DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 13, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Hon. Scott Shorr
Margurite Weeks
Alicia Wilson

Members Absent:

Hon. Jonathan Hill
Hon. Norman R. Hill
Hon. Melvin Oden-Orr
Michael Shin
Stephen Voorhees
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 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ORCP 71	• Annotated ORCP • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • UTCR 5.100		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 9:30 a.m.

II. Administrative Matters

A. Approval of December 9, 2023, Minutes

Mr. Andersen asked whether anyone had corrections to the draft minutes from December 9, 2023 (Appendix A). Hearing none, he asked for a motion for approval. Judge Bloom made a motion to approve the draft minutes. Judge Norby 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 apologized for the slow process. He stated that he would finalize the comments from last biennium and circulate them to last biennium's Council members for review, as well as bringing them to this Council in February.

B. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby stated that the committee had met on December 22, 2023. She reminded the Council that the committee had, at the December meeting, introduced a preliminary draft that incorporated some revisions to the published amendment from the 2021-2023 biennium. These revisions, most importantly, crystallized the definition of what an abusive litigant is, linking it directly to bad faith and shielding protected persons under the law. The revisions also neutralized much of the language that appeared to be skewed against plaintiffs and unduly empowering to defendants. At the committee's December meeting, there was further discussion about the new proposed definition and its merits compared to the prior definition. The committee is presenting a new draft today (Appendix B), created by Ms. Holley with contributions by Ms. Dahab. Ms. Holley had pointed out that the December definition might have been overreaching to extend to all persons protected under the law, including those who may not be parties to a case. The committee agreed that the Council only has the authority to control the abuses of one party by another party through a procedural rule, and not to extend the rule to be a tool for reining in misconduct against witnesses or other non parties. Therefore, the committee deleted from last month's draft the reference to protected persons as a separate category. In conjunction, the definitions that

flowed from the inclusion of protected parties as a separate category were also deleted.

Judge Norby stated that Ms. Holley had raised a concern with the committee that, if the Council enacts an abusive litigant rule, some less ethical attorneys might see it as an invitation to find a use for this new process that would otherwise not occur to them. The committee had a robust discussion about whether creating the rule would meaningfully help the courts, since the courts already have this inherent authority, whether it would provide helpful and meaningful enough protection for the majority, and whether promulgating a new rule should not go forward out of fear that a few people might attempt to misuse it. The committee's consensus was that the Council should not be ruled by a minority who may misuse a rule but, rather, be guided by the mission of protecting those who need help. A question was also raised about whether existing case law on the abusive litigant process is sufficient to give the courts everything they need to provide this protection without a rule being adopted. The committee appeared to have consensus that the practice is not well known or standardized enough, and that it is not easily accessible to lawyers or judges. The feeling was that adopting a rule that standardizes the process will allow courts to understand the option, its limitations, and the correct procedures to use, as well as helping attorneys understand the process before they have to learn it on the fly when the courts start to use it. Judge Norby explained that the committee seemed to have shared optimism that the new revisions to the proposed rule capture the concept of abusive litigation much better than it was captured last biennium.

Ms. Holley stated that her only clarification would be that she does not necessarily think that it is only unethical attorneys who might use a potential rule in ways that the Council does not intend. She explained that sometimes newer attorneys, who are very enthusiastic and want to aggressively advocate for their clients by fully using the rules, can sometimes create unintended consequences.

Mr. Goehler suggested that, since an abusive litigant rule had been published but not promulgated last biennium, it might be a good idea to take a rough vote to see how much support exists for the rule in general before spending too much time working further on the draft. Mr. Andersen agreed, but asked if there were more comments from Council members first.

Judge Bloom stated that, while he feels that the idea of the rule is well intentioned, and he appreciates the work that has gone into it, he feels that it has a lot of dangerous down sides. He stated that he would not support the rule in any form because he feels that it is subject to abuse, creates more litigation, and could impact access to justice. He noted that it does take more court work to deal with the people at whom these motions are more most often directed, but that they are vulnerable people. He opined that there is a trade off between allowing people to file cases that have no merit and impeding access to the courts that he

does not want to limit by rule. He would rather deal with such cases individually as they come up in his courtroom. Judge Bloom stated that he can only recall one such case in the 13 years he has been on the bench.

