MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, October 14, 2023, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams
Alicia Wilson

Members Absent:

Michael Shin
Hon. Jonathan Hill
Hon. Norman R. Hill
Scott O'Donnell

Guests:

John Adams, Oregon Tax Court
Aja Holland, Oregon Judicial Department
Molly Quillin, University of Oregon School of Law
Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting		**ORCP/Topics Discussed & Not Acted On this Biennium**		**ORCP Amendments Promulgated this Biennium**	**ORCP/Topics to be Reexamined Next Biennium**
ORCP 10 ORCP 12 ORCP 15 ORCP 19 ORCP 21 ORCP 23 ORCP 54 ORCP 55 ORCP 58 ORCP 68 ORCP 69 ORCP 71	Discovery (ORCP 36-46) ORCP/Administrative Law ORCP/UTCR Judges & the ORCP Electronic Signatures Service by Publication Vexatious Litigants	ORCP 10 ORCP 12 ORCP 15 ORCP 19 ORCP 21 ORCP 23 ORCP 68 ORCP 69 ORCP 71	Discovery (ORCP 36-46) ORCP/Administrative Law ORCP/UTCR Judges & the ORCP		

I. Call to Order

Mr. Andersen called the meeting to order at 9:40 a.m.

II. Administrative Matters

A. Approval of September 9, 2023, Minutes

Judge Peterson pointed out two errors in the draft minutes from September 9, 2023 (Appendix A). On page six, Senate Bill 688 is erroneously referred to as Senate Bill 68. On page nine, the phrase, "wanted the either the Council," needs one of the words "the" removed. Judge Williams made a motion to approve the draft minutes with the amendments recommended by Judge Peterson. Ms. Dahab seconded the motion, which was approved unanimously by voice vote.

B. Essential Rules for Oregon Courts

Judge Peterson let the Council know that the Office of Legislative Counsel has published a volume called *Essential Rules for Oregon Courts*. He stated that he had proposed this publication to Legislative Counsel some time ago, and that he had envisioned a slightly smaller volume and had not considered including the tax court rules, but that he was very pleased to see the book finally published. At a cost of just $65, it is a much cheaper option than the Thomson Reuters publication most lawyers purchase. Judge Norby asked Judge Peterson to share a link to the publication that she could share with her court staff. He agreed to do so.

III. Old Business

A. Annual Election of Officers per ORS 1.730(2)(b)

1. Vice Chair

Mr. Andersen asked for nominees for the still-open position of vice chair. Ms. Johnson made a motion to nominate Mr. Goehler as vice chair. Ms. Wilson seconded the motion, which was approved unanimously by voice vote.

B. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson reported that staff comments were not yet complete. He stated that he would finish drafting the comments and circulate them to the members of last year's Council for review to ensure that the explanations are consistent with the actions of that Council. They will, of course, also be shared with the current Council. Judge Peterson explained that the intent of staff comments is to provide

a convenient way for researchers to get an overview of why the Council made a rule change, while more detailed legislative history can be found in the Council's minutes.

2. Legislative Assembly's Statutory Amendments Affecting Civil Procedure

Judge Peterson explained that, in the 2021-2023 biennium, the Council had made two suggestions to the Legislature for statutory amendments. The first was in regard to references to ORCP 55 in Oregon Revised Statute (ORS) 136.100. These references became outdated after the Council's reorganization of Rule 55 in the 2017-2019 biennium. House Bill 2325 (Appendix B) made the Council's suggested amendments.

However, the Legislature did not take action on the Council's recommended amendment to ORS 45.400, which would have changed the default of 30 days' notice before trial for remote witness testimony. Judge Peterson stated that the Council may decide to put this item on the agenda again this biennium and see if the Oregon State Bar (OSB) would be willing to make the recommended amendment a part of its law reforms package to the Legislature. He stated that it might make a difference to have a champion for the suggested amendment in the Legislature.

Ms. Johnson asked for clarification about the process when the Council would like the OSB to potentially present an issue to the Legislature. She asked whether there is a direct conduit of communication between the Council and the OSB. Judge Peterson explained that Matt Shields is the Council's OSB liaison, and that Mr. Shields works with the OSB's lobbying arm. Ms. Nilsson noted that Mr. Shields was not currently present at the meeting, but that he planned to join at about 10:00 a.m.

Mr. Andersen remarked that his recollection was that both plaintiffs' and defense lawyers on the Council last biennium were in favor of eliminating the 30 days, and that judges were neutral. He wondered about the most efficient way of getting the recommendation before the Legislature. Judge Peterson stated that he would talk to Mr. Shields about the best way to do so. He stated that it strikes him that the Bar's package of law reform measures would be the most effective way to approach this. Mr. Andersen recalled that the Council had mentioned the recommendation in its transmittal letter to the Legislature. Judge Peterson affirmed this, but stated that such a recommendation is not enough to get the issue in front of the Legislature in a bill, which is likely what needs to happen.

Mr. Andersen asked what could be done today to ensure that the proposal reaches the Legislature. Judge Peterson suggested appointing a short-term committee to look at the proposed amendment. Ms. Holley noted that the previous Council had voted to approve the suggestion last biennium and

suggested that a new committee was unnecessary. Mr. Andersen agreed, and asked for a volunteer to shepherd the proposal to the Legislature. Judge Peterson stated that he would take responsibility for speaking to Mr. Shields.

Mr. Goehler mentioned that timing is also a consideration, because there is a while before the Legislature will be in session again. He stated that, as the Council is doing its work, he imagines that other instances of potential legislative changes may arise. He suggested starting a list with these proposals so that they can be tracked and presented to the Legislature at the appropriate time.

C. Potential Addition of Family Law, Protective Proceeding Attorneys to the Council

Judge Peterson referred to the Council's authorizing statutes (Appendix C) and noted that ORS 1.730 requires that the lawyers on the Council be broadly representative of the general bar. By tradition, the Council has maintained a distinct balance of six plaintiffs' and six defense attorneys. Also by tradition, the chair and vice chair position have alternated between a plaintiffs' side member and a defense side member, which gives the Council legitimacy and maintains a good power balance. Judge Peterson stated that there is no statutory reason that 12 attorneys from all kinds of practices could not be appointed to the Council. He did point out that appointment of different practitioners would have an impact on the Council's tradition with respect to officers.

Judge Peterson explained that the OSB Board of Governors (BOG) is responsible for appointing attorney members to the Council. He reaches out to the staff at the OSB when it is time for appointment of new Council members, lets them know the current geographical makeup of the Council, and tells them how many plaintiffs' and how many defense attorneys are required. He stays out of the actual appointment process beyond that, although it is his understanding that both the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) have strong roles in recommending attorneys to the OSB for appointment. Judge Peterson's position is that attorneys who wish to be appointed to the Council should fill out the OSB's volunteer opportunity form so that the BOG has uniform information on everyone; however, he is aware that, in some instances, members of OTLA or OADC have had their names put forward by those organizations without having completed an OSB volunteer form. Judge Peterson noted that it is possible that there are members of OTLA and OADC who have experience in family law and protective practice and suggested that those organizations might recommend such practitioners for Council membership.

Mr. Andersen reminded the Council that responders to the Council's survey had not only recommended including a family law practitioner on the Council, but also mentioned that the ORCP should take family law petitioners more into consideration when amending the rules. He asked the Council for comments.

Judge Norby stated that, in her experience, family law and protective proceeding procedural approaches are distinct from the rest of litigation in that there typically is not that much disagreement about procedural issues. For example, in family law, an attorney is just as likely to represent a husband as a wife or a child, as the petitioner or the respondent, so there is less potential for debate about whether something is working or not based on the position that the parties take at the table. Unlike general civil litigation, where there is frequent dissension between the defense approach and the plaintiff's approach, the same attorney is likely to take any place at the table for protection proceedings. Judge Norby thought that it might be helpful to identify some judge members with particular expertise in family law and probate and ask for them to be appointed to the Council when judge vacancies arise. That would eliminate the need for altering the balance of six plaintiffs' attorneys and six defense attorneys, which she feels is very important.

Judge Bailey stated that he has been handling family law cases for the past two years, and that clearly much of what happens in family law is determined by the ORCP, whether it be the type of service, discovery, or depositions. He opined that it makes sense to include that perspective on the Council. He agreed with Judge Norby that sometimes family law lawyers represent petitioners and sometimes they represent respondents, so they would bring a unique perspective in being able to see both sides of the rules and how the rules can have an impact, depending on which side one is on. Judge Bailey stated that he had talked to some family law practitioners who were not aware that they might be eligible to be appointed to the Council, so it would be important to let them know if the Council were to make the decision to include them.

Mr. Goehler agreed with Judge Norby's and Judge Bailey's comments. He stated that family law practitioners are essentially neutral. He proposed the idea of keeping five defense attorneys and five plaintiffs' attorneys and adding two from the family law and/or protective proceeding bar. This would keep balance on the Council and provide valuable input that is lacking now. Ms. Wilson stated that she suspects that attorneys from rural counties practice in a lot of different areas, so she would expect that there are OADC members who have family law experience.

Mr. Andersen agreed with Judge Norby that the judicial perspective is very important, but stated that it is also important to get the perspective of actual practitioners who deal with issues that are unseen by the judges, or sometimes do not come to the surface. Judge Peterson stated that he has felt like the judges have been able to help provide good perspective on family law and protective proceeding issues, although he agreed that their perspective is different from that of a practicing attorney. He did point out that the Council has a bit more control over its requests for appointment of judges than it does for attorney appointments. He stated that he suspects that he could let the Circuit Court Judges Association know that the Council really needs a judge who specializes in family or protective proceedings. However, the BOG is not as predictable in its

appointments.

Ms. Nilsson suggested forming a committee to do a little bit of further study before jumping to a solution. Judge Bailey agreed and volunteered to chair a committee. Mr. Kekel, Ms. Johnson, and Ms. Wilson agreed to join the committee.

D. Potential Amendments to the ORCP/Formation of Committees

Mr. Andersen directed the Council's attention to Appendix D, the chart of suggestions received by the Council. He opened the floor for discussion and potential formation of committees. Judge Shorr noted that the Council has limited resources, and asked if there is a reasonable number of issues that the Council has traditionally undertaken in a biennium, just to get an idea of what might be too much or too little. Judge Norby stated that the Council typically ends up with between six and eight committees. In past biennia, the Council has gone through the entire list of suggestions or topics one by one and decided whether there is enough interest on each to form a committee. Mr. Andersen stated that this process would be acceptable to him if the Council agrees. Mr. Goehler suggested working through the list and seeing how far the Council could get during this meeting.

ORCP 10 B

The Council discussed suggestions to eliminate the three-day "mailbox" rule in ORCP 10 B. Ms. Holley noted that this suggestion comes up often and that she personally does not see the need to eliminate the rule. Ms. Weeks stated that she disagrees, and that it would be an easy action to take. As the public member of the Council who interfaces with many attorneys, this is the number one complaint that she receives. Attorneys find it frustrating because they need to reference another rule to determine how long a party has for a response or a reply. It is cumbersome to have to look in at least two places. There is no longer a mailbox rule in other jurisdictions, and that has not seemed to have adversely affected practice.

Judge Peterson noted that, when service by facsimile became common, there was a thought that the three-day rule was not needed because faxes were "instant," and that there could be different rules for different means of service. However, he recalled an attorney during his days in practice who would routinely fax him pleadings at about 6:15 on Friday evenings. He commented that now, in the days of e-mail, there are still people who like to disconnect from their electronic devices in the evening or on the weekend. He stated that the three-day rule feels like a matter of Oregon professionalism, where attorneys do not try to get a one-up on each other.

Ms. Holley stated that her experience is that most people practice without the three-day rule and do not rely on it. However, there are instances where it acts as a buffer. She stated that she does not have a strong opinion, but agreed that it can provide a little security. Mr. Andersen asked whether anyone had a solution to the problem that would arise if the three-day rule were eliminated and the event deadline occurred on a Saturday, a Sunday or a holiday. Ms. Holley stated that, by rule, the deadline is moved to the next Monday. Judge Peterson agreed that, according to ORS chapter 174, the deadline would be the next day that the court is open. Judge Bailey stated that a workaround could be to use the term "business days" and eliminate the question of weekends and holidays. If someone sent a document on a Friday afternoon, Monday would be the effective service day.

Ms. Weeks noted that the comments that she hears come mostly from plaintiffs' attorneys, mostly because she interacts more with plaintiffs' counsel due to the type of firm she works in. She stated that the comments are not vehement, but it is the general consensus from the people she works with that the mailbox rule is not helpful. She agreed with Ms. Holley that most attorneys do not really take it into account and just operate on the actual response time based on the UTCR. The three-day rule just becomes a buffer, but she would argue that it is just a further complication. In addition, in the interest of making the rules more readable and accessible to people who are not attorneys, removing the three-day rule would be a way of simplifying deadlines.

Judge Norby stated that, to her, it feels like an issue of strategy versus congeniality. She noted that being hard and fast with timelines leads to a concept of a party losing if they are a second late, not because they deserve to lose on the merits. She stated that she is a little uncomfortable with removing the three-day rule because there are people who assume, perhaps incorrectly, that the people who are complaining are frustrated that they cannot work strategy in their clients' favor. That is, of course, a big part of what lawyers do. However, she believes that, when it comes to deadlines, having a little flexibility or showing that we are trying to do things for the right reasons in the right way is a good thing. Judge Norby stated that she sees it as almost an access to justice issue, but she does not feel strongly about it.

Mr. Larwick pointed out that it is still possible to effectively serve documents on the other side by mail. He stated that he was not sure whether the proposals are to do away with the three-day rule even when serving by mail, which seems like it could have strategic implications, especially with regard to, for example, a reply to a summary judgment motion, which has a five-day response time. He stated that he could then see parties using the elimination of the mailbox rule as a strategic advantage by sending everything by mail from that point on, with no more courtesy copies, to give the other side very little time to respond to certain motions. Mr. Larwick stated that he actually believes that the three-day rule creates sort of an incentive to send courtesy copies by email, because there is not

really much strategic advantage whether the opposing party has five days or eight days.

Judge Oden-Orr noted that, as a lawyer, he did not like the three-day rule. As a judge, he has had to address three-day rule issues, with the request always being to strike something because it was late. He stated that the most compelling consideration for him is self-represented litigants who have to look from rule to rule to rule to understand how to file papers and do things. He would be in favor of a change that would give more clarity to them. Clarity of the rules should be the Council's goal.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate eliminating the three-day rule or not. A majority of the Council voted against forming a committee. Judge Bailey stated that he does not feel strongly about it; however, perhaps there is a middle ground where either the rules could be changed so that readers do not need to go somewhere else to find the three-day rule, or the concept of business days could be inserted. Judge Williams agreed, but stated that he would go with the majority vote. Ms. Weeks stated that she would be happy to join a committee if one were formed. She agreed with Judge Norby's points, and could be swayed into keeping the three-day rule, but she would be curious to look into using judicial days as opposed to just days in the rule. She stated that she would also be curious to explore where the three-day rule would be moved if this were possible, since deadlines are found throughout the ORCP.

Ms. Holley asked Judge Bailey whether his thought was to move the three-day rule into every rule that has a timeline. Judge Bailey stated that this could be a potential solution. He explained that about 40% of the cases he handles are family law, and self-represented litigants in this area do not necessarily know that they have to go someplace else in the rules to find out what time period is related to the rule they are reading. It may be that the Council would decide that it is appropriate to insert the three-day rule into certain areas of the ORCP and not in others. It may also be that this solution is too cumbersome. Ms. Holley supported Judge Norby's comments and stated that the three-day rule gives a little bit of friendliness and reduction of "gotcha" tactics. Judge Bailey said that he would love to tell Ms. Holley that, in the world of family law self-represented litigants, there are not a lot of attempts at "gotchas," because they love each other and there is no animus between the parties. Sadly, that is not the case.

Ms. Weeks asked whether it would be possible to create a rule that simply lays out every single deadline and put the three-day rule into that. This would create only one place people had to go to know what deadlines are. Mr. Andersen stated that there is a red book published by the OSB that compiles all of these deadlines.

Mr. Andersen conducted another voice poll as to whether the Council wished to form a committee to investigate a change in the three-day rule. A majority of the Council voted against forming a committee.

ORCP 12 - Clerks and E-Filing

After discussion, the Council agreed that this is not an issue that changes to the ORCP could help to improve. Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate further. A majority of the Council voted against forming a committee.

Judge Peterson noted that this may be an issue for the UTCR Committee, as Chapter 21 of the UTCR deals with the filing of pleadings. Mr. Andersen asked Judge Peterson and Ms. Nilsson what could be done to notify the people who have made suggestions to the Council that their suggestions had been considered and that the Council would not be taking action, but that they may wish to pass the suggestion on elsewhere. Judge Peterson stated that the Council receives many suggestions and it is difficult to individually communicate with each person regarding the status of their suggestion. However, staff will communicate with each person for whom it has an e-mail address, thanking them for their suggestion and inviting them to join the Council's listserv to follow its work. He noted that Ms. Holland, who is associated with the UTCR Committee, is present at the meeting and is now aware of this suggestion.

