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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Hon. Scott Shorr

Members Absent:

Hon. D. Charles Bailey, Jr.
Michael Shin
Stephen Voorhees
Margurite Weeks
Alicia Wilson
Hon. Wes Williams

Guests:

John Adams, Oregon Tax Court
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
• Abusive Litigants • Electronic Signatures • Law School Education on ORCP • Limited Practice Paralegals • ORCP 14 • ORCP 31 • ORCP 39 • ORCP 55 • ORCP 58	• ORS 45.400 • Service by Posting/Publication	• ORCP 10 • ORCP 12 • ORCP 15 • ORCP 19 • ORCP 21 • ORCP 23 • ORCP 58 • 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ORCP 71	• Annotated ORCP • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • UTCR 5.100		

I. Call to Order

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

II. Administrative Matters

A. Approval of November 11, 2023, Minutes

Mr. Andersen asked whether anyone had corrections to the draft minutes from November 11, 2023 (Appendix A). Hearing none, he asked for a motion for approval. Judge Hill made a motion to approve the draft minutes. Ms. Dahab 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 reported that he is still in the process of drafting staff comments for last year's promulgated rules, and that he is also working on an article for the Oregon State Bar's (OSB) Legislative Highlights publication regarding those promulgated rules.

2. Suggested Change to ORS 45.400

Judge Peterson reminded the Council that no official action has been taken by this biennium's Council regarding the suggestion made last biennium to the Legislature to amend ORS 45.400 (Appendix B), on which the Legislature did not take any action. Judge Peterson noted that the Council had a fairly robust discussion last biennium before making its suggestion to the Legislature. He stated that COVID-19 had taught us a lot of things, one of which is that many court proceedings can be conducted remotely. ORS 45.400 currently requires 30 days' advance notice, which he believes is being observed primarily in the breach and is really an impediment that requires additional motion practice. The suggested changes to the statute are to allow the court to use its discretion, as well as making sure that all parties, attorneys, and witnesses, as well as the court, have reliable facilities to allow for remote testimony. Judge Peterson stated that, if the Council thinks that these changes are good ones, perhaps the OSB could include the suggestion in its law reform package this session, or it could be presented to the Legislature in another way.

Judge Jon Hill noted that the Council had discussed this suggestion extensively last biennium, and he believes that it is a good idea to move forward and present it again to the Legislature. While he agreed that there are new members of the

Council this biennium, he was not certain that more discussion was required. Ms. Johnson inquired whether the intention is just to tailor the possibility of remote testimony to the facilities of the individual county courthouses, or whether it is to make remote testimony easier to obtain, when appropriate. Mr. Andersen explained that, when the Council made changes to the ORCP last biennium to accommodate remote testimony for depositions and trials, it hit the stumbling block of ORS 45.400's 30-day notice requirement. The consensus of the Council was that attorneys rarely know 30 days in advance if they will need remote testimony, and that this time period is too long. Mr. Andersen opined that the method of recording is a minor problem compared to the 30 days.

Judge Peterson pointed out that there is no suggestion to change any of the factors that should be considered but, rather, to give the court the discretion to weigh those factors and determine whether it is reasonable to allow the testimony to be remote. Judges would have the same authority, just not the default 30-day time period.

Judge Jon Hill made a motion to approve the suggestion to the Legislature to amend ORS 45.400. Ms. Holley seconded the motion, which was approved unanimously by voice vote with no abstentions.

B. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby reminded the Council that, in the 2021-2023 biennium, she chaired a committee on this topic. A new proposed rule was drafted, ORCP 35, that was directed at creating a standardized process to fill the void of information about the way that courts currently exercise control over abusive litigation. She admitted that, in retrospect, the committee was insufficiently populated with representatives of the plaintiffs' bar. Consequently, those committee members without that perspective were incapable of seeing the subject from enough angles to properly write a rule that would work for both the defense and the plaintiffs' bar. The proposed rule was approved by a majority of the Council but did not receive the super majority vote needed for promulgation. Judge Norby explained that the current committee was created with healthy, if reticent, representation from the plaintiffs' bar. An attempt is being made to revise the proposal that was developed this last biennium to include protections that the plaintiffs' bar needs, along with ones that were previously included but that were perceived to be more weighted toward the defense bar. Ultimately, the goal remains to create a rule that can standardize the current, random processes that are being used by various Oregon trial courts to facilitate intervention when abusive litigation is occurring. Judge Norby thanked Aja Holland from the Oregon Judicial Department (OJD), who was extremely helpful during the drafting of the process sections of the draft amendment last biennium, as well as OJD employees who work with the Odyssey

filing system that the courts use.

Judge Norby stated that, during its December 6, 2023, meeting, the committee appeared to have some consensus that it is mainly the definitional sections of the rule that are problematic, and that the process sections of identifying abusive litigants, how to handle them, and how they can still file a valid lawsuit thereafter are far less objectionable. She stated that she was pleased about that, since the committee spent much of its time last biennium on the process sections. Therefore, the focus this biennium will be on creating a definition of an abusive litigant that is acceptable to all, which was the goal last biennium that was not quite achieved.

Judge Norby explained that she had sent a copy of the published amendment from last biennium to Ms. Holley, who had volunteered to begin to reconstruct the definitional language and to balance some other language that appeared to unfairly target plaintiffs. Judge Norby then combined Ms. Holley's definitional changes with some procedural components from the prior rule (Appendix C). She noted that the definition last biennium had focused on repetitive litigation and that, after seeing Ms. Holley's new draft, she now better understands the concerns of the plaintiffs' bar. She stated that this new draft emphasizes when someone is being abusive and weaponizing litigation, which is what the courts are now trying to control with random processes.

Ms. Holley indicated that the draft is still preliminary, since she was uncertain of some of the internal references and Odyssey processes. Judge Norby stated that Ms. Holley's reordering of the sections is helpful and streamlines the structure. She pointed out that another significant change from last biennium is that the rule attempts to identify an abusive litigant, who can be someone who has any relationship to a case. A protected person can be a witness as well as a party. For example, a presiding judge could enter an order against an abusive litigant who is not a plaintiff to disallow ongoing filings, rather than being limited to preventing any new cases from being filed by a plaintiff. Language from case law has also been added that specifies that any order must be narrowly tailored to the actual issue so that, for example, filing abusive pleadings in a tort claim would not preclude someone from filing a divorce proceeding.

Judge Norby reminded the Council that it has not created a completely new rule in a long time. It has been and will continue to be a real undertaking, but she is personally invested in creating a rule that will help the courts prevent the real suffering that is occurring and that courts have inherent authority to address, but sometimes do not because adequate processes are not in place and not enough court staff is available to research those processes. Her goal is not to create a rule that hurts anyone but, rather, to standardize a mishmash of processes that judges are already using. She asked that Council members review the current draft and provide her with input so that the rule can be in its best possible form and

hopefully get support from the entire bench and bar this biennium.

2. Composition of Council

Judge Bailey was not present at the meeting, so a report was deferred until the January Council meeting.

3. Electronic Signatures

Ms. Wilson was not present at the meeting, so Ms. Holley reported on the committee's activities. She referred the Council to the committee's report (Appendix D), and stated that the potential solution the committee is considering is to add language to ORCP 1 to state that the signature for declarations may be in the form of proof for electronic filing in accordance with the ORCP or any other rules of court. This language would effectively point to the Uniform Trial Court Rules (UTCR) regarding electronic signatures on declarations.

Mr. Andersen stated that he noticed that several people who suggested changes to the ORCP regarding electronic signatures had pointed out that there is a big difference between an electronic signature and a digital signature. He asked whether the committee had explored how to solve this problem. Ms. Holley stated that this is addressed in the UTCR (UTCR 21.090). Apparently, the person who is filing can use the "/s" option, while the person who is not filing must use an authenticated signature. She observed that this is a distinction that could potentially be a trap for people. Mr. Andersen asked how the "/s" differs from a person actually signing a piece of paper, scanning or taking a photo of it, and using it as a digital image. Ms. Holley stated that the committee had discussed this and had differing opinions. Her opinion was that a scanned or photo of a signature was more like a real signature, whereas Ms. Holland felt that it was more like the"/s" option. Ms. Holley noted that it can also be valid to physically sign with an "x" mark. She stated that an authenticated signature is probably more the equivalent of a notarized signature but, perhaps, even better, because some authentication systems will actually take a picture of the person signing and require them to make a "thumbs up" gesture, and the IP address of the device is also captured.

Mr. Andersen asked committee members present whether it would be useful to have more discussion at this time, or to wait until Ms. Wilson is present. Ms. Holley stated that it may make sense to wait for Ms. Wilson, since she had done the research, although the committee had basically come to the conclusion to propose that declarations be treated like other filings and to point to the UTCR. Ms. Holland stated that it would depend on whether the Council wants to make additional changes or to go with Ms. Wilson's approach to amend ORCP 1 to point to the existing UTCR and sort of bless the UTCR definition for electronic signatures.

Judge Norby stated that she did not see any reason to delay voting on the proposed language if the committee feels that this is the path to take. Judge Peterson explained that, as a matter of process, the Council can approve language at any meeting along the line. At that point, the proposal is tentatively approved, and the Council would not necessarily come back to it until the September meeting, when it would vote on publication. On the other hand, anything can be taken back off the shelf, so to speak, at any time if a Council member has second thoughts or additional input. His only concern is that, once a draft amendment is put on the shelf, it may stay there without anybody thinking about it again until September. Judge Norby stated that she was not concerned because, if the chair or any other member has input in the future, the subject can be reopened. She expressed concern about spending too much time on an issue that the committee has already handled quite efficiently. Judge Peterson acknowledged that the UCTR Committee had done a lot of heavy lifting on this issue and examined it carefully, so there is an existing body of work for the Council to look at. If the Council's group of plaintiffs' attorneys, defense attorneys, and judges have examined that work and determined that there are no unintended consequences to pointing to the UTCR, the Council may be ready to make this one of the shortest and most effective committees in Council history. Ms. Holley stated that the committee agreed that this was the best approach.

Mr. Andersen wondered whether an addition was needed to make the distinction between an authenticated signature and electronic signature. Ms. Holley pointed out that this is a distinction that is made in the UTCR. She also stated that the committee felt that the UTCR Committee was better suited to make such distinctions because, while that Committee does not meet as often as the Council, it is able to make adjustments to the UCTR on a shorter cycle than the Council makes changes to the ORCP. There was concern within the committee that the Council being involved in such details would create an unwieldy system that is unable to quickly respond to changes in technology.

