MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 11, 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
Hon. Jonathan Hill
Meredith Holley
Lara Johnson
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Michael Shin
Hon. Scott Shorr
Margurite Weeks
Hon. Wes Williams
Alicia Wilson

Members Absent:

Eric Kekel
Hon. Norman R. Hill
Stephen Voorhees

Guests:

Aja Holland, Oregon Judicial Department
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**
• Annotated ORCP • Composition of Council • Electronic Signatures • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP 14 • ORCP 39 • ORCP 54 • ORCP 58	• Plain Language in the ORCP • Remote Probate Practice • Self-Represented Litigants • Service in EPPDAPA Cases • Service, Generally • Service by Posting • Training on Civil Procedure • Uniform Collaborative Law Act • UTCR 5.100	• ORCP 10 • ORCP 12 • ORCP 15 • ORCP 19 • ORCP 21 • ORCP 23 • ORCP 68 • ORCP 69 • ORCP 71	• Annotated ORCP • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate Practice • Service in EPPDAPA Cases • Service, Generally • UTCR 5.100		

I. Call to Order

Mr. Andersen called the meeting to order at 9:29 a.m.

II. Administrative Matters

A. Approval of October 14, 2023, Minutes

Mr. Andersen asked whether anyone had corrections to the draft minutes from October 14, 2023 (Appendix A). Judge Peterson pointed out the need to change the word "providence" on page 19 to "province." Judge Bloom made a motion to approve the draft minutes with Judge Peterson's suggested correction. Judge Shorr seconded the motion, which was approved unanimously with no dissensions or abstentions.

III. Old Business

A. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson stated that he was still working on staff comments from last biennium, along with legislative highlights for Mr. Shields.

B. Potential Amendments to the ORCP

1. Formation of Committees

Mr. Andersen directed the attention of the Council to Appendix B, the remaining suggestions for amendment to the Oregon Rules of Civil Procedure (ORCP).

Judge Peterson addressed the first suggestion, which came from a self-represented litigant who was confused about why they could not serve the petitioner in an EPPDAPA case with their objection to the petition but, rather, that the court needed to do so. The reason is that the petitioner has a protective order to keep the respondent from contacting them. Apparently, in this case, it did not appear that the court provided notice of the respondent's request for a hearing. However, this is not an issue that the Council can do anything about; there is a statute that handles protective proceedings. The Council decided not to form a committee regarding this issue.

Mr. Andersen referred to the suggestions regarding mediation. With regard to adding mediation to the required court annexed alternative dispute resolution (ADR) options, Judge Peterson pointed out that ADR is statutory, and not a part of the ORCP. Mr. Andersen agreed. He asked whether there is anything that the Council can do to craft language or a rule within the ORCP with regard to ADR.

Judge Peterson opined that this would be a legislative matter, since the ORCP does not have much to do with mandatory ADR requirements. Mr. Andersen agreed.

Judge Bailey stated that his court has conciliation services that do mediation for them, and that he believes that some other courts do as well, along with mediation requirements for family law. He stated that he believes that mediation is a form of ADR, so he was confused as to the exact nature of the request; he wondered whether the idea was to require that the resolution reached in mediation be made binding. Mr. Andersen stated that, some years ago, Klamath County adopted a well-intentioned procedure that no case could go to trial without a settlement conference. Over time, however, the process became pro forma: a one-hour slot would be assigned to a judge to resolve a case, the judges became reluctant, and the litigants did not have much confidence in the process. The procedure became counterproductive. Mr. Andersen opined that ADR needs to be left a bit flexible for judges. He added that he did not believe that the Council could make any rule changes in this regard. Judge Bloom agreed that it is legislative and beyond the scope of the Council. The Council did not form a committee on this matter.

Ms. Wilson referred to the comment about the Uniform Collaborative Law Act. She stated that she has been hearing more talk about the collaborative law approach, but that she does not know much about it. It is her understanding that there is actually a process to become certified in this alternative mediation style, and she would be interested to know whether other jurisdictions are adopting it into their rules. Mr. Andersen asked whether Ms. Wilson was willing to volunteer for a committee on this topic. Ms. Wilson stated that she would be happy to do a quick survey into what other jurisdictions are doing and report back. The Council asked her to do so.