ORCP 21 (15, 19, 47 E)

Mr. Andersen noted that one suggestion regarding Rule 21 argues that Rules 19 and 21 pose a conflict with one another when considered alongside Rule 15. There are also suggestions that the time frames in Rule 21 are complicated for no good reason and that it would be useful to clarify whether Rule 21 requires a party to assert a lack of subject matter jurisdiction in an initial response or whether it can be raised later.

Judge Peterson noted that in the case cited in the first comment, *Wells Fargo Bank, N.A. v. Clark*, 294 Or App 197, 199 (2018), the Court of Appeals seems to solve the problem pretty well. If a party files a motion to dismiss, ideally it would be ruled on and it would clarify the pleadings but, if it does not get ruled on, the party can file an answer and has not waived its motion to dismiss. It seems to him that the *Wells Fargo* decision said that these three rules work fine as they are.

Ms. Wilson stated that she thought that the third suggestion about the waiver of subject matter jurisdiction was an interesting point, because the rule uses the language "the defense of lack of jurisdiction over the person," which does sound like personal jurisdiction. That may be confusing to some people. However, the case law is clear that subject matter jurisdiction cannot be waived by the failure to

raise it. Mr. Larwick stated that court's jurisdiction is going to be statutory and go beyond what the rules of civil procedure allow, so he did not think that just failing to raise that jurisdictional issue would be enough to expand the court's jurisdiction over matter. Judge Peterson stated that there is a fair amount of case law that says that the parties cannot confer subject matter jurisdiction on the court. However, Rule 21 A(1)(a) says that a lack of jurisdiction over the subject matter should be raised, and presumably fairly quickly. Rule A(1)(2) says that a motion to dismiss asserting any defenses in paragraph A(1)(a) through paragraph (A)(1)(i) must be filed before pleading. One potential change to the rule might be to change paragraph A(2)(a) to leave out subject matter jurisdiction, thinking people would usually raise subject matter jurisdiction right out of the box and the court can raise it later on its own initiative. Perhaps it is paragraph A(1)(a) and A(2)(a) that seem to be suggesting that, if subject matter jurisdiction is not raised at the first instance, it is waived. Ms. Holley pointed out that, because the word "may" is used, it seems fine. She stated that it seems intentionally written to her.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate Rule 21 matters further. A majority of the Council voted against forming a committee.

ORCP 23

Mr. Andersen directed the Council's attention to the suggestion regarding Rule 23: that, if the parties stipulate to filing an amended complaint, parties should not have to go to the expense of getting a court order. Ms. Johnson stated that this suggestion interests her a bit because, sometimes when courts are overwhelmed or there has been a change of staff, she has experienced a delay between the submission of a stipulated motion to amend and the order being signed. If there is a deposition set and pending, this complicates the preparation. It may take one thing off of busy courts' schedules, but she does not know how to procedurally accomplish it. She did point out that, the way the rule is written now, it does not explicitly state that a signed order is required. She stated that a change may be worth considering if the judges find that it is something that might be helpful to them in keeping control of their dockets. Ms. Holley stated that she has filed amended complaints with written consent, without a motion or order, and has not received any push back, so she believes it is already allowed. Judge Peterson pointed out that Rule 23 already states that a pleading may be amended by written consent of the adverse party, so this may be a solution in search of a problem.

Ms. Dahab stated that she has had the same experience as Ms. Johnson, and agrees that it is confusing. She has done the same thing as Ms. Holley and filed a stipulated amendment or included in the caption "with opposing party's consent" and called it good. However, each time she does that she always pauses. She stated that she could see how others might take the same pause and feel that an

order might be necessary, which would lead to the same kind of delay Ms. Johnson spoke of. Ms. Holley asked whether the Council would be able to make a staff comment to clarify the rule. Judge Peterson stated that staff comments are only appropriate when the Council amends a rule. He did note that the minutes of this meeting would be available for citation if an issue arose on appeal.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate this matter further. A majority of the Council voted against forming a committee.

ORCP 54

Judge Peterson stated that this suggestion points out a conflict between offers of judgment under Rule 54 E and court-annexed arbitration. The solution appeared to be a statutory change, which is outside of the Council's purview. Judge Peterson noted a Court of Appeals case that was decided the previous week, *Mendoza v. Xtreme Truck Sales, LLC,* 328 Or App 471 (2023), and stated that it may be the case that a statutory change has been made. However, he did not dig any deeper than a cursory reading of the opinion, and it may be worth having a committee take a look at the issue to see whether a problem exists.

Mr. Goehler stated that he agreed that it was worth forming a committee to explore the issue. He noted that how this happens in practice with mandatory arbitration tends to be different from how the rules read. Most arbitrators will consider an offer of judgment before there is an actual judgment entered. Mr. Goehler stated that this is an issue that is, practically speaking, worked around by everyone. If a committee could take a look and determine whether an offer of judgment can be applied before an actual judgment is entered, and determine whether that is a statutory fix, that would be helpful. Judge Bloom stated that he would be willing to look at the issue as well.

Judge Norby pointed out that all of the rules for court-mandated arbitration are statutory, and that there is very little interplay with the ORCP because it is a separate process. She expressed discomfort with the thought of interjecting a rule into that process. Mr. Anderson asked whether she was comfortable with the idea of suggesting a statutory change to the Legislature if a problem were to be identified. Judge Norby stated that she was fine with that. Mr. Goehler stated that the only change to ORCP 54 E that he could envision is a change to the timing– whether it is triggered by an entry of judgment or not. However, it may be that this group of intelligent minds would discover an unintended consequence of such a change. He thought that it was worth exploring.

Mr. Goehler agreed to chair an ORCP 54 committee. Judge Bloom, Ms. Dahab, and Judge McHill agreed to serve on the committee.

ORCP 55

Mr. Andersen directed the Council's attention to the comments regarding Rule 55. He noted that one of the comments was from Greg Zahar, who had appeared at the September 9, 2023, Council meeting to present his thoughts. Mr. Andersen reminded the Council that Rule 55, under Judge Norby's leadership, went through a major reorganization during the 2017-2019 biennium. At that time, the idea was not to introduce changes to the rule, but to wait to see how the reorganization worked before considering changes that would affect the rule's operation. He asked the Council if any of the suggested changes suggested seemed to warrant a committee.

Judge Peterson pointed out that the Council spent a lot of time last biennium working on an amendment to Rule 55 that would give an occurrence witness the ability to ask for relief if a appearing on the date required by a subpoena is really inconvenient for them. That amendment did receive a majority vote, but not the super majority vote needed for promulgation. He noted that, although the entire rule change was not promulgated, there was consensus for Judge Norby's suggested changes to the form of subpoena that made the subpoena seem like it was not an RSVP but, rather, a command. Judge Peterson recommended that the Council form a Rule 55 committee. He recommended that Judge Norby chair the committee. Judge Norby agreed to chair a Rule 55 committee. Ms. Holley, Mr. Larwick, Judge Peterson, and Ms. Weeks joined the committee.

Judge Norby suggested that the committee should be better at providing more alternatives for the Council to consider so that, if some changes are rejected, the ones that receive consensus can still be promulgated.

ORCP 58

Mr. Andersen stated that the suggestions regarding Rule 58 come from the criminal defense bar, who do not like jury questions in criminal trials. The final suggestion proposes the solution of allowing juror questions with the court's consent, except that, in a criminal matter, jurors may not submit questions if objected to by any defendant.

Judge Norby stated that she has pretty strong feelings about this. She noted that she has come a long way on the issue, because she was formerly a big proponent of jury questions in all cases. She was, however, persuaded during an attempted murder case that jury questions could sometimes shift the burden of proof from the state to the defendant. Judge Norby stated that she now does not allow jury questions in any criminal trials. She feels that this is a significant issue.

Ms. Wilson echoed Judge Norby's comments. She wondered whether the Council had considered that ORS chapter 136 applies Rule 58 to criminal trials when it

changed the rule in 2000 to add jury questions. She stated that this is a big concern in certain criminal cases. Judge Oden-Orr stated that it is his understanding that this was a jury innovation technique that the court adopted, based on the idea of trying to improve the experience for jurors and helping them understand information and make decisions. He stated that he often finds jury questions interesting, and of course, the judge decides whether or not the question is appropriate. Mr. Andersen noted that the proposed amendment would empower the defense attorney to object and end the inquiry.

Judge Bloom stated that he was on the Council as a lawyer when jury questions were added to Rule 58. However, recent case law makes clear that, in criminal cases, they could have the effect of inappropriately shifting the burden. He is as concerned as Judge Norby about the issue, and the criminal bench in Jackson County is not allowing juror questions at this time.

Judge Bailey recalled that the committee that Ms. Holley chaired that did such good work on peremptory challenges had considered removing criminal cases from the ORCP altogether and asking the Legislature to create its own rules regarding juries in criminal cases, which would include juror questions. He agreed with Judge Oden-Orr that 20+ years ago it was the "cool" thing to do to allow jurors to ask questions, because the thought was to have jurors to feel like they are part of the process. However, the majority of the questions from jurors cannot be used for some reason anyway, and the judge ends up looking like the "bad guy" because they have to say no to the juror. Given the new case law that has determined that juror questions can be a burden shift, his opinion is that juror questions in criminal trials just need to be eliminated altogether.

Judge Bloom agreed to chair a committee regarding this issue. Judge Bailey, Ms. Dahab, Ms. Holley, Judge Oden-Orr, Judge Williams, and Ms. Wilson joined the committee.

ORCP 68

Mr. Andersen directed the Council's attention to the comments regarding Rule 68 and attorney fees. Judge Peterson stated that, with regard to the first suggestion, Rule 68 had been rewritten to pretty clearly lay out that the first party files a statement, the second party may file an objection, and the first party then may file a response. The rule contains the names of the documents and the timelines for filing the documents. The second suggestion is that the person submitting the statement of attorney fees should tell the other side that they have a right to object within 14 days. Judge Peterson stated that he does not know that attorneys have an obligation to tell the other side that they should object if they wish to. For judges, that would create a headache because objections could go up exponentially. Judge Norby stated that she has a lot of self-represented litigants who immediately write her expressing their objections to statements for attorney

fees, so she did not believe that suggestion number two was necessary.

Judge Bailey stated that it might potentially be worth exploring the issue of self-represented litigants who have been found in default but who believe that they can still object. He stated that the rule is clear, but it creates a lot of confusion and anger in certain people when the judge has to sort of politely let them know that they were found in default, and thank them for their objections which will not be considered. Mr. Andersen asked how a change to Rule 68 would solve that problem. Judge Bailey stated that the rule could make clearer that, if one is found in default, they cannot provide an objection, or something of that nature.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate this matter further. A majority of the Council voted against forming a committee.

ORCP 69

Mr. Andersen directed the Council to the comments regarding Rule 69. Judge Bailey stated that, in family law cases, there is sometimes gamesmanship where parties do not send out the notice before taking default, or wait until the last minute to file an answer. Sometimes it is just because they just do not know better, because they are self represented. But perhaps the issue could be explored. Judge Bailey stated that he does not understand why, when a summons says that the person has 30 days to respond, the person who issues the summons then has to give notice of taking default before doing so. He opined that the rule should be 30 days and, if the answer is not filed, the default can be taken. It would certainly speed things up.

Judge Peterson expressed a contrary position. He stated that this is an example of the kind of professionalism contained in the Oregon rules that reduces Rule 71 practice. He noted that people used to serve the 10-day notice to take default contemporaneously with the 30 days of the summons, and that the Council had changed the rule to clarify that one had to wait the whole 30 days before giving that 10-day ping. He does not have a problem with that. Judge Peterson stated that the second comment is a little more challenging, because family law cases are just different and do tend to go on forever. He suggested that this could be a potential issue for consideration. Judge Bailey noted that this is where the three-day "mailbox" rule comes into play. A party serves a summons, waits the 30 days, then serves the 10-day notice and files for judgment for default on the 11th day. However, the opposing party comes back and says, wait a minute, there is the mailbox rule. So the first party really has to wait longer than the 10 days, and the opposing party potentially has 43 days to respond to something versus the 30 days that the summons told them they had to respond. Judge Bailey stated that there is not good case law that suggests whether the mailbox rule applies to the 10 days' notice of intent to take default, but the rule sort of suggests that it does.

Since the mailbox rule adds extra time, he is not sure why the defendant would get an extra 10 days if the goal is to speed up the process.

Judge Norby suggested that this may be one of those instances alluded to by a Council member where being a judge removes you from the process. She stated that she has learned over the years that the communication between lawyers during that 30 days can sometimes feel misleading in the sense that it looks like the case is progressing. A defendant does not necessarily have to file an answer, but then the plaintiff pings them and they know they do have to file their answer. She stated that, for judges who are not involved in whether there are ongoing communications between the attorneys or the parties, it might seem that the course of litigation is smooth. If it were smooth, she would be more inclined to agree with Judge Bailey. However, since she believes that frequently it is not smooth, and judges are not aware of all of the kinks in the process, she is not in favor of making such a change.

Mr. Andersen stated that, speaking from a plaintiffs' attorney's perspective, what typically happens after a lawsuit is filed is that he receives a letter from an insurance company-retained defense attorney to let him know that they are representing the defendant and asking him not to take default without 10 days' written notice. As Judge Norby said, a lot of communication can occur during those 30 days, including production of documents. Without the 10-day rule, if default just suddenly occurred, it would be a real surprise to the defense attorneys that he deals with. Ms. Holley stated that she had the experience that Judge Bailey described except that, in her case, the defense attorney forgot to send a notice of intent to appear and defend to her, but she was aware that he was on the case for other reasons. She took a default and the defense attorney claimed that he had sent her a notice. She told him that he had not, and he invoked the three-day rule. Ms. Holley was fine with that. She thinks that it is fine to not have a judgment based on a technicality.

Judge Peterson reiterated that he believes that the 10-day rule in Rule 69 makes defaults a little more solid and less likely to be overturned under Rule 71 B. Because the defendant was served with a summons that did not get their attention, and then a 10-day notice that did not get their attention, and now they are coming hat in hand and asking for relief from judgment, the judge is less likely to grant that relief. Ms. Dahab stated that, from an access to justice perspective, it concerns her to make default orders and default judgments easier to get. From a practical perspective, although the timeline getting the case to judgment might be sped up, it would likely just result in a lot more motions to vacate those default orders and default judgments.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate this matter further. A majority of the Council voted against forming a committee.

ORCP 71

Mr. Andersen directed the Council's attention to the suggestions regarding Rule 71. Ms. Holley stated that she believes that the rule is fine in its current form and that it does not need to be amended. Judge Peterson pointed out that the Council had previously amended Rule 71 B to include language about intrinsic and extrinsic fraud, and the second comment would expand on that. He stated that he does not have a position on it, but that the comment is interesting. The line between intrinsic and extrinsic fraud is not always a bright one.

Judge Shorr stated that there has been some recent case law. The comment states that court should have more concern about intrinsic fraud. In theory, this is true; however, judges also have concerns that this issue should be resolved through the adversarial process, where there might be a different timeline where something is not discovered. There is a goal favoring a finality of judgment. Litigants should be encouraged to resolve every potential issue through litigation before a final judgment. Judge Shorr stated that he does not quite see the disconnect that the commenter does, and that he would not be in favor of revising the rule based on what he has seen so far.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate this matter further. A majority of the Council voted against forming a committee.

Apply the ORCP to Administrative Law Cases

After discussion, the Council agreed that this is not an issue that is within the Council's purview. Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate further. A majority of the Council voted against forming a committee.

Assigning Judges in Multnomah County

After discussion, the Council agreed that this is not an issue that is within the Council's purview. Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate further. A majority of the Council voted against forming a committee.

ORCP and UTCR

After discussion, the Council agreed that the ORCP provide the big picture framework for the courts and the UTCR provide the more nitty gritty administrative components. Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate further. A majority of the Council voted against forming a committee.

Discovery (Rules 36-46)

Mr. Andersen drew the Council's attention to the suggestions regarding the discovery rules in the ORCP and asked for comments. Judge Peterson noted that the first comment was made by a self-represented litigant. It is true that Rule 43 does not specifically state that it is up to the party to initiate discovery and that permission from the judge is not required, but the rule otherwise sets out methods and timelines and is clear. Judge Bailey noted that the criminal statute on discovery states that both parties are required to provide discovery and have an ongoing duty to provide discovery. He stated that perhaps it would not hurt to include that in Rule 43. He agreed with Judge Peterson that the rule is otherwise very clear. He was not sure that he was in favor of forming a committee.

Regarding the suggestion to amend Rule 47 C to require conferral on all civil motions, not just discovery motions, Judge Bloom pointed out that the UTCR require conferral on discovery motions and Rule 21 motions, but not summary judgement motions or motions to dismiss for failure to state a claim. He did not see a need to change that. Ms. Holley agreed. Mr. Goehler stated that the local federal rule requires a conferral on all motions. In the case of a dispositive motion, the conferral usually consists of a telephone call to say, "Hey, I am going to file this, are you going to dismiss the case or not?" He opined that having to make that call is not worth the two minutes it takes. Mr. Goehler stated that he likes the Oregon rules the way they are. Judge Peterson stated that he thinks that the good people who wrote UTCR 5.010 on conferral determined which motions should be conferred on and which should not. He suggested that there is already a lot of motion practice, and he does not feel comfortable adding another layer.