Judge Norby made a motion to approve the committee's draft amendment of ORCP 1. Judge Jon Hill seconded the motion, which passed unanimously by voice vote with no abstentions.

4. Law School Education on ORCP

Judge Peterson reported that he had not yet connected with a representative from Willamette University College of Law, but that he had been in communication with Lewis and Clark Law School. He stated that the Oregon Pleading and Practice class that he used to teach and that used to be offered every other year has not been offered recently. He is going to have a lunch meeting with the Associate Dean of Faculty and a new professor who has been hired to enhance experiential teaching at the law school. They are very interested in the Council's feedback about the ORCP and how Lewis and Clark might make

the ORCP something that law students have a good opportunity to become familiar with.

Ms. Johnson reported that the University of Oregon has a first year general civil procedure class, and a trial practice class that is offered every other year. The trial practice class is broader than the Oregon civil pleading and practice class described by Judge Peterson, but it does cover the ORCP. There is no class specific to the ORCP that is offered.

Judge Norm Hill stated that he could fill the Council in a bit on Willamette's classes. They offer a trial practice class every year that does not substantially deal with the ORCP. However, they also offer a yearly pre-trial civil litigation class taught by Judge James Edmonds, and he believes that it is primarily based on the ORCP. The class walks through the life of a case, and he is reasonably certain that it is a state court case as opposed to a federal court case.

Mr. Andersen asked the Council for further suggestions on how the it can best serve the bar in ensuring that attorneys, especially young attorneys, are familiar with the rules of civil procedure. Judge Norby stated that she hoped that Judge Peterson would be willing to continue to be a liaison in such outreach efforts. She stated that the Council is built around the rules of civil procedure–not just making them, but ensuring that people know that they can and should access them and how to do so. Judge Peterson stated that he is impressed that Lewis and Clark is so receptive, and that the Council should listen to the requests for help that have come in response to its biennial surveys. He stated that he is happy to continue to work toward this effort.

Judge Norby stated that there are many areas of practice in that offer annual updates, such as probate law, and they tend to be very well attended. She wondered if the Council would consider, if not an annual, perhaps a biennial update to review the changes made to the ORCP. Perhaps the OSB would be willing to support this. Mr. Andersen asked what the best way to implement this idea would be. Judge Norby asked Mr. Shields whether the Bar might be willing to aid in this effort. Mr. Shields stated that, if the Council could provide one or two volunteers to be presenters, the CLE department of the Bar would likely be willing to work with the Council to create such an event. He stated that he would ask Karen Lee from the CLE department to get in touch with Mr. Andersen. Mr. Andersen stated that he would ask the Oregon Trial Lawyers Association's education committee to incorporate a presentation on the changes to the ORCP at its annual convention. He asked whether a member of the Oregon Association fo Defense Counsel would be willing to make the same suggestion to that organization. Mr. Kekel stated that he would do so. Mr. Andersen also suggested proposing to the OSB's mentorship program that it include education on the ORCP in its suggestions of what should be discussed with new lawyers. Mr. Shields stated that he could inquire about it; however, there is great variety in the

knowledge base of mentors, and some may be better equipped than others to provide education on the ORCP

5. Limited Practice Paralegals

Judge Oden-Orr stated that he had taken a look at the OSB's new rules on limited practice paralegals (LPP) to get a better sense of what changes might need to be made to the ORCP as a result. He referred to an e-mail summary of his committee's work (Appendix E). He stated that the new rules give these LPP the right to take certain actions in family law matters and landlord tenant matters. In family law matters, they cannot go to court, but for landlord tenant matters, they can appear. Put simply, since those things are covered by the ORCP, the references to attorneys need to be looked at closely to see if LPPs also need to be referenced so that they are covered by the rules. For example, the Council should consider fee recovery issues, an LLP-client privilege, discovery, subpoenas, and sanctions. Judge Oden-Orr stated that he had provided his small committee of Judge Peterson and Mr. Shields excerpts of the ORCP that refer to attorneys, which should help the committee narrow down areas that need to be examined.

Judge Peterson suggested that the committee could stand to be a bit larger. The issue may be as simple as a definition change in Rule 1, but it may be that the entirety of the ORCP needs to be examined to figure out which specific rules need to be amended. He asked for a plaintiffs' attorney and a defense attorney to join. Ms. Dahab and Mr. Goehler agreed to join the committee. Mr. Andersen asked the committee to identify whether one definitional change can be regarding what an attorney means, or whether other changes will need to be made to specific rules. Judge Oden-Orr stated that the committee would do this before the January Council meeting.

6. ORCP 14/39 E

Mr. Goehler reminded the Council that the committee is looking into the issue of getting assistance from the court during a deposition. He stated that the practice is often to take a break during the deposition to call a judge and ask for a ruling on particular objections. He stated that Ms. Holland had pointed out that the Supplemental Local Rules (SLR) for Multnomah County were being looked at and had accommodations for that procedure; however, ORCP 39 requires a motion for getting court assistance, and ORCP 14 requires motions presented outside of trials to be in writing. There is a disconnect between the practice what the procedural rules say. The committee's first decision was whether to do anything, and the consensus was to do something to align practice with procedure. He asked the Council whether there was any disagreement with that conclusion.

Judge Norm Hill asked whether the intent is to create a rule with a specific procedure, because it is very jurisdictionally specific how these matters come

before the court. He does not believe that such specific procedures are within the purview of the ORCP. Mr. Goehler stated that the second issue the committee discussed is philosophically how to proceed. The idea is to preserve the existing rule requiring motions to be written, but to also allow an SLR that makes arrangements to provide assistance during a deposition possible and authorized. Any amendment would allow flexibility for procedures in different jurisdictions. Judge Norm Hill stated that he believes that the court has the inherent authority to do this already. Mr. Goehler stated that he has never heard of a judge denying help on the telephone during a deposition, and he agrees that the court has the authority to do so; however, because Rule 39 specifically says that it has to be done by motion, there is a disconnect and the possibility of a judge going by the letter of the rule and declining to rule on a discovery dispute. This is what is driving the effort for an amendment that accounts for the current practice and also gives the flexibility for each circuit to handle these matters in the way they wish to. Judge Norm Hill agreed that, if someone believes that the rules do not allow for participants in a deposition to call the local court pursuant to that court's procedure and quickly get ruling on a question, clarification should indeed be made.

Judge Peterson agreed with Judge Norm Hill. He stated that the committee had agreed that it is a good idea to continue the practice of allowing participants in a deposition to call the courts to have questions resolved, and that there was some discussion as to whether to make it county or district specific, but the consensus was not to do so. Ms. Johnson stated that, typically, the ORCP do not refer a practitioner to the SLR, as the SLR are meant to supplement the ORCP. She stated that it is a better practice to write the ORCP in a uniform fashion and defer to the different districts to create practices based on their resources. She explained that, in Lane County, trial judges are not typically assigned to a case and there is no SLR allowing for contacting judges during a deposition, but that it does happen. If the language in the amendment requires the counties to pass an SLR, or to have a trial judge assigned, it would impose a set of systems that counties might not be able to handle. She does not think that the ORCP should ask districts to rewrite rules or to assign trial judges. Mr. Goehler stated that the intent would be to provide an option; it would be giving courts permission or authority to do so, not forcing them to do so. Judge Norm Hill stated that he has no problem simply modifying the rule to acknowledge that the court has this inherent authority. However, the method used by courts is not something that the Council should weigh in on, because it will look different in 36 different counties.

Judge Bloom reminded the Council that the person who brought this issue to the Council's attention had stated that at least one judge was not allowing this practice, so there is a reason to amend the rules. He believes that the ORCP should be consistent with common practice, and they should be statewide so that everyone knows what the practice is. He reiterated that the idea is not to require counties to make a judge available, as some counties might not have the

resources to do so. A deposition can always be suspended, if necessary. Judge Bloom pointed out that he had not initially thought that an amendment to the rules was needed; however, if the rules can be changed to conform to the practice and prevent problems, this is a good thing.

Ms. Holland reminded the Council that the UTCR Committee had raised this issue, and it had envisioned something simpler – an amendment to ORCP 14 that creates an additional exception. Right now, a motion must be in writing except during trial. The UTCR Committee's recommendation was to add language such as, "or during deposition." She stated that she did not think that more detail is needed, nor is giving courts the authority to adopt SLR, because they already have that authority.

Mr. Goehler stated that the committee would take all of this input into consideration as it works on draft language for both Rule 39 and Rule 14. The committee will present drafts at the next Council meeting.

7. ORCP 55

Judge Norby stated that the ORCP 55 committee was created to determine which, if any, of the proposed amendments that were not approved by a super majority in the last biennium should be reintroduced, and also to consider whether it is time to include e-mail as an option when personal service of a subpoena is waived. Judge Norby stated that the draft language before the Council today (Appendix F) is very preliminary, to show the Council what the committee is contemplating. The committee has discussed adding a requirement for language about consequences for failure to comply with a subpoena and an option to quash. Judge Norby reminded the Council that, last biennium, there was actually a form motion to quash proposed to be built in to the subpoena. The form was simplistic, but it was controversial enough that the consensus of the committee was not to include it this biennium. However, the concept of adding language that motions to quash are options for subpoenas to appear, not just for subpoenas to produce, made sense to the committee, which feels that it should be reintroduced. Last biennium's Council appeared to strongly favor the inclusion of language on subpoenas that cautioned recipients that disobeying the command to appear or to produce has consequences, so the committee proposes to include adding language to that effect as well.

Judge Norby explained that the committee had also discussed adding language to allow e-mail as an option when personal service is waived. The committee had a great discussion about how frustrating it can be for practitioners when they have had conversations with a witness about waiving their need to be personally served, but then having that person not be very diligent about things like signing their return of receipt for certified mail. However, a consideration is that, if an e-mail option were introduced, those people may also not be so diligent about

providing a confirmation that they received their e-mail. The issue is not simply about allowing e-mail, since everyone agrees that e-mail is pretty prolific now. The struggle is to include something in the rule to ensure that it is easy to use properly, because confirmation of receipt of e-mails is challenging to accomplish. The committee discussed whether there could be a different way to prove the return of service provided for in the rule aside from relying on the witness who agreed to follow through the with the agreement to reply or send a confirmation that they received the e-mail. The option that is under consideration right now is having a declaration of stipulated alternative service that would parallel the existing certificate of service, but with information that is specific to the agreement that was reached between counsel and the witness, and the method to be used and the response or refusal to respond by the recipient.