Mr. Andersen referred to the comment suggesting that matters be allowed to be brought to the attention of courts without formal motions. He stated that he believes that there are some courts that already allow this, and that he could think of both reasons for and against it. Judge Norby stated that, once requests are allowed outside of motions, there begins to be ambiguity about whether there are deadlines for responses, what the time is to reply, how the ruling will be issued, and whether a hearing should be held. She agreed that, from time to time, courts have interpreted informal letters as motions, but emphasized that it needs to be the court that makes that determination so that the document can be "received" and cross-referenced by the clerk. Judge Norby pointed out that the Council has also received comments from people who are concerned about clerks designating documents incorrectly or wielding too much power. She envisioned a morass of difficulties with allowing the procedure on a larger scale.

Judge Peterson recalled that, a few biennia ago, the Council had received a suggestion to stop requiring points and authorities with motions, because judges already know what the applicable law is. A few lawyers on the Council were amenable, but most of the judges were vehemently opposed, since their careers as lawyers may have been spent in different areas of law than the cases over which they now presided. Judge Peterson stated that he likes the uniformity and timing of motions, and that motions do not assume the omniscience of judges. Judge Jon Hill expressed concern that it is a slippery slope from documents being accepted like this to "motions" being filed by directly e-mailing judges. Judge Norby stated that letters to the judge sometimes happen in adoptions and juvenile courts, but it is sort of an organic process that works itself out. She stated that she did not feel that the ORCP should be tailored to juvenile or adoption court.

Mr. Andersen wondered whether the suggestion might have some genesis in unrepresented parties, since everyone knows how to write a letter, but not everyone knows how to draft a motion. He expressed concern about freezing out unrepresented parties. Judge Bailey stated that the courts are not freezing out unrepresented litigants. Individual counties and individual judges already allow a lot of self-represented parties to respond by writing letters or nonstandard documents. If a judge receives a letter stating, "I object," that judge will usually take it as an objection and use it as a basis to set a hearing date. Judge Bailey expressed concern that vexatious litigants would use this proposed rule change as an opportunity to further exploit the system. He also agreed with Judge Norby that there would be no process to get these documents into the court system and that it would lead to unequal treatment. The Council decided not to form a committee regarding this issue.

Mr. Andersen referred the Council to the suggestions opposing non-precedential opinions. He noted that this is a suggestion more properly addressed to the Court of Appeals. Judge Shorr stated that these opinions are just a way to resolve cases where the Court is not making law. He suggested that the commenters could pass their suggestions along to the Oregon Rules of Appellate Procedure (ORAP) Committee, which will start meeting again in January of 2024, as the non-precedential opinions are located in a temporary ORAP that the committee will be considering amending.

Ms. Nilsson noted the suggestions about plain language in the ORCP. She stated that there is a fine line between making the rules more understandable for self-represented litigants and keeping the language accessible for practitioners, but that it is something that the Council keeps in mind every time a rule is amended. She stated, however, that a complete rewrite of the rules is not a project that the Council has considered undertaking. Judge Peterson agreed that, every time a rule is amended, the Council goes through the entire rule and cleans it up, makes it more uniform with the other rules, and tries to take out some archaic language.

On the other hand, similar to insurance policies, if the rules are changed to make them understandable to the least sophisticated consumer, they will get really, really long. There is a fine line between plain language and what makes sense to those practitioners who have to use the rules.

Judge Jon Hill noted that the first and third suggestions regarding self-represented litigants basically ask for completely opposite things. One is asking that we apply the rules strenuously to everybody, including self-represented litigants. The other is asking judges *not* to apply the rules strictly to self-represented litigants. And the suggestion in the middle is just sort of aspirational. Judge Jon Hill stated that he believes that the Council can do its best to keep self-represented litigants in mind and use plain language where appropriate, but he did not believe that a committee was needed. The Council agreed. The Council also did not form committees on providing an annotated version of the ORCP or remote probate practice.