Judge Peterson addressed Ms. Holley's concern. He noted that, when Rule 11 of the Federal Rules of Civil Procedure and Oregon Rule of Civil Procedure (ORCP) 17 were enacted, there was fear that they would be subject to abuse and overuse. It would seem that those rules provide a perfect opportunity for people to file motions early in the litigation; however, it does not seem like those rules have been subject to abuse. In addition, when the Council made changes to Rule 27 several biennia ago, the plaintiffs' bar was concerned that those changes would cause harm. However, the attorneys that were concerned that the amendment would impede filing their claims were not seeing the really unscrupulous abuses that were happening, such as people appointing guardians ad litem who were not acting in the best interest of the protected person. Because of the concerns of the plaintiff's bar, the Council provided safety valves. That would be the intent with this rule as well. In terms of Judge Bloom's concern, Judge Peterson stated that, as a judge, he has wrestled with these cases that are a ridiculous waste of the court's time. He understands that it is part of the job, and occasionally even humorous, but parties are absolutely being harmed by abusive litigation by having to hire attorneys to read through many, many, many pages of gibberish, respond to it, and just get raked over the coals. Judge Peterson stated that, if a lawyer has had a client who has been a victim of this type of harassment, or if a judge has witnessed it, they know that it is no small thing. He stated that, even if it a rare thing, he would like to help make it rarer.

Mr. Larwick asked whether the committee had examined potential constitutional issues such as due process, the Seventh Amendment right to a civil jury trial, or Article One, Section 10 of the Oregon Constitution, the open courts clause. He stated that he is curious about whether creating additional obstacles to filing cases may interfere with some of those constitutional protections. With regard to Judge Peterson's comments, he stated that his understanding has always been that the court has statutory, perhaps inherent, authority to order attorney fees in a situation where a party files frivolous pleadings and runs up a big attorney bill for the other side. It seems like that type of attorney fee award would pretty quickly make some of that type of abusive litigation go away. Mr. Larwick stated that he is unsure whether the rule is necessary, but stated that he is trying to figure out the nuances of it.

Judge Norby stated that, since it is the appellate courts that have effectively created the procedure, she would think that they would not likely have approved it if they felt there were constitutional implications. Ultimately, the way the rule would be drafted would not prevent anyone from filing a valid case; it would just add an extra layer of review for people who have abused court processes in the past. The rule would allow for a pre-filing order, which basically requires a party

that has been abusive in their litigation tactics in the past, to a degree that bad faith has been found by a judge, to get permission to file a new case from a presiding judge. She noted that this would still require work on the part of the courts, but less work than having repeated filings in a short period of time. With regard to attorney fees, she stated that she has had to cobble together a procedure to deal with abusive litigants about once a year for the last five or six years, at the request of other judges on her bench who noticed the cases but did not have the time or the staff to figure out what to do about it. In a case that happened last year, there are no longer attorneys involved. That sequence of cases had been going on for so long that neither party could afford attorneys any more. There are cases where attorney fees do not matter, because the motivation for abuse is not intentional bad faith, but mental illness. When creating the definition, the committee talked about the desire to not get bogged down in the need to prove intention, because oftentimes people who wind up as abusive litigants have untreated mental health issues. They may not be creating the problems intentionally, but they are still very expensive and very harmful to the people that are having to fight against them.

Mr. Larwick asked whether, in the case of a mentally ill person like Judge Norby described, that person would need to get an order from the presiding judge to be allowed to file a new case and, if the presiding judge said no, if that would create a due process issue. Judge Norby stated that the Court of Appeals seems not to think so, since they approved the pre-filing order and review of new cases by a judge. She noted that the process has been reviewed by the Court of Appeals on more than one occasion, and it is also used in federal courts. Ms. Johnson asked for the name of the appellate court case that Judge Norby referenced that approved a procedure or a standard under which a trial court can prevent additional litigation from the same party. Judge Norby stated that she could not recall the name of the case at the moment, but that she would e-mail it to Ms. Johnson. Ms. Johnson asked whether the court actually addressed constitutional issues in that decision. Judge Norby stated that she would double check and let the Council know at the next meeting. Ms. Johnson stated that she did not recall the committee addressing the specific constitutional issues that Mr. Larwick had raised, and she asked that the committee do so before any rule is proposed for a vote.