Judge Norby stated that the committee is also considering amending the requirements for the confirmation of postal mail when personal service is waived. She stated that the committee is fortunate to have Ms. Weeks as a member, as she has been able to explain the frustrations of having a witness agree to receive service by mail and then either refusing or forgetting to sign the mail certificate. There is proposed language similar to that in the e-mail option to have a stipulated alternative service declaration that would parallel a certificate of service that someone would file if they were personally serving a summons. This would be an option that could be filed either by the attorney or by the paralegal who was achieving the actual mail service.

The committee did not have the opportunity to discuss whether these changes would be separate proposals so that, if one of them was disfavored, the Council could still preserve the others, which it was unable to do last biennium. Judge Norby felt that it would probably be wise to keep the proposals separate to avoid the same problem this biennium. She asked Council members if there was any objection to the concepts the committee is working on.

Ms. Johnson stated that she finds that, with her clients, there is a bit of a generational divide on e-mail. Many clients do not access or read their e-mail, and this is also the case with witnesses. She asked whether the proposed amendments allow for service to be effective if a witness has not agreed to receive service of a subpoena via e-mail, but the subpoena has nonetheless been sent by e-mail and e-mail has been confirmed. Judge Norby stated that this is not the intent of the draft language. She stated that everything would have had to have been agreed upon, including the method of service, the address to be used for service, whether e-mail or postal mail, and the date and time for appearance. Ms. Johnson asked for Judge Norby to point her to the place in the draft language that states that the witness has to agree to service by e-mail. Judge Norby stated that it could be found in the following: “B(2)(c)(i)(A) the witness agreed to appear and testify if subpoenaed using a mail or e-mail address that the witness confirmed to be accurate.” She stated that the intent of that language was for the witness to have

agreed to either mail or e-mail service and to confirm that the mail or e-mail address that they gave was accurate. Ms. Johnson stated that someone might agree that their e-mail address is what their e-mail address is, but they may not want to be served by e-mail because they may not be someone who checks their e-mail regularly. Judge Norby stated that the way she drafted the language may not be clear and that she would attempt to clarify it.

Ms. Holley asked whether the amendment is specifically for e-mail or for other forms of electronic service. She noted that people who do not check e-mail may frequently check Facebook Messenger or text messages. Judge Norby stated that this is a great question that illustrates that the chair of the committee is a tech dinosaur. She asked for Ms. Holley's help with these issues during committee work. Ms. Holley stated that she could not recall what the original request was, but that it might be good to address other means of electronic communication. Judge Norby stated that she was not aware of whether other forms of electronic service were commonly used, but that the committee could certainly discuss whether to expand beyond e-mail, and perhaps present alternative proposals, one with just e-mail and one that includes other means of electronic service.

Judge Peterson stated that the original proposal came from a legislative bill last biennium and that it was limited to e-mail. He pointed out that the Council has already made changes to ORCP 7 B(6) regarding alternative service of a summons to allow summonses to be served by Facebook Messenger and other such means. This expansion of alternative service gave him pause at first, but it has not seemed to cause any problems, so it could be a possibility here. He noted that another thing to consider is that mail service remains burdened because the 10-day and three-day requirements are still there. At some point, nobody will want to serve by mail unless the recipient does not have e-mail, so that is something to think about.

Judge Peterson recalled that, last biennium, there was unanimous support for putting some clearer language in the form of subpoena to indicate that, if you do not honor a subpoena, bad things could happen to you. The simple form for a person to move to quash the subpoena received a clear majority, but not a super majority. He wanted to raise the issue with the new Council, beyond just the committee. He stated that Mr. O'Donnell had done some research on three jurisdictions that have such a process, and Judge Peterson himself had followed up with a couple of presiding judges and court administrators in Utah who said that including a form motion to quash has not been a problem there. Judge Peterson stated that the form motion to quash did not receive a super majority because some Council members last biennium thought that the sky would fall, that no one would honor subpoenas, and that courts would be inundated with motions to quash. That has not been the case in Utah. At the first committee meeting this biennium, some members thought that it was a better idea to let the OJD create the motion to quash form; however, this would make the form difficult

to find for those who did not know where to look. Judge Peterson stated that he is a fan of access to justice not only for clients of lawyers, but for poor innocent bystanders or occurrence witnesses who get subpoenaed to court. They may be needed for cases, but they may also have a planned vacation out of the country and honestly be unable to appear. There are advantages to having the form. It makes things somewhat uniform. The form created last biennium requires a short narrative to tell the court why a person is unable to appear. Judge Peterson also suggested that it is much easier to ask for sanctions when one can tell the judge that all the witness had to do was fill out the form on the subpoena and ask for permission to not appear, but they did not. He believes that including the form motion to quash makes a stronger case for sanctions for disobeying a subpoena. However, he did not know if there was any traction within the committee, let alone the entire Council, for having a form objection available outside of one that is buried in the OJD forms department.

Judge Norby stated that she was in favor of the limited motion last biennium. However, she does not believe that there is a problem getting sanctions now if someone was personally served and does not appear. She stated that she is interested in others' thoughts on that. Mr. Larwick stated that he feels that the committee should have more discussions, particularly with regard to waiver of service. He noted that it has occurred to him that changes to this rule could have implications with regard to the hearsay rule at trial. For example, if service was waived by a witness who was subpoenaed to trial, and they were not personally served, the court is essentially relying on the attorney's declaration that service was waived, because the witness did not participate by showing up or sending the mailer back. He wondered whether that would be enough to then open up the hearsay rule where portions of that person's testimony and deposition could be read into evidence. Judge Norby stated that she appreciated those reflections and agreed that they should be addressed by the committee. Judge Peterson agreed that it is an important issue to be discussed, but his impression is that the change is intended to simply potentially hold a witness up for contempt for not responding. It does not mean that they are considered unavailable as a witness.

8. ORCP 58

Judge Bloom referred the Council to the short e-mail summary of the committee's December 6, 2023, meeting (Appendix G). He reminded the Council that the committee was considering modifying the procedure for jurors asking questions that is contained in Rule 58 B(9). This issue came to the Council primarily from criminal defense attorneys who are concerned about the process and how juror questions in criminal cases could shift the burden of proof. Initially, Judge Bloom personally believed that juror questions in criminal cases should be banned. He has changed his opinion, and the committee agrees. There is no desire to change the rule as it applies to civil cases, and making the change with regard to criminal cases seems more substantive than procedural. The question should probably be

left to the Legislature, since it created the statutes that make ORCP 58 applicable to criminal actions. The committee also agreed that there are procedural safeguards in the rule as it exists, because there is a time to object to proposed questions and there is also discretion with the court to allow the questions or not.

Judge Peterson stated that he was uncertain whether a change would cross the line into substantive law; however, if the committee is satisfied with leaving the rule as it is, criminal law practitioners who are concerned could ask the Legislature to amend the statute that incorporates ORCP 58 for criminal trials. Ms. Holley agreed. Judge Norby agreed as well. Judge Bloom noted that Ms. Dahab had received feedback from civil practitioner colleagues that they wanted to keep juror questions in the rule. From a judicial perspective, he thinks that juror questions in civil cases are a buy-in that keeps jurors engaged. Sometimes they are not allowed, just like attorneys' questions. As for criminal cases, his bench is not allowing juror questions because of the concerns raised in *State v. Longjaw*, 318 Or App 487 (2022).

Ms. Holley made a motion to disband the committee and keep the rule as it is. Judge Jon Hill seconded the motion, which passed unanimously by voice vote with no abstentions.

9. Service by Posting/Publication

Judge Bloom referred the Council to a memo from the Futures Subcommittee of the OJD's State Family Law Advisory Committee (SFLAC) recommending that OJD create and maintain a legal notice website as an alternative to traditional publication (Appendix H). Judge Bloom stated that he feels that, until such a website has been created, the committee would be spinning its wheels to attempt to draft a rule that presupposes the process. He continued to express support for the concept of the legal notice website, which seems to be working well in other states that use it. He stated that there are links to other states' websites in the memo. This method of publication is particularly helpful in termination of parental rights cases, as well as other family law cases. Until the OJD or some other agency of the state creates the website, however, it would not be a productive use of Council members' time to try to create a rule. Judge Bloom stated that he is hopeful that the Jackson County Courts will become a pilot for testing any new site that is developed.

Judge Jon Hill stated that he had been really wanting the Council to get moving on this, because it is an important access to justice issue. He explained that he now agrees with Judge Bloom that, since the SFLAC is already working on this issue, it does not make sense for the Council to try to work in tandem with them. He stated that he is willing for his court to be part of the pilot project when and if it is launched.

Judge Peterson agreed with his colleagues in terms of process. He pointed out, however, that he does not think that the creation of this website will be a panacea. It will provide some modicum of due process, but it will not be substantially better than publication in a newspaper or on a board at the courthouse, because it assumes that someone knows that such a website exists and has technological savvy. Judge Bloom agreed.

Mr. Andersen asked whether Judge Bloom's recommendation is to table the issue until the website has been created. Judge Bloom agreed. The Council agreed to table the issue.

10. Uniform Collaborative Law Act

Ms. Wilson was not present at the meeting, so a report was deferred until the January Council meeting.

IV. New Business

A. ORCP 31 (Interpleader)

Mr. Andersen explained that Judge James Edmonds of Marion County had contacted the Council with a suggestion regarding Rule 31 (Appendix I). The judge related a situation that occurred in his courtroom and proposed to include "third party claims" to clarify the available methods to add parties in a defendant-initiated interpleader action.

Mr. Goehler explained that the Council had examined and amended the interpleader rule two biennia ago. The main changes were to the attorney fee and counterclaim portions of the rule. The issue raised by Judge Edmonds was not something that was considered. Mr. Goehler stated that it might be good to set up a Rule 31 committee and take a look.

Mr. Andersen asked if Mr. Goehler would be willing to chair the committee. Mr. Goehler agreed to do so. Ms. Dahab and Judge Peterson agreed to serve on the committee.

V. Adjournment

Mr. Andersen adjourned the meeting at 11:22 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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

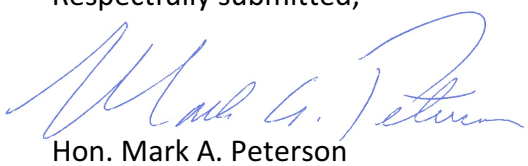
A. Limited Practice Paralegals

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

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

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

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

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

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

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

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

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

(E) Any other circumstances that constitute good cause.

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

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

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

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

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

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

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

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

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

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

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proceeding.