Judge Bloom addressed the suggestion to eliminate the deadline 60 days before trial for filing summary judgment. He stated that most people in practice for a while will recall that the deadline used to be 45 days. The Council changed it to 60 days in the 1990s, with the thought that this would give the parties leave to prepare the summary judgment motion well before the trial and would also give judges time to deliberate. Judge Bloom stated that he thinks 60 days is appropriate, and pointed out that the rule as it exists also grants leave to allow the parties to file a request to modify the 60 day period. He did not see a problem.

Mr. Andersen asked if any Council members wished to address the numerous suggestions to add expert discovery, to make the ORCP more like the federal rules, or any of the additional suggestions regarding discovery. Ms. Holley stated that similar proposals regarding expert discovery, federalization, and proportionality have been submitted during each of her biennia on the Council, and that a committee had been formed for further consideration during one of those biennia, and she does not believe that any such change has a chance of making it to promulgation. Each side has strongly entrenched positions, and she does not think it is a good use of anyone's time to go through those battles again.

Judge Peterson noted that the Council has had a number of practitioners who practice in Washington state and in the federal courts as well as in Oregon. Those practitioners do not see the Washington or federal rules as panaceas for making things more efficient or moving more quickly or less expensively. Judge Peterson remarked that he used to love interrogatories, when he was the one preparing them. They are more fun to draft than to respond to, and they take a lot of time. Ms. Holley agreed. She stated that she practices a lot in federal court and does not find it to be more efficient. Proportionality does not change things that much, but it does kind of invite more fighting. Mr. Goehler stated that the majority of his cases are in Washington now, and they are at least 50% more expensive to handle. It takes extra time to do interrogatories and expert discovery, and costs explode especially as one gets closer to trial. He stated that he is happy to be in Oregon and play by the ORCP every time he has a state court case here. Judge Peterson noted that attorneys who work in construction defect cases informally exchange experts, because it is more efficient for them. Attorneys have figured out how to do it where it makes sense to do it, but requiring it will cause costs to go up and timelines to be longer.

Judge Peterson addressed a comment stating that the discovery rules do not work very well for the landlord-tenant docket. He stated that he understands the comment, particularly because he is currently handling that docket, but that it would be extraordinarily difficult for the Oregon rules of civil procedure to have an exception for certain, fairly rare, but specialized practices. Most of the attorneys that know that area of law come into court and work with the judge so that they can arrange depositions where necessary. Judge Norby stated that Clackamas County has a supplementary local rule for discovery that is mainly geared toward self-represented litigants in landlord tenant law. She noted that when there are attorneys on both sides, they have their own ideas about how it is all going to go and how long it is going to take, and they generally just ask for continuances and tell the judges how they want their discovery to happen.

Judge Peterson noted that there was also a comment that there are no sanctions for people that do not play by the rules. He pointed out that this kind of comment has come up repeatedly in Council surveys, and stated that he is not sure there is anything that the Council can do to get judges to impose more severe sanctions on people. The rules already exist, and sanctions already exist within them. The rules provide the tools, and if they do not get used in the way that someone would like them to be used, the Council probably cannot do anything about that. Judge Norby stated that she thinks that there is a dearth of creativity when attorneys bring motions to compel discovery; they do not propose sanctions. She stated that she feels like this suggestion is asking for the Council to dictate what sanctions attorneys should propose, or remove their need to think them up, and she does not feel that this is the Council's job.

Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate discovery issues. A majority of the Council voted against forming a committee.

Electronic Signatures

Mr. Andersen directed the Council's attention to the suggestions to allow electronic or digital signatures on declarations or affidavits. Ms. Holley stated that she would not be opposed to including explicitly, perhaps in ORCP 1, that electronic signatures are acceptable. Ms. Wilson suggested that it could be included in ORCP 1 E, although it would not work for affidavits. She proposed that a committee could explore what type of electronic signature would be acceptable, as there are many different kinds.

Judge Bailey stated that he is not opposed to forming a committee, but that his recollection was that Chief Justice Walters had recently amended the UTCR regarding allowing electronic signatures for declarations. He wondered whether the Council would potentially be overstepping its bounds. Although he sees the ORCP as statutes, which are stronger than the UTCR, it has typically been the province of the Chief Justice to make this kind of change. Ms. Holland stated that she is always hesitant to interject in Council meetings with regard to UTCR issues, but there is indeed a UTCR that already allows electronic signatures for declarations. She stated that there might be some room for an ORCP, and maybe an argument that the ORCP is superior to the UTCR, and that she is not opposed to a committee investigating this issue. Mr. Andersen asked Ms. Holland if she would be willing to participate in a committee. She stated that she would be willing to assist the committee if it was appropriate. Judge Peterson agreed that this would be appropriate so that the Council and the UTCR Committee are not working at cross-purposes

Ms. Wilson agreed to chair a committee to investigate electronic signatures. Ms. Holley joined the committee, with Ms. Holland serving as liaison from the UTCR Committee.

Judges and the ORCP

After discussion, the Council agreed that this is not an issue that is within the Council's purview. Mr. Andersen conducted a voice poll as to whether the Council wished to form a committee to investigate further. A majority of the Council voted against forming a committee.

Vexatious Litigants

Judge Norby stated that she had previously reached out to Ms. Holley, who kindly agreed to be on a new vexatious litigant committee that Judge Norby is happy to chair if the Council is willing to form it. She stated that she is still hopeful and optimistic that there is a rule that can be drafted that will be acceptable to the plaintiffs' bar. Having Ms. Holley as an articulate representative of the plaintiffs' bar to help her understand where some of the pitfalls are will be very helpful. Ms. Holley stated that she cannot guarantee that she can get the plaintiffs' bar on board, but that she is willing to help. Judge Norby stated that she is fully prepared for failure; however, this is her final biennium on the Council and she feels that promulgation of a vexatious litigant rule would be a huge contribution to the bar before she leaves. Judge Bailey stated that he would be happy to join a committee. Ms. Dahab, Ms. Johnson, Mr. Marrs, and Judge Peterson also joined the committee.

Service by Publication

Judge Bloom stated that, at a recent meeting of the courts, a discussion was had regarding the fact that service by publication is really not an option in many places that do not have newspapers anymore. He stated that he is aware that the remaining newspapers have a strong willingness to want to continue publication in their papers, but that OJD is considering creating a centralized website for publication. This seems to him a great idea that would actually provide notice that is much more reasonably calculated to reach the intended party than posting in the courthouse or a posting in a newspaper where a person out of state would not have the opportunity to read it. Judge Bloom stated that he thinks that the Council should look into modifying Rule 7 if the OJD is going to, in fact, create this website. He stated that this is an exciting possibility because it is more reasonably calculated to notify people about litigation. Mr. Andersen asked Judge Bloom if he would be willing to chair a committee regarding this issue. Ms. Holley asked whether it would be prudent to wait until the website is developed.

Judge Norby pointed out that there are local court websites that do exist, but that it is extremely difficult to get OJD to make timely updates of them. She stated that she cannot speak for every court, but with the courts she has been involved with, it can take a year to get something posted on an OJD website because there is not enough personnel. While it does sound like a good idea, it may not be achievable without funding for new positions to create websites.

Judge Bailey concurred with Judge Bloom that this is an exciting possibility. In the family law area in Washington County, there are a lot of people who do not know how to accomplish service. They request publication in the local newspapers which, quite frankly, nobody reads anymore, or they request posting in the Washington County Courthouse, knowing that the defendant is in a different

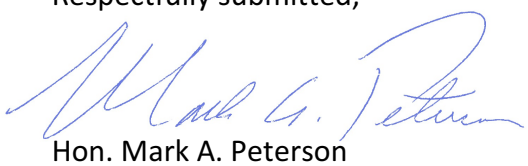
nation sometimes, and cannot necessarily get here and across the border. He stated that a rule change might need to happen in combination with a UTCR, or perhaps working with the Chief Justice to even create a statute that requires the courts to provide this type of posting. Judge Peterson noted that the Council had amended Rule 7 with regard to alternative service, and opined that service by publication may not even be needed any more, since better ways are available.

Judge Bloom stated that he understands and respects Judge Norby's concerns. He stated that the idea is that this is not something that local courts would do but, rather, a central OJD database where litigants can look. He stated that he did not want the Council to get ahead of itself because he was not certain where the OJD was in the process. However, he wanted the Council to be ready to coordinate if a change to the rules was necessary. Judge Peterson asked Judge Bloom if he would be willing to do some investigation between this meeting and the November meeting to see what progress the OJD had made. Judge Bloom agreed.

IV. Adjournment

Mr. Andersen adjourned the meeting at 12:11 p.m. after asking Council members to review the remaining suggestions prior to the next Council meeting, and committee chairs to be prepared to report progress at the next meeting.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 9, 2023, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Hon. Jonathan Hill
Meredith Holley
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Norman R. Hill
Derek Larwick
Hon. Thomas A. McHill

Guests:

Kenneth C. Crowley, Outgoing Chair
Barry J. Goehler, Awaiting Reappointment
Paul Hathaway, Lorber Greenfield & Polito
Ramon Henderson, Hodgkinson Street
Aja Holland, Oregon Judicial Department
Eric Kekel, Dunn Carney
Alicia Wilson, City of Medford
Greg Zahar, civilian volunteer, Eugene Police Department

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 54 ORCP 55 ORCP 57				

I. Call to Order

Mr. Crowley called the meeting to order at 9:32 a.m.

II. Introductions

Judge Peterson explained that there had been a delay in the Oregon State Bar (OSB) Board of Governors (BOG) appointing new members to the Council, and that there were currently six vacancies on the Council: four defense attorneys and two plaintiffs' attorneys. He noted that Mr. Goehler had asked to be reappointed and that, in his experience, the BOG reappoints members who ask for reappointment. Mr. Goehler stated that he would refrain from voting during the meeting.

Members and guests introduced themselves. Outgoing chair Ken Crowley stated that he had enjoyed his time on the Council and that it had been a great learning opportunity. He stated that appreciates all of the time and effort that Council members and staff put into the process and that he will miss being a part of it.

III. Approval of February 13, 2023, Minutes

Mr. Crowley asked whether members had the opportunity to review the February 13, 2023, minutes (Appendix A), and whether anyone had suggested changes. Hearing none, he asked for a motion to approve the minutes. Judge Bloom made a motion to approve the February 13, 2023, minutes. Mr. Andersen seconded the motion, which was approved unanimously by voice vote.

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

Mr. Crowley asked for nominations for Council officers. Ms. Holley nominated Mr. Andersen as Council chair. Judge Norby seconded the nomination. Mr. Andersen stated that he would accept the responsibility if the Council voted for him. The Council voted unanimously by voice vote to elect Mr. Andersen as Council chair.

Mr. Crowley asked for nominations for vice chair. Mr. Goehler stated that he would be willing to serve if nominated, if he were to be reappointed. Judge Peterson suggested deferring the vote until the next Council meeting. Council members agreed.

Mr. Crowley asked for a nominee for the position of treasurer. Ms. Holley nominated Ms. Weeks for the position. Judge Norby seconded the nomination. Ms. Weeks accepted the nomination, which was approved unanimously by voice vote.

Mr. Crowley turned over the meeting to the new chair, Mr. Andersen. Judge Peterson presented Mr. Crowley with an engraved plaque to thank him for his service over the last eight years and his service as chair for the past biennium. Mr. Crowley stated that the reward has really been the process, and that it has been quite an enjoyable process for him to be a part of. He stated that he was going to dedicate his award to his wife, who had put up with a lot of missed Saturdays.

He stated that he has appreciated all of the support that he has received from every one of the members of the Council. Although there are sometimes differences of opinion, the way that we work through them is honest, and the process really works for us in Oregon.

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

Judge Peterson stated that the Council's authorizing statute requires the Council to have rules of procedure (Appendix B). In 2016, the Council re-examined the rules and updated them. He invited Council members to read through the rules and to take a look at the Council Timeline (Appendix C) that Ms. Nilsson had put together to keep track of the statutorily-driven tasks that the Council must perform each biennium. It is a handy overview to help keep us on task.

VI. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson explained that, in the 2021-2023 biennium, the Council had considered a number of changes. Three of them were really heavy lifts, one of which got over the finish line and two of which did not. This is a new Council, and whether or not it will re-examine those two potential amendments or not remains to be seen. Appendix D lists the changes that the Council did promulgate. It also shows the changes in terms of what material is deleted and what material is added.

Judge Peterson briefly reviewed the promulgated rules:

- The change to Rule 7 was suggested by a non-lawyer process server. With regard to service on corporations, the rule contained requirements about serving an agent in the county where the case was commenced, which seemed like more of a venue issue. The language in question was found in the statute that predated Rule 7. No one on the Council could make any sense as to why the language was necessary, and it created problems because some courts were treating service on agents as substituted service. The Council simply removed the "in the county" language, as well as making technical changes such as changing the word "upon" to "on."
- Rule 39 was clarified and modernized to change telephone depositions to electronic depositions.
- Rule 55 was reorganized a few biennia ago to make the rule much clearer, and the Council has made a few changes since then to refine the rule. Last biennium, there was a suggestion made by a judge, which Judge Peterson agreed with, about having a procedure for an occurrence witness to object to a subpoena. The Council spent a lot of time crafting that process and also to make it clear in the wording of the subpoena that, if a witness ignores the subpoena, adverse consequences could await them. That rule change received a majority vote, but not the super majority vote required for promulgation.

However, there were some technical changes to Rule 55 that were promulgated.

- Rule 57 was the rule that the Council did a lot of heavy lifting on that did make it to the finish line. The Court of Appeals had actually asked the Council to look at Rule 57 in *State v. Curry*, 298 Or App 377 (2019), finding that the rule was not working. The changes focused on peremptory challenges and jury selection. It took two biennia to complete this work, and Ms. Holley was instrumental in putting together a workgroup to study the issue that included prosecutors and criminal defense attorneys, since Rule 57 also applies by statute to criminal trials.
- The changes to Rule 58 clarify remote testimony and bring it into the modern era.
- The change to Rule 69 was to update a reference to the Servicemembers Civil Relief Act, along with a few technical changes.

Judge Peterson stated that he was pleased to report that, after the promulgated rules were transmitted to the Legislature, the Legislature did not ask for the Council's clarification on any of them, nor did the Legislature take any action to modify or repeal the Council's promulgations. This means that the promulgated rules will become effective on January 1, 2024.

The House Judiciary Committee did, however, ask for a presentation from the Council, which is the first time this has happened during Judge Peterson's tenure with the Council. Mr. Andersen and Judge Peterson went to Salem and testified, and Judge Peterson felt that the presentation was somewhat instructive. He stated that the Council's liaison from the OSB thought that the chair of the House Judiciary Committee may have simply wanted the members, many of whom are not lawyers, to have some appreciation of what the Council does. Judge Peterson reported that, during the presentation on the changes to Rule 57, one member of the Committee interrupted to ask what a peremptory challenge is. At that point, Judge Peterson thought that the presentation was effective, because it showed the Committee that the Council is a specialized group that exists to deal with the ORCP, and the Legislature might be wise to defer to the Council in matters that regard the rules of court.

B. Staff Comments

Judge Peterson reported that staff comments for last biennium are not quite completed, but that they should be done soon and that they will be sent to Council members from last biennium for their review and comment. He explained that Council staff had drafted explanatory comments for promulgated rules since the beginning of the Council, but that they had stopped before his tenure on the Council, partly because of *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) and *State v. Gaines*, 206 P3d 1042 (Or 2009). However, the Council had decided several biennia ago that staff should resume writing comments. When

comments are drafted now, they stand alone and it is made clear that they are an indication of why the changes were made, but readers seeking legislative history are directed to look at the minutes for the deliberations of the Council. Staff comments are just a quick guide to what the changes were and what the Council was doing.

C. Legislative Assembly's ORCP Amendments Outside of Council Amendments

1. ORCP 55 B (SB 688)

Judge Peterson referred the Council to Appendix E, Senate Bill 68 from the last legislative session (2023), which was not passed. He stated that he and Mr. Andersen had discussed the bill briefly during their testimony before the House Judiciary Committee. The bill was designed to make service of subpoenas on willing witnesses available by e-mail as opposed to just by mail. He commented that the fix proposed in the bill is very simple, but that the Council's job is to examine such seemingly simple fixes to make sure they do not have unintended consequences.

Mr. Andersen invited guest Greg Zahar to speak about this issue. Mr. Zahar explained that he is currently a volunteer with the Eugene Police Department, and that one of his jobs is to serve criminal subpoenas for the agency. He stated that the district attorney's office has authorized volunteers to e-mail subpoenas to witnesses, but that the timeline they have been given for service and obtaining receipt of service is the standard that is set in the rules for US postal mail – ten days prior to the court date, and three days prior to the court date for a response. Mr. Zahar stated that his objective is to try to move from the "snail mail" standard to the instantaneous e-mail standard, so that, if a subpoena is e-mailed and the sender receives a receipt, then it is as good as served. He explained that he quite frequently receives rush subpoenas for delivery where the court date is less than 10 days away, which eliminates the possibility of emailing the subpoena, even if the witness is responsive to receiving it by e-mail.

Mr. Andersen noted that the amendments in the senate bill do not include a date for a response. He asked whether the intent is, as long as the witness responds electronically, there is no need to include a date. Mr. Zahar stated that he would defer to the Council's judgment on that. However, he pointed out that e-mail is instantaneous, and that they could conceivably e-mail a subpoena for a court date two days away and get a response receipt, so that the witness would be served and can appear in court.