Judge Bailey stated that the Court of Appeals always has to look at the constitutionality of a decision that they make in regard to whether they are going to be denying someone's due process rights. Although it may not have been expressly stated in the decision, the Court will have at least considered the Oregon constitution. In the case of a presiding judge's decision, it is appealable to a higher court, so there is due process in play. Hopefully, this alleviates some of the concerns about due process. Judge Bailey stated that he agrees with Judge Norby's comments that many of these cases will not even have attorneys involved, so attorney fees are not an issue. He noted that there is a particular

family law case in his court where a person continues to file things. There is an attorney on the other side and, as a result of that, the other litigant is always having to answer. It is costing fees, but there are not enough assets to the abusive litigant's name for those attorney fees ever to be paid. The abusive litigant is not an attorney, so there is no ethical cudgel to be used such as the threat of reprimand or disbarment. There is really no remedy other than this kind of rule, not only to save the court's time, which is valuable, but also to help the abusive litigant and the other side to not have to continue to fight these costs, which keep going up, not to mention the time and trouble. However, Judge Bailey agreed that, if half of the Council members will not support any rule, there is no point in putting in the time and effort to create one.

Judge Norby stated that other states are creating similar rules. She noted that the name of the rule had been changed from "vexatious litigants" to "abusive litigants" in part because, since last biennium, another state had come on board that is specifically using the word "abuse" to refer to people who have restraining orders and others who are being protected from abuse by parties who then use the system in reverse to try to have continued contact with the protected party when they are prohibited from doing so. In other words, the focus is on protecting parties from further abuse by those who attempt to use the system to perpetuate that abuse.

Judge Bloom made a motion to essentially "kill" the committee. Ms. Wilson seconded the motion. Mr. Larwick asked for clarification if this was a motion to disband the committee and stop all work on an abusive litigant rule. Mr. Andersen stated that it seems to him that now is the time to bring this issue to a head. If the motion is defeated, the committee has the Council's blessing to go forward and refine the draft rule. If it passes, that would be the end of the committee's work. Judge Norby stated that she is curious as to why a motion would be brought this early since, last biennium, the committee was allowed to keep working to a finished product. She stated that, when she asked for support to form a committee at the beginning of the biennium, she acknowledged that last biennium's draft had been defeated but she was still willing to put in an effort if other people signed on. Others did sign on, so why would the committee be killed at this point? That seems like an aggressive approach to her.

Ms. Holley stated that she is willing to put in the work because she respects Judge Norby and appreciates all of the work that she has put into it. She does, however, think that there is some wisdom in saying that, if there will ultimately be no support, there is no need to continue refining the draft. She agreed with Ms. Dahab that the language is now better and more even, but she was not certain that she feels 100% behind the rule as a concept. She tends to agree with Judge Bloom that there are many risks to it.

Ms. Dahab asked for clarification as to whether a vote not to kill the committee was equivalent to a vote to pass the rule. She stated that she could envision the committee continuing to work on the rule, to nail down some of the constitutional questions that are yet unresolved, and to refine the language to try to get broader support. If it does not pass, it does not pass, but at least the committee will have finished the task that it has set out to do. Mr. Andersen clarified that a vote not to kill the committee did not necessarily mean a vote to ultimately support the rule; just to allow it to be ironed out further.

Judge Shorr stated that, at the moment, he was leaning toward not supporting the rule. However, if the committee wanted to continue working on the rule, perhaps a tentative vote could be taken just to measure how much support the rule has. If the committee wants to continue despite the results of that vote, Judge Shorr felt they should be allowed to do so.

Judge Bailey pointed out that the Court of Appeals has said that judges have the inherent power to label a litigant as vexatious. He stated that part of what he thought the committee was about was to get some consensus around the entire state of a process. He did not believe that there was a question of whether the Council can do this or not; the federal courts have allowed it and higher courts have said it is allowed. He believes that creation of a rule is just memorializing that approval so that there is an actual process across the state for how courts can accomplish it. If the Council stops the process now, there will still be 20-some counties doing this in 20-some different ways, if they choose to do it at all, and that defeats the purpose of the committee.

Mr. Goehler agreed with Judge Bailey that having a uniform process will be beneficial. He stated that the Council would not be making new law here, but that having procedural rules will provide consistency and hopefully also prevent trial judges from being overturned on appellate review. He stated that there are many peculiar issues to figure out, such as how much security should be posted and what factors should be looked at to determine that. He suggested that perhaps including those in the rule might help bring more people along in supporting it. At the same time, if there is a strong majority against it, the work might be futile.

Ms. Nilsson pointed out that there were only 17 out of 23 council members present today, so a vote would not be completely representative of everyone who would be voting to publish or promulgate. She stated that this is something to keep in mind if it comes to a vote. Judge Bloom withdrew his motion to kill the committee. Ms. Nilsson prepared a Zoom poll on whether Council members would vote for a rule on abusive litigants in any form. 16 members voted; nine voted in favor and seven against.