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

(8) As used in this section:

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

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

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

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

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

CCP Summary – Rule 35 Committee Mtg
November 27, 2023 @ 1:00 PM

Members Attending: Judge Norby, Judge Peterson, Judge Bailey, Julian Marrs, Lara Johnson, Meredith Holley, Nadia Dahab

Absent: Judge Jon Hill (Not his fault! The link was not sent to him!)

Summary

In the 2021-2023 Biennium, a CCP committee drafted a new rule – ORCP 35 – directed at creating a standardized process to fill the void of information about the way courts exercise control over vexatious litigation. The committee was insufficiently populated with representatives of the plaintiff's bar, however, which was an insurmountable obstacle to gaining a super-majority for publication of the proposed new rule at the end of the biennium.

This Biennium, a new committee was created with healthy (if reticent) representation from the plaintiffs' bar, to attempt to revise the proposal so that it is inclusive of protections needed by both sides of the bar. Ultimately, the goal remains to create a rule that can guide and standardize a previously random process used by Oregon trial courts to facilitate appropriate intervention when abusive litigation occurs.

The Chair sent a copy of the unapproved 2023 draft to Ms. Holley, who volunteered to begin to reconstruct the definitional language and to balance other language that appeared to target plaintiffs unfairly. At the committee meeting, there appeared to be a modicum of consensus that these are the only rule sections that are problematic. More specifically, the process sections of the rule, which were rooted in case law, past judicial practice, and requests from the OJD Odyssey liaisons, are not problematic. Therefore, the committee's focus will most likely be on revising the definitional language to identify abusive litigants in a way that is palatable to the plaintiffs' bar and the defense bar.

After the committee meeting, Ms. Holley sent some preliminary suggestions for revisions to Judge Norby. Judge Norby incorporated those along with procedural components deemed necessary to align with existing practice and with OJD (Odyssey) staff preferences. Although this early draft has not yet been reviewed by the full committee, it is included with these Minutes to gauge initial reactions from the Council.

ABUSIVE LITIGANTS

RULE 35

A The Presiding Judge of any Judicial District may, with due process, issue an order designating a party as an abusive litigant, restricting ongoing abusive filings, and requiring posting of a security deposit, as provided in this rule.

B Definitions.

B(1) For purposes of this rule, "abusive litigant" means a person who is a party to a civil action or proceeding who in bad faith, through court filings, harasses, coerces, intimidates, discriminates against, or abuses another party to litigation, a protected person, or a member of a protected class.

B(2) For purposes of this rule, “protected person” means a person who is protected by court order or pretrial release agreement.

B(3) For purposes of this rule, “protected class” means a class protected under ORS 659A.403. A filing may be abusive if it targets a member of a protected class because of that person’s protected identity. A filing not abusive merely because it alleges that another party has engaged in harassment, coercion, intimidation, discrimination, or abuse.

B(3) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

B(4) For purposes of this rule, "security" means an undertaking by an abusive litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

C Determining whether a litigant is acting in bad faith. To determine whether a litigant is acting in bad faith, the court may consider:

C(1) whether the litigant is represented by counsel;

C(2) whether the litigant had a good faith expectation of prevailing;

C(2) the litigant's motive in pursuing the litigation;

C(3) the litigant's history of litigation and whether it entailed abusive suits;

C(4) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

C(5) any other considerations that are relevant to the circumstances of the litigation.

D Designation and security hearing.

D(1) In any case pending in any court of this state, including a case filed in the small claims department, the Presiding Judge may, on the court's own motion or on the motion of a party, set a hearing to determine whether a litigant has engaged in abusive litigation. At the hearing on the motion, the court may consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant to the motion.

D(2) If, after considering all of the evidence, the court designates a party as an abusive litigant, the court must state its reasons on the record or in its written order. The court's order must be narrowly tailored to protect parties or persons targeted by abusive litigation and to the disallowed topic or issues.

D(3) The court may require the abusive litigant to post security in an amount and within such time as the court deems appropriate in order for the litigation to continue. If the abusive litigant fails to post security in the time required by the court, the court must promptly issue a judgment on the merits against the abusive litigant.

D(4) A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

E Issuance of pre-filing order. The Presiding Judge of any Judicial District may, on its own motion or on the petition of any interested person, enter a pre-filing order prohibiting an abusive litigant from commencing any new action or claim in the courts of that judicial district without first obtaining leave of the presiding judge. On entry, a copy of the pre-filing order will be sent by the court to the person designated to be an abusive litigant at the last known address listed in court records, and to the opposing parties, if any. Disobedience of such an order may be punished as a contempt of court.

F Challenge to pre-filing order.

F(1) **Procedure.** An abusive litigant may request to initiate litigation that would otherwise violate the court's order only by petition to the Presiding Judge, which may be made ex parte if no action is pending. The petition must be accompanied by an affidavit or a declaration and must include as an exhibit a copy of the document that the litigant proposes to file. The petition will only be granted on a showing that:

F(1)(a) the filing is made in good faith and not for the purpose of discrimination, harassment, coercion, intimidation, or abuse of another party, a protected person, or a member of a protected class; or

F(1)(b) that a statute of limitations or ultimate repose deadline is so imminent that denial of the request to commence the new action could foreclose the litigant's right to bring a potentially valid claim.

F(2) **Deposit of security.** The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

F(3) **Relation back.** If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file.

G Motion for hearing stays pleading or response deadline. If a motion for an order to designate an abusive litigant and to deposit security is filed in an action:

F(1) if security is required to be deposited, the moving party must plead or respond within the time remaining for response to the original pleading or within 10 days after the deposit of security, whichever period may be the longer, unless the court otherwise directs; or

F(2) if no security is required to be deposited, then the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within ten (10) days after service of the order allowing the case to proceed, whichever period may be the longer, unless the court otherwise directs.

H Cases filed without leave of the presiding judge. If an abusive litigant initiates new litigation without first obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the abusive litigant is subject to a pre-filing order. The notice must be served on all parties who have been served or who have appeared in the case. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim unless the abusive litigant files a motion for leave to proceed within 10 days of issuance of the notice. If the presiding judge issues an order allowing the action to proceed, then the abusive litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading or

within 10 days after service of that order, whichever period may be the longer, unless the court otherwise directs.

MEMORANDUM

To: Council on Court Procedures

From: Sub-Committee on Electronic Signatures, Alicia M. Wilson

Date: 12-06-2023

Subject: **ORCP 1 – Electronic Signatures**

Issue Presented: The Uniform Trial Court Rules (UTCRs) were amended to allow for electronic signatures on pleadings, filings and declarations for registered filers in Odyssey or conventional filers, and authenticated electronic signatures for filing declarations or filings for non-filers. Those UTCR rules could appear to conflict with ORCP 1E (specifically E(2) and E(3)) which state that the declaration, "must be signed by the declarant."

Recommendation: The sub-committee recommends amendment to ORCP 1E clarifying and adopting the scheme in the UTCRs that allow electronic signatures in certain circumstances and authenticated electronic signatures in others for declarations.

Discussion: The UTCR Committee spent substantial time reviewing and revising the current UTCR provisions in UTCR 21.090 that distinguish between an "authenticated signature" which uses software that include a security procedure as defined in ORS Chapter 84, an "electronic signature" and an "original signature." Specifically, regarding declarations, the UTCRs allow an electronic signature for a declaration of a person that is the filer of the document and requires all other declarations to have an authenticated signature.

Arguably ORCP 1E conflicts with the UTCRs regarding electronic signature for declarations. ORCP 1E(2) pertaining to declarations signed within the United States provides the declaration, "must be signed by the declarant." Similarly ORCP 1E(3) provides the declaration, "must be signed by the declarant," for declarations signed outside the United States.

A review of case law did not locate any case where there was an argument specifically that the declaration was invalid due to the signature component, however there are cases where

one party argued failure to comply with ORCP 1E requirements for the Declaration was grounds to find the declaration facially invalid and subject to a motion to strike.

- *Matter of Marriage of Dennis*, 324 Or App 200 (2023) (not reported) (Husband challenging wife's counsel's declaration for failure to include language in ORCP 1 E(2) being under penalty of perjury).
- *Much v. Doe,* 311 Or App 652 (2021) (Party challenging declarations submitted that did not include the language in ORCP E(2) being under the penalty of perjury)

Proposed Recommended Language:

The current alternate language coming out of the committee is as follows:

ORCP 1E(1) **Definition.** As used in these rules, "declaration" means a declaration under penalty of perjury. A declaration may be used in lieu of any affidavit required or allowed by these rules. A declaration may be made without notice to adverse parties. <u>The signature for declarations may be in the form approved for electronic filing in accordance with these rules or any other rule of court.</u>

MEMORANDUM

TO: Uniform Trial Court Rules (UTCR) Committee

FROM: Aja T. Holland, UTCR Reporter

RE: Clarification of Electronic Signature Requirements

DATE: March 2, 2021

At the Fall 2020 UTCR meeting, the UTCR Committee received several public comments from practitioners seeking clarification regarding electronic signature requirements in the UTCRs. This memo addresses those concerns and proposes amendments to UTCR 1.110, 2.010, and 21.090.

(1) Electronic vs. Digital Signatures

"Electronic signature" as used by the general public, is an umbrella term that covers a multitude of software and signature types. A "digital signature" is a specific type of electronic signature that utilizes a mathematical algorithm to generate two long numbers, called keys, one public and one private. The mathematical algorithm acts like a cipher, creating data matching the signed document, called a hash, and encrypting that data. The resulting encrypted data is the digital signature[1].

Current UTCR 21.090 does not require the use of digital signatures in any circumstance. The eSignature workgroup's intent was to require the use of signature software that meets the technical and legal requirements in ORS chapter 84, which is a lower technical requirement than digital signature software provides. Most commercially available electronic signature software products do not meet the "digital signature"

[1] https://www.docusign.com/how-it-works/electronic-signature/digital-signature/digital-signature-faq

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definition; however, many products do meet the "security procedure" requirement in current UTCR 21.090(6). This graphic is intended to be informational and is not an endorsement of any particular product; some products may not be included in this graphic.

Current UTCR 21.090 allows the use of two types of electronic signatures:

- UTCR 21.090(5) allows a filer who is the same person as the declarant to use an electronic symbol intended to substitute for a signature, such as a scan of a handwritten signature or a signature block that includes the typed name preceded by an "s/" in the space where the signature would otherwise appear. In the proposed amendments that follow, this is referred to as an "electronic signature."