Judge Norby thanked Mr. Zahar for the suggestion. She noted that she was the person who did the majority of the work reorganizing Rule 55, and that was such a major overhaul that the Council was concerned about adding anything new at that time – the thought was to make the existing rule understandable, readable, and usable. The plan was to evaluate the results and, after finding that the reorganization has been accepted and seen as an improvement, to start making any additional, incremental changes as needed. Judge Norby stated that Mr. Zahar's suggestion is exactly the sort of thing that the Council was hoping to be considering in attempts to modernize the rule. She stated that the Council would want to make sure not to create a scenario where a witness can be served instantaneously and then be expected to be able to appear immediately, so she was certain that the Council would be having further discussions about the suggestion. Ms. Holley stated that this circumstance may only apply in situations where a witness has waived personal service, so it seems like simultaneous electronic mailing might not be a problem because the witness may have already agreed to an appearance date.

Ms. Wilson pointed out that the comment appears to be coming from the criminal side, which is a completely different procedure under ORS chapter 136. She agreed that it is a good idea to look at Rule 55, but to also keep in mind that a change to Rule 55 might not address the concern that Mr. Zahar is raising. Judge Peterson stated that he believes that some of the cases for which Mr. Zahar is serving subpoenas are actually civil domestic violence cases. He stated that he does not have a vote on which proposals the Council will form committees; however, he suggested that proposals that were made in the Legislature might be important for the Council to take a serious look at.

Mr. Andersen asked Mr. Zahar for any additional comments regarding this requested change. Mr. Zahar stated that, in every circumstance where they e-mail witnesses, they have already contacted the witness and received permission to do so. Mr. Andersen asked whether Mr. Zahar could think of any reason that the service of subpoenas by e-mail would make any difference in a civil context as opposed to a criminal context. Mr. Zahar stated that he did not believe so, because it is a matter of convenience and streamlining the process. He noted that he has served subpoenas by e-mail to out-of-area witnesses in cases where it would be virtually impossible to serve them in person. Mr. Goehler asked how witness fees and travel payments are dealt with in such cases. Mr. Zahar stated that has not been personally involved in that aspect; the district attorney's office deals with that piece.

Mr. Andersen asked whether Judge Norby would be willing to examine the issue in more detail prior to the next Council meeting and present more information to the Council before the Council agrees to form a committee. Judge Norby agreed.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Mr. Andersen stated that it had been suggested that the Council's October meeting be held in person. He asked Council members to discuss their feelings about holding the October meeting, or another meeting during the biennium, in person. Some members were happy to continue meeting virtually, as it is easier for members outside of the Portland metro area. Some members expressed a desire to meet in person at some point during the biennium, but felt that October was too soon. Some felt that meeting in person later in the biennium would allow for more robust discussion on issues once committees had been formed. Ms. Nilsson pointed out that it is important to ensure strong attendance at the publication and promulgation meetings in September and December of 2024, respectively, and that in-person meetings in those months may not be advisable. Some members noted that combining the meeting with a fun group event afterwards may encourage more participation. It is also important to try to provide the best meeting experience possible for Council members who are unable to attend in person and who need to participate by Zoom or to call in.

After discussion, the Council agreed to hold an in-person meeting in June of 2024, presumably at the OSB's offices, unless another location is otherwise decided on later. The Council also agreed to meet on the second Saturday of the month. The meeting schedule will be as follows:

- October 14, 2023
- November 11, 2023
- December 9, 2023
- January 13, 2024
- February 10, 2024
- March 9, 2024
- April 13, 2024
- May 11, 2024
- June 8, 2024
- September 14, 2024
- December 14, 2024

B. Funding

Judge Peterson explained that the Legislature provides the Council with a general fund allocation, a pass through that is part of the Oregon Judicial Department's (OJD) budget. Last biennium that allocation was $57,343. During Judge Peterson's tenure on the Council, the Council has become associated with Lewis and Clark Law School, where he used to teach. The OJD sends a check to the law school, and it goes into a restricted account which is used to pay for Ms. Nilsson, who is now an independent contractor, and a modest stipend for the executive director. These funds also pay for expenses that the Council incurs in terms of necessary software and things of that nature. In addition to those funds, the OSB allocates $4000 per year in travel funds to the Council. Before the pandemic, the Council met in person, usually at the OSB and occasionally around the state. The funds from the OSB have usually been enough to pay our public member and the judge members, who are public servants. However, if we do not meet very much in person, that travel budget may be enough to also pay the mileage for our attorney members to travel to our in-person meeting in June.

C. Council Website

Ms. Nilsson explained that the Council website is something that she has been working on since she joined the Council in 2007. Prior to the creation of the website, Council history material was only available in seven different law libraries, roughly along the I-5 corridor. As of the last biennium, the website was very close to containing the complete history of the Council. This summer, Ms. Nilsson updated all of the rule histories for each rule amended by the Council. Meanwhile, Judge Peterson hired a research assistant who did the same with the legislative history of each rule that has been amended by the Legislature. Now, if someone wants to know the history of a rule that has been amended by either the Council or the Legislature, they can find that history on the website, along with the "legislative history" in the minutes. The website is pretty complete. Mr. Andersen stated that it is a website to be proud of and that it is very accessible.

D. Results of Survey of Bench and Bar: Generally

Mr. Andersen stated that, in reading the survey, he noticed that there is a lot of public relations work for the Council to do. There are a lot of great things happening, but there are not many attorneys or members of the public who are aware of what we do and why it could be important to them. Judge Peterson stated that it is not for lack of trying, but he agreed that the survey indicated that there was, even among attorneys and judges, a lack of knowledge of what the Council is and what the Council does. He stated that Judge Norby had written a great article about the Council that the OSB Bulletin had declined to publish, but that the Oregon Association of Defense Counsel (OADC) had published it in their member publication. However, it clearly did not have the reach that we had hoped. Judge

Norby asked whether the article might be published on the Council's website. Ms. Nilsson asked whether the Council would need to reach out to OADC for permission to do so. Judge Norby stated that she had previously spoken to OADC about doing so and that it would be fine. Ms. Nilsson stated that she would put the article on the website.

Judge Peterson stated that the first three questions in the survey ask whether the respondents believe that the ORCP promote the just, speedy, and inexpensive determination of civil court actions, which is the part of the Council's charge. 48.8% of respondents agreed that the ORCP promote the just determination of civil court actions; however, only 25.3% agreed that the ORCP promote the speedy determination, and only 13% the inexpensive determination. Judge Peterson stated that, when making rule amendments, it might be worthwhile to keep in mind that the general view seems to be that the Council may be doing a good job in terms of keeping the rules just, but not so much in terms of speedy or cheap.

Judge Peterson noted that the survey was sent to all bar sections with lawyers that are likely to be in civil court. He remarked that it is unfortunate that many members of the Oregon legal profession do not know the origin of the ORCP, nor are they familiar with the composition of the Council. Among those who are familiar with the Council, the quality of the Council's work fared well. There were questions about the responsiveness of the ORCP to the needs of litigants, lawyers, and judges. Not surprisingly, responsiveness to the needs of litigants fared highest. A significant number of people who took the time to answer the poll have never visited the website, which is unfortunate since it contains a wealth of information, but most who had visited the website found the content to be good or very good. Most respondents wanted the either the Council or the Council and the Legislature to have responsibility for the ORCP. Finally, there were a number of general comments about the Council.

Mr. Andersen noted that 309 people responded to the survey generally, with about 200 completing the full survey. He stated that he felt that this is a fairly robust number to give an idea of how the Council's work is perceived.

Mr. Goehler noted that one of the common themes of the suggestions is to try to make the Oregon rules more like the federal rules. He stated that he finds it interesting that the survey results also show that the ORCP do not peg the top of the charts for being speedy and inexpensive, because federal court practice is nothing close to speedy or inexpensive. He stated that this is something to keep in mind as the Council is working through the suggestions.

Judge Jon Hill wondered whether some of the attorneys who made suggestions regarding cost issues might be domestic relations attorneys. He stated that he wondered whether there is a possibility to include a domestic relations attorney on the Council, or whether the attorney positions are limited to the plaintiffs' and

defense bar. Since there are other groups who use the ORCP, it might be worth considering broadening the composition of the Council. Mr. Andersen stated that this is a good suggestion that is worth considering.

Judge Norby suggested that having an attorney who deals with protective proceedings like guardianship might also be useful. Ms. Nilsson noted that the composition of the Council is statutory, but wondered whether that includes the specificity of plaintiffs' and defense bar members. Judge Norby stated that the statute would need to be examined to see whether it would need to be amended. She asked Ms. Nilsson whether the survey invites people to apply to join the Council. She suggested that this might be a helpful way to recruit interested parties. Ms. Nilsson stated that the survey does not do this now, but that she did not see any reason that it could not be included.

Judge Peterson noted that the BOG makes the attorney appointments and that Council staff does not have a hand in it except to let the OSB know how many plaintiffs' and defense attorneys are needed. He stated that the Council has always relied on judges, who have experience in family law and probate, for expertise in those areas, but that this is not completely fair.

Judge Norby remarked that including attorneys outside of the plaintiffs' and defense bar would also affect how the chair and vice chair are chosen, because that is also by rule supposed to alternate between a plaintiffs' attorney and defense attorney. Judge Peterson stated that it has been a matter of collegiality on the Council that the vice chair from the previous biennium has been elected as chair in the current biennium, and that a member from the opposing side is then elected as vice chair. He stated that he feels that this has been helpful in terms of members playing nicely during the during the deliberations. Judge Norby agreed, but felt that a domestic relations attorney who was potentially added, for example, could not hold one of those positions for fear of upsetting that balance. Judge Peterson agreed that is a concern. Ms. Nilsson pointed out that this alternating of positions is not by rule but, rather, by tradition. She wondered whether a recommendation to the Legislature for a statutory change would ultimately be needed to add new positions to the Council.

Judge Norby suggested forming a committee to further look at the issue. Mr. Andersen asked whether any member was willing to take a preliminary look at the issue before a committee was formed. Judge Bloom expressed concern about forming any committee before the Council has a full contingent of attorney members. Mr. Andersen agreed, and asked Ms. Nilsson to put this item on the agenda for the October meeting.

VIII. Old Business

A. ORCP/Topics to be Reexamined Next Biennium

1. ORCP 54 E / ORS 36.425(6)

Judge Peterson noted that this suggestion (Appendix F) had been submitted to the Council at the end of last biennium and that the previous Council did not have the time to consider it. He pointed out that the proposed solution is to modify a statute, which the Council does not have the authority to do. The concern is in regard to Rule 54 offers of judgment in court-annexed arbitration and how it impacts an award of attorney fees, and it may be that there is a different workaround to amend Rule 54 E. He suggested carrying this item over to the next meeting, as there are other suggestions about Rule 54 and a committee may be formed. The Council agreed. Ms. Nilsson stated that she could include it with the other suggestions regarding Rule 54 and they could all be considered together at the next meeting.

2. ORCP 57

Ms. Holley stated that these suggestions (Appendix G) came from a public comment made by the Oregon Justice Resource Center (OJRC) after the publication of amendments to Rule 57 last biennium. She noted that the additional changes to the rule were considered extensively by the workgroup and ultimately decided against. She suggested that the Council write the OJRC thanking them for their suggestions and referring them to the Dropbox link with the workgroup's content that includes the extensive consideration of the Washington rule. She also stated that her inclination would be not to add more to the rule now when the new version has not yet been tested. The Council agreed.

Ms. Holley asked whether Judge Peterson and Ms. Nilsson would be willing to write the letter. Ms. Nilsson stated that they would draft a letter and have Ms. Holley review it before sending.

Mr. Andersen thanked Ms. Holley again for her hard work in elegantly getting the ship to shore on the amendments to Rule 57 last biennium. Ms. Holley thanked Mr. Andersen for speaking on behalf of the amendment before the Legislature, and for everyone's efforts last biennium.

IX. New Business

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

B. Potential amendments received from Council Survey

Mr. Andersen proposed that Council members look carefully at the suggestions received through the survey (Appendix H) before the next Council meeting so that they could be prepared to thoroughly discuss those items. He noted that it is important to honor the time of those respondents who took the time to share their ideas with the Council and give thorough consideration to their suggestions.

Ms. Nilsson noted that Judge Norby had e-mailed her earlier with some corrections to categorizations of some of those suggestions from the survey, and that she would be making those corrections. She stated that she would also take the remaining individual suggestions and categorize and include them in the chart so that they can all be more easily considered together by topic. She stated that she would get this to Council members in the coming week so that they would have plenty of time to look it over before the October meeting. Judge Norby asked that Ms. Nilsson include the vexatious litigation topic from last biennium, as she would like to try to form a committee again this biennium and make another attempt to create a rule this biennium.

Mr. Andersen asked Ms. Nilsson if she could also include individual page numbers on the meeting packet, in addition to the separately numbered attachment pages. Ms. Nilsson agreed that she would do this on the left side of the packet.

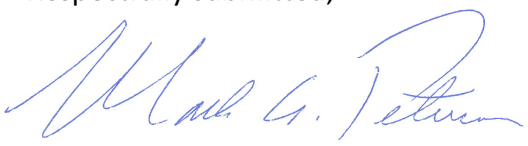
X. Appointment of committees regarding any items listed in VIII-IX

This item was deferred until the October meeting.

XI. Adjournment

Mr. Andersen adjourned the meeting at 11:04 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

CHAPTER 302

AN ACT HB 2225

Relating to courts; creating new provisions; amending ORS 1.300, 7.095, 21.135, 21.200, 21.205, 21.345, 33.055, 107.434, 133.545 and 136.600; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

TRANSCRIPTION FEES

SECTION 1. ORS 21.345 is amended to read:

21.345. (1)(a) A transcriber may not charge more than [*$3*] **$4.25** per page for preparation of a transcript.

(b) The Judicial Department may periodically increase the maximum fee a transcriber may charge to account for changes in the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor, since the last time the fee was increased. If the Judicial Department increases the fee under this paragraph, the adjusted maximum fee shall be rounded to the nearest quarter dollar, but the unrounded amount shall be used to calculate subsequent adjustments. The increased fee becomes effective on July 1 following the election to increase the fee and applies to transcripts ordered on or after July 1 following the election to increase the fee.

[*(b)*] **(c)** A transcriber may not charge a fee in addition to the fee established under this subsection for:

(A) An electronic copy required to be served on a party;

(B) A paper copy required to be served on an unrepresented party under ORS 19.370 (4)(a) or (b); or

(C) A paper copy required to be filed with the trial court under ORS 19.370 (4)(d).

(2) Except as provided in subsection (3) of this section, a reporter employed by one of the parties may charge fees as agreed to between the reporter and all of the parties to the proceeding for preparing transcripts on appeal. The reporter and the parties must agree to the fees to be charged before the commencement of the proceeding to be recorded. A share of any fees agreed upon shall be charged to parties joining the proceeding after the commencement of the proceeding.

(3) A reporter employed by one of the parties may not charge a public body, as defined by ORS 174.109, fees for preparing transcripts on appeal that exceed the fees established by subsection (1) of this section.

(4) Each page of the original transcript on appeal prepared under this section must be prepared as specified by rules for transcripts on appeal adopted by the Supreme Court and the Court of Appeals.

(5) Except as otherwise provided by law, the fees for preparing a transcript requested by a party shall be paid forthwith by the party, and when paid shall be taxable as disbursements in the case. The fees for preparing a transcript requested by the court, and not by a party, shall be paid by the state from funds available for the purpose.

(6) When the court provides personnel to prepare transcripts from audio records of court proceedings, the fees provided in subsection (1) of this section to be paid by a party shall be paid to the clerk of the court.

(7) For purposes of this section, "transcript" has the meaning given that term in ORS 19.005.

SENIOR JUDGES

SECTION 2. ORS 1.300 is amended to read:

1.300. (1) A judge who retires from the circuit court, Oregon Tax Court, Court of Appeals or Supreme Court, except a judge retired under the provisions of ORS 1.310, may be designated a senior judge of the State of Oregon by the Supreme Court and, if so designated, shall be so certified by the Secretary of State.

(2)**(a)** Upon filing with the Secretary of State an oath of office as a senior judge as prescribed in ORS 1.212, a senior judge is eligible for temporary assignment, with the consent of the senior judge, by the [*Supreme Court*] **Chief Justice of the Supreme Court or the designee of the Chief Justice,** to a state court as provided in this subsection, whenever the [*Supreme Court*] **Chief Justice or the designee of the Chief Justice** determines that the assignment is reasonably necessary and will promote the [*more*] efficient administration of justice.

(b) A senior judge who retired from the Supreme Court may be assigned **under this subsection** to any state court.

(c) A senior judge who retired from a court other than the Supreme Court may be assigned **under this subsection** to any state court other than the Supreme Court.

(d) A senior judge assigned to serve as a circuit court judge may be assigned under this subsection to serve in any one or more counties or judicial districts during the term of the assignment.

