MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 10, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Nadia Dahab
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
Stephen Voorhees
Margurite Weeks

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Christopher Garrett
Michael Shin
Hon. Wes Williams
Alicia Wilson

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 Moved to Publication Docket	ORCP/Topics to be Reexamined Next Biennium
• Abusive Litigants • 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ORCP 71	• Annotated ORCP • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • UTCR 5.100	• ORCP 14 • ORCP 39	

I. Call to Order

Mr. Andersen called the meeting to order at 9:30 a.m.

II. Administrative Matters

A. Approval of January 13, 2023, Minutes

Mr. Andersen asked whether anyone had corrections to the draft minutes from January 13, 2024 (Appendix A). Judge Peterson stated that, on the last line of the first full paragraph on page 12, the phrase "could be accomplished in the original lawsuit," should read, "could not be accomplished in the original lawsuit." Mr. Goehler made a motion to approve the minutes, as amended by Judge Peterson. Ms. Johnson seconded the motion, which was approved unanimously by voice vote with no abstentions.

III. Old Business

A. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson noted that the Court of Appeals had referenced staff comments in a recent decision, which shows that they are important. He stated that the comments are more than halfway completed, but that he had been ill and not been able to complete them. He hopes to get them to the Council before the next meeting.

2. Executive Director Stipend

Judge Peterson explained that he has been the Executive Director of the Council since 2005, when he took over from Maury Holland at the University of Oregon. He actually did not receive a stipend for the first biennium, because the Council did not get funded that biennium due to a dispute in the Legislature. He served that biennium for free. The Council's biennial allotment from the Legislature is now approximately $57,000, and Judge Peterson's monthly stipend is $1000, which has not increased since 2007. Judge Peterson has felt for some time that this is not an adequate amount. When he met with the Associate Dean and new professor of practice at Lewis & Clark Law School, he mentioned that, at some point, he would retire from his Council work and would need to canvass the three law schools in Oregon to find an appropriate replacement who teaches pleading and practice. He was told that a $1,000 monthly stipend probably was not going to interest anyone enough to take the position. Judge Peterson noted that it seems inappropriate to substantially raise the stipend when someone new is hired; that would be unfair to the person who has been doing the work for a period of time.

Judge Peterson noted that he had held back from bringing up the subject because the Council's budget has been lean. He recently discovered, however, that the Oregon Judicial Department (OJD) did not know to send the Council's biennial allotment to the law school's restricted account a few biennia ago. Those funds have now reached the appropriate account, so there is now a surplus that must be spent down. Judge Peterson stated that he has spoken with Phil Lemman at the Oregon Judicial Department (OJD), under which the Council's budget resides, and mentioned that he believes that the stipend is too low. Mr. Lemman stated that the Council can seek additional funding next biennium. Judge Peterson stated that, while he is uncomfortable asking, the takeaway is that he is, indeed, asking for an increase in the stipend. He stated that he has no intention of going away any time soon, but that part of good leadership is planning for succession. He would like to set the Council up so that it can attract a good candidate at some point in the future and so that he can get them trained to do the work.

Mr. Andersen asked whether Judge Peterson was recommending that the stipend be increased to $1500. Judge Peterson confirmed that amount. Mr. Andersen asked whether Ms. Nilsson's salary should also be increased. Judge Peterson stated that Ms. Nilsson received regular raises when she was an employee of the law school and that, now that she is a contract employee, she will continue to do so. Even with the increase in costs for Ms. Nilsson to work from Sweden and the increase in the Executive Director's stipend, there will be enough money to spend down the surplus in the Council's restricted account at the law school.

Mr. Andersen asked for details on how the Council spends the $57,000 per biennium it is now allocated. Judge Peterson explained that the Council has a partnership with the law school that includes office space, printing, and storage space for the Council's records. The funds from the Legislature pay for staff costs, the website, software, and other incidentals not provided by the law school. He believes that this is a very good return on the dollar for the state of Oregon.

Judge Norby asked whether the Council, or some subgroup of the Council, could sign off on some kind of letter to the people making the budget decision about their observations of the degree of work and dedication that Judge Peterson provides. This would be a record of the Council's support of this request.