- UTCR 21.090(6) allows a filer who is not the same person as the declarant to submit a document signed with an original signature, or a document signed using electronic signature software that includes a security procedure designed to verify that an electronic signature is that of a specific person. A security procedure is sufficient if it complies with the definition of "security procedure" in ORS ch. 84. In the proposed amendments that follow, this is referred to as an "authenticated signature."

Neither of these signature requirement meets the technical definition of a "digital signature".

(2) Proposed Amendments to UTCR 1.110, 2.010, and 21.090

At the Fall 2020 UTCR Committee meeting, the committee expressed some agreement that the UTCRs governing signatures should be clarified to address the concerns laid out in public comments. Following the fall meeting, I worked with Sam Dupree, OJD Assistant General Counsel, to propose amendments to UTCRs governing electronic signatures.

- The amendments to UTCR 1.110 define "authenticated signature", "electronic signature", and "original signature". The substance of these definitions was taken from existing requirements in UTCR 21.090. These definitions can be used throughout the UTCRs to apply uniform signature requirements and to consistently refer to each signature type without redefining each signature type in each instance.

- The amendments to UTCR 2.010 allow a party to conventionally file a document containing an electronic or authenticated signature, as those terms are defined in UTCR 1.110. These requirements mirror the requirements in UTCR 21.090 for electronic filing. For instance, if the document to be conventionally filed contains the filer's own signature, the document may be signed using an electronic signature, but if the document contains someone else's signature, the signature must be either an original or an authenticated signature. The retention and certification requirements also mirror those of 21.090. If a filer submits a document containing an authenticated signature, the filer is required to retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action.
- The amendments to UTCR 21.090 refer to the signature types, as defined in proposed 1.110, and change references to whether the declarant is the same person as the filer to whether the document contains the signature of the filer. This change is intended to clarify that these requirements apply to signatures on all documents, not just declarations. The amendments to 21.090 also consolidate the retention and certification requirements into the same subsection as the signature type requirement. This change is intended to improve the readability of the rule.

(3) Summary:

The proposed amendments to UTCR 1.110, 2.010, and 21.090 are intended to respond to public comments requesting clarification of the signature requirements in UTCR, to create consistent terms for use throughout the UTCR, and to reorganize existing signature requirements in a way that improves readability. The UTCR committee should consider these proposals at its spring meeting on March 5, 2021 for potential adoption effective August 1, 2021, or following an additional public comment period.

1.110 DEFINITIONS

As used in these rules:

(1) {**"Authenticated Signature" means a specific type of electronic signature created using software that includes a security procedure designed to verify that a signature is that of a specific person. A security procedure is sufficient if it complies with the definition of "security procedure" in ORS ch. 84.**}

[(1)]{**(2)**}"Court contact information" means the following information about a person submitting a document: the person's name, a mailing address, a telephone number, and an email address and a facsimile transmission number, if any, sufficient to enable the court to communicate with the person and to enable any other party to the case to serve the person under UTCR 2.080(1). Court contact information can be other than the person's actual address or telephone or fax number, such as a post office box or message number, provided that the court and adverse parties can contact the person with that information.

[(2)]{**(3)**}"Days" mean calendar days, unless otherwise specified in these rules.

[(3)]{**(4)**}"Defendant" or "Respondent" means any party against whom a claim for relief is asserted.

[(4)]{**(5)**}"Document" means any instrument filed or submitted in any type of proceeding, including any exhibit or attachment referred to in the instrument. Depending on the context, "document" may refer to an instrument in either paper or electronic form.

{**(6) "Electronic Signature" means an electronic symbol intended to substitute for a signature, such as a scan of a handwritten signature or a signature block that includes the typed name preceded by an "s/" in the space where the signature would otherwise appear.**

Example of a signature block with "s/":

s/ John Q. Attorney

JOHN Q. ATTORNEY

OSB # Email address

Attorney for Plaintiff Smith Corporation, Inc.}

(7) "Original Signature" means a handwritten signature on a printed document.

[(5)]{**(8)**}"Party" means a litigant or the litigant's attorney.

[(6)]{**(9)**}"Plaintiff" or "Petitioner" means any party asserting a claim for relief, whether by way of claim, third-party claim, crossclaim, or counterclaim.

[(7)]{**(10)**}"Trial Court Administrator" means the court administrator, the administrative officer of the records section of the court, and where appropriate, the trial court clerk.

2.010 FORM OF DOCUMENTS

(1) * * * * *

* * * * *

(6) Party Signatures and Electronic Court signatures

(a) The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature. All signatures must be dated.

(b) {**When a document to be conventionally filed contains the signature of the filer, the filer may sign the document using either an original signature, an electronic signature, or an authenticated signature, as those terms are defined in UTCR 1.110.**

(c) When a document to be conventionally filed contains the signature of someone other than the filer, the document may be signed using either an original signature, or an authenticated signature as defined in UTCR 1.110. If the document contains an authenticated signature:

(i) The party certifies by filing that, to the best of the party's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.

(ii) Unless the court orders otherwise, the filer must retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action.

[*(b)*]{**(d)**}The court may issue judicial decisions electronically and may affix a signature by electronic means.

(i) The trial court administrator must maintain the security and control of the means for affixing electronic{ **court**} signatures.

(ii) Only the judge and the trial court administrator, or the judge's or trial court administrator's designee, may access the means for affixing electronic { **court**} signatures.

21.090 ELECTRONIC SIGNATURES

(1) The use of a filer's login constitutes the signature of the filer for purposes of these rules and for any other purpose for which a signature is required.

[*(2) In addition to information that law or rule requires to be in the document, a document filed electronically must include an electronic symbol intended to substitute for a signature, such as a scan of the filer's handwritten signature or a signature block that includes the typed name of the filer preceded by an "s/" in the space where the signature would otherwise appear.*

Example of a signature block with "s/":

s/ John Q. Attorney

JOHN Q. ATTORNEY

OSB # Email address

Attorney for Plaintiff Smith Corporation, Inc.]

[*(5)*]{**(2)**}When {**a document to be electronically filed contains the signature of**} the filer[*is the same person as the declarant named in an electronically filed document for purposes of ORCP 1 E*], the filer {**may sign the document using either an electronic signature, or an authenticated signature, as those terms are defined in UTCR 1.110**}.[*must include in the declaration an electronic symbol intended to substitute for a signature, such as a scan of the filer's handwritten signature or a signature block that includes the typed name of the filer preceded by an "s/" in the space where the signature would otherwise appear.*

Example of a signature block with "s/":

s/ John Q. Attorney

JOHN Q. ATTORNEY]

[*(6)*]{**(3)**} When {**a document to be electronically filed contains the signature of someone other than the filer,**}[*the filer is not the same person as the declarant named in an electronically filed document for purposes of ORCP 1E,*] the document may be signed using either {**an original signature or authenticated signature, as those terms are defined in UTCR 1.110. The filer certifies by filing that, to the best of the filer's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.**}*[:]*

(a) [*Electronic signature software that includes a security procedure designed to verify that an electronic signature is that of a specific person. A security procedure is sufficient if it complies with the definition of "security procedure" in ORS ch. 84*]{**If the document contains an authenticated signature, the filer must retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action, unless the court orders otherwise.**}[*; or*]

(b) {**If the document contains a**}[*A*]n original signature [*on a printed document. T*]{**,t**}he printed document bearing the original signature must be imaged and electronically filed in a format that accurately reproduces the original signature and contents of the

document{**, and the filer must retain the document in the filer's possession in its original paper form for no less than 30 days, unless the court orders otherwise**}.

*[(3)]***{(4)}**When more than one party joins in filing a document, the filer must show all of the parties who join by one of the following:

(a) Submitting an imaged document containing the signatures of all parties joining in the document;

(b) A recitation in the document that all such parties consent or stipulate to the document; or

(c) Identifying in the document the signatures that are required and submitting each such party's written confirmation no later than 3 days after the filing.

*[(4)]***{(5)}** When a document to be electronically filed contains the signature of a notary public, the document must be electronically filed in a format that accurately reproduces the signatures and contents of the document.

[(7) When a filer electronically files a document described in subsection (6) of this rule, the filer certifies by filing that, to the best of the filer's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.

(8) Unless the court orders otherwise, if a filer electronically files:

(a) A declaration that contains an electronic signature of a person other than the filer, the filer must retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action.

(b) An image of a document that contains the original signature of a person other than the filer, the filer must retain the document in the filer's possession in its original paper form for no less than 30 days.]

2011 Commentary: The Committee does not intend the requirement to include an email address in a signature block to constitute consent to receipt of service of documents by email. Electronic service of documents may only be accomplished as specified in UTCR 21.100.

From: Web.Administrator@ojd.state.or.us
To: Bruce Miller; Jennifer McQuain; Aja T. Holland
Subject: A new UTCR comment has been submitted
Date: Tuesday, June 16, 2020 3:59:48 PM

Name: J Glenn Null
UTCR Chapter: 0

Subject: 21.090

I'd strongly encourage the rule to be consistent with the generally understood definitions of "electronic signature" as opposed to "digital signature." These are two very different types of signatures.

Click here to open the UTCR comment document.

From: Web.Administrator@ojd.state.or.us
To: Bruce Miller; Jennifer McQuain; Aja T. Holland
Subject: A new UTCR comment has been submitted
Date: Friday, July 10, 2020 11:53:58 AM

Name: Samantha Robell
UTCR Chapter: 0

Subject: 21.090(6)(a)

This sounds like a "digital signature" procedure as opposed to an "electronic signature" due to the requirements under ORS ch. 84. I would foresee attorneys needing guidance as to the specificity of what qualifies under this process.

Click here to open the UTCR comment document.

From: Web.Administrator@ojd.state.or.us
To: Bruce Miller; Jennifer McQuain; Aja T. Holland
Subject: A new UTCR comment has been submitted
Date: Tuesday, July 28, 2020 9:40:48 PM

Name: Julie Garner
UTCR Chapter: 21

Subject: 7

what is an appropriate inquiry and procedure for validation of a signers signature contained in efiles if the signer is not also the filer.
Perhaps that should be added for security reasons to prevent legal gurus from claiming to represent or be affiliated with a person or entity and in reality with electronic everything the person in question has no idea of how the identity of oneself can be used over and over with no knowledge of it. Identity theft is real and awful. I cant even get my own credit report.
Security of self identity , independent choices and decisions, equal world wide web access and privacy should be a citizens right. And until it happens to you then you will never know how hard it is to breathe even with white skin.

Click here to open the UTCR comment document.