(3) The assignment of a senior judge [*shall be made by an order which*] shall designate the court **or courts** to which the judge is assigned and the duration of the assignment. [*Promptly after assignment of a senior judge under this section, the Supreme Court shall cause a certified copy of the order to be sent to the senior judge and another certified copy to the court to which the judge is assigned.*] **The Chief Justice or the designee of the Chief Justice shall promptly notify the senior judge, and the court or courts to which the judge is assigned, of the assignment.**

(4) Each senior judge assigned as provided in this section has all the judicial powers and duties,

while serving under the assignment, of a regularly elected and qualified judge of the court to which the senior judge is assigned. The powers, jurisdiction and judicial authority of the senior judge in respect to any case or matter tried or heard by the senior judge while serving under the assignment shall continue beyond the expiration of the assignment so far as may be necessary to:

(a) Decide and dispose of any case or matter on trial or held under advisement.

(b) Hear and decide any motion for a new trial or for a judgment notwithstanding a verdict, or objections to any cost bill, that may be filed in the case.

(c) Settle a transcript for appeal and grant extensions of time therefor.

(5) A senior judge assigned as provided in this section shall receive as compensation for each day the senior judge is actually engaged in the performance of duties under the assignment an amount equal to five percent of the gross monthly salary of a regularly elected and qualified judge of the court to which the senior judge is assigned, or one-half of that daily compensation for services of one-half day or less. However, a retired judge shall not receive for services as a senior judge during any calendar year a sum of money which when added to the amount of any judicial retirement pay received by the senior judge for the year exceeds the annual salary of a judge of the court from which the senior judge retired. The compensation shall be paid upon the certificate of the senior judge that the services were performed for the number of days shown in the certificate. Services by a senior judge under an assignment and receipt of compensation for services shall not reduce or otherwise affect the amount of any retirement pay to which the senior judge otherwise would be entitled.

(6) A senior judge assigned to a court located outside the county in Oregon in which the senior judge regularly resides shall receive, in addition to daily compensation, reimbursement for hotel bills and traveling expenses necessarily incurred in the performance of duties under the assignment. The expenses shall be paid upon presentation of an itemized statement of the expenses, certified by the senior judge to be correct.

SECTION 3. ORS 133.545 is amended to read:

133.545. (1) A search warrant may be issued only by a judge. A search warrant issued by a judge of the Supreme Court or the Court of Appeals may be executed anywhere in the state. Except as otherwise provided in subsections (2), (3) and (4) of this section, a search warrant issued by a judge of a circuit court may be executed only within the judicial district in which the court is located. A search warrant issued by a justice of the peace may be executed only within the county in which the justice court is located. A search warrant issued by a municipal judge authorized to exercise the powers and perform the duties of a justice of the peace may be executed only in the municipality in which the court is located.

(2) Notwithstanding subsection (1) of this section, a circuit court judge may authorize execution of a search warrant outside the judicial district in which the court is located, if the judge finds from the application that one or more of the objects of the search relate to an offense committed or triable within the judicial district in which the court is located. If the warrant authorizes the installation or tracking of a mobile tracking device, the officer may track the device in any county to which it is transported.

(3) Notwithstanding subsection (1) of this section, a circuit court judge duly assigned pursuant to ORS 1.615 to serve as a judge pro tempore in a circuit court**, or a senior judge duly assigned to serve in a circuit court under ORS 1.300 and who has authorization from the presiding judge of that judicial district,** may authorize execution of a search warrant in any judicial district in which the judge [*serves as judge pro tempore if the application requesting the warrant includes an affidavit showing that a regularly elected or appointed circuit court judge for the judicial district is not available, whether by reason of conflict of interest or other reason, to issue the warrant within a reasonable time*] **is assigned to serve as judge pro tempore or as senior judge**.

(4) Notwithstanding subsection (1) of this section, a circuit court judge may authorize execution of a search warrant outside the judicial district in which the court is located if the judge finds that:

(a) The search relates to one of the following offenses involving a victim who was 65 years of age or older at the time of the offense:

(A) Criminal mistreatment in the first degree as described in ORS 163.205 (1)(b)(D) or (E);

(B) Identity theft;

(C) Aggravated identity theft;

(D) Computer crime;

(E) Fraudulent use of a credit card;

(F) Forgery in any degree;

(G) Criminal possession of a forged instrument in any degree;

(H) Theft in any degree; or

(I) Aggravated theft in the first degree;

(b) The objects of the search consist of financial records; and

(c) The person making application for the search warrant is not able to ascertain at the time of the application the proper place of trial for the offense described in paragraph (a) of this subsection.

(5) Application for a search warrant may be made only by a district attorney, a police officer or a special agent employed under ORS 131.805.

(6) The application shall consist of a proposed warrant in conformance with ORS 133.565, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that the objects of the search are in the places, or in the possession of the individuals, to be searched. If an affidavit is based in whole or in part

on hearsay, the affiant shall set forth facts bearing on any unnamed informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

(7) Instead of the written affidavit described in subsection (6) of this section, the judge may take an oral statement under oath. The oral statement shall be recorded and a copy of the recording submitted to the judge who took the oral statement. In such cases, the judge shall certify that the recording of the sworn oral statement is a true recording of the oral statement under oath and shall retain the recording as part of the record of proceedings for the issuance of the warrant. The recording shall constitute an affidavit for the purposes of this section. The applicant shall retain a copy of the recording and shall provide a copy of the recording to the district attorney if the district attorney is not the applicant.

(8)(a) In addition to the procedure set out in subsection (7) of this section, the proposed warrant and the affidavit may be sent to the court by facsimile transmission or any similar electronic transmission that delivers a complete printable image of the signed affidavit and proposed warrant. The affidavit may have a notarized acknowledgment, or the affiant may swear to the affidavit by telephone. If the affiant swears to the affidavit by telephone, the affidavit may be signed electronically. A judge administering an oath telephonically under this subsection must execute a declaration that recites the manner and time of the oath's administration. The declaration must be filed with the return.

(b) When a court issues a warrant upon an application made under paragraph (a) of this subsection:

(A) The court may transmit the signed warrant to the person making application under subsection (5) of this section by means of facsimile transmission or similar electronic transmission, as described in paragraph (a) of this subsection. The court shall file the original signed warrant and a printed image of the application with the return.

(B) The person making application shall deliver the original signed affidavit to the court with the return. If the affiant swore to the affidavit by telephone, the affiant must so note next to the affiant's signature on the affidavit.

SERVICE OF PARENTING TIME MOTION

SECTION 4. ORS 107.434 is amended to read:

107.434. (1) The presiding judge of each judicial district shall establish an expedited parenting time enforcement procedure that may or may not include a requirement for mediation or participation in an alternative dispute resolution conference under ORS 107.103. The procedure must be easy to understand and initiate. Unless the parties otherwise agree or an alternative dispute resolution conference under ORS 107.103 is scheduled, the court shall conduct a hearing no later than 45 days after the filing of a motion seeking enforcement of a parenting time order. The court shall provide forms for:

(a) A motion filed by either party alleging a violation of parenting time or substantial violations of the parenting plan. When a person files this form, the person must include a copy of the order establishing the parenting time.

(b) An order requiring the parties to appear and show cause why parenting time should not be enforced in a specified manner. The party filing the motion shall serve a copy of the motion and the order on the other party **in the manner provided by law for service of a summons**. The order must include:

(A) A notice of the remedies imposable under subsection (2) of this section and the availability of a waiver of any mediation requirement; and

(B) A notice in substantially the following form:

When pleaded and shown in a separate legal action, violation of court orders, including visitation and parenting time orders, may also result in a finding of contempt, which can lead to fines, imprisonment or other penalties, including compulsory community service.

(c) A motion, supported by an affidavit or a declaration under penalty of perjury in the form required by ORCP 1 E, and an order that may be filed by either party and providing for waiver of any mediation requirement on a showing of good cause.

(2) In addition to any other remedy the court may impose to enforce the provisions of a judgment relating to the parenting plan, the court may:

(a) Modify the provisions relating to the parenting plan by:

(A) Specifying a detailed parenting time schedule;

(B) Imposing additional terms and conditions on the existing parenting time schedule; or

(C) Ordering additional parenting time, in the best interests of the child, to compensate for wrongful deprivation of parenting time;

(b) Order the party who is violating the parenting plan provisions to post bond or security;

(c) Order either or both parties to attend counseling or educational sessions that focus on the impact of violation of the parenting plan on children;

(d) Award the prevailing party expenses, including, but not limited to, attorney fees, filing fees and court costs, incurred in enforcing the party's parenting plan;

(e) Terminate, suspend or modify spousal support;

(f) Terminate, suspend or modify child support as provided in ORS 107.431; or

(g) Schedule a hearing for modification of custody as provided in ORS 107.135 (11).

ORCP CITATION CHANGE

SECTION 5. ORS 136.600 is amended to read:

136.600. The provisions of ORS 44.150 and ORCP 39 B and [*55 E and G*] **55 A(6)(d) and 55 B(4)** apply in criminal actions, examinations and proceedings.

ELECTRONIC RECORDS

SECTION 6. ORS 7.095 is amended to read:

7.095. (1) Where the application of electronic data processing techniques is determined to be feasible and expedient in maintaining records of the courts of this state, the Chief Justice of the Supreme Court may authorize records to be kept by use of electronic data processing equipment. Court records maintained as provided by this section shall contain the information otherwise required by law for the records of courts in this state. **Notwithstanding ORS 192.311 to 192.478, records shall not be subject to public disclosure until reviewed and accepted by the court.**

(2) The State Court Administrator may prescribe standards governing the use of such techniques, the preservation of the records so maintained, and controls to prevent unauthorized access to records maintained through the use of electronic data processing equipment.

CONTEMPT

SECTION 7. ORS 21.135 is amended to read:

21.135. (1) Unless a specific fee is provided by subsection (3) **or (4)** of this section or other law for a proceeding, a circuit court shall collect a filing fee of $281 when a complaint or other document is filed for the purpose of commencing an action or other civil proceeding and when an answer or other first appearance is filed in the proceeding.

(2) Except as provided in subsection [*(4)*] **(5)** of this section, the filing fee established by subsection (1) of this section applies to:

(a) Proceedings in which only equitable remedies are sought.

(b) Appeals from a conviction of a violation in justice or municipal courts as provided in ORS 21.285.

(c) Interpleader actions.

(d) Actions relating to a trust.

(e) Proceedings for judicial review of an agency order.

(f) Declaratory judgment actions.

(g) Any other action or proceeding that is statutorily made subject to the fee established by this section and any other civil proceeding for which a specific filing fee is not provided.

(3)(a) The circuit court shall collect a filing fee of $263 in adoption cases under ORS chapter 109, excluding readoptions under ORS 109.385, when a petition is filed for the purpose of commencing an adoption proceeding or when any other document or other first appearance is filed in the proceeding. The fee shall include the cost of issuing one or more certificates of adoption under ORS 109.410.

(b) When separate petitions for adoption of multiple minor children are concurrently filed under ORS 109.276 by the same petitioner, one filing fee shall be charged for the first petition filed and the filing fees for concurrently filed petitions shall not be charged.

(4) The circuit court shall collect a filing fee of $56 for actions seeking remedial sanctions for contempt of court under ORS 33.055 and when a first appearance is filed in the proceeding.

[*(4)*] **(5)** The filing fee established under subsection (1) of this section does not apply to:

(a) Expunction proceedings under ORS 419A.262;

(b) Petitions under ORS 163A.130 or 163A.135 for an order relieving the person from the duty to report as a sex offender if the person is required to report under ORS 163A.025; or

(c) Any juvenile delinquency proceeding arising under ORS chapter 419B or 419C.

SECTION 8. ORS 21.200 is amended to read:

21.200. (1) In any action or other proceeding subject to a fee under ORS 21.135, 21.145, 21.160 or 21.170, a $111 fee must be paid by the party filing one of the following motions and by the party responding to the motion:

(a) A motion for summary judgment under ORCP 47.

(b) A motion for judgment notwithstanding the verdict under ORCP 63.

(c) A motion for new trial under ORCP 64.

(d) A motion for relief from judgment under ORCP 71.

(e) A motion for preliminary injunction under ORCP 79.

[*(f) A motion seeking remedies for contempt of court.*]

(2) The fees provided for in this section may not be collected from the state, a county, a city or a school district.

(3) The fees provided for in this section may not be collected for motions made to an arbitrator or mediator in an arbitration or mediation required or offered by a court, or to any motion relating to an arbitration or mediation required or offered by a court.

(4) The clerk shall file a motion or response that is subject to a fee under this section only if the fee required by this section is paid when the motion or response is submitted for filing.

SECTION 9. ORS 21.205 is amended to read:

21.205. (1) In any action or other proceeding subject to a fee under ORS 21.155, a $167 fee must be paid by the party filing a motion that seeks entry of a supplemental judgment and by a party responding to the motion.

(2) The fee provided for in subsection (1) of this section does not apply to any motion under ORCP 68, 69 or 71.

(3) In any action or other proceeding subject to a fee under ORS 21.155, a $56 fee must be paid by the party filing [*one of the following motions*] **a motion under ORS 107.434** and by a party responding to the motion[*:*]**.**

[*(a) A motion filed under ORS 107.434; and*]

[*(b) A motion seeking remedies for contempt of court.*]

[*(4) Only the fees specified by subsection (1) of this section may be collected if a party concurrently files a motion that seeks entry of a supplemental judgment and a motion seeking remedies for contempt of court.*]

SECTION 10. ORS 33.055 is amended to read:

33.055. (1) Except as otherwise provided in ORS 161.685, proceedings to impose remedial sanctions for contempt shall be conducted as provided in this section.

(2) The following persons may initiate the proceeding [*or, with leave of the court, participate in the proceeding, by filing a motion requesting that*] **by filing an action and may request that the contempt** defendant be ordered to appear:

(a) A party aggrieved by an alleged contempt of court.

(b) A district attorney.

(c) A city attorney.

(d) The Attorney General.

(e) Any other person specifically authorized by statute to seek imposition of sanctions for contempt.

(3) If the alleged contempt is related to another proceeding, [*a motion*] **an action** to initiate a proceeding to impose remedial sanctions must be filed in accordance with rules adopted under ORS 33.145.

(4) The person initiating a proceeding under this section shall file supporting documentation or affidavits sufficient to give **the contempt** defendant notice of the specific acts alleged to constitute contempt.

(5)(a) **The contempt defendant shall be served with the document initiating the contempt action in the manner provided in ORCP 7.** The court may issue an order directing the **contempt** defendant to appear. Except as otherwise provided in paragraph (b) of this subsection, the **contempt** defendant shall be personally served with the order to appear in the manner provided in ORCP 7 [*and 9*]. **If the contempt defendant is represented by counsel in a proceeding to which the action for contempt under this section is related, that counsel shall also be served with the initiating instrument and any order to appear in the manner provided in ORCP 9.** The court may order service by a method other than personal service **on the contempt defendant** or issue an arrest warrant if, based upon motion and supporting affidavit, the court finds that the **contempt** defendant cannot be personally served.

(b) The **contempt** defendant shall be served by substituted service if personal service is waived under ORS 107.835. If personal service is waived under ORS 107.835, the **contempt** defendant shall be served by the method specified in the waiver.

(6) The court may impose a remedial sanction only after affording the **contempt** defendant opportunity for a hearing tried to the court. The **contempt** defendant may waive the opportunity for a hearing by stipulated order filed with the court.

(7) A **contempt** defendant has no right to a jury trial and, except as provided in this section, has only those rights accorded to a defendant in a civil action.

(8) A **contempt** defendant is entitled to be represented by counsel. A court shall not impose on a **contempt** defendant a remedial sanction of confinement unless, before the hearing is held, the **contempt** defendant is:

(a) Informed that such sanction may be imposed; and

(b) Afforded the same right to appointed counsel required in proceedings for the imposition of an equivalent punitive sanction of confinement.

(9) If the **contempt** defendant is not represented by counsel when coming before the court, the court shall inform the **contempt** defendant of the right to counsel, and of the right to appointed counsel if the **contempt** defendant is entitled to, and financially eligible for, appointed counsel under subsection (8) of this section.

(10) Inability to comply with an order of the court is an affirmative defense.

(11) In any proceeding for imposition of a remedial sanction other than confinement, proof of contempt shall be by clear and convincing evidence. In any proceeding for imposition of a remedial sanction of confinement, proof of contempt shall be beyond a reasonable doubt.

(12) Proceedings under this section are subject to rules adopted under ORS 33.145. Proceedings under this section are not subject to the Oregon Rules of Civil Procedure except as provided in subsection (5) of this section or as may be provided in rules adopted under ORS 33.145.

APPROPRIATIONS

SECTION 11. Notwithstanding any other provision of law, the General Fund appropriation made to the Public Defense Services Commission by section 1 (6), chapter 481, Oregon Laws 2023 (Enrolled Senate Bill 5532), for the biennium beginning July 1, 2023, for court mandated expenses, is increased by $902,665 for the purpose of carrying out the amendments to ORS 21.345 by section 1 of this 2023 Act.

SECTION 12. Notwithstanding any other provision of law, the General Fund appropriation made to the Department of Justice by section 1 (5), chapter 382, Oregon Laws 2023

(Enrolled Senate Bill 5514), for the biennium beginning July 1, 2023, for defense of criminal convictions, is increased by $50,000 for the purpose of carrying out the amendments to ORS 21.345 by section 1 of this 2023 Act.

CAPTIONS

SECTION 13. The unit captions used in this 2023 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2023 Act.