Judge Norby stated that she appreciated the vote and the conversation, and that it had given her some ideas about how to better present the issue to the Council.

She stated that she would prepare a short paper answering some of the questions that had arisen in today's discussion to hopefully be helpful to the newer Council members.

2. Composition of Council

Judge Bailey stated that he did not have much to report. He has been trying to get in touch with Susan Grabe of the Oregon State Bar (OSB), but has been unsuccessful. He has contacted other family law judges in other counties to ask whether they would like to see a member of the family law bar join the Council. He has not heard anyone who disagrees with the idea so far. He hopes to do further outreach and then have the committee meet to have a discussion about the procedure that would be required to add a family law practitioner to the Council.

3. Electronic Signatures

Ms. Nilsson explained that she had left this item on the agenda, even though the Council had voted to move the committee's recommendation to amend ORCP 1 to the publication agenda for September, because Ms. Wilson was not at the last meeting and she wanted to give Ms. Wilson the opportunity to comment as committee chair. Judge Peterson noted that he may not have been clear at the last meeting, but he does not think that the Council should be voting to approve draft rules for the publication docket until they are in the Council's format, put together by Ms. Nilsson, so that the exact format and language, including the correct base language of the rule itself, is certain. He also pointed out that the Limited License Paralegal committee may decide to recommend a change to Rule 1, in which case the rule may need to be tweaked further. He suggested leaving this item on the agenda and having Ms. Nilsson produce a draft for Council approval, as well as to allow for the potential for further changes to the draft. The Council agreed.

4. Law School Education on ORCP

Judge Peterson reported that he had met with an associate dean at Lewis & Clark Law School and a professor who has been hired to enhance experiential education at the law school. It turns out that the school is not teaching Oregon Pleading and Practice at all right now. They are probably going to be offering a trial practice class that will attempt to incorporate, in a fairly comprehensive manner, the Oregon Rules of Civil Procedure, and said that they would work with Judge Peterson on that. As Judge Norm Hill reported at the last Council meeting, Judge James Edmonds teaches civil procedure at Willamette University College of Law. Judge Peterson has not reached out to Judge Edmonds, but has reached out to a former colleague at Willamette and has not yet heard back.

Judge Peterson reminded the Council that there had been some discussion about having the OSB address the ORCP in a continuing legal education (CLE) seminar, either biennially as a separate topic or incorporating the ORCP into other CLEs. He stated that Mr. Shields had been in touch with Mr. Andersen with regard to this. Mr. Shields stated that he had talked to the head of the OSB's CLE department, Karen Lee, who is happy to talk to the Council about doing this. He asked whether there is a point person from the Council who would be able to talk to Ms. Lee about the logistics of either creating a standalone CLE or including the ORCP in, for example, the "Learning the Ropes" CLE for new lawyers.

Mr. Andersen stated that he had contacted the executive director of the Oregon Trial Lawyers Association (OTLA) about holding a CLE on the ORCP. She responded that there is a joint OTLA and Oregon Association of Defense Counsel (OADC) seminar in the works in which they could incorporate something about the ORCP. Mr. Andersen stated that this would be an ideal place, because it would be equally applicable to both sides.

Ms. Weeks stated that, as a paralegal, she would appreciate it if training for legal staff was available as well. Paralegals are often sort of the front line in their law firms for making sure things comply with the rules. In fact, she joined the Council as a result of a training put on through OTLA's legal staff listserve at which Judge Peterson presented. Ms. Nilsson asked whether Ms. Weeks was involved in the Oregon Paralegal Association, as that might also be a place where education on the ORCP would be helpful. Ms. Weeks stated that she was not, primarily because most of her work is not in Oregon at the moment, but that she would look into it.

Mr. Kekel stated that he had volunteered to reach out to OADC, and that he had spoken with the president, Peter Toomby, and also with Sheila Cieslik, who heads the litigation practice group. They were very receptive to having a presentation on the ORCP at OADC's annual meeting, and were going to present the idea at the planning meeting for the annual meeting. He has not yet heard back on the results of that presentation. His understanding of a collaboration between OTLA and OADC is that it is very preliminary at the moment, so he is not sure what the outcome of that will be. However, he is hopeful that there can at least be some presentation on the ORCP at the annual meetings of each of the organizations. Mr. Andersen agreed that the collaboration between OTLA and OADC is preliminary.

