with the concept of a parenthetical explanation.

Judge Norby stated that she does not agree with Draft 1A. For her, the duration is not the primary point of confusion with the phrase GAL, so recycling the word “guardian” to describe a GAL actually exacerbates the problem. For her, the word “guardian” as used in Rule 27 has two fundamental separate meanings, and that is where the confusion is created. A “guardian” is a person who has duties and obligations that are delegated through court letters of authority for whatever duration, either short or long term. A guardian decides where a person lives, what medical care they get, who takes care of their daily needs, and a number of other things. A GAL does none of those things and yet is called the same thing. She believes that the use of the word “guardian” in GAL is a misnomer and that clarity is needed. A GAL is, in her experience, nothing more than an intermediary with the court for a minor or incompetent person. If a GAL is merely an intermediary between the unemancipated minor and the court, or at most a special advocate, but not a guardian in the fundamental sense of the word, it is irresponsible to pretend to define the term GAL by saying that it is a guardian for purposes of the litigation. It is a half answer that is completely unhelpful.

Judge Norby’s suggestion is to rewrite the first sentence in section A and include a parenthetical explanation of a GAL as follows:

When a person who is a party to any court action has a guardian or a conservator or is an unemancipated minor, the person shall appear in the court action through the guardian, conservator, or a guardian ad litem (competent adult spokesperson) appointed by the court in which the action is brought.

Judge Roberts stated that she does not agree with Judge Norby as to what a GAL is. She pointed out that it is not just a spokesperson or intermediary but, rather, a person who has authority to make decisions on behalf of the person who is the subject of the guardianship. The relationship of a GAL is as a representative or as an authorized agent, but not just a spokesperson. Judge Norby noted that she is not wedded to the word “spokesperson,” but that the committee had not gotten to the point of discussing alternatives. She stated that, if the Council could agree that a parenthetical is needed, perhaps a better word could be found.

Mr. Goehler stated that he would like to lobby on the side of not including parenthetical language. He stated that the term GAL has been around for a long time and it has a defined meaning. Judge Norby asked what the defined meaning is. Mr. Goehler observed that a GAL can have many responsibilities, including a decision maker, a spokesperson, and a person with fiduciary duties. It is a guardian whose only duties relate to the litigation. It serves the same function as a broader guardian, but only relating to whatever the issues are in the litigation. He stated that he thinks that trying to delineate any duty, or trying to define the term to say that a GAL is only a spokesperson, is troublesome. He prefers to leave the rule the way it is. Judge Norby pointed out that a GAL is not a parental guardian, not a guardian in a probate sense. It is very limited in its fiduciary obligation and very, very limited in its authority.

Judge Roberts pointed out that the current discussion is about substantive law, i.e., the substance of what a guardian is, and the Council needs to be careful. She suggested that Judge Norby may be wanting to translate GAL to a different term that has a different meaning. Judge Norby explained that she does not want to do this but, rather, to translate it to a term that has the same meaning, but that is more easily accessible. She worried that the rule is using the word guardian in different ways in the same sentence and expecting people to understand what the distinctions are without help, which is irresponsible.

Justice Nakamoto agreed with Judge Roberts that a GAL is not a mere spokesperson. She stated that GAL is a different term than guardian, and she stated that she does not see the confusion. Mr. Andersen also agreed. He pointed out that the term “ad litem” means “for the suit,” and that this is clearly different from a guardian or conservator. Judge Norby asked whether it is different because of the duration. Ms. Payne stated that it is not just because of the duration but because it is for the substantive purposes of the lawsuit. Judge Bailey stated that the GAL is standing in for the unemancipated minor for purposes of the litigation. Judge Norby noted that this is the concept that she was hoping to convey with her parenthetical—a stand in or surrogate, or another word that ties it to what their duty actually is during the lawsuit. For the scope of the lawsuit, their duties are completely different from any other type of guardian.