NOTICE SEEKING PUBLIC COMMENT ON
OUT-OF-CYCLE REVISION OF UTCR 1.050(2), AMENDMENT OF UTCR 21.090, AND REPEAL OF UTCR 21.120

(Comment Period Closes at 5:00 pm on August 31, 2020)

I. INTRODUCTION

We are seeking comment on out-of-cycle revision of Uniform Trial Court Rule (UTCR) 1.050(2), amendment of 21.090, and repeal of 21.120. Revision of 1.050(2) was adopted out-of-cycle by Chief Justice Order 20-015, effective May 12, 2020. Amendment to 21.090 and repeal of 21.120 were adopted out-of-cycle by Chief Justice Order 20-008, effective March 27, 2020.

II. HOW TO SUBMIT COMMENTS

You may submit your comments by:

- clicking on the button below, next to each rule
- email (utcr@ojd.state.or.us)
- traditional mail (UTCR Reporter, Supreme Court Building, 1163 State Street, Salem, Oregon, 97301-2563)

Please submit your comments so that we receive them by 5:00 p.m. on August 31, 2020. Comments will be reviewed by the UTCR committee at its next meeting on October 2, 2020.

III. OUT-OF-CYCLE CHANGES

For the convenience of the reader, deleted wording is shown in [*brackets and italics*] and new wording is show in {**braces, underline, and bold**}. Revision of 1.050(2) (in lieu of a simpler amendment) consists of a complete rewriting of a large section of this rule so there is no use of [*brackets and italics*] or {**braces, underline, and bold**}.

1. 1.050

EXPLANATION
The UTCR Reporter requested this revision to clarify SLR timelines and processes, including those for adopting changes and disapprovals recommended by the committee. The revision was adopted out-of-cycle by Chief Justice Order 20-015, effective May 12, 2020, so that it would apply to SLR changes under consideration now for adoption on February 1, 2021.

REVISED RULE

Click Here to Comment on This Rule

1.050 PROMULGATION OF SLR; REVIEW OF SLR; ENFORCEABILITY OF LOCAL PRACTICES

(1) * * *

* * * * *

(2) Review of SLR

(a) The presiding judge must give written notice of proposed new rules and proposed changes to existing rules to the president(s) of the bar association(s) in the affected judicial district and allow the bar association(s) to provide public comment to the presiding judge. The presiding judge must give the written notice at least 49 days before the date of submission of the SLR to the Office of the State Court Administrator (OSCA) pursuant to subsection (b).

(b) On or before September 1 of each year, the presiding judge or designee must submit to OSCA a complete set of SLR, including proposed new rules and proposed changes to existing rules, if any. The submission must include a written explanation of each proposed new rule and each proposed change of an existing rule. Absent a showing of good cause, proposed new rules and proposed changes to existing rules will be considered by the UTCR Committee and the Chief Justice or designee not more often than once each year.

(c) SLR submitted to OSCA must show proposed changes as follows: new wording and new rules must be in bold and underlined and have braces placed before and after the new wording ({**_..._**}), wording to be deleted and rules to be repealed must be in italics and have brackets placed before and after the deleted wording ([*...*]). When final SLR are submitted to OSCA pursuant to subsection (g), changes shall not be indicated in the manner required by this subsection.

(d) The UTCR Committee will conduct an annual review of existing rules, proposed new rules, and proposed changes to existing rules. The UTCR Committee may suggest rule changes to a presiding judge, and recommend disapprovals to the Chief Justice, regarding existing rules, proposed new rules, and proposed changes to existing rules.

(e) The Chief Justice or designee shall issue any disapprovals on or before December 15 of the same year. If a local rule is disapproved, notice of that action shall be given to the presiding judge of the judicial district submitting the rule.

(f) A presiding judge may include in the final SLR, submitted pursuant to subsection (g), changes suggested by the UTCR Committee. A presiding judge must address in the final SLR any disapprovals made by the Chief Justice. Subsection (a) does not apply to these changes or disapprovals.

(g) Judicial districts must file with OSCA a final certified electronic copy of their SLR in PDF and send a copy to the president(s) of the bar association(s) in the affected judicial district. The final certified electronic copy must be received by OSCA no later than January 1 of the next year. Those SLR become effective on February 1 of the next year. SLR filed after January 1 become effective 30 days after the date received by OSCA.

(h) The Chief Justice may waive the time limits established in this section upon a showing of good cause.

(3) * * *

2. 21.090

EXPLANATION
On August 31, 2018, Salem Attorney Kristin Lamont submitted a proposal to allow electronic signatures on declarations. The concept was studied by a workgroup after discussion at the fall 2018 UTCR Committee meeting. At the UTCR committee meeting on October 18, 2019, the committee preliminarily recommended changes to the proposed rule recommended by the workgroup that tie the rule to ORS Chapter 84, address the use of wet signatures, and set different retention time for electronic and wet signatures. At the fall meeting on October 18, 2019, the committee noted that:

- The rule allows the use of electronic signature software that includes an audit trail;
- An electronic filer will need to remove the audit trail when submitting documents for filing because the electronic filing system will not accept them;
- An opposing party can challenge an electronic signature; and
- Use of electronic signatures is voluntary, not mandatory.
- The Oregon Law Commission is studying a proposal to allow notaries to notarize documents remotely, so this rule may require future amendment.

Prior to the UTCR committee meeting on April 3, 2020, this rule was adopted out-of-cycle by Chief Justice Order 20-008, effective March 27, 2020. Chief Justice Walters adopted this rule out-of-cycle to assist attorneys and litigants in maintaining social distance during the COVID-19 pandemic.

AMENDED RULE

Click Here to Comment on This Rule

21.090 ELECTRONIC SIGNATURES

(1) * * *

* * * * *

(4) [*Except as provided in section (5) of this section, w*]{**W**}hen a document to be electronically filed requires [*a signature under penalty of perjury, or*] the signature of a notary public, the [*declarant or*]notary public shall sign a printed form of the document. The printed document bearing the original signatures must be imaged and electronically filed in a format that accurately reproduces the original signatures and contents of the document. [*The original document containing the original signatures and content must be retained as required in UTCR 21.120.*]

(5) When the filer is the same person as the declarant named in an electronically filed document for purposes of ORCP 1 E, the filer must include in the declaration an electronic symbol intended to substitute for a signature, such as a scan of the filer's handwritten signature or a signature block that includes the typed name of the filer preceded by an "s/" in the space where the signature would otherwise appear.

Example of a signature block with "s/":
s/ John Q. Attorney
JOHN Q. ATTORNEY

{**(6) When the filer is not the same person as the declarant named in an electronically filed document for purposes of ORCP 1E, the document may be signed using either:**

(a) Electronic signature software that includes a security procedure designed to verify that an electronic signature is that of a specific person. A security procedure is sufficient if it complies with the definition of "security procedure" in ORS ch. 84; or

(b) An original signature on a printed document. The printed document bearing the original signature must be imaged and electronically filed in a format that accurately reproduces the original signature and contents of the document.

(7) When a filer electronically files a document described in subsection (6) of this rule, the filer certifies by filing that, to the best of the filer's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.

(8) Unless the court orders otherwise, if a filer electronically files:

(a) A declaration that contains an electronic signature of a person other than the filer, the filer must retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action.

(b) An image of a document that contains the original signature of a person other than the filer, the filer must retain the document in the filer's possession in its original paper form for no less than 30 days.}

3. 21.120

EXPLANATION
Prior to the UTCR committee meeting on April 3, 2020, this rule was repealed out-of-cycle by Chief Justice Order 20-008, effective March 27, 2020. Repeal of the rule was preliminarily recommended for approval by the UTCR committee at the fall meeting on October 18, 2019. The Chief Justice repealed the rule out-of-cycle to assist litigants in maintaining social distance during the COVID-19 pandemic. See explanation for the related amendment to UTCR 21.090, above.

REPEALED RULE

Click Here to Comment on This Rule

21.120 RETENTION OF DOCUMENTS BY FILERS AND CERTIFICATION OF ORIGINAL SIGNATURES {**(Repealed)**}

[*(1) Unless the court orders otherwise, if a filer electronically files an image of a document that contains the original signature of a person other than the filer, the filer must retain the document in the filer's possession in its original paper form for no less than 30 days.*

(2) When a filer electronically files a document described in section (1) of this rule, the filer certifies by filing that, to the best of the filer's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.]

{**REPORTER's NOTE: UTCR 21.120 was repealed effective March 27, 2020. See UTCR 21.090 for retention and certification requirements.**}

Current UTCRs Relating to Electronic Signatures (as of 11/13/2023):

1.110 DEFINITIONS

As used in these rules:

(1) "Authenticated Signature" means a specific type of electronic signature created using software that includes a security procedure designed to verify that a signature is that of a specific person. A security procedure is sufficient if it complies with the definition of "security procedure" in ORS chapter 84.

(2) "Court Contact Information" means the following information about a person submitting a document: the person's name, a mailing address, a telephone number, and an email address and a facsimile transmission number, if any, sufficient to enable the court to communicate with the person and to enable any other party to the case to serve the person under UTCR 2.080(1). Court contact information can be other than the person's actual address or telephone or fax number, such as a post office box or message number, provided that the court and adverse parties can contact the person with that information.

(3) "Days" means calendar days, unless otherwise specified in these rules.

(4) "Defendant" or "Respondent" means any party against whom a claim for relief is asserted.

(5) "Document" means any instrument filed or submitted in any type of proceeding, including any exhibit or attachment referred to in the instrument. Depending on the context, "document" may refer to an instrument in either paper or electronic form.

(6) "Electronic Signature" means an electronic symbol intended to substitute for a signature, such as a scan of a handwritten signature or a signature block that includes the typed name preceded by an "s/" in the space where the signature would otherwise appear.

Example of a signature block with "s/":
s/ John Q. Attorney
JOHN Q. ATTORNEY
OSB #
Email address
Attorney for Plaintiff Smith Corporation, Inc.

(7) "Original Signature" means a handwritten signature on a printed document.

(8) "Party" means a litigant or the litigant's attorney.

(9) "Plaintiff" or "Petitioner" means any party asserting a claim for relief, whether by way of claim, third-party claim, crossclaim, or counterclaim.

(10) "Remote Means" or "Remote Proceeding" means the use of telephone, telecommunication, video, other two-way electronic communication device, or simultaneous electronic transmission, in a manner that permits all participants to hear and speak with each other.

2.010 FORM OF DOCUMENTS

Except where a different form is specified by statute or rule, the form of any document, including pleadings and motions, filed in any type of proceeding must be as prescribed in this rule.