Judge Peterson stated that the Council should have a point person to get back to Ms. Lee at the OSB to hash out how the Council might serve the bar, how the bar might serve lawyers, and what they think of Ms. Weeks' idea of a program for paralegals and other support staff. Mr. Andersen asked whether Judge Petersen had a recommendation on who the point person should be. Judge Peterson stated that he is willing to do it, but that he is happy to defer if someone else is willing.

Mr. Andersen stated that Judge Peterson would seem to be a natural fit for the position. Judge Peterson agreed to contact Ms. Lee and report back.

5. Limited Practice Paralegals

Mr. Goehler stated that Judge Oden-Orr was unable to be present at the meeting and had asked him to report on behalf of the committee. He referred the Council to Judge Oden-Orr's committee report (Appendix C). He reminded the Council that the preliminary issue was whether this could be handled with a definition, or whether it would need to be handled rule by rule. He stated that the consensus seems to be that the right place to make a change is by definition in Rule 1. The committee is considering some draft language, but feels that it is probably worth taking a closer look before having the Council have a full-blown discussion.

Mr. Andersen asked whether the language proposed in new subsection 1(G) is incorporating UTCR 1.210, or whether a change is required in two places. Mr. Goehler explained that the UTCR change has already been approved and will be coming out in the next UTCR promulgation. The committee's thought was, since that change will be happening with the UTCR, the Council can do something basically parallel to that. It is not exactly lockstep, but moving in the same direction to keep the rules consistent, and to incorporate the limited practice paralegals where applicable.

Ms. Dahab pointed out that there is still some question about whether that single definitional change solves all of the issues. She noted that there are references, for example, to attorney fees, and the committee still needs to figure out whether attorney and paralegal fees apply in every circumstance or whether there are individualized issues that are raised. However, the committee hopes that a single definitional change, pending resolution of those issues, is the solution.

Ms. Nilsson stated that she had provided Judge Oden-Orr with an annotated version of the ORCP that highlighted all instances of "attorney," "lawyer," and "counsel," in the ORCP. She stated that the only references to "lawyer" are in the notice required to be in the summons in Rule 7, in the phrase "Lawyer Referral Service." However, there are 11 references to "counsel." She pointed out that, if the decision were made to go with one definition in Rule 1, there would still likely need to be some cleanup to replace instances of the word "counsel" with the word "attorney," or some other solution to address the issue.

Judge Peterson stated that he thinks that a change to Rule 1 is appropriate. He wanted to raise the issue of attorney fees and the fee shifting statutes. He asked whether a paralegal working on their own qualifies for paralegal fees, and whether this is a substantive change. He wondered whether this is something that the Council can do anything about, or whether it is a matter for the Legislature. Ms. Holland stated that she believes that Senate Bill 306 from the

2023 legislative session already applied instances of attorneys fees to licensed paralegals. She thinks that this is a solved issue, where the Legislature has already said that a licensed paralegal can seek attorney fees in the same way that an attorney can. She suggested that someone on the committee might want to review Senate Bill 306 to be certain. Mr. Shields stated that Senate Bill 306 defined "attorney" to include an LLP who is practicing within the scope of their practice for the purposes of Chapter 90. He could not swear that the bill catches every place there is an attorney fee statute. Judge Peterson stated that this was his concern; the two areas the limited practice paralegals will work in are family law and landlord tenant cases. It looks like there has been a substantive change to make it clear that, for landlord tenant cases, attorney fees also mean paralegal fees, but he does not know that it will necessarily carry over to family law cases. This is a concern that the committee needs to address.

6. ORCP 14/39 E

Mr. Goehler reported that he was not able to get a committee meeting scheduled. He was able to put together drafts for both rules, however, and he will get a committee meeting scheduled in the next few weeks to take a look at the drafts and hopefully bring something back to the Council in February.

Judge Peterson pointed out that, at the last Council meeting, there was a fairly robust discussion about whether the Council's intention was to micromanage the way that judicial districts handle this issue. He stated that the committee's intent, as reflected in the drafts that Mr. Goehler is working on, is to simply make it possible for judicial districts to assist attorneys in depositions who have problems and who reach out to the court for help. The intent is just to avoid the conflict in the rules, where a written motion is currently required. Mr. Goehler agreed, and stated that the intent is not to direct any particular way of doing things but, rather, to permit a judge's assistance.