Judge Bailey asked who is confused as to what a GAL is. Judge Norby stated that self-represented litigants certainly are. Judge Bailey stated that he appreciates that the Council is trying to make the rules easier to understand for those without law degrees. However, the fact that they have entered litigation without a lawyer should not result in the Council potentially making substantive changes to law. Judge Norby explained that there are also new judges who do not understand what a GAL is. When she first became a judge, she did not fully understand it

either, until she had appointed a few GALs and gone through the proceedings and seen how they worked. She opined that the phrase is complicated for both more educated and undereducated people, and that it deserves a description.

Mr. Eiva suggested a parenthetical referencing the relevant statutes next to the words guardian and conservator, because at least it would tell the reader that GAL is different. The practitioner could then look and see what a guardian is and what a conservator is, determine that a GAL is neither of those things, and figure out that they need to consult someone. Judge Norby expressed frustration because it seems like the Council is saying that the term cannot be described, so the Council should not describe it. Judge Roberts stated that it is inappropriate to give a law lesson attached to a rule. Judge Norby asked if Judge Roberts could explain what a GAL is. Judge Roberts stated that a GAL is a person appointed by the court pursuant to a statute or Rule 27 who has the authority to act on the behalf of a person in that action and for the purposes of that litigation. Mr. Eiva appreciated this definition.

Judge Norby asked whether there is any disagreement among the Council about trying to improve the first sentence in section A even if there is no effort to clarify what a GAL is. Judge Peterson expressed concern that, the way Judge Norby's sentence was rewritten in Draft 1B, it would always force the court to appoint a GAL, even if the person had a guardian or conservator who would be more appropriate to represent the person in the litigation. Judge Norby pointed out that the sentence does not say who needs to be appointed but, rather, it just lists them in the same order that they appear earlier in the section. Judge Peterson stated that he may have read the sentence incorrectly, but he will look at it further to be sure that it does not have unintended consequences.

Judge Norby asked whether there is any disagreement on using the words "mandatory" or "unemancipated." Mr. Andersen stated that his concern is that the language appears to make it a mandatory appointment for an unemancipated minor, but it is not clear that it is required for an incapacitated or financially incapable person. Judge Peterson suggested changing the conjunction to "and" to remedy this problem. Mr. Andersen stated that he likes the lead line to section A because it lists all three possibilities: guardian, conservator, and guardian ad litem.

Justice Nakamoto asked whether making appointment mandatory for an unemancipated minor actually changes the rule, because a 14-year-old plaintiff could come to court and act without a guardian ad litem. Mr. Hood stated that he believes that there are certain situations, like access to some medical care, where such minors do not need parental permission. Justice Nakamoto pointed out that subsection B(1) states that, if the minor is 14 years of age or older, then the court

will appoint a GAL on application of the minor. A 14 to 17 year old can initiate litigation on their own without a GAL. Judge Norby acknowledged that it is more than unemancipated minors. Judge Peterson stated that it has always been his understanding that a 15 year old can file the case, but the rule presumes that they will have the sense to ask for appointment of a GAL. If a minor is under 14, they are not competent enough to do that. He wondered whether Justice Nakamoto was saying that a 15 year old can file a case and proceed without a GAL. Judge Wolf pointed out that the rule says that, from age 14 to 17, the minor has to apply for a GAL, not that they can proceed without one. However, under age 14, a relative or friend asks for a GAL to be appointed or the court appoints a GAL on its own. Judge Peterson agreed that, if a 15 year old does not move for appointment of a GAL in some fashion, he imagines that the court would not proceed without one.

Mr. Eiva asked whether there is any defined procedure is to get a GAL appointed on a case that has no case number. He stated that he goes into ex parte and the court appoints the GAL and everyone winks and nods and says go file your case. It is a little bit odd. Judge Peterson stated that he would assume that a lawyer would have the complaint ready to file and do it simultaneously. Mr. Eiva pointed out that the complaint needs to be filed with the GAL's name on it. He stated that he would love to have a rule that lays out a procedure for this.