OPERATIVE DATES

SECTION 14. The amendments to ORS 21.345 and 107.434 by sections 1 and 4 of this 2023 Act become operative on the 91st day after the date on which the 2023 regular session of the Eighty-second Legislative Assembly adjourns sine die.

SECTION 15. The amendments to ORS 21.135, 21.200, 21.205 and 33.055 by sections 7 to 10 of this 2023 Act become operative on October 1, 2023.

EMERGENCY CLAUSE

SECTION 16. This 2023 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2023 Act takes effect on its passage.

Approved by the Governor July 18, 2023
Filed in the office of Secretary of State July 18, 2023
Effective date July 18, 2023

45.400 Remote location testimony; when authorized; notice; payment of costs. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

(2) A party filing a motion under this section must give written notice to all other parties to the proceeding [*at least 30 days before the trial or hearing at which the remote location testimony will be offered.*] **sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those factors specified in (3)(b) and to advance those factors specified in (3)(c).** [*The court may allow written notice less than 30 days before the trial or hearing for good cause shown.*]

(3)(a) Except as provided under subsection (5) of this section, the court may allow remote location testimony under this section upon a showing of good cause by the moving party, unless the court determines that the use of remote location testimony would result in prejudice to the nonmoving party and that prejudice outweighs the good cause for allowing the remote location testimony.

(b) Factors that a court may consider that would support a finding of good cause for the purpose of a motion under this subsection include:

(A) Whether the witness or party might be unavailable because of age, infirmity or mental or physical illness.

(B) Whether the party filing the motion seeks to take the remote location testimony of a witness whose attendance the party has been unable to secure by process or other reasonable means.

(C) Whether a personal appearance by the witness or party would be an undue hardship on the witness or party.

(D) Whether a perpetuation deposition under ORCP 39 I, or another alternative, provides a more practical means of presenting the testimony.

(E) Any other circumstances that constitute good cause.

Council on Court Procedures
October 14, 2023, Meeting
Appendix B-7

(c) Factors that a court may consider that would support a finding of prejudice under this subsection include:

(A) Whether the ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding.

(B) Whether the nonmoving party demonstrates that face-to-face cross-examination is necessary because the issue or issues the witness or party will testify about may be determinative of the outcome.

(C) Whether the exhibits or documents the witness or party will testify about are too voluminous to make remote location testimony practical.

(D) The nature of the proceeding, with due consideration for a person's liberty or parental interests.

(E) [*Whether facilities that would permit the taking of remote location testimony are readily available.*] **Whether reliable facilities and technology that would permit the taking of remote location testimony are readily available to the court, counsel, parties and the witness.**

(F) Whether the nonmoving party demonstrates that other circumstances exist that require the personal appearance of a witness or party.

(4) In exercising its discretion to allow remote location testimony under this section, a court may authorize telephone or other nonvisual transmission only upon finding that video transmission is not readily available.

(5) The court may not allow use of remote location testimony in a jury trial unless good cause is shown and there is a compelling need for the use of remote location testimony.

(6) A party filing a motion for remote location testimony under this section must pay all costs of the remote location testimony, including the costs of alternative procedures or technologies used for the taking of remote location testimony. No part of those costs may be recovered by the party filing the [*motions*] **motion** as costs and disbursements in the proceeding.

(7) This section does not apply to a workers' compensation hearing or to any other administrative proceeding.

(8) As used in this section:

(a) "Remote location testimony" means live testimony given by a witness or party from a physical location outside of the courtroom of record via simultaneous electronic transmission.

(b) "Simultaneous electronic transmission" means television, telephone or any other form of electronic communication transmission if the form of transmission allows:

(A) The court, the attorneys and the person testifying from a remote location to communicate with each other during the proceeding;

(B) A witness or party who is represented by counsel at the hearing to be able to consult privately with counsel during the proceeding; and

(C) The public to hear and, if the transmission includes a visual image, to see the witness or party if the public would otherwise have the right to hear and see the witness or party testifying in the courtroom of record.

COUNCIL ON COURT PROCEDURES

1.725 Legislative findings. The Legislative Assembly finds that:

(1) Oregon laws relating to civil procedure designed for the benefit of litigants which meet the needs of the court system and the bar are necessary to assure prompt and efficient administration of justice in the courts of the state.

(2) No coordinated system of continuing review of the Oregon laws relating to civil procedure now exists.

(3) Development of a system of continuing review of the Oregon laws relating to civil procedure requires the creation of a Council on Court Procedures.

(4) A Council on Court Procedures will be able to review the Oregon laws relating to civil procedure and coordinate and study proposals concerning the Oregon laws relating to civil procedure advanced by all interested persons. [1977 c.890 §1]

1.730 Council on Court Procedures; membership; terms; rules; meetings; expenses of members.

(1) There is created a Council on Court Procedures consisting of:

(a) One judge of the Supreme Court, chosen by the Supreme Court.

(b) One judge of the Court of Appeals, chosen by the Court of Appeals.

(c) Eight judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association.

(d) Twelve members of the Oregon State Bar, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this paragraph, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that the lawyer members of the council shall be broadly representative of the trial bar and the regions of the state.

(e) One public member, chosen by the Supreme Court.

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council. If a quorum is present, an affirmative vote by a majority of the members of the council who are present is required for action by the council on all matters other than promulgation of rules under ORS 1.735. An affirmative vote of fifteen members of the council shall be required to promulgate rules pursuant to ORS 1.735.

(b) The council shall adopt rules of procedure and shall choose, from among its membership, annually, a chairperson to preside over the meetings of the council.

(3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the promulgation, amendment or repeal of a rule under ORS 1.735, the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting.

(c) The council shall make available upon request a copy of any rule which it proposes to promulgate, amend or repeal.

(4) Members of the Council on Court Procedures shall serve for terms of four years and shall be eligible for reappointment to one additional term, provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of the terms to be filled. Vacancies occurring shall be filled by the appointing authority for the unexpired term.

(5) Members of the Council on Court Procedures shall not receive compensation for their services but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the council, as provided in ORS 292.210 to 292.288. [1977 c.890 §2; 1981 c.545 §1; 1993 c.772 §1; 1995 c.658 §12; 1997 c.137 §§1,2; 2003 c.110 §2; 2007 c.65 §1]

1.735 Rules of procedure; limitation on scope and substance; submission of rules to members of bar and Legislative Assembly.

(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each odd-numbered year regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not

become effective unless the exact language of the proposed promulgation, amendment or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which the council plans to take final action on the promulgation, amendment or repeal. If the language of the proposed promulgation, amendment or repeal is changed by the council after consideration of the language at the meeting, the council must publish or distribute notification of the change to all members of the bar within 60 days after the meeting. All changes made to proposed promulgations, amendments or repeals of rules pursuant to the provisions of this subsection must be clearly identified when the promulgation, amendment or repeal is submitted to the Legislative Assembly under subsection (1) of this section. [1977 c.890 §3; 1979 c.284 §1; 1983 c.751 §6; 1993 c.772 §2; 2003 c.110 §1; 2011 c.545 §27]

1.740 Employment of staff; public hearings. In the exercise of its power under ORS 1.735, the council:

(1) May employ or contract with any person or persons, as the council considers necessary, to assist the council; and

(2) Shall endeavor to hold at least one public hearing in each of the congressional districts of the state during the period between odd-numbered year regular sessions of the Legislative Assembly. [1977 c.890 §4; 1993 c.772 §3; 2011 c.545 §69]

1.742 [1993 c.634 §3; repealed by 2001 c.716 §30]

1.745 Laws on civil pleading, practice and procedure deemed rules of court until changed. All provisions of law relating to pleading, practice and procedure, including provisions relating to form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in courts of this state are deemed to be rules of court and remain in effect as such until and except to the extent they are modified, superseded or repealed by rules which become effective under ORS 1.735. [1977 c.890 §5; 1979 c.284 §2]

1.750 Legislative Counsel to publish rules. The Legislative Counsel shall cause the rules which have become effective under ORS 1.735, as they may be amended, repealed or supplemented by the Legislative Assembly, to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes. [1977 c.890 §6]

1.755 Gifts, grants and donations; Council on Court Procedures Account.

(1) The Council on Court Procedures is authorized to accept gifts, grants and donations from any source for expenditure to carry out the duties, functions and powers of the council.

(2) The Council on Court Procedures Account is established separate and distinct from the General Fund. All moneys received by the council, other than appropriations from the General Fund, shall be deposited into the account and are continuously appropriated to the

council to carry out the duties, functions and powers of the council. [1995 c.61 §3; reenacted by 1997 c.196 §3; 2001 c.716 §20]

1.760 Legislative advisory committee. (1) The Council on Court Procedures shall elect five persons from among its members to serve as a legislative advisory committee. Two members of the committee shall be judges. Two members shall be members of the Oregon State Bar who are not judges. One member shall be the public member designated under ORS 1.730 (1)(e). The committee shall elect one of its members to serve as chairperson of the committee.

(2) Upon the request of the chairperson of a legislative committee considering legislation that proposes changes to the Oregon Rules of Civil Procedure, the legislative advisory committee established under this section shall provide technical analysis and advice to the legislative committee. Analysis and advice shall be by a majority vote of the legislative advisory committee. The committee shall consult with and consider comments from the full Council on Court Procedures to the extent possible. Analysis and advice under this subsection must be provided within 10 days after the request from the chairperson of a legislative committee.

(3) The legislative advisory committee established under this section may vote to take a position on behalf of the Council on Court Procedures on proposed legislation. If the legislative advisory committee has voted to take a position on behalf of the council, the committee shall so indicate to the legislative committee.

(4) Members of the legislative advisory committee established under this section may meet by telephone and may vote by telephone. Meetings of the committee are not subject to ORS 192.610 to 192.690.

(5) Members of the legislative advisory committee established under this section may appear before legislative committees for the purpose of testifying on legislation that proposes changes to the Oregon Rules of Civil Procedure. [1995 c.455 §8]

Category/Rule	Subcategory/additional information	Suggestion
9	SUGGESTION RECEIVED BY STAFF (See attachment D-10 for more detail)	**The council has already in the past (See November 2011 Minutes) affirmed that the ORCP applies to EPPDAPA cases. When a respondent requests a hearing from the court this is a written request and ORCP 9(A) requires that the petitioner be served a copy but right now the EPPDAPA statute under ORS 124.020(9)(b) delegates serving a copy of the request on petitioner to the Clerk of Court during the notice of hearing process or so it appears. I am a petitioner in a EPPDAPA case and was never served a copy of the request for hearing and when I contacted the court to ask why I wasn't served citing ORCP 9(A) and ORS 124.020(9)(b) I was told that the neither the respondent nor the Clerk is required to provide me any service of a copy and that I could go purchase a copy of my own.**
10 B	SUGGESTION RECEIVED BY STAFF (See attachment D-11 for more detail)	**I write to request a helpful simplification in civil practice through removal of the +3 day rule under ORCP 10B. I hope to present on this in person but provide you with a summary of the reasons here first...This rule should be deleted because it is unclear, ambiguous, and inconsistently applied.**
10 B		Please remove the +3 day rule under ORCP 10B. I have many reasons supporting the removal, and I would like to discuss those with the appropriate person from CCP
10 B		ORCP 10B. Adding an additional 3 days to respond to a notice or other document for all types of service is stupid. The additional time rule should be deleted and all of the standard response times should be extended for 3 days so attorneys do not have to consult multiple rules.
12	Clerks and e-filing	The e-filing system and it's implementation is very poor, and it now seems like the clerks wield arbitrary control over pleadings that are filed. Additionally conducting all of the filing via this remote system has made the clerks unhelpful in resolving filing defects. For example: a pleading is filed, "accepted", but then weeks later an email will annouce the pleading is rejected/unsigned with little to no explanation or assistance in correcting the issue. This issue cuts across all counties, and under the old system a clerk would discuss and explain any issue rather than issue a fiat rejection from on high. This results in wasted time, money, and energy as a practitioner searches for the "fix" without any assistance from often unreachable clerks. The ORCPs need to be modified to make it clear that the clerks are not to act as empowered gatekeepers, which is precisely what ORCP 12 seems to direct "pleadings shall be liberally construed". Thus some form of rule needs to make it clear that just because an attorney files a pleading with the wrong coding (e.g. motion to compel production vs motion to compel discovery) the pleading should not be rejected over what amounts to essentially a bookeeping exercise by the court.
21	15, 19, 47 E	ORCP 19 and ORCP 21 arguably pose a conflict with one another when considered alongside ORCP 15. There potential timing implications per ORCP 15 in failing to deny allegations in a complaint and where a litigant moves for a partial motion to dismiss. There should be a deferred period for an answer while a motion is pending. The same should apply for a partial motion for summary judgment ORCP 47. Please see Wells Fargo Bank v. Clark, 294 Or. App. 197 and https://willamette.edu/law/resources/journals/wlo/orappeals/2018/09/wells-fargo-bank-v.-clark.html.
21		The time frames in Rule 21 are complicated for no good reason.
21		It would be useful to clarify whether ORCP 21 requires a party to assert a lack of subject matter jurisdiction in an initial response to a complaint or whether that defense can be asserted at any time. ORCP 21A(1) lists lack of subject matter jurisdiction, so arguably under ORCP 21F, the motion is waived if not included in the initial response. On the other hand, ORCP 21G says the court must dismiss a case where there is lack of subject matter jurisdiction, implying that the defense may not be waived by failing to include it in the initial response in accordance with ORCP 21F. It would be good to have clarity on whether the defense of a lack of subject matter jurisdiction is or is not waived by not including this defense in the initial response to a complaint.
23 A		ORCP 23A - if parties have agreed to amendment after a response has been filed, a Motion, Declaration, and Order to allow the amendment should not be required. This causes more expense for parties, and more work for judges. This rule should be revised to allow the amendment to be filed along with a Declaration indicating that the parties have agreed as confirmed in a writing, attached to the Declaration. No order should be required.

Category/Rule	Subcategory/additional information	Suggestion
54	SUGGESTION FROM LAST BIENNIUM (See attachment D-15 for more detail)	**Revise ORS 36.425(6) to have the arbitrator consider and determine the effect of any ORCP 54 offers of judgments on the attorney fees and costs after submitting the arbitration award to the court.**
55	LEGISLATIVE EFFORT LAST BIENNIUM (see attachment D-17 for more detail)	**Suggested amendment to ORCP 55 B(2)(c) regarding individuals waiving personal service:** ***"B(2)(c)(iv) Signed mail receipt. If the subpoena was electronically mailed, the electronic mail was sent before the date to appear and testify and the witness sent an electronic mail response before the date to appear and testify verifying that the witness received the electronic mail."***
55 D		ORCP 55 continues to be a bit confusing. (I know it was revised not terribly long ago).
55 D		**The 2019/2020 revisions to ORCP 55 were very helpful in clarifying issues with issuing and serving subpoenas, but I would recommend going a step further and having a separate ORCP involving out-of-state subpoenas.** I suggest the same for ORCP 7 in relation to out-of-state service and especially in foreign jurisdictions not party to the Hague Service Convention. The CCP definitely has a better grasp of the needs of litigants in comparison with the Legislature. The CCP does good work and the archives of past ORCPs and historical notes are immensely helpful.
55 D		Please clarify the timelines for ORCP 55D document production. After the reconfiguration from ORCP 55H, it became less clear. For example, when seeking disclosure of mental health records of an opposing party, if there already exists a Qualified Protective Order and Order for In Camera Review, it needs to be clearer as to how much advanced notice is required to give the opposing party/counsel before the subpoena is sent to the entity from whom records are sought. Is it the same 14 days as when the records are to be produced directly to the requesting party? What is "reasonable?" Can the words "In Camera Review" be included to clarify, since that is the actual terminology used?
58 B (9)		I would like to amend the rule regarding jury questions as applies to criminal matters, with the rule amended to allow defense to veto any questions proposed.
58 B (9)		I practice criminal law exclusively. ORCP 58B(9) should be amended to prohibit juror questions in criminal trials. Alternatively, it should be amended to prohibit juror questions if objected to by the defense. Any discussions regarding juror questions should be resolved on the record and outside of the presence of the jury.
58 B (9)		At least for criminal matters, I believe that ORCP 58B(9) should remove juror questions altogether, or pbe amended to read: "With the court's consent, jurors shall be permitted to submit to the court written questions directed to witnesses or to the court[, except that in a criminal matter, jurors may not submit questions if objected to by any defendant]. The court shall afford the parties an opportunity to object to such questions outside the presence of the jury."