7. ORCP 31

Mr. Goehler reminded the Council that Judge James Edmonds had raised an issue regarding Rule 31 with the Council. Judge Edmonds had a case in his court against a person who had a claim against a defendant covered by a bond, as well as the bond company. The bond company had other potential claimants to the bond who were unrelated to the claim that the plaintiff was pursuing, but the bond company attempted to bring in these other potential claimants to the case. Judge Edmonds suggested that perhaps the interpleader rule should be expanded to incorporate third-party practice. Mr. Goehler stated that the committee had looked at Rule 31 and determined that it does not seem to be a good fit, because it would require a whole new definition of what a third-party defendant is. A third-party defendant has to have some potential liability to the plaintiff or to the third-party plaintiff, and a party that is completely unrelated to the litigation does

not have that. Mr. Goehler opined that what should have happened in Judge Edmonds' case is that the bond company should have filed an interpleader action under Rule 31, named all the potential claimants to the bond as interpleader defendants, and then deposited the bond money with the court. At that time, any other litigation would be stayed and, at the end of it, the bond company could be dismissed from any litigation. Mr. Goehler pointed out that this is the way Rule 31 works now, and a change to the definition of a third party would be quite drastic. The committee discussed the fact that the rules are designed to accomplish this procedure, but that it could not be accomplished in the original lawsuit.

Mr. Goehler suggested that the Council communicate with Judge Edmonds to let him know that the Council has studied the issue and determined that a rule change is not appropriate if the rules are applied the way they are intended. Judge Peterson agreed. He stated that it appeared that, in Judge Edmonds' case, a party had decided to just throw additional parties into a lawsuit that did not really belong there. With the court's power to stay the initial action that caused the bond company to get nervous, that takes care of everything; the bond company can file its own lawsuit and bring the other parties in, the original case will get stayed, and everything will probably get taken care of in the interpleader case. Judge Peterson offered to contact Judge Edmonds and let him know the results of the Council's efforts regarding this issue.

8. ORCP 55

Judge Norby stated that the committee met on January 3, 2024, and that the meeting focused on paragraph B(2)(c), which provides for processes when a witness agrees to appear by subpoena without the need to be personally served. She stated that this distinction is important, because these processes would not apply to just anyone but, rather, to agreeable, cooperative witnesses who need advice about how to coordinate their appearance. The committee had several aims. The first was expanding the options for service to include service by e-mail, as well as service by more typical mail service. The second was to allow cooperative witness subpoenas to have some flexibility and timing of transmission. If a witness has agreed to attend and testify without personal service, the committee did not necessarily see a need for the notice to be mailed 10 days in advance when the witness has already agreed to the time and date and to waive traditional service. The third was expanding the option for confirming the delivery of subpoenas to cooperative witnesses to shift away from the signature requirement, specifically to avoid the post-pandemic reluctance to touch pens and signature machines. With cooperative witnesses, the committee wanted to create flexibility to include more commonly relied on methods of confirming delivery, like tracking and using unsigned postcards. The committee also wanted to expand the option to certify that service was properly completed to allow for filing of declarations by a party's agent as opposed to only allowing traditional certificates of service.

Judge Norby explained that the committee intends to meet again to review the carryover proposals from last biennium, but that it wanted to allow Council members to provide input on the committee's work to date (Appendix D).

Judge Peterson reminded the Council that the concept of e-mail service to willing witnesses was a Senate Bill in the last legislative session, so it was incumbent on the Council to take a hard look at it. He opined that Judge Norby's work product is much more detailed and better than the Senate Bill, which is the reason why the Council exists. This is one of several charges that the Rule 55 committee is looking at to streamline the system for getting a willing witness to appear. He stated that he believes that the main concern is, if the witness is willing and then does not sign a return of service, is there a workaround so that a party is not suddenly left short without a witness. The goal is to make it easier to show that there is an agreement and that the witness was served, even in an alternate way.

Ms. Nilsson asked whether the committee was going to look into expanding into other forms of electronic service, besides e-mail. Judge Norby asked what other forms Ms. Nilsson was thinking of. Ms. Nilsson mentioned Facebook Messenger and WhatsApp, among others. Judge Norby stated that she is not familiar with the technology, but that she hoped that Ms. Holley, who is on the committee, would be willing to assist her in looking into it. Ms. Holley stated that the committee had talked about including general language about electronic service, but that it had slipped her mind. Ms. Nilsson suggested that the committee look to the changes made to the service rules, specifically Rule 7 D, regarding electronic service, for language that might be helpful.