Ms. Payne stated that she does understand the rule to require a GAL for anyone who is an unemancipated minor, but it just depends on who is filing the application for a GAL. The intent is that, if the minor is 14 or older, they are competent enough to participate in the GAL appointment process. However, if they are under 14, they are not competent enough to participate in that process. Ms. Gates agreed that this is how the rule reads, but asked whether there are any circumstances where a minor can go forward without a GAL. Justice Nakamoto stated that a 15 year old can initiate an action without a GAL, but paragraph B(2)(b) says that, if a minor does not seek a GAL, another party can try to impose a GAL on the minor. She stated that she could see a judge sua sponte saying to a minor, "Look, you probably need some guidance from a competent adult." Judge Wolf observed that the rule says "shall." Judge Peterson agreed. He stated that he has always assumed that a 15 year old can file an action, but that it is not going to go forward without a GAL. Mr. Hood stated that he thinks that subsection B(1) assumes that the case has been filed already. If the lawsuit has been initiated, the court will ask the minor's age and start that process. Mr. Crowley noted that the procedures are laid out in section D, section E, section F, and section G.

Judge Peterson stated that, when he used to file motions to waive filing fees, he would have the complaint and motion prepared, would first present the motion,

and then would file the case. In the Rule 27 context, his solution would be to show up and say he needed a GAL appointed and have his case ready to file with the GAL's name on it. Mr. Andersen stated that he just files the motion and the case at the same time. Mr. Eiva agreed that this is generally what he does, but the rule is not clear. He stated that he was trained that a lawsuit cannot be filed without a GAL if the person is under 18, so the knowledge that the rule allows a suit to be filed for a 16 year old with a motion attached for a GAL relieves a lot of pressure.

Ms. Gates asked whether the Council is ready to take a vote on any of the issues brought up by the committee. Judge Norby stated that she feels that the Council should not take any action at this point if it is not going to be clarifying what a GAL is. Judge Bailey stated that an unemancipated minor is also a correction. Ms. Gates stated that she thinks that the lead line changes are useful. Judge Peterson noted that, if the lead lines are changed, the text throughout will need to be changed to match the lead lines. He stated that the title of the rule would also need to be changed. Ms. Gates asked the committee to bring those changes back to the Council.

6. ORCP 55

Mr. O'Donnell stated that he has been in trial and that the committee has not made a lot of progress. They will meet and report at the next Council meeting.

Mr. Andersen stated that he has always understood that, when a subpoena is issued, whether it is signed by the court or by an attorney as an officer of the court, the person receiving the subpoena is obligated to show up and, if they do not, they can be held in contempt of court. For his own clarification, he asked whether the person issuing the subpoena has to go to court to enforce it before someone can be held in contempt for not complying. Mr. O'Donnell stated that this was, in part, Judge Marilyn Litzenberger's issue with an unrepresented fact witness and what they have to do to lodge an objection sufficient to avoid contempt. That is unclear. He stated that this is something that the Rule 55 committee can look at because, when it comes to subpoenas for documents, it can be even a little more confusing. Judge Peterson agreed that it would be nice to flesh this out better.

7. ORCP 57

Ms. Holley stated that the committee had not met since the last Council meeting, and that they are still in the research stage. She has looked at about half of the states to see if they have a rule comparable to Washington State's and she has not found anything close so far. Judge Tookey sent the committee a work group

summary from the Washington rule that is interesting. The committee will meet again this month.

IV. New Business

A. ORCP 32

Mr. Crowley explained that this issue (Appendix E) was brought to his attention through the State of Oregon's Special Litigation Unit and Trial Division. Under the current rule, if a settlement is reached before the class has been certified, the settlement needs to be approved by the court and the class members need to be notified. However, if the class is not certified, that creates problems for the resolution of the settlement. Judge Peterson explained that one part of the concern is whether notice has to be provided to some or all of the class members. The suggestion is to give the court a little more discretion to say that no notice need to be sent to anyone if it is a class that is not likely to be certified or is undefined. It would allow the court to take a look, say, "I don't smell any rat here," and allow settlement without notifying potential class members. Ms. Gates observed that the goal is to avoid disincentivizing a settlement because of having to certify a class when it is disputed that it even is a class.