Mr. Shields suggested talking to Mr. Lemman very early in the budgeting process for next biennium. If the Council gets the request included in OJD's initial ask, it will probably sail through with no questions because it is such a small amount of money. Asking for an increase during the legislative session is a much bigger lift. Judge Norm Hill stated that an ask should be made now, because OJD is currently formulating requests. He suggested that the request might even be a few weeks late already.

Judge Jon Hill stated that he was not sure if this is enough of an increase for the long term. He suggested building in some sort of structure for the future, such as cost of living increases. Judge Norby made a motion to increase the Executive Director stipend to $1500 a month, with a provision for cost of living increases. Ms. Weeks seconded the motion. The motion passed unanimously by voice vote with no abstentions.

Mr. Andersen asked about the mechanism to put this into effect immediately. Judge Peterson asked Mr. Shields whether a letter directed to Mr. Lemman at OJD would be appropriate. Mr. Shields asked whether Judge Peterson was asking about the budget ask or an immediate change to the stipend. Judge Peterson stated that he was referring to the budget ask. Mr. Shields stated that he suggested starting with Mr. Lemman and that there may be a point down the road when a letter to the appropriate legislative committee would make sense. Judge Peterson stated that, with regard to the immediate stipend increase, there is enough money in the Council's current reserves to cover that. He noted that it would not be good to ask the Legislature for an increase when there is a reserve.

Mr. Anderson worried that the two separate issues of an immediate stipend increase and a budget ask may be being conflated. He asked if someone could provide some guidance or untangle the two issues. Judge Peterson stated that the increase to $1500 will remove the accidental surplus. Asking the OJD to increase the budget sufficiently to pay for the realistic cost of having the Executive Director services provided would be appropriate. He stated that he could provide some figures for whoever might be drafting the letter. Mr. Andersen asked whether the letter to the OJD would have more clout if it came from a judge. Mr. Shields stated that he thinks that it makes sense for the letter to come from the Council itself, so perhaps from the current chair. Judge Norby stated that she had collected a lot of letters on Judge Peterson's behalf when she nominated him for two years running for the Professionalism Award from the Commission on Professionalism. She stated that she could use those letters, combined with her nomination letter, to draft something that Mr. Andersen could either adopt or use parts of. Mr. Andersen agreed and suggested that both he and Judge Norby could sign the letter.

B. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby reminded the Council that she had sent the documents contained in Appendix B to individual Council members the previous week. Those documents include a general statement and a chart with responses to concerns that have been expressed by Council members. Judge Norby stated that she wished to begin with a statement before opening up the topic for broader discussion. She explained that the Council on Court Procedures was created to end a hundred

years of disagreement and confusion about Oregon's trial court processes. The Council is unique because it includes attorneys and a public member in rule-making that other states only entitle judges to do. The idea behind the Council was that including voices from practitioners and a public member would shape better, fairer processes than judges could create alone–by reaching acceptable compromises when dissension threatened to obstruct the completion of rules needed by courts.

Judge Norby noted that the Council crafted 57 rules in 1978, and 18 more in 1980. It left nine rule numbers open for expansion. No new rule has been created since 1980. It is now 45 years after the Council's creation, and modern-day Council members enjoy dissension and debate as much as those in the 20th century did. However, Judge Norby opined that the notion that any new rule is a bad rule is a false premise, the same false premise held for 100 years before the Council's creation. The notion that partisanship can and should be used to block the formation of a court rule for a process already in use, is not a notion that is consistent with the goal of using diverse attorney voices to shape a better process, as the Council was designed to do. If the Council fails to form a rule that the courts need, then judges can do so themselves through Supplementary Local Rules. But, if the Council continues to fulfill the purpose it was created to serve, it will not force judges to act autonomously. Instead, as it did between 1978 - 1980, it will help shape a compromise process that is better, fairer, and more uniform, to help judges get it right.