9. Uniform Collaborative Law Act

Ms. Wilson reminded the Council that a few responders to the survey had made comments about the Uniform Collaborative Law Act (UCLA), and that she wanted to take a deeper look at the issue. She had wanted to connect with the Commons Law Center, because she knows that they have attorneys who use this collaborative approach, but she has not been able to get in touch with them. She has done some research, however, and discovered that about 18 states, plus Washington D.C., use the UCLA. Some do it by legislation and some by rule. It is most commonly used in family law, and it is like another procedure by which people can do mediation. It is, in effect, a limited lawyer practice where a client signs on to have their lawyer help come to a resolution using this collaborative law practice model, which usually stays any litigation. If the parties do not come to an agreement, they get new lawyers for the litigation. There is a model draft rule that can be looked at if the Council is interested in pursuing the matter.

Judge Peterson stated that he has heard the phrase "collaborative law," but he is not certain what it really entails. He asked whether Ms. Wilson envisioned that any ORCP would need to be amended to facilitate more collaborative law practice.

Ms. Wilson stated that she did not think that this would be necessary. She stated that there are already attorneys in Oregon that are using this approach. She does, however, want to contact one of these practitioners and see what their views were on whether any changes to the rules would help; for example, whether it would help to have formalized rules for staying a proceeding to allow this alternative approach to take place. She noted that this might be better handled by the UTCR as a type of alternative mediation scenario, however.

Ms. Nilsson wondered how people are practicing this approach when there is no framework for it in Oregon. Ms. Wilson stated that she is curious about that as well, which is why she wants to speak with a practitioner. Ms. Holley observed that Ms. Wilson had stated that some states have statutes and some states have rules regarding this collaborative law approach. She noted that the Council is unable to make rules that have substantive implications, and cautioned that any changes might need to be left to the Legislature. Ms. Wilson stated that her focus was on how rule changes might need to be made to facilitate this type of practice, for example how a judge would adopt the contract that each side signs that says that they agree to participate in this alternative system. She stated that she has not yet examined the issue deeply enough to determine whether that is or is not a concern.

Judge Peterson suggested deferring the issue for a month while Ms. Wilson makes further inquiries. The Council agreed.

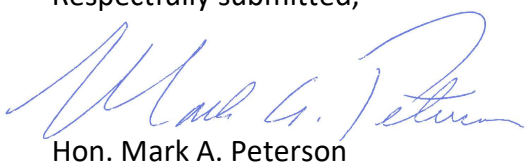
IV. New Business

No new business was raised.

V. Adjournment

Mr. Andersen adjourned the meeting at 10:50 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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		

Council on Court Procedures
January 13, 2024, Meeting
Appendix A-1

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

CCP Summary – Rule 35 Committee Mtg
December 22, 2023 @ 12:30 PM

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

Absent: Judge Bailey

Summary

At our December 2023 full Council meeting, the Rule 35 Committee introduced a preliminary draft which incorporated revisions to the 2021-22 Biennium proposed rule. The revisions focused on crystallizing the definition of an "Abusive Litigant" to link it directly to bad faith and the shielding of protected persons under the law. The revisions also neutralize language that appeared to be skewed against plaintiffs and unduly empowering to defendants.

At today's meeting of the Committee, we further discussed the new proposed definition and its merits, compared to the definition in the 2021-22 Biennium draft rule. The Committee is unified in approving of the new definition created by Ms. Holley, in consultation with Ms. Dahab. Ms. Holley noted that the re-written definition may be over-reaching to extend to all protected persons under the law, including those who may not be parties to a case. The Committee agreed that we only have the authority to control abusive of a party by another party through this rule procedure, and it should not extend to be a tool for reining in misconduct against witnesses or other non-parties. The reference to protected persons as a separate category from abused parties was deleted. In turn, the definitions that flowed from the inclusion of protected parties was also deleted.

Ms. Holley also raised a concern that the existence of an Abusive Litigant rule could be taken by some less ethical attorneys as an invitation to find a use for a process that would otherwise lie dormant. Members asked whether creating the rule would meaningfully help the courts, since courts already have the authority. We talked about whether we have an obligation to refrain from action that is important, helpful, and meaningful protection for many out of fear that a few may attempt to misuse it.

Committee members also raised the question about whether the current case law on this process is sufficient to give the courts what they need to provide protection to abused litigants without a rule being adopted. There appeared to be consensus that the practice is not well known, not standardized, and not easily accessible to lawyers or judges. Adopting a rule that standardizes it will allow courts to understand the option, its limitations, and the correct procedures to use in applicable situations. It will also help attorneys understand the same things.

Ms. Holley and Ms. Dahab suggested further refinements to the language of the new proposed rule, which were generally well received by the Committee members. We shared some optimism that the new proposed rule captures the concept of abusive litigation that justifies protective measures, and accurately describes what the measures can and should be. The current rule draft is attached.