Judge Bailey noted that he appreciates that the reason that the rule is there is to protect those who may not have been given notice that they may be part of a class. He wondered what the settlement would be that where one would be looking to not give notice to the class. Who are the plaintiffs that are going to prevail in that settlement that the court is not going to take a look at? Mr. Crowley stated that he is not in a very good position to answer that but, when a class action is filed, there is a certain group that stands up in representation of the class, and he assumes that the settlement is going to be arranged between the lawyers representing those specifically identified individuals and that defendant. The rest of the class has not fully been identified and has not been certified, so the actual class is not a party to the lawsuit until a certification has taken place. Judge Bailey clarified that the settlement only involves the plaintiff as an entity or individual. Mr. Crowley agreed that this is his understanding.

Judge Peterson stated that this is also covered in Rule 54 A. He stated that, typically, a plaintiff can dismiss five days before trial with just a notice of dismissal, but Rule 54 A carves out that under Rule 32, if you have filed as a class, you cannot simply, as an individual, dismiss a case. Judge Bailey stated that the rule is trying to protect those who are potentially part of the class who have not been certified as the class yet so, as long as it somehow reads that the lawsuit is being resolved in terms of the individuals only, it should be all right. Judge Wolf stated that, in that case, he thinks that they do not need to provide notice. But, If a defendant is settling with just the proposed class representative and that representative is the only one affected by the settlement, notice is required

even thought the class has not been certified under the rule as it exists. Judge Roberts asked how one knows who to notify if the class has not been certified. Judge Wolf pointed out that this is the problem.

Ms. Gates stated that it seems reasonable to take a look at the issue. Ms. Payne wondered whether the Council has the authority to change the rule because a notice requirement to class members may be substantive since it might affect people's rights. She suggested that the committee examine that issue. Ms. Gates agreed that this should be the first part of the committee's charge. Judge Peterson pointed out that the Council did make a change in Rule 32 about 10 years ago that covered the notice and there was a lot of discussion about it, but he could not recall whether the Council had asked the Legislature to make the change or whether the Council had made the change itself. He suggested that the committee look at this history as well.

Mr. Crowley and Ms. Gates agreed to join a Rule 32 committee, with Mr. Crowley as chair. Ms. Gates suggested that Judge Hill and Judge Tookey would also make good members of this committee.

B. ORCP 58

Judge Peterson explained that another new suggestion involved Rule 58 (Appendix F), which states that parties are allowed two hours of closing argument. In the case brought to the Council's attention, a self-represented defendant apparently insisted on using the full 120 minutes that the rule provides. Judge Peterson stated that he had not previously read that part of Rule 58 closely, but it does seem to say that, if you want two hours, you get two hours, with no discretion on the part of the court to limit it. Judge Bailey noted that there can be some type of judicial discretion, in the form of a suggestion such as, "Counsel, I think the jurors have heard enough." He noted that this is not a limitation but, rather, a suggestion.

Ms. Gates pointed out that, typically, when the Council hears of one instance of a problem, it does not form a committee. Judge Norby suggested that, if the Council were consider a change to the rule, perhaps the length of argument should be connected to the length of the case. Mr. O'Donnell noted that each case can be very different, regardless of the length of the trial. Judge Bailey stated that he likes the idea of an hour as a base time and then leaving it to the discretion of the judge if the parties need more time.

Mr. Goehler stated that he had not previously read Rule 58, but that the two-hour allowance seems like something that ought to be just taken away. He nominated himself to be on a Rule 58 committee. He remarked that he has never known of a situation where the argument has gone too far but, if a judge does not have the discretion to cut

someone off, he has a problem with that. Mr. Eiva opined that discretion should be very limited if an attorney is substantively arguing the case. Mr. Goehler stated that he believes that a judge should have the discretion to say each side gets half an hour and, if each party says they need a little bit more, they can work it out. Judge Norby noted that judges do not usually have to tell people to stop talking. Mr. Andersen stated that the last thing attorneys want is to have judges telling them how long to take. If it is a very complicated trial with a lot of issues, a lawyer might need more time. Mr. Goehler observed that appellate cases do have time limits. Mr. O'Donnell opined that this would be ad hoc justice. He worked for Multnomah County Circuit Court Judge R.P. Jones, who told him to take attorneys who were taking too long on closing arguments outside the courtroom and tell them, "You lost this jury two hours ago; Judge Jones says do not let it happen again." That was pretty effective. Judge Bailey observed that many of Oregon's rules are not inspired by good attorneys.