(1) * * *

* * * * *

(5) Party Signatures and Electronic Court Signatures

(a) The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature. All signatures must be dated.

(b) When a document to be conventionally filed contains the signature of the filer, the filer may sign the document using either an original signature, an electronic signature, or an authenticated signature, as those terms are defined in UTCR 1.110.

21.090 ELECTRONIC SIGNATURES

(1) The use of a filer's login constitutes the signature of the filer for purposes of these rules and for any other purpose for which a signature is required.

(2) When a document to be electronically filed contains the signature of the filer, the filer may sign the document using either an electronic signature, or an authenticated signature, as those terms are defined in UTCR 1.110.

(3) When a document to be electronically filed contains the signature of someone other than the filer, the document may be signed using either an original signature or authenticated signature, as those terms are defined in UTCR 1.110. The filer certifies by filing that, to the best of the filer's knowledge after appropriate inquiry, the signature purporting to be that of the signer is in fact that of the signer.

(a) If the document contains an authenticated signature, the filer must retain the electronic document until entry of a general judgment or other judgment or order that conclusively disposes of the action, unless the court orders otherwise.

(b) If the document contains an original signature, the printed document bearing the original signature must be imaged and electronically filed in a format that accurately reproduces the original signature and contents of the document, and the filer must

retain the document in the filer's possession in its original paper form for no less than 30 days, unless the court orders otherwise.

(4) When more than one party joins in filing a document, the filer must show all of the parties who join by one of the following:

(a) Submitting an imaged document containing the signatures of all parties joining in the document;

(b) A recitation in the document that all such parties consent or stipulate to the document; or

(c) Identifying in the document the signatures that are required and submitting each such party's written confirmation no later than 3 days after the filing.

(5) When a document to be electronically filed contains the signature of a notary public, the document must be electronically filed in a format that accurately reproduces the signatures and contents of the document.

2011 Commentary:

The Committee does not intend the requirement to include an email address in a signature block to constitute consent to receipt of service of documents by email. Electronic service of documents may only be accomplished as specified in UTCR 21.100.

Shari Nilsson <nilsson@lclark.edu>

Licensed Paralegals & ORCPs

1 message

Melvin Oden-Orr [redacted] Fri, Dec 8, 2023 at 7:47 PM

[redacted]

Kelly,

Having reviewed the rules for Licensed Paralegals (LP), I believe further review is required to determine in what ways the ORCPs should be modified to account for the practice. The scope of practice for Licensed Paralegals is limited to certain aspects of family law and landlord-tenant. The Rules for Licensing Paralegal do not allow a paralegal to appear in court on behalf of a party in family cases, they do however, allow them to assist in the preparation of pleadings filed with court, as well as in discovery. In landlord-tenant practice, the rules allow appearances in court to the same extent non-attorneys are permitted. LPs can also assist in preparing certain court filings. The LP Rules require one hour of continuing education specifically related to the ORCP every three years. As we all know, family law and landlord-tenant are within the scope of the ORCPs when they reach the Circuit Courts. The changes could be extensive. For example, there may be some instances where the Rules reference "a party or attorney", such as in ORCP 9. Those need to be reviewed to determine whether it should also include a reference to LPs. At a minimum, amendment of ORCP 17 should be considered to address LP practice. In addition, the following issues in the ORCPs should be looked at:

- LP Fee recovery
- Privilege and discovery considerations (there is a new LP-client privilege)
- Sanctions
- Subpoenas
- "active member of the bar" reference in Rule 7 and 17

Unfortunately, I will need to leave the meeting early tomorrow to attend to some family matters. I hope this is helpful.

Melvin Oden-Orr

Multnomah County Circuit Court Judge

Multnomah Central Courthouse

1200 SW First Avenue

Portland, OR 97204

(971) 274-0664

Jan Napier, Judicial Assistant

Council on Court Procedures
December 9, 2023, Meeting
Appendix E-1

CCP Summary – Rule 55 Committee Mtg
November 14, 2023 @ 1:00 PM

Members Attending: Judge Norby, Judge Peterson, Meredith Holley, Derek Larwick, Margurite Weeks

Summary

This biennium's ORCP Committee was created to determine which, if any, of the proposed amendments that were not approved by a super-majority in the last biennium should be re-introduced, and to consider whether it is time to include email as an option when personal service of a subpoena is waived.

1. **Adding Language Re: Consequences & Option to Quash.** (Carried over from last biennium.) – The consensus of the committee members was that inclusion of a form Motion to Quash is too strongly disfavored to be revived. However, the concept of extending the express notation that Motions to Quash are options for Subpoenas to Appear, and are not restricted to Subpoenas to Produce, makes sense and should be reintroduced. Also, the Council appeared to strongly favor the inclusion of language on subpoenas cautioning recipients that disobeying has consequences. **(See the committee's initial effort to address these in section §A(1)(a)(vi) & §A(7) at the end of these minutes.)**

2. **Adding language to allow email as an option when personal service is waived.** The consensus of the committee members was that it may be time for this addition because email use has become a preferred method of communication. However, confirmation of receipt of emails is challenging to accomplish. Since personal service is only waived when there is communication between the party issuing the subpoena and the recipient, it may make sense to create a process of confirming receipt with a declaration of service. The members discussed the historical reliance on absolute proof of actual receipt in the absence of a Certificate of Service. Since the option to waive is never assumed, but only used with permission from the recipient, we decided to seek the Council's thoughts on the use of a Declaration of Stipulated Alternative Service, which would parallel a Certificate of Service, but with information specific to the agreement reached, the method used, and the response or refusal to respond by the recipient. **(See the committee's initial effort to address this in section §B(2)(c) at the end of these minutes.)**

3. **Amending requirements for confirmation of snail mail when personal service is waived.** The committee members went on to consider an issue raised by Margurite, regarding the challenge experienced by attorneys when a person agrees to waive personal service but refuses to sign for the mail that they agreed to use as an alternative. We debated whether a person who agrees to alternative service by a specific method for an agreed upon date and time should have the ability to unilaterally break the agreement when the subpoena arrives by refusing to generate the evidence that it arrived. We also noted the dramatic increase in the USPS use of tracking services, and their reliability. We decided to seek the Council's thought on use of USPS tracking information as proof of snail mail service, without requiring a signature. **(See the committee's initial effort to address this in section §B(2)(c) at the end of these minutes.)**

2023 Committee Draft Proposed Amendments
RULE 55

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number;

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this rule; and

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraph A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b) of this rule.

A(1)(a)(vi) state the following in substantively similar terms:

A(1)(a)(vi)(A) that all subpoenas must be obeyed unless a judge orders otherwise, and

A(1)(a)(vi)(B) that disobedience of a subpoena is punishable by a fine or jail time.

* * * * *

A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by the court or by the judge who issued the subpoena or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

A(7) Recipient's option to move to quash, or to move to modify subpoena to appear and testify. A person who is subpoenaed to appear and testify may move to quash or move to modify the subpoena. A motion to quash or to modify must be served and filed with the court before the date and time set for the recipient to appear and testify. A copy of the motion must be served on the party who issued the subpoena. The court may quash or modify the subpoena if the subpoena creates an unjustifiable burden that is not outweighed by the party's need for the testimonial evidence, or if the witness proves a legal right not to testify.

* * * * *

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

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that:

B2(c)(i)(A) the witness agreed to appear and testify if subpoenaed using a mail or e-mail address that the witness confirmed to be accurate;

B(2)(c)(i)(B) the specific date and time for the witness to appear and testify was coordinated with the witness who agreed it was acceptable, and

B(2)(c)(i)(C) The mail or e-mail address used to deliver the subpoena contained no typographical or other errors, and

B(2)(c)(i)(D) The transmission was sent promptly after the witness agreed to the date and time to appear.

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

B(2)(c)(iii) Signed mail receipt. If mailed, ~~T~~the subpoena was mailed more than 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, or that provided tracking service, and:

B(2)(c)(iii)(A) If mailed with signature on delivery, then the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, either signed the return receipt, or affirmatively declined to sign the return receipt, more than 3 days before the date to appear and testify, or~~.~~

B(2)(c)(iii)(B) If mailed with tracking service, then the tracking shows that the mail was delivered more than 3 days before the date to appear and testify.

Shari Nilsson <nilsson@lclark.edu>

ORCP 58

Benjamin Bloom < . . t .o .u > Wed, Dec 6, 2023 at 6:30 PM

[redacted]

Hi Kelly and Shari:

I wanted to give a brief report for our subcommittee. We exchanged opinions about amending Rule 58 B(9) and met once via Teams. We ultimately decided not to propose any changes to the rule. Initially, we all agreed that questions should continue to be allowed in civil trials at the discretion of the court. After further discussion, we also felt that we should not amend the rule to prohibit jury instructions in criminal cases or condition use of the questions as a couple practitioners requested in their comments to the Council. There were several reasons for not wanting to eliminate or alter the procedure for allowing questions in criminal trials. One of the reasons was that under the current rule, parties already have the right to object to questions outside the presence of the jury. Perhaps the most significant reason for not wanting to amend the rule for questions in criminal matters was the subcommittee's feeling that the amendment would be straying into substantive matters. The legislature is free to create a statute to prohibit or limit jury questions in criminal cases (as are individual trial court judges), but we did not see the need to amend ORCP 58 B(9).

Benjamin M. Bloom

Presiding Judge, 1st Judicial District

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SFLAC Futures Subcommittee – Court Legal Notice Webpage Proposal (Approved by SFLAC Sept 8, 2023)

Futures Subcommittee Participants: Ryan Carty, Chair; Samantha Malloy, Co-Chair; Stephen Adams, Colleen Carter-Cox, Bryan Marsh, Crystal Reeves, John Grant, William Howe, Angela Laidlaw, Hon. Karrie McIntyre, Linda Hukari, Hon. Sean Armstrong, Hon. Maureen McKnight, Valerie Colas, Nanci Thaemert

Summary: The Futures Subcommittee requested that the SFLAC support a recommendation to OJD to create an OJD maintained and operated legal notice webpage as an alternative to traditional publication in a newspaper for family law litigants to utilize to increase access to justice and due process for Oregon litigants. **APPROVED by SFLAC after review by all other subcommittees at the September 8th Quarterly meeting.**

Goals:

- View alternate service in family law cases through the Equity Framework established by Chief Justice M. Walters, August 1, 2022
- Increase access to justice for Oregon families participating in the court system by providing no cost, easily accessible avenues for alternate method of service by publication
- Online legal notice promotes due process through a consistent and easily searchable mechanism to learn of pending court cases
- Encourage parties to engage in their cases by filing timely responses while simultaneously connect them on the same OJD website that provides educational materials and forms for meaningful participation in their case
- Facilitate timely closure of court cases within recommended time standards
- Reduce conflict for children and families by facilitating timely action on their cases

Findings:

- The cost to publish a summons (and sometimes additional notices) is exorbitant making publishing cost prohibitive for many litigants. The cost can range from $250 to over $500.00 depending upon the publication.
- The public no longer looks to newspapers as a main source of news and information, rendering published notices ineffective.
- The physical courthouse presence for the public is declining in favor of remote filings and hearings
- The current information seeking behavior is to go directly to the website of the source for information.
- The public utilizes online resources for news and information and generally does this on a mobile device.
- Online notices create a searchable tool for finding case information that facilitates due process.
- Other state courts such as Alaska and Connecticut have taken the lead in creating this type of resource.