Category/Rule	Subcategory/additional information	Suggestion
58 B (9)		ORPC 58 B (9) should be amended as follows: "With the court's consent, jurors shall be permitted to submit to the court written questions directed to witnesses or to the court[, except that in a criminal matter, jurors may not submit questions if objected to by any defendant]. The court shall afford the parties an opportunity to object to such questions outside the presence of the jury." I can submit briefing in support of the argument that allowing juror questions in a criminal matter violates due process, just send me an email to george112076@gmail.com. Thanks for your time and attention. George Gilbert, OSB. No. 112076
68 C		ORCP 68 could be clearer on the procedure for requesting and objecting to fees. I can't offer specifics but I've seen a variety of ORCP 68 requests and forms of objections.
68 C		I work with many clients who are representing themselves. One of the issues I run into frequently is the lack of a notice requirement in Rule 68 C(4). Receiving a document entitled Statement of Attorney Fees is not sufficient to provide notice that a party may oppose the request by filing an objection. An attorney may provide that information in a cover letter but in my experience rarely do.
68 C		Attorney fees award if a court enforces an unwritten local rule, in favor of the attorney objecting to the unwritten (SLR) rule.
68 C		Clarifying rules under ORCP 68 for claiming attorney fees and costs, other than upon entry of a judgment or upon request for supplemental judgment for costs of collection after entry of a judgment. There is an implied miscellaneous procedure for fees by motion but the rules are unclear. The specific example giving rise to the issue is a post-judgment motion under which a party has a right to fees, but where the prevailing party is not the original judgment creditor.
69	7	In my experience, Rule 69B encourages gamesmanship by defendants flouting the intent of the rule. It ends up putting the onus on the plaintiff to go through the dance of pinging the defendant, then filing a notice of intent to take default, just to get the defendant to file an answer.
69		(4) Address or clarify procedures relating to motions to allow relief requested (e.g., a party files a motion seeking affirmative relief, and the other side does not respond/object/request hearing, etc.), and otherwise clarify application/scope of ORCP 69 with respect to family law modification proceedings (ORS 107.135), in particular. Example: in original domestic relations action, both parties appeared, and a judgment of dissolution entered. Years later, one party moves to modify the judgment under ORS 107.135 and serves the order to show cause on the other party in the manner required by ORCP 7. The non-moving party does not respond or answer the order to show cause re: modification within the time required (or otherwise provide notice of intent to do so). In this circumstance, is the moving party permitted to seek default under ORCP 69, or does the rule no longer apply because the other party technically did appear/defend in the original underlying matter, albeit possibly many years prior? (This may seem like a silly question, but I've heard of courts rejecting motions for default in such circumstances, appearing to rely on the aforementioned reasoning.)
71 B		Make it harder to vacate default judgments under orcp 71B(1)(a) excusable neglect, or add some sort of penalty or attorney fee provision. The low threshold for what constitutes excusable neglect under the current case law practically makes the rule pointless and only creates more time and expense for attorneys and their clients.

Category/Rule	Subcategory/additional information	Suggestion
71 C		ORCP 71B and C - The court should have the inherent ability to set aside a judgment for Intrinsic fraud - which relates to the merits of the case - under ORCP 71C, rather than extrinsic fraud. Extrinsic fraud should not be a basis for a set aside under ORCP 71C (which has no time limitation). ORCP 71B(1) already permits set aside for both intrinsic or extrinsic fraud if filed within one year. Currently, an intrinsic fraud discovered more than a year from the judgment notice is barred from a set aside order. That seems backwards. The court should be more concerned about intrinsic fraud upon the court - where a party's fraud is directly related to the merits. The policy of finality of judgments is important - and should apply to extrinsic fraud as it does under ORCP 71B. But if a person is intentionally committing fraud about the merits of a cause (intrinsic), they should not have more safety from a set aside ruling than would a person who commits fraud about an issue that has no real bearing on the case (extrinsic). ORCP 71C authority to set aside an order without time limitation should be applicable to only intrinsic fraud. As is now, case law states the direct opposite. The recent case of A.B.A. v. Wood, 326 Or App 25 (2023) , has a good discussion of the types of fraud. The person in that case who was wronged, and later found evidence of intrinsic fraud, was denied relief because they sought a set aside under ORCP 71C (and was too late to file under ORCP 71B). Alternatively, there should be a longer statute of limitations under ORCP 71B if the fraud is intrinsic (e.g. ORS 107.452 provides for a 10 year SOL if a divorcing spouse learns of intentional concealment of assets after the judgment).
71 C		Extend the period in which people can file to set aside a judgment that they did not know about and make it easier to have an unknown judgment set aside. I have seen cases where the records show the wrong person was served but it was many years too late. This sort of rule favors the large corporations and bill collectors over people.
Apply the ORCP to administrative law cases		Not your domain, but Oregon's administrative proceedings are bordering on dysfunctional when complex matters are involved. The system simply cannot handle complex proceedings. There needs to be some attention to addressing standardization of procedures in those proceedings - which would likely work much better if they were governed by the ORCP.
Assign (and keep) one judge to a case (Mult. Co.)		In re Multnomah County in particular - could we PLEASE have judges assigned to cases from the beginning? It's so inefficient and unworkable, even with the newer "motions judge" process. If the motions judge doesn't rule someone's way, they won't agree to them continuing....which necessitates educating a new judge. So dumb!
ORCP/UTCR/OJD		Weave more UTCR in to the ORCP.
ORCP/UTCR/OJD		I sometimes wonder whether and to what extent the CCP, UTCR committee, and the committee or individuals responsible for promulgating OJD's Forms interact with one another, and whether there would be any benefit to increased collaboration amongst and between them?
ORCP/UTCR/OJD		It seems like the ORCPs have lost most of their relevance because the UTCRs and LCRs are more important to follow. The ORCPs give a big picture, but if you aren't familiar with the UTCRs and LCRs of various courts, the procedures in the ORCPs often become meaningless.
Discovery (Rules 36-46)	**SUGGESTION RECEIVED BY STAFF (See attachment D-20 for more detail)**	**Yesterday I had a major case affecting my health dismissed on summary judgment in part because I did not understand that litigants themselves (IOW, the plaintiff) must initiate discovery. I didn't see anything at all - and still don't - in ORCP about how discovery is initiated...If the ORCP had said explicitly how to commence discovery, I would not have made this mistake.**
Discovery (Rules 36-46)	47 E; UTCR conferral on all motion	Commentary may help the inconsistent application of the rules by judges. Too much variability. And the summary judgment rule is being abused with the attorney declaration. I'm not a fan of expert discovery but there is too much hiding the ball.
Discovery (Rules 36-46)	47 C; Expert discovery	We should adopt a requirement for conferral on all civil motions, not just discovery motions. The 60-days-before-trial deadline for filing summary judgment motions should be removed or a discovery cut-off should be imposed to ensure discovery is complete in time to meet the MSJ deadline.

Category/Rule	Subcategory/additional information	Suggestion
Discovery (Rules 36-46)	Expert discovery; federalize the ORCP	Add a rule for use of interrogatories. Change ORCP 26 to require disclosure of experts and use of exchange of expert reports. Make ORCP like federal court practice.
Discovery (Rules 36-46)	Expert discovery; federalize the ORCP	Our rules should more closely track the FRCP, particularly with respect to identification of witnesses and experts before trial and expert discovery.
Discovery (Rules 36-46)	Expert discovery	Provision for appealing decisions on preliminary injunctions and TROs; expert discovery
Discovery (Rules 36-46)	Expert discovery	Expert discovery, but try getting that by OTLA.
Discovery (Rules 36-46)	Expert discovery	get rid of trial by ambush with respect to expert testimony.
Discovery (Rules 36-46)	Expert discovery	allow expert discovery; include interrogatories among discovery options
Discovery (Rules 36-46)	Federalize the ORCP	1) Allow interrogatories in discovery (can save discovery expenses by avoid unnecessary depositions when document requests alone are insufficient) 2) Renumber the ORCPs to align with FRCP rule numbers (like Washington does with its Civil Rules)
Discovery (Rules 36-46)	Federalize the ORCP	In general, the ORCP should better match the FRCP.
Discovery (Rules 36-46)	Proportionality in discovery	Adding a proportionality requirement for discovery like the FRCP.
Discovery (Rules 36-46)	Proportionality in discovery	Adopt a proportionality rule simliar to that in FRCP 26
Discovery (Rules 36-46)		Legislature to create a Family Law Discovery Master (impartial) and both parties must supply documentation. CCP to draft procedures and sanctions. Goal/Aim is to reduce discovery costs and attorney fees and create an equitable process (restrict/ limit the discovery games/ disparate information.
Discovery (Rules 36-46)		Trial by ambush should be done away with. Automatic mandatory discovery in every case. This would reduce the cost and level the playing field.
Discovery (Rules 36-46)		Please, PLEASE, delete the stupid addition to ORCP 43 that was put in a few years ago that says if you don't respond to an rfp within 30 days your objections are deemed waived. That serves absolutely no purpose than to add a procedural booby trap to the rule. I routinely advise opponents that I pay no attentio to that part of the rule, and ask that they do the same, which is also needless. Get rid of it. .
Discovery (Rules 36-46)		ORCP 36 and the UTCR on discovery motions. The lack of disciplined approaches to discovery requests and responses is increasing. It's way more difficult and abstract then it should be to enforce compliances.
Discovery (Rules 36-46)		There needs to be a procedure for the short docket landlord/tenant cases so that discovery will occur timely.
Discovery (Rules 36-46)		Could allow for interrogatories as a discovery tool that would cost parties less than a deposition.

Category/Rule	Subcategory/additional information	Suggestion
Discovery (Rules 36-46)		I would like to explore the possibility of amending ORCP 43 and 45 to provide shorter timelines for summary proceedings, such as FED cases (forcible detainer and entry). Currently, it is up to the court to specify a shorter timeline for responding to discovery requests if they choose to do so. The court never does so on its own motion - which effectively requires a defense attorney to make motion to the court for a shorter timeline when they may have been hired only a few days prior to a trial date and are scrambling to draft and file an amended answer and corral witnesses. This is unduly burdensome on the defense attorney in FED cases and further weighs the scales in favor of Plaintiffs who are already far better-positioned to win their case based on having better access to counsel.
Discovery (Rules 36-46)		As a small-town attorney representing ordinary people, I see a disconnect between what the rules are meant to do, and what actually happens. **Clients are often shocked to see how parties FAIL to play by the rules (discovery especially), without reprimand by the Court** -- unless, of course, they spend their own money trying to get sanctions or court orders to address the issue. Even then, the at-fault party still seems to get the benefit of the doubt, and a million chances, presumably to preserve "access to justice" and "due process." Even with a fee award, there is the issue of collection. Thus, the party who plays by the rules bears a financial burden for managing dysfunctional/cheating litigants, and confidence in the court system's ability to deliver "justice" is diminished. I don't know what the solution is, but the courts shouldn't be bending over backwards to protect parties who are pro-se and abusive of the system -- or parties who hire an attorney who is complicit in the abuse -- in the name of access to justice. Abusive plaintiffs may need to have their cases dismissed as a discover sanction. Abusive defendants may need similar treatment. It might cause successive case filings, but it could send a message over time.
Discovery (Rules 36-46)		Automatic discovery sanctions, discovery cutoff dates. Actual teeth to the rules.
Discovery (Rules 36-46)		The Code should be amended to include a limited number of interrogatories. More cases drag on and require depositions than they should if basic information was required from the parties. The lack of discovery mechanisms and lack of any real enforcement of ORCP 44 and 45 result in parties withholding documents and information that if disclosed earlier in the proceedings would likely lead to resolution without the need for trial preparation or use of the court's resources for trial dates that ultimately do not proceed.
Electronic signatures		Something addressing digital signatures should be incorporated into the ORCP regarding parties and counsel signing paperwork, declarations/affidavits.
Electronic signatures		It would be convenient to allow for electronic/digital signature (Adobe Esign for example) of declarations submited in support of motions.
Judges and the ORCP		I don’t have a specific rule, but judges should be required to follow the Rules in every case. I feel they allow manipulation of the rules depending on who they want to favor.
Judges and the ORCP		I have had a judge recently tell me that these rules and the statutes are just "form over substance." Shocking to me. I would like a rule that explains to judge's these aren't just suggestions. These are rules that they must apply and respect.
Judges and the ORCP		Provide training for judges on civil procedure
Judges and the ORCP		We need a review mechanism for courts that disregard or simply do not know the ORCP without adding to our clients' attorney fees. Someone please look in on the Deschutes County Probate Court. It seems as if everyone is operating as though there were no ORCP and it is creating chaos.
Mediation	Incorporate Uniform Collaborative Law Act in ORCP	I would like to see the ORCP changed to incorporate the Uniform Collaborative Law Act - https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf
Mediation	Add mediation as option in court-annexed ADR	I strongly urge that mediation be added to the ADR options. Mediation has as good a resolution rate as nonbinding arbitration, and in many cases, the parties would prefer to satisfy the ADR requirement via mediation -- but most courts don't allow that, and leaving it to each court to decide does not promote the consistent administration of justice.

Category/Rule	Subcategory/additional information	Suggestion
Motion practice	Allow use of letter requests in lieu of motion practice	Allow matters to be brought to attention of courts without formal motions; e.g., email request for conference to address matters matters. If court believes the matter warrants the usual written motion process, he/she can so require. The amount of time and money wasted -- wasted -- on the formality and delay and expenses associated with "the rules" is positively staggering.
Non-precedential opinions	Opposition to non-precedential opinions	The non precedential opinions are a horrible idea. I read the advance sheets every week. It is clear the appellate judges would rather write a short letter than an actual opinion. That having been said, some of the NPO's are very good and SHOULD be law. I practice in the family law area. The number of published opinions has dropped to almost zero since last year. This state of affairs is not helpful. The job of the appeals court is to review and make law. It does not do this with the NPO. I really think this is a mistake which will freeze the state of the law to what it is in 2023 or move it forward way too slowly. I can see an NPO in very limited cases, but not the way it is in fact being used now. I strongly strongly believe that this practice is a mistake.
Non-precedential opinions		Get rid of NPO's.
Plain language		I would love to contribute to any efforts to translate the rules into plain language so that more Oregonians can understand the process and participate in civil litigation.
Plain language		As a newly barred attorney, I filed my first action in court the spring. I read the ORCP through multiple times, as well as your TCR and local rules. I nevertheless got a whole bunch of things wrong. The judge told me I should read the MRCP thoroughly. I thought I had, but it was also clear to me after reading it multiple times that the rules are written so that people who understand how to operate in the courts already can read them. They are not written in a way that allows people to access the courts if they don't already know how to interface with courts. There is a lit of assumed knowledge not spelled out in the rules.
Plain language		It would be good for the CCP to continue to consider the needs of self-represented litigants when developing rules of civil procedure and drafting them in language that can be easily understood by a self-represented litigant.
Provide an annotated ORCP/UTCR		A well annotated version of the rules with cross references to the OTCRs would be helpful
Remote probate practice		Making the probate process as friendly as possible to be conducted remotely is preferable.
Self-represented litigants		Rules guiding both attorneys, judges and litigants on the responsibility of pro se parties to abide by the rules, particularly those strictly applied to lawyers but not so much to pro se parties. This is in regard to time for motions, replies, amendments, form of pleadings, exhibits, ex party contacts, inappropriate remarks to counsel or tribunals.
Self-represented litigants		Always keep self-represented individuals in mind.
Self-represented litigants		The rules are a morass of confusion and traps for the inexperienced or unrepresented. People who do not have lawyers or law degrees are held to the same standards as lawyers and this is unjust and confusing for them.
Service	7; 9	Greater allowance for electronic service.

Category/Rule	Subcategory/additional information	Suggestion
Service	7; 13	Clean up summons and service, translate into plain language and Spanish, require the court to make form available when ORCP lays out the text of the document (e.g. Summons). Allow "posting" to be done by court staff. Its confusing and hard for the public to be moving and posting things to bulletin board for alt service. Why doesn't Rule 13 acknowledge that family law complaints are called "Petition?" I have been struggling to reconcile ORS 18.075(b) and ORCP 67 and 54.
Service	7	I see a hole in the service rules on how to serve a state official, sued in their personal capacity. Does the rules for individual apply, or the rule for the State apply. The federal rules address this issue explicitly FRCP 4(i)(2) and (3).
Service	7	I would also like to see ORCP 7 loosened up a bit as to service requirements. A lot of time seems to be lost on trying to get folks served and in family law, certain provisions (like retroactive support) are contingent upon date of service.
Service	7	The 2019/2020 revisions to ORCP 55 were very helpful in clarifying issues with issuing and serving subpoenas, but I would recommend going a step further and having a separate ORCP involving out-of-state subpoenas. **I suggest the same for ORCP 7 in relation to out-of-state service and especially in foreign jurisdictions not party to the Hague Service Convention.** The CCP definitely has a better grasp of the needs of litigants in comparison with the Legislature. The CCP does good work and the archives of past ORCPs and historical notes are immensely helpful.
Service	7	Like federal court, there should be a broader ability for waiver of process service. Plaintiff should submit the waiver, if Defendant fails to waive, Defendant should pay the costs of process service.
Service	7	Consider possible service by electronic means such as email or facebook. We often allow this as an alternative when service cannot be made in person, but it might be more efficient to include it as an option in certain cases.
Service	7	Establish a new method for notice rather than publication in newspapers, which is an ineffective method of notifying general public
Service	9; 10 B; UTCR 5.100	UTCR 5.100 is unclear and makes things very difficult for attorneys, especially when the other party is unrepresented. it is a rule that makes no sense and most judges seem to ignore it. It should simply be done away with- or amended to apply to only orders and judgments that have substance to them more than granted or denied. The timelines are also ridiculous. If you are going to say 7 days, plus 3 for mailing, why not just say 10. and why do we need that much time if we fax or email. Also, no one pays attention to the service rule that says it is only considered served when the other party acknowledges receipt. Common sense is lacking in a lot of these rules.
Service	9; reduce paper copies	Reduce requirements for paper copies;
Service	9; require litigants/attorneys to update service information	(1) Make clear(er) that parties who have appeared/provided notice of intent to appear in an action have a duty and continuing obligation to provide the court & other parties with current contact information sufficient to allow for service of process under ORCP 9. We run into issues with this frequently when dealing with unrepresented (pro se) litigants. I do note that UTCR 2.010(13) partially addresses this by requiring attorneys/parties to provide notice of change in address or telephone number, but doesn't clearly require provision of contact information in the first instance. Cf. UTCR 1.110(2), 2.010(6) & (13), and 2.080(1). However, it seems more appropriate to incorporate this requirement directly into the ORCP. See, e.g., ORCP 9, ORCP 17A, and/or ORCP 69B.
Service	9	ORCP 9. It's time to incorporate some version of email service, WITH ADEQUATE PROTECTIONS FOR CIRCUMSTANCES WHERE SERVICE MIGHT BE MISSED, into the ORCP.
Service	9	Make email service without the need for a read receipt to be the standard.
Service	9	Service by e-mail is antiquated and not in-line with how the law is practiced in the present-day.