The Council turned its attention to the many suggestions regarding service. Judge Peterson suggested that some of the suggestions had already been addressed by amendments made by the Council in recent biennia: electronic service and alternative service, for example. He did note that there were a few specific objections with regard to e-mail service about which the Council could have a discussion, as well as out-of-state service, but that most of the suggestions were quite general. Ms. Johnson stated that she thinks that the suggestion regarding defendants paying for the cost of service of process if the defendant fails to waive service would not be well received by the defense bar. However, she wondered whether it might make sense to allow for that to happen in some way that would be recognized by the courts, if there is mutual agreement. She stated that this might reduce costs and be helpful to the parties.

Judge Peterson recalled that the suggestion regarding defendants paying for the cost of service of process if the defendant fails to waive service was looked at by a committee last biennium, and that it was included in a draft amendment, but that the amendment failed to receive majority support because of timing implications in of the suggestion and because the plaintiffs' bar and defense bar had different ideas about it. He noted that, particularly in family law cases where respondents are not always receptive to being served, it might be helpful to make it less profitable for them to avoid service. Mr. Goehler noted that last biennium's service committee had looked at many different issues, including this one. He recalled that the plaintiffs' bar and the defense bar had different positions as far as the timing. The federal rule has both a carrot and a stick: penalties for not accepting service as well as additional time to file an answer when service is accepted. Mr. Goehler stated that he would be happy to chair a service committee if the Council would like to revisit this, as well as any other, service issues.

Judge Peterson addressed the question of ambiguity in the ORCP regarding how to serve a state official in their personal capacity. The suggestion points out that the federal rules address this issue explicitly, while the ORCP do not. Judge Peterson stated that he was not sure how often this issue arises. He looked at Federal Rule of Civil Procedure 4 I, and it seems that to serve an official for a lawsuit in their individual capacity, it is only necessary to serve that person by registered or certified mail. However, given the federal rule, the prudent course might be to serve both the agency and the individual, just in case. Mr. Andersen stated that he has encountered that situation with actions against state and local governments where the claim for relief against the individual exceeds the tort claims limits in the Trial Claims Notice Act. He stated that he has not found the ORCP to be prohibitive, and that he has just served the individual as well as the entity. The Council did not form a committee on service issues.

Mr. Andersen asked whether the Council wanted to discuss the suggestion to create a rule to create a continuing obligation to provide the court and other parties with current contact information. He stated that it is certainly in a litigant's best interest to keep the court advised. Judge Bloom pointed out that there is no need to create a procedural rule for this. He stated that it is incumbent on litigants to let the other side and the court know how to contact them. Judge Norby stated that, if such a rule were necessary, it would be more appropriately placed in the Uniform Trial Court Rules (UTCR). The Council decided not to form a committee on service issues.

Judge Norby addressed the suggestion regarding additional training on civil procedure in law schools. While it is not the Council's charge to be educators, she wondered if it would be worth doing some outreach or offering assistance with law school curricula, as this is not an isolated comment. She suggested that more education on civil procedure by the law schools might result in fewer comments like this each biennium. Judge Jon Hill stated that Judge Norm Hill and Justice Garrett are both professors, and he would be curious to get their take on whether this is more of a perception versus reality issue, or whether students are really not getting civil procedure education.

Judge Peterson stated that he used to teach Oregon Pleading and Practice when he was a Clinical Professor at Lewis & Clark Law School, so his students were certainly educated on the ORCP. However, most students take the Federal Rules of Civil Procedure as their first class in law school, when they don't know anything and do not have any context, and they do not get any other civil procedure education beyond that. He stated that he was not aware of whether the University of Oregon or Willamette are currently offering a course in Oregon civil procedure or not, and that it might be worthwhile to find out. Judge Norby stated that, when she was in law school, the only exposure she received to civil procedure was when she did mock trial courses, and that was limited to the mock trial rules.

Mr. Marrs stated that his partner currently teaches a class in Oregon pleading and practice at the University of Oregon School of Law. Justice Garrett mentioned that Lewis and Clark Law School still offers a course in Oregon pleading and practice as well. Judge Peterson noted that, during much of his time, the course was taught by an adjunct professor.