- In the National Center for State Courts' Service Modernization Brief published August 2022, legal notice websites is included as one of the recommendations for best practices regarding service of process.
- *Stats re defaults*:

Oregon Dissolution of Marriage and Default Judgments			
Year	2019	2020	2021
Dissos Filed	16,136	14,196	14,911
Defaults by Year	4,200	3,255	3,536
% of Defaults	26.03%	22.93%	23.72%

Needs:

- Review ORCP, UTCR, and relevant family law statutes to address alternate methods of service to adopt a definition of "posting" at the courthouse to include electronic posting on the OJD website
- OJD Staff time
  - Initially: Develop web page
  - Ongoing: Continued maintenance and posting and removing of notices

Recommendation:

The Futures Subcommittee requested the SFLAC support to forward a recommendation to the Chief Justice and State Court Administrator for OJD to implement an OJD operated legal notice webpage, based on the primary goal to improve access to justice for Oregon families. *Each SFLAC subcommittee reviewed the proposal for input and provided it to the Futures Subcommittee. The matter was put to vote on September 8, 2023 and was endorsed unanimously by the SFLAC to forward to the Chief Justice and State Court Administrator.*

A court-maintained and facilitated webpage for public posting alternate service, will allow family-law litigants routine access to a primary system of public notice which allows them to receive notice, or give notice, of legal action. Fundamental to OJD establishing this webpage are the concepts that, 1) it must be free to the litigant (not means-tested), 2) electronically searchable by name, 3) and using the most efficacious method (usually the internet, maintained by government at its own expense).

The SFLAC role is limited, and it is noted that we are advocating only for family law related lawsuits, (i.e., name changes, paternity, custody, parenting time, ORS 109.119/psychological parents, child support, divorce). We express no views regarding any other subjects of public-notice laws, service requirements, or practices (i.e., probate, auctions, real property, or meetings). While the SFLAC takes no position on the applicability of the recommendation to other areas of law, we do recommend that OJD not assert a blanket opposition to this type of service that would bar much needed family-law reform. Family law is a unique and emotionally charged area of law that squarely places children and families into direct and ongoing conflict. It is essential that family law matters be handled timely to reduce or eliminate ongoing conflict and perfecting service, can be a barrier to timely resolutions.

Other supplemental methods with costs in individual cases (newspapers, social media, etc) should remain available by motion of a party and court order but, we recommend that the Court adopt a policy that does not require parties to pay additional costs for service regardless of method.

Oregon Rules of Civil Procedure were updated in 2018 to allow service by electronic means, email, text, or social media platform. This was a first step in incorporating more modern means of communication and correspondence. These methods however are not effective for many litigants who aren't in touch with the other party or have conflict resulting in blocked social media accounts and phone numbers or may be subject to domestic violence protective orders that prohibit third party contact.

Historically, it may have been a policy approach by OJD to limit the possible costs associated with the task of providing a forum for public notice or otherwise endorse service by publication in the newspaper thereby subsidizing those entities. However, the SFLAC is an independent, statutorily constructed entity that is charged with providing advice to OJD. The foundation of this proposal lies in the recommendation that the Court launch itself into the present day by meeting our families in the current social and informational structure of society. Access to justice demands it. This recommendation is in line with the Chief Justice Order, dated August 1, 2022, charging OJD to adopt Equity Framework.

Sources:

National Center for State Courts, Trends in State Courts 2016 edition: Special Focus on Family Law and Court Communications, pgs 75-79.

National Center for State Courts, Service Modernization Brief, August 2022
www.ncsc.org/__data/assets/pdf_file/0018/82512/Service-Modernization-Brief.pdf

Court Manager, Volume 30, Issue 4, Page 23: Alaska Court System Legal Notice Website article
https://fliphtml5.com/kvqg/jyuu/basic

https://www.txcourts.gov/judicial-data/citation-by-publication/

https://www.nngroup.com/articles/information-seeking-behavior-changes/

Existing Legal Notices Websites:

Alaska
Connecticut
Delaware
Texas
Utah

MOTION FOR ORDER OF NOTICE IN FAMILY CASES
JD-FM-167 Rev. 12-21
C.G.S. § 46b-46; P.A. 21-15; P.B. §§ 11-4, 25-28, 25a-8

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

ADA Notice
The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at *www.jud.ct.gov/ADA.*

COURT USE ONLY
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Judicial District of	At (Town)	Docket number (if any)
Plaintiff's name (Last, first, middle initial)	Defendant's name (Last, first, middle initial)	
Party to be notified (Select one) ☐ Plaintiff ☐ Defendant		Return date, if applicable (Month, day, year)

1. In this court case I am requesting: *(Select all that apply)*

- ☐ Divorce (Dissolution of Marriage)
- ☐ Dissolution of Civil Union
- ☐ Legal Separation
- ☐ Custody of Children
- ☐ Other (specify) _____
- ☐ Annulment
- ☐ Visitation with Children
- ☐ Parentage Determination
- ☐ Support for Self or Child

2. *(Select one)*

☐ The party to be notified lives out of state at:

_____
(Number, street, town, state, zip code)

Therefore, I ask the court's permission to serve the party to be notified by registered or certified mail (to be done by a State Marshal or other proper officer), or by an authorized person in the state where the party to be notified lives, or to make such other order of notice as the court deems reasonable.

If this motion accompanies a complaint for divorce (dissolution of marriage), complaint for dissolution of civil union, legal separation or annulment, application for custody or visitation, or a petition for parentage or support, the defendant or respondent, when served, will be subject to automatic court orders which are attached to the complaint, application, or petition.

☐ The current address of the party to be notified is unknown and all reasonable efforts to find them have failed. I have made the following efforts (Select all that apply):

- ☐ contacted directory assistance
- ☐ contacted relatives/friends of the party
- ☐ contacted current/previous employer(s) of the party
- ☐ other (specify): _____

Therefore, I ask the Court's permission to publish notice of this case on the State of Connecticut Judicial Branch's Legal Notices website located at http://civilinquiry.jud.ct.gov/LegalNoticeList.aspx.

Signature (Attorney or self-represented party)	Print name of person signing	Date signed
Address (Number, street, town or city, state, zip code)		Telephone number (Area code first)

Print Form Reset form

Shari Nilsson <nilsson@lclark.edu>

consideration of ORCP change

James C. Edmonds [redacted] Wed, Dec 6, 2023 at 7:31 PM

[redacted]

Hi Kelly

I am on the UTCR Committee and was given your contact information by Aja Holland. I am suggesting revision of ORCP 31 (interpleader) based on some confusion regarding the procedural mechanism currently identified in the rule.

I recently had a case where a Defendant Bond Company was sued by a Plaintiff alleging a claim against a defunct used car dealership. The car dealership was also named as a Defendant. The Bond Company filed an answer that was somewhat convoluted but intended to be an interpleader. In short, the Bond company was offering its bond funds for any claims arising out of the defunct car dealers actions. The bond company was aware of at least one other potential claimant who was not the Plaintiff. In an effort to bring that individual into the lawsuit, the bond company lawyer filed an answer with an "additional counterclaim Plaintiff" naming the additional claimant in the caption and denominating that individual as a "counterclaim Plaintiff". That individual received the answer and , representing himself, filed a "complaint" in the same case leaving the case with two "complaints" filed by different Plaintiffs.

The bond company lawyer also added another party, the manager of the defunct car dealer, as a "cross claim Defendant". This was not a person named in the original pleading.

We held a status conference to sort out what was happening and through that conversation determined how the bond company lawyer came to his conclusions.

As you know, ORCP 31 is typically used by Plaintiffs to name, *as defendants,* all persons that may have a claim to contested funds. However the rule also states : "A Defendant exposed to similar liability may obtain interpleader by way of cross claim or counterclaim". In our case, the bond company lawyer thought his only method for interpleader as a Defendant was to name additional parties through "counterclaim" or "cross claim". The problem is that ORCP 22 defines a counterclaim as "against a Plaintiff" and a cross claim can be made only against other defendants who are already named in the action. Neither the new claimant nor the cross claim defendant were named by in the original lawsuit.

I believe the proper method for a Defendant to add parties to an interpleader (as opposed to making claims against parties already in the action) is by a third party claim. Because this is not expressly stated in ORCP 31, the bond company lawyer was trying to create claims against non parties by counterclaim and cross claim. To remedy this, we struck the cross claim and counterclaim under ORCP 21E and the bond company is taking the initiative to file a third party claim to add the others.

The ORCP 31 fix may be to merely add the words "third party claims" to clarify the available methods to add parties in a Defendant initiated interpleader action.

Council on Court Procedures
December 9, 2023, Meeting
Appendix I-1

If I am in error in this review or if there is another reason for not including third party claims for defendant initiated interpleader, please let me know.

Thanks

Jim

James C. Edmonds

Circuit Court Judge, Marion County

(503) 373-4303

NO ex parte communication allowed: Please note that the Court cannot receive any correspondence, including email, about a particular case unless copies are provided to all parties in the case. Any e-mail sent to the court regarding a specific case must certify, by listing in the "cc," that a copy has been provided to all attorneys (or parties pro se). Please direct such emails to Cindy Twiggs, my Judicial Assistant.

NO pleadings filed by email: Case specific emails must also reference the main parties and case number in the subject line. Email may not be used to file documents, but may be used to provide my office with a "Judge Copy" of trial memorandum or other documents. If materials are provided by email, no hard copy follow up is needed. Please direct such emails to Cindy Twiggs, my Judicial Assistant. Any email that is received by this office and does not comply with these rules will be deleted and disregarded.