Judge Norby wondered about the history of the rule. Judge Roberts stated that she vaguely remembers a case that did deal with limitations on time, a misdemeanor case in front of then-circuit court Judge Ellen Rosenblum. Judge Rosenblum limited the time, and got reversed on appeal. Judge Bailey noted that, in that case, it was a very short amount of time. Mr. O'Donnell stated that there are already ways that judges can deal with the issue. Judge Roberts stated that lawyers should try the cases, not judges. Judge Norby asked whether the two hour allowance applies to jury trials or court trials. Mr. Goehler replied that it only applies to jury trials.

The consensus of the Council was not to form a committee on this issue.

C. Legal Needs Study

Ms. Nilsson noted that much of the discussion regarding Rule 27 at the last meeting involved how much to change the rules to assist self-represented litigants. The view was expressed that the effort should be to get lawyers for those litigants, rather than changing the rules for their benefit. Ms. Nilsson explained that her full-time job is with the Campaign for Equal Justice, a support organization for legal aid. She noted that there has been a consistent effort to increase the number of legal aid lawyers over the years but, despite those efforts, only 15% of the legal needs of low-income Oregonians are currently being met. She distributed a Legal Needs Study (Appendix G) completed in 2018 and noted that many of its findings are stark; for example, the average low-income household has 5.4 legal problems, and 84% of low-income people with a civil legal problem went without representation or legal assistance. She asked that Council members consider these things when thinking about the needs of self-represented litigants.

V. Adjournment

Judge Peterson reminded the Council that there are five meetings remaining to get the rest of its work done. The Council does not typically meet in July or August, but it can, if necessary. It would behoove Council members to have all committee reports ready in January.

Ms. Gates explained that the next meeting will be held on January 11, 2020, at the Bar offices. She adjourned the meeting at 11:22 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director



Shari Nilsson <nilsson@lclark.edu>

Fwd: ORCP 31 (Interpleader)

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

Sat, Jan 4, 2020 at 12:39 PM

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

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

From: <mark@moc-law.com>
Date: Mon, Dec 30, 2019 at 7:54 AM
Subject: RE: ORCP 31 (Interpleader)
To: Mark Peterson <mpeterso@lclark.edu>

Mark:

I remember the case, we had some internet fraud and a disabled person's account was used to deposit the money gained by the fraud.

Everyone agreed the money needed to go back from where it came.

However, the interpleader grants attorney fees to whomever interpleads the money into court. Why? We had to work around that big issue. There needs to be a means of "friendly" interpleader. We had to interplead it because the Federal Government claimed that the money was his and cut him off from receiving SSI. By court order we were able to interplead the money, hopefully to restore his SSI.

Additionally ORCP 31 B states "Any party or amount involved as to which the Plaintiff admits liability." Why is it limited to the plaintiff? In my case it was the defendant. Additionally at the end it says "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 seems to me that instead of focusing on "Plaintiff" the focus should be upon the party depositing the money.

COCOP Meeting Packet
January 11, 2020
Attachment B-1

If there is an ongoing suit and plaintiff X sues Defendants Y and Z, and Y just wants to deposit the money and let X and Z fight it out, the way the rule is read, the procedure applies plaintiff's not defendants. We had to work through this with the Judge and the Judge just simply ignored the word plaintiff.

ORCP 31 A and B seem to presuppose Plaintiff, when it should be party neutral. That is my suggestion.

Mark O. Cottle - Attorney

mark@moc-law.com

www.Oregon-familylaw.com
22021 SW Sherwood Blvd.,

PO Box 1124

Sherwood, OR 97140
503 625 5529

Fax: 503 625 4169

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From: Mark Peterson <mpeterso@lclark.edu>
Sent: Friday, December 27, 2019 6:45 PM
To: mark@moc-law.com
Subject: ORCP 31 (Interpleader)

Mark,

COCF Meeting Packet
January 11, 2020
Attachment B-2

You responded to the Council on Court Procedures' biennial survey of the OSB in August. You indicated that ORCP 31 is confusing and could be improved. I left a voicemail for you on or about December 4 to follow up regarding your concerns relating to Rule 31. The Council works on a biennial schedule and it is now that suggestions for improvements to the ORCP are under consideration for referral to a committee for potential amendments. Can you provide any insight as to how Rule 31 is failing to serve litigants and lawyers or, more specifically, how the rule can be improved? The Council will next be meeting on January 11, 2020. I have been assigned to explore your concerns. In order to receive consideration this biennium, it is important that I hear from you prior to the January 11 meeting.