Judge McHill stated that, if this problem is big enough, it might be a great topic for the Oregon State Bar to create some CLE opportunities for lawyers. Judge Norby noted that Linda Kruschke on the Bar's publication committee is currently working on a CLE on the evidence code for which Judge Norby is one of the authors. Judge Norby mentioned to Ms. Kruschke that the ORCP would be a good CLE topic, and Ms. Kruschke was excited about it, but it will be a while before it can happen.

Mr. Andersen asked whether anyone had suggestions for other ways to organize CLEs on the ORCP, perhaps to inspire bar sections to do so. Judge Norby stated that she recalled that, years ago, legal publications had to include practical tips. While she felt that a CLE devoted solely to the ORCP might be unpopular because it would be overwhelming, she wondered whether the Bar could encourage people to include practical tips about the ORCP that apply to that area of law in each CLE, or even an hour of the CLE that is about the ORCP. She felt that might be a better way to approach it. Mr. Shields stated that there is no current rule that would require a CLE program to include that. A rule could be created; however, how it would work in practice is uncertain, since most CLEs are 90 minutes or so. He stated that the first step might be to reach out to sections and educate them on the importance of talking about the ORCP, rather than mandating it. Mr. Andersen asked whether Mr. Shields would be able to reach out to sections and give them the feedback that, based on comments received from the Council, attorneys are struggling to understand the rules and that it might be helpful to include an educational component about the ORCP in their CLEs. Mr. Shields stated that he would be glad to start a conversation about it and help figure out who at the Bar that message should come from.

Judge Bailey stated that the Supreme Court had just announced a new process for law students to allow them to collaboratively work with an attorney for several hundred hours. He observed that it will be interesting to see whether that approach will be beneficial because, by the very nature of having to work with those attorneys, those students will be introduced to the ORCP in a different way than the law schools are doing it right now.

Judge Peterson stated that he would reach out to Lewis & Clark and Willamette University to clarify what their current civil procedure education looks like. Ms. Johnson agreed to check in with the University of Oregon. Both will report back at the next Council meeting.

The Council did not form a committee regarding the suggestion to clarify or adopt procedures with respect to disputes over the form of judgment or orders (Uniform Trial Court Rule 5.100), as this is within the purview of the UTCR Committee.

C. Committee/Exploratory Reports

1. Composition of Council

Judge Bailey stated that the committee has started preliminary work on this issue. He and other members of the committee have reached out to different family law groups to discuss this issue. He noted that most of the groups or individuals either had not heard of the Council or, if they were aware of it, did not have any idea of the make up of the body or whether there are any family law members on it. Family law practitioners clearly understand that the ORCP have an impact on them, and most were surprised to learn that family law practitioners are not specifically included on the Council. So far, every individual or group that has been approached has been positive about the addition of family law practitioners to the Council.

Judge Bailey stated that the Washington County Local Family Law Committee will be meeting later in November, and that he will reach out to them to get their feedback. Judge Norby recommended reaching out to local family law committees in other counties as well. Mr. Shields stated that he would send family law section leadership information to Judge Bailey. Ms. Johnson asked Mr. Shields whether he would be able to get information from the Bar regarding how often family law lawyers have applied to sit on the Council and how much interest they have shown. Mr. Shields stated that he would try to find that information.

Ms. Nilsson asked whether the committee is reaching out to protective proceedings, lawyers as well. Judge Bailey stated that this would be primarily probate lawyers, since family law practitioners primarily handle the family abuse protection act cases. He stated that he had not reached out to any probate practitioners, but that he could do so. He did point out that there are very few attorneys in that area, probably just a couple dozen in the entire metro area. Ms. Nilsson stated that she remembered them being mentioned at the last meeting, so she did not want them to be forgotten. Judge Peterson noted that Brooks Cooper, an expert in probate, was at one time a Council member, but that he could not recall how he had been appointed. Judge Norby stated that Mr. Cooper is unique in that he is an almost pure litigation lawyer who does probate litigation.

2. Electronic Signatures

Ms. Wilson stated that the committee had not had the opportunity to meet, but would do so before the December Council meeting. She noted that Ms. Holland had agreed to provide the committee with background from the UTCR Committee

so that they can develop a plan of action with that historical background in mind.