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.

B(2) 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(3) 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 Factors the Court May Consider. To determine whether a party is an abusive litigant as set forth in B(1), in addition to any other indicia of 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; or

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 must 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. The filing of a motion for hearing to designate a party as an abusive litigant stays pleading or response deadlines. After the presiding judge makes a determination on the merits of the motion, deadlines are set at the longest of the following, unless the court directs otherwise: their original date, within 10 days of the order, or within 10 days of the deposit of security.

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 issuing 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.

Shari Nilsson <nilsson@lclark.edu>

Report on License Paralegal Incorporation to ORCPs

Melvin Oden-Orr Tue, Jan 9, 2024 at 8:45 PM

Kelly, I will be on vacation and traveling this weekend and unable to make the meeting. The subcommittee had a discussion, and the consensus is a possible change to ORCP 1 would be a good way to address Licensed Paralegals in the Rules. There were still some questions as to whether such a change would address all the issues. Nevertheless, we specifically discussed creating a new 1G, and making the current 1G a new 1H. The language (slightly modified here) considered was the following:

New 1G

"Where applicable, all references to "attorney" shall include, when applicable, a Licensed Paralegal for activities performed within a Licensed Paralegal's scope of practice and otherwise are authorized by the Rules for Licensing Paralegals and Rules of Professional Conduct for Licensed Paralegals, the Oregon Rules of Professional Conduct for Licensed Paralegals, and other applicable statutes and Supreme Court rules."

As additional background, the UTCR committee approved the following provision to address the same issue:

UTCR 1.210 APPLICATION OF UTCRS TO LICENSED PARALEGALS

"Unless the context requires otherwise, or unless otherwise stated in the rules, when these rules refer to an attorney, they also apply to a licensed paralegal representing a party within the scope of the Oregon Supreme Court Rules for Licensing Paralegals."

In the update from OSCA distributed on 12/15/23 they explained the following with respect to the UTCR changes:

UTCR and Other Updates

The Chief Justice has approved amendments to existing Uniform Trial Court Rules (UTCR) and the adoption of new UTCR 1.210, which provides that when a UTCR refers to an attorney, that UTCR also applies to licensed paralegals practicing within the scope of the Rules for Licensing Paralegals (RLP), unless the context or the text of the rule requires otherwise. Other conforming changes to UTCRs replace references to "counsel" and "lawyer" with "attorney," so that that term is used uniformly throughout rules that apply to licensed paralegals. UTCR 13.090 was amended to clarify that arbitrators must be attorney members of the bar and that, for the purposes of that rule, "attorney" does not include licensed paralegals.

I hope this is helpful in moving this conversation forward.

CCP Summary – Rule 55 Committee Mtg
January 3, 2024 @ 1:00 PM

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

Not Attending: Marguerite Weeks

Summary

The focus of this meeting was on Section B(2)(c), which provides for processes when a witness agrees to appear without the need to be personally served. The updates discussed by the committee are aimed at the following goals:

1. Expand the options for service to co-operative witnesses to include service by email, as well as by mail services.

2. Allow for flexibility in the timing of transmission of subpoenas to cooperative witnesses who agree to attend and testify without personal service.

3. Expand the option to confirm delivery of subpoenas to cooperative witnesses to shift it away from a signature requirement (due to post-pandemic reluctance to touch signature machines and pens) and toward more commonly relied upon methods of confirming delivery, like tracking and use of unsigned postal cards.

4. Expand the option to certify that service was properly completed to allow for filing of Declarations by a party's attorney or agent.

The Committee plans to meet again in January/February to review the carry-over amendment proposals from the last biennium, but seeks the Council members' thought on the proposals summarized above, and shown in the attachment on p. 3.

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

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 within a specific timeframe using mail or e-mail to a designated address that the witness confirmed is accurate;

B(2)(c)(i)(B) the specific date, time and place for the witness to appear and testify was coordinated with the witness and agreed upon, 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 within the timeframe agreed upon.

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~~Confirmation of receipt. If mailed, ~~T~~the subpoena was ~~mailed more than 10 days before the date to appear and testify~~sent in a manner that provided a signed receipt on delivery, or provided tracking service that confirmed delivery, and:

B(2)(c)(iii)(A) If mailed with signature on delivery, then the return receipt confirmed delivery within the agreed upon timeframe, or~~the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receiptmore than 3 days before the date to appear and testify.~~

B(2)(c)(iii)(B) If mailed with tracking service, then the tracking shows that the mail was delivered within the agreed upon timeframe.