Category/Rule	Subcategory/additional information	Suggestion
Service	9	It would be very good if email became the only method of correspondence and we eliminated regular mail altogether. It is inefficient and no more reliable than email.
Training on civil procedure		I like the rules, but most young lawyers seem to be unaware of many of the rules and their purposes. Perhaps more training on procedure in law school and intro CLE courses?
UTCR 5.100		(2) Clarify/adopt procedures with respect to disputes over form of judgment/orders. (UTCR 5.100 leaves a lot to be desired, to say the absolute least).
Vexatious litigants rule	**RE-EXAMINATION FROM LAST BIENNIUM**	**Re-examine vexatious litigant proposed rule from last biennium.**
Vexatious litigants rule		(3) Adopt - or perhaps recommend that the legislature adopt or investigate - remedies/procedures which provide at least some sort of limited protection from abuse/harassment by vexatious litigants (whether party is pro se or represented). See, e.g., California Code of Civil Procedure s. 391(b); cf. 28 USC 1927. I know this is a tricky issue which raises very real access to justice concerns, but I represent a lot of survivors of domestic violence/sexual assault, and it is not uncommon for perpetrators to weaponize and misuse the (civil) court system to intimidate and/or continue to exert control over the victim. Effective remedies to address this behavior are so limited as to be virtually non-existent, which further emboldens these individuals to continue engaging in the same behavior. Again, I know this is a difficult subject area, and I of course worry about infringement on an individual's right to access the courts, but I can't help but think that there must be a way to balance the interests at stake here.
Vexatious litigants rule		We badly need a rule on vexatious litigants. The current climate in litigation is getting far more antagonistic and pro se plaintiffs are filing multiple lawsuits against the same defendants. Please, please, please move the vexatious litigant rule forward so defendants who are being harassed have a rule/procedure to rely upon to stop the craziness!
Vexatious litigants rule		As a small-town attorney representing ordinary people, I see a disconnect between what the rules are meant to do, and what actually happens. Clients are often shocked to see how parties FAIL to play by the rules (discovery especially), without reprimand by the Court -- unless, of course, they spend their own money trying to get sanctions or court orders to address the issue. Even then, the at-fault party still seems to get the benefit of the doubt, and a million chances, presumably to preserve "access to justice" and "due process." Even with a fee award, there is the issue of collection. Thus, the party who plays by the rules bears a financial burden for managing dysfunctional/cheating litigants, and confidence in the court system's ability to deliver "justice" is diminished. I don't know what the solution is, but **the courts shouldn't be bending over backwards to protect parties who are pro-se and abusive of the system -- or parties who hire an attorney who is complicit in the abuse -- in the name of access to justice. Abusive plaintiffs may need to have their cases dismissed as a discover sanction. Abusive defendants may need similar treatment. It might cause successive case filings, but it could send a message over time.**

Shari Nilsson <nilsson@lclark.edu>

Re: ORCP and EPPDAPA

1 message

Mark Peterson <mpeterso@lclark.edu> Sat, Aug 13, 2022 at 2:17 AM
To: < @gmail.co >
Cc: Shari Nilsson <nilsson@lclark.edu>

Mr. ,

I will look into the issue that you have raised regarding service issues in EPPDAAPA cases. As you may know, the Council works on a biennial schedule and will not consider new changes to the ORCP until September of 2023. (The Council is completing its work on this biennium's changes.)

Thank you for raising this issue. If I have insight to offer, I will respond further but not over the next week as I will be out of state.

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

On Tue, Aug 9, 2022 at 5:18 PM < @gmail.com> wrote:

> Hello,
>
> I am writing to suggest improvement to the Oregon Rules of Civil Procedure (ORCP) as they apply to EPPDAPA cases. The council has already in the past (See November 2011 Minutes) affirmed that the ORCP applies to EPPDAPA cases. When a respondent requests a hearing from the court this is a written request and ORCP 9(A) requires that the petitioner be served a copy but right now the EPPDAPA statute under ORS 124.020(9)(b) delegates serving a copy of the request on petitioner to the Clerk of Court during the notice of hearing process or so it appears. I am a petitioner in a EPPDAPA case and was never served a copy of the request for hearing and when I contacted the court to ask why I wasn't served citing ORCP 9(A) and ORS 124.020(9)(b) I was told that the neither the respondent nor the Clerk is required to provide me any service of a copy and that I could go purchase a copy of my own. The fact I wasn't served as a pro se disabled petitioner deprived me of time to prepare and adequate service and notice process. For these reasons I am asking the council to improve ORCP 9 or any other areas of the ORCP so that parties in these EPPDAPA proceedings get proper service of filings. I did ask Judge Patrick Henry for a continuance and order directing the Clerk to serve me but he denied this and didn't accept the argument that I was entitled to a copy of the request or that I was entitled to service of it. It appears to me the Multnomah County Circuit Court as a practice does not treat ORCP as applying to EPPDAPA proceedings which is unfortunate as it can deprive both parties from processes they are entitled to under the ORCP.

August 4, 2023

VIA EMAIL

Council on Court Procedures
Attn: Mark Peterson
c/o Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR, 97219

Re: Proposal to Eliminate the +3 Day Rule in ORCP 10B

Dear Hon. Mark Peterson and Members of the Council:

I write to request a helpful simplification in civil practice through removal of the +3 day rule under ORCP 10B. I hope to present on this in person but provide you with a summary of the reasons here first.

ORCP 10B provides:

> **B Additional time after service by mail, e-mail, facsimile communication, or electronic service.** Except for service of summons, whenever a party has the right to or is required to do some act within a prescribed period after the service of a notice or other document upon that party and the notice or document is served by mail, e-mail, facsimile communication, or electronic service, 3 days shall be added to the prescribed period.

This rule should be deleted because it is unclear, ambiguous, and inconsistently applied.

A. ORCP 10B Causes Ambiguity and Creates Risk of Malpractice

It is universally accepted that laws should be clear, precise and unambiguous. Although the rule seems facially clear, ambiguities arise often when the rule is applied. A common source of confusion arises with application of the rule to statutory timelines, such as whether the rule applies when a defendant to a small claims action demands jury trial (i.e., does the plaintiff have 20 days

to file a complaint in circuit court under ORS 46.465(3)(a) or does the plaintiff get an additional 3 days under ORCP 10B)?

This question was raised in *Oregon Credit & Collections Bureau, Inc., v. Valech,* Case No. 22cv11731. There, the plaintiff collection agency filed a small claims complaint, and the defendant requested jury trial. Pursuant to ORS 46.465(3)(a), plaintiff was required to file a formal complaint in circuit court within 20 days of the notice. Plaintiff filed the complaint within 22 days of the notice, and defendant moved to dismiss the case for failure to timely file a complaint under ORS 46.465(3)(a). In its response, plaintiff argued that +3 day rule under ORCP 10B applies and should allow him to file the complaint within 23 days. (*See* attached *Valech* Response to Summary Judgment at 2-3). The court found in favor of the defendant and dismissed the case, awarding fees to the defendant. (*See* attached *Valech* Order). When the case was dismissed, the statute of limitations had run, and the plaintiff was unable to pursue its claim at all. This is all because of the lawyer's mistaken reliance on ORCP 10B, possibly giving his client a malpractice claim.

Similar questions arise in other statutory settings such as ORS 20.080, probate (ORS 113.145), and protective proceedings (ORS 125.065). Some may argue that it is simple enough to interpret because statutes trump rules, and therefore ORCP 10B does not apply to statutory timelines. The analysis is not as simple as it seems. In *State v. Vanornum,* 354 Or 614, 317 P3d 889 (Or. 2013), Justice Landau said in his concurring opinion that some rules in ORCP are statutes and some are not. *Id.* at 633. If the legislature amends, repeals, or supplements any rule submitted by the CCP, the resulting rules are statutes. *See id.* "If the legislature chooses not to amend, repeal, or supplement the rules that the council submits, those rules simply 'go into effect' on January 1 following the end of the legislative session. When they 'go into effect,' however, they do so as rules, not as statutes." *Id.* (internal citations omitted). "To the extent that any rule conflicts with a statute enacted by the legislature, the rule is invalid." *Id.* at 634. Applying Justice Landau's concurring opinion, a practicing attorney upon identifying a conflict between an ORCP and a statute, would have to look up the legislative history for each rule to see if that rule was amended, repealed or supplemented by the legislature at any time in its history. If a rule had been amended, repealed or supplemented by the legislature at one point, the attorney would have to compare it to the statute and see which came later to decide whether the rule or the statute applies.[1] ORCP

[1] Moreover, if the rule was amended by the legislature after the statute with which it is in conflict was enacted or amended, but was again amended by the CCP but not amended, repealed, or supplemented by legislature, then the

10B has a possible conflict with many statutes that require timely responses. It is unreasonable to require attorneys to look through legislative history to resolve every conflict between a statute and ORCP 10B.[2]

B. The costs of confusion from ORCP 10B exceed its benefits

Presumably, when ORCP 10B was written, additional three days were needed to account for the delay in delivery of mail. Since then, technology has greatly improved to a point where electronic service methods (email, e-file service, and fax) are instantaneous and substantially more reliable than USPS.[3] Currently, the only time ORCP 9 service does NOT trigger a +3 day extension is when service is made personally, which rarely happens.

Some may argue that without 10B's extra 3 days, there just isn't enough time to file responses, especially when the response is due within 7 days or less. In such cases, each individual rule should be amended to allow extra time. If rules do not give enough time to file responses, the extra time should be written into those specific rules, and not somewhere else in the ORCPs. For example, ORCP 47C should be amended to allow 8 days instead of 5 for a party to reply to a response opposing summary judgement motion. Rules should be self-contained, especially with respect to deadlines imposed by those rules. Parties and attorneys should not have to refer back and forth through various rules and statutes to determine their response deadlines.

C. ORCP 10B is a Barrier to Access to Justice

Rules should be clear and accessible to everybody, not just to attorneys who are familiar with the practice. As written, ORCP 10B creates an unfair advantage to practitioners who are readily familiar with the rules over new attorneys, out of state attorneys, and pro se litigants, by hiding the extra time allowance in a section that is separate from where the response times are found. Such a practice goes against the concept of fair play and substantial justice, and acts as a barrier to access to justice.

latest rule would not trump the statute, but the previous one would. These kinds of situations can make a relatively simple task of determining response deadlines very cumbersome very quickly.

[2] There are numerous other areas in which ORCP 10B creates ambiguity and risk of malpractice. I would be happy to go over each of those instances if the Council is interested.

[3] On a related note, mail service under Rule 9 should be abolished altogether, especially if the party is represented.

I would like the opportunity to go over more problematic scenarios Rule 10B and present my case in person in front of the Council, so that I can address any individual concerns the members may have about my proposal. Thank you very much for your time and courtesies.

Sincerely,

/s/ Young Walgenkim
Young Walgenkim
Hanson & Walgenkim, LLC

<u>SITUATION</u>: Conflict between Court Rules and Arbitration Statute

The purpose of court-annexed arbitration is to promote speedy resolution of disputes and reduce the burdens on court by deciding smaller civil disputes where only money through arbitration with reduced court involvement. But a conflict exists between the arbitration statute and the court rules for certain cases heard in arbitration and are not appealed to trial de novo.

In *Mendoza v Xtreme Truck Sales LLC*, 314 Or App 87 (2021), the Court of Appeals held that, based on the language of ORCP 54(E), when a dispute over entitlement to attorney fees or costs arises from an offer of judgment, the arbitrator's final award—including the attorney fees and costs award, which the arbitrator now makes without knowing about the offer of judgment—must become a final judgment before the offer of judgment is disclosed and the effect of the offer of judgment on the attorney fees and costs award is determined.

This creates a conflict with ORS 36.425(3), which states that "If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed."

So the statute on arbitrations dictates that final judgments are not subject to appeal, but the *Mendoza* holding directs litigants to wait until the judgment (including the award of attorney fees and costs) becomes final before disclosing the offer of judgment to the court so it can decide the effect on the attorney fees and costs. And there is no procedure in statute or rule for raising this issue, so each trial court who encounters it must create an ad-hoc procedure to consider the issue.

<u>TARGET</u>: A simple, clear procedure for litigants to follow during arbitration when an ORCP 54 offer of judgment might affect fees and costs.

Litigants, arbitrators, and courts should have a simple process for cases when an offer of judgment may affect the attorney fees and costs after an arbitration and the case is not appealed to trial de novo.

<u>PROPOSAL</u>: Revise ORS 36.425(6) to have the arbitrator consider and determine the effect of any ORCP 54 offers of judgments on the attorney fees and costs after submitting the arbitration award to the court.

ORS 36.425
Filing of decision and award

(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. **Any claim or defense pursuant to ORCP 54E offer to allow judgment must be filed as exceptions under this subsection.** Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. [*If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed.*] The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.

Senate Bill 688

Sponsored by Senator MANNING JR (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Allows witness to waive personal service of subpoena by electronic mail.

A BILL FOR AN ACT

Relating to waiver of personal service of subpoena; amending ORCP 55 B.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 55 B, as amended by the Council on Court Procedures on December 10, 2022, is amended to read:

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, prisoners, and parties.

B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or out of court, including:

B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or on the taking of a deposition in an action pending therein.

B(1)(b) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or by any officer empowered by the laws of the United States to take testimony; or

B(1)(c) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of nonparty individuals or nonparty organizations; payment of fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place specified in the subpoena.

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed **or electronically mailed** to the witness, but mail **or electronic mail** service is valid only if all of the following circumstances exist:

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; [*and*]

B(2)(c)(iii) Signed mail receipt. **If the subpoena was mailed,** the subpoena was mailed more than 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify[.]**; and**

B(2)(c)(iv) Signed mail receipt. If the subpoena was electronically mailed, the electronic mail was sent before the date to appear and testify and the witness sent an electronic mail response before the date to appear and testify verifying that the witness received the electronic mail.

B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered, along with fees for one day's attendance and mileage, in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with fees for one day's attendance and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with fees for one day's attendance and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location specified in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

B(5) Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations. A subpoena directed to a party who has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this rule.

Shari Nilsson <nilsson@lclark.edu>

Re: ORCP serious flaw for self-represented litigants (rule 36)

Mark Peterson <mpeterso@lclark.edu> Fri, Jun 23, 2023 at 8:46 PM
To: < @seastorm.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

,

I am assuming that you are litigating in Oregon's (state) circuit courts. You will find that the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure are quite different. I will add your suggestion for a rule amendment to the Council's agenda for the first biennial meeting (when the Council decides which rules to consider for amendment). However, the rules providing for specific discovery methods are instructive as to timing. See, e.g., Rules 37 A, 39 A, 41 A and 43 A.

Mark
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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

On Fri, Jun 23, 2023 at 6:24 AM < @seastorm.com> wrote:

> I am forced to be a self-represented litigant because of cross-industry blacklisting and what I believe are life-endangering civil liberties violations as well as false light portrayals about me. This has affected every aspect of my life, including my access to the justice system to try to remedy these problems. It's a horrible situation that I am trying to litigate to the best of my ability through the court system.
>
> Yesterday I had a major case affecting my health dismissed on summary judgment in part because I did not understand that litigants themselves (IOW, the plaintiff) must initiate discovery. I didn't see anything at all - and still don't - in ORCP about how discovery is initiated. Other documents online specified that it is improper to ask for discovery before a judge orders a conference. Based on that - the lack of information about how discovery is initiated in Oregon, plus the FRCP rule in which it appears that the court initiates the process - when all the defendants simultaneously filed Motions For Summary Judgment immediately after the complaint was filed - I thought that as long as I provided SOME evidence and raised questions of fact, that the Motion would be denied. I responded to all the Motions and - again, based on what I did and did not read in the rules - read the replies and waited for the hearing.
>
> At the hearing I was chastised for not having asked the defense for discovery materials prior to the hearing. The judge acted like I should have known from reading the ORCP that I was supposed to ask for discovery materials. The mistake I made was based on an omission in ORCP and erroneously assuming that the process would be like the federal process. If the ORCP had said explicitly how to commence discovery, I would not have made this mistake. Today I'll be spending time trying to figure out how to begin the discovery process in

Oregon.

Courts and due process are supposed to be available to citizens, but there are a number of ways that pro se and indigent litigants are treated very poorly. In addition, we cannot access a lot of the materials that attorneys or people with wealth can access (like ABA materials). I have to rely heavily on what I can access - case law online, rules, and statutes.

Thank you.