3. ORCP 54

Mr. Goehler reminded the Council that the issue is how an offer of judgment gets applied in mandatory arbitration. *Mendoza v. Xtreme Truck Sales, LLC*, 314 Or App 87, 497 P3d 755 (2021) (Mendoza I), basically said that an offer of judgment cannot be considered until after entry of the court's judgment, when the attorney fees and costs are looked at and the offer of judgment is examined. Mr. Goehler stated that his initial impression and discussion with other committee members was that there could be a ripple effect with Rule 68, Rule 69, and all post judgment procedures, and that may be something the Council does not want to do. Mr. Goehler did more research and his research discovered that the issue has already been resolved.

Last biennium, the Legislature passed Senate Bill 307, which amended ORS 36.425, a statute that allows costs and fees to be considered pre judgment. The Legislature said that claims or defenses related to costs and attorney fees must be filed as an exception after the arbiter's award is filed. Prior to the amendment, ORCP 54 E(3) was read as precluding the filing of the offer to allow judgment prior to the court entering its judgment. The statute is effective on January 1, 2024. Mr. Goehler moved to disband the ORCP 54 Committee. The Council agreed.

4. ORCP 55

Judge Norby reported that the committee had not had the chance to meet, but that it would do so before the December Council meeting.

5. ORCP 58

Judge Bloom reported that members of the Rule 58 committee had some e-mail exchanges regarding what to do about the issues raised in *State v. Longjaw*, 318 Or App 487 (2022). Judge Bloom noted that there is some interesting language in that case that addresses the risk of allowing juror questions in criminal cases. The case addressed not a question that jurors were not allowed to ask, but a question that was asked and not objected to, so the issue was whether allowing that question was harmless error. However, the court did take the time to point out the pitfalls of jury questions in criminal cases. During the committee discussions, Ms. Dahab had pointed out that, in civil cases, many plaintiffs' bar practitioners like jury questions because they help keep jurors engaged, which was the idea of the rule change initially. However, the committee agreed that, in criminal cases, juror questions are problematic. The committee will be looking at the different options presented by the different people who suggested a change to the rules, and also welcomes input from other Council members.

Judge Bailey also expressed concern that judges can end up looking like the "bad guy" to jurors if they decide to disallow questions. He worried that juror questions in criminal cases are rife with problems and, with trial court judges being reversed frequently in the appellate courts already, suggested that it is a door that the Council might want to close. Judge Bailey pointed out that the criminal justice system is truly an adversarial system, and it is the responsibility of the advocates to present whatever information the jurors need to know. We need to hold our attorneys to a high standard in these cases. Judge Bailey opined that, in the civil justice system, juror questions do not have the potential for as much harm or damage, and the decision should be left to the judges unless the parties are in agreement. Judge Jon Hill stated that, in his two-judge district, juror questions are no longer allowed at all because they proved to be too problematic. Judge Norby stated that she could recall both a criminal case and a civil case in which a juror question made the case. She has not allowed juror questions in criminal cases ever since an aggravated murder trial a number of years ago where she was persuaded that, if a juror question is compelling enough, it proves the case and removes the burden of proof obligation from the state. In civil cases, juror questions can lengthen the case, but they can also be very helpful.

6. Service by Posting

Judge Bloom stated that he had spoken to a few people at the Oregon Judicial Department (OJD) regarding the establishment of a centralized website for service by posting/publishing. He stated that some other states, including Delaware, have this system, and he thinks that it is a much better way to provide actual notice to litigants than expecting people to read an electronic newspaper or go to a courthouse, especially when they live out of state or out of the country. Judge Bloom stated that the OJD is still working, figuring out the technical aspects of the system, so there is no need for the Council to make a rule change at this time. He stated that he would report back to the Council when the OJD is ready to launch the centralized site.

Mr. Andersen noted that there were concerns expressed about the length of time it might take for items to be posted on such a site. He asked whether Judge Bloom was looking into the efficiency of getting the website updated. Judge Bloom stated that, once the system has been created, his sense is that things will be able to be posted right away. Allowing service on the website may be started as a pilot project in several courts first before it goes statewide. Judge Bloom did point out that most people will not even recognize the need to use it because they are able to achieve service by the traditional means. However, for those rare cases where a defendant cannot be found, it will be very helpful. Judge Norby wondered whether there might already be an existing, national, centralized repository that could be used. Judge Bloom stated that he thought that it was better to wait for OJD to finalize its plans before making any changes to the ORCP.