You may respond by email or, if a short conversation would be more effective, please call me on my cell phone (503-54407022) as the office telephone works primarily for leaving voicemails; as a small agency, office hours are limited.

Thanks,

Mark

--

Mark A. Peterson

Executive Director

Council on Court Procedures

Clinical Professor of Law

Lewis & Clark Law School

[10015 SW Terwilliger Blvd](#)

[Portland OR 97219](#)

mpeterso@lclark.edu

(503) 768-6505

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] that time.

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.]* **A party to**
7 **any action 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, appointed by the court in which that action is brought, who has the**
10 **authority to act on behalf of that party in that action and for the purposes of that litigation.**

11 The 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 125.005,
17 is a party to an action and does not have a guardian or conservator, the person shall appear by
18 a guardian ad litem appointed by the court in which the action is brought and pursuant to this
19 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 the
23 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 of
6 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 of
9 the person, or other interested person, filed within the period of time specified by these rules
10 or any other rule or statute for appearance and answer after service of a summons or, if the
11 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 defined
24 in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
25 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
26 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 a
5 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 the
16 relationship of the person making the motion to the person for whom a guardian ad litem is
17 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 may
21 object in writing to the clerk of the court in which the matter is pending and stating the desire
22 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.

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.]* **A party to**
7 **any action 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 125.005,
17 is a party to an action and does not have a guardian or conservator, the person shall appear by
18 a guardian ad litem appointed by the court in which the action is brought and pursuant to this
19 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 the
23 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 of
6 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 of
9 the person, or other interested person, filed within the period of time specified by these rules
10 or any other rule or statute for appearance and answer after service of a summons or, if the
11 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 defined
24 in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
25 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
26 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 a
5 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 the
16 relationship of the person making the motion to the person for whom a guardian ad litem is
17 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 may
21 object in writing to the clerk of the court in which the matter is pending and stating the desire
22 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.

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. The
7 appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is
8 made on the court's motion or a statute provides for a procedure that varies from the
9 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] an unemancipated minor or a
12 person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005,
13 is a party to an action and does not have a guardian or conservator, the person shall appear by
14 a guardian ad litem appointed by the court in which the action is brought and pursuant to this
15 rule, as 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.

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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.

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

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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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Shari Nilsson <nilsson@lclark.edu>

ORCP 55 Question

1 message

Victoria Katz <victoria.katz@aderant.com>

Thu, Jan 9, 2020 at 1:30 PM

To: "mpeterso@lclark.edu" <mpeterso@lclark.edu>, "nilsson@lclark.edu" <nilsson@lclark.edu>

Dear Mr. Peterson and Ms. Nilsson,

We are writing in the hopes you might be able to provide us some clarification regarding ORCP 55, as amended effective 1/1/20. Specifically, we are looking for information about ORCP 55C(3)(b) regarding the time permitted by subpoena for production of required document or things.

Prior to the 1/1/20 amendments, ORCP 55D(1) stated, "In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period." [Emphasis added.]

Following the 1/1/20 amendments, ORCP 55C(3)(b) says, "The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time." [Emphasis added.]

Although the 14-day time period is the same in the two rules, ORCP 55C(3)(b) does not set forth a triggering event for calculating this time period. Is the 14 days to be calculated from the date of service of the subpoena, as before, or perhaps from the date of receipt of the subpoena or the date of the subpoena itself?

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many law firms practicing in the Oregon State Courts. Thus, we would greatly appreciate any information you are able to provide us regarding this matter.

Thank you in advance for your time and consideration.

Sincerely,

Victoria Katz

Senior Rules Attorney

Email: victoria.katz@aderant.com

Support: +1-850-224-2004

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COCF Meeting Packet
January 11, 2020
Attachment E-1



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