Judge Bailey agreed that this is something that is needed. He stated that he had recently had a petitioner who needed to serve a respondent who was located somewhere in Mexico, and who was not legally able to come to the United States. The petitioner was asking for alternative service, but Judge Bailey was forced to deny alternatives because there had to be some likelihood that they would be noticed by the respondent. This new method would provide a much more likely opportunity of notice for those who are out of state or out of the country.

Judge Jon Hill wondered why the Council should not start working on a rule change now in anticipation of the OJD's rollout of this new procedure, given the Council's lengthy rule change process. Judge Bloom stated that he thinks that the rule will be an easy pass, since the benefit will be to provide better notice. It would just be an alternative to service by publication or posting, so all that would be needed would be an extra line that says that, after making one attempt to serve someone in person or by one of the other methods, a party may get permission to serve by posting on this new website. He suggested, however, that until the actual mechanism is created by OJD, the rule should not be changed. Judge Hill disagreed and preferred to work on a rule change now; this might even motivate OJD to get its website online faster.

Judge Hill, Judge Bailey, and Ms. Weeks agreed to join Judge Bloom on a service by posting committee.

7. Vexatious Litigants

Judge Norby reported that the committee had not had the chance to meet, but that it would do so before the December Council meeting.

D. New Business

1. Suggestions from UTCR Committee re: ORCP 14 and 39

Mr. Andersen directed the Council's attention to a new suggestion from the UTCR Committee (Appendix C), and asked Ms. Holland to provide some background. Ms. Holland explained that the UTCR Committee does a review of existing and newly proposed court Supplemental Local Rules (SLR) each fall. There is an existing SLR that allows parties to contact the court by telephone during a deposition if they want some sort of assistance in resolving a dispute. One of the judges on the UTCR Committee pointed out that he does not believe that the ORCP allow parties to contact the court by telephone for assistance during a deposition. This judge pointed specifically to ORCP 14 and the fact that all motions have to be in writing, except during trial, and ORCP 39 E, which does allow parties to reach out to the court, but only by motion. The UTCR Committee understood that the court needs a written motion to preserve the record, but they also thought that there were probably quite a few courts that have an informal practice of allowing parties to

reach out to the court by telephone, so they wanted a little bit more clarity on whether that is something that should be allowed by SLR under the current rule. Ms. Holland thought that the Council might also want to consider whether a change to the ORCP is warranted to allow the practice.

Judge Peterson acknowledged that there are certainly people who behave poorly in depositions, and it would be helpful to be able to get a judge on the line to resolve those issues. He stated that Rule 14 was dispositive in a Court of Appeals case a couple of years ago, where the Court said that it means what it says, that motions must be in writing. Therefore, he feels that Rule 14 A would need to be changed to allow this to happen.

Mr. Goehler stated that he is ambivalent on the issue, so he thinks that it might be helpful to see where a committee lands on it. He stated that there are good arguments on both sides for whether to allow a judge to decide during a deposition while the deponent is there, as opposed to having a deposition paused for weeks while the objections are dealt with via motion. The latter may be better on the one hand to really flesh out what the issues are and get a formal order to resume the deposition. On the other hand, there may be a very simple fix in some instances where a judge can simply say, “Answer the question.”

Judge Hill stated that the UTCR Committee may have been talking about the SLR in his county, because they have been using this process for 20-odd years. The telephone conversation takes place on the record. If it's not something that's fairly easily resolved, or requires a motion to be filed, the deposition is paused. Practitioners seem to really like it. Judge Hill was curious what the Council thinks of it.

Ms. Wilson stated that, in practice, a lot of times the parties do have a sense of whether they are going have conflicts during depositions ahead of time. When you cold call a judge during a deposition, nine times out of 10, you cannot reach the judge unless you have planned it ahead of time and asked the judge if they are going to be available. She stated that she thinks the practice can be helpful, so she is interested in seeing what people think about it.

Judge Bloom stated that he thought that it was standard practice to contact judges during a deposition when things come up. He can understand situations where depositions must be suspended, but obviously that is not ideal in a lot of cases. It is better to get things resolved immediately so the deposition can proceed. If some judges or some courts are requiring motions, he thinks that a committee should look at the issue. Judge Bailey agreed, and suggested forming a committee.

Mr. Goehler agreed to chair the committee. Judge Bailey, Judge Bloom, Ms. Dahab, Judge Jon Hill, Ms. Johnson, Judge McHill, Judge Norby, Mr. O’Donnell,

Judge Peterson, and Ms. Wilson agreed to serve on the committee. Ms. Holland agreed to serve as liaison from the OJD.

IV. New Business

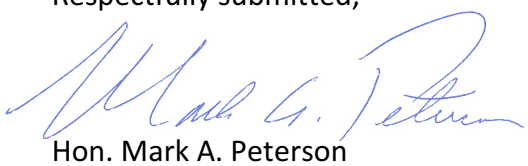
A. Limited Practice Paralegals

Judge Peterson informed the Council that the Oregon State Bar has created a procedure to license limited practice paralegals (LLP) who will be allowed to do certain things in the family and landlord tenant law practice areas. This may require changes to the ORCP. For example, Rule 17 regarding signing of pleadings may need to be amended. Another possibility might be a change to Rule 1, where "attorney" could be defined. Judge Oden-Orr stated that he would be willing to serve on a committee to look into this issue. Judge Peterson stated that he would join the committee. Mr. Shields asked to be included in any meetings on the issue, as he was part of the Bar group that put together the LLP program.

V. Adjournment

Mr. Andersen adjourned the meeting at 11:08 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

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

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Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams
Alicia Wilson

Members Absent:

Michael Chin
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

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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 providence 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

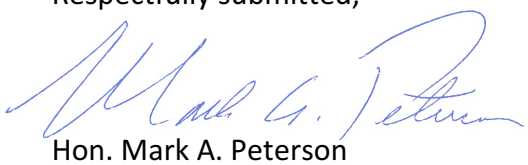
publication may not even be needed any more, since better ways are available.

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

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.**
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.
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.

Category/Rule	Subcategory/additional information	Suggestion
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.
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	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;

Category/Rule	Subcategory/additional information	Suggestion
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.
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).

Shari Nilsson <nilsson@lclark.edu>

UTCR Committee Suggestion on ORCP 14A & 39E

Aja T. Holland <aja.t.holland@ojd.state.or.us> Tue, Oct 24, 2023 at 8:57 PM
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, "kelly@andersenlaw.com" <kelly@andersenlaw.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

Good morning Chair Andersen and Judge Peterson:

The UTCR Committee met last week and asked me to make a suggestion/request for the Council on Court Procedures to review ORCP 14A and ORCP 39E(1).

Some courts have supplementary local rules (SLR) that allow parties to contact the court during a deposition to resolve disputes and objections. Even courts that do not have SLR on this topic will often allow parties to contact the court in this fashion. One UTCR Committee judge member pointed out that he no longer allows parties to contact him by phone during depositions because ORCP 14A requires motions to be in writing (except during trial) and, although ORCP 39E(1) allows the parties to contact the judge for assistance during a deposition, nothing in ORCP 39E(1) suggests that the written motion requirement in ORCP 14A does not apply when that occurs.

The Committee did not suggest wording for a proposed fix but I believe this issue could be addressed with a slight tweak to ORCP 14A – assuming that the Council wants to allow the common current practice where parties reach out to the court for assistance without submitting a written motion. Alternatively, if the intent of the committee is to require a written motion to seek assistance under ORCP 39E(1), that clarification would be helpful so that the UTCR Committee can disapprove existing SLR that currently purport to allow a more informal practice.

ORCP 14 A **"**Motions; in writing; grounds. An application for an order is a motion. Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

ORCP 39E(1) "Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection."

I realize that this suggestion may have come too late for the current amendment cycle but if this is something the Council would like to hear more about I would be willing to be present at a future meeting to present the issue.

Thanks,