Judge Norby stated that the proposed abusive litigant rule distills a process used in Oregon to put a minimal safety measure in place after a litigant has demonstrably abused court processes to cause suffering to another litigant in the past. She stated that this is, thankfully, not a frequent occurrence, but when it happens, it is brutal. She stated that, not only is it wrong for the abused party to have to continually oppose, fight back, and show up in court for no good reason; it is also wrong because it makes judges themselves complicit in the abuse of process. Judges must preside over the abusive proceedings and, thus, become a part of that abuse. They have no way to extricate themselves, and essentially become the puppets of the abusive litigant. This has the added problem of presenting to the public as destructive, as onlookers fail to understand why the judge does not do something to stop what is happening. Absent the ability to initiate an abusive litigant process, many judges cannot do anything but watch abusive litigation unfold. Although processes to stop such litigation currently exist, they are only known to experienced judges, and are difficult for busy judges to figure out.

Judge Norby opined that the evidence that courts need this process is the number of courts that already have laws in place to guide it, among them California, Florida, Hawaii, Ohio, Idaho, Georgia, Texas, the United Kingdom, Scotland, Ireland, Australia, New Zealand, Canada, India, and the US federal courts. She

stated that this process is not an endorsement of any prior case or use of the process but, rather, a measure that simply allows judges to preview future pleadings for colorable merit, after a litigant has demonstrably abused court processes to cause suffering to another in the past. It is a limited safeguard against targeted injustice that hurts people, not a barrier to justice for reasonable litigants. It is also a way to protect against judicial complicity in the abuse of process, so that the public will not perceive judges as even worse representatives of justice than they already do.

Judge Norby pointed out that, in the chart and statement in Appendix B, there are annotated responses to specific individual concerns expressed in past meetings. She understands that some Council members are afraid of unintended consequences that may arise from use of the rule. However, as a judge who has seen abuse of process firsthand, she believes that concern about imagined, possible future issues should not override the need to address a known, certain, immediate issue. She asked the Council to return to its original mission, which was not to hide, remove, or block court processes already in use but, rather, to help judges by making existing processes be the best they can be through compromise and cooperation.

Judge Jon Hill stated that, from his point of view, the first question for the Council is whether it wants to be involved in this process or whether this will essentially become a series of different supplemental local rules (SLR) in different counties throughout the state. He stated that this is what he envisions happening if the Council does not take action.

Mr. Kekel stated that he did not necessarily have a comment for or against creating a rule, but that he had been contacted by the board of the Oregon Association of Defense Counsel (OADC) and that the group will be discussing the issue at its board meeting on January 21, 2024. The OADC has asked to have an opportunity to provide input to the Council before any final decisions are made. Judge Norby stated that she would appreciate hearing those thoughts.

Mr. Goehler stated that he would like to second Judge Norby's comments. He opined that having a rule would provide consistency across the state and would also provide judges with the guidance and the framework to deal with this situation when it arises. He pointed out, especially for the newer members of the Council, that a lot of work had already been done on crafting the rule during the prior biennium, so the lift here should not be as heavy in making adjustments to that prior draft. Judge Norby stated that Ms. Holley and Ms. Dahab had already made substantial adjustments to last biennium's draft that she believes create a more balanced rule. She is not certain, however, whether those adjustments would be used if SLR committees ended up picking up the ball if the Council were to drop it.

Mr. Larwick stated that he was on the committee last biennium. He recalled that the main concern was self-represented litigants who were filing the same case against the same defendants in multiple counties. Judge Norby stated that this has been her personal experience. However, in doing research to try to demonstrate that this is a problem not just in her county or in her experience, she located many cases that had other scenarios. Apparently, it is a bigger problem in some jurisdictions. Mr. Larwick stated that proposed section E of the most recent draft that was circulated at the last meeting states that the order can prohibit an abusive litigant from commencing any new action or claim in the courts of that judicial district. He pointed out that the rule as drafted would not prevent a self-represented litigant from filing in other counties. Judge Norby stated that she did not have that draft before her, as she intended to discuss the concept and not the specific content at today's meeting. She stated, however, that the intent of the draft is to require a pre-filing review by the presiding judge of any future litigation, and that would be statewide. Mr. Larwick asked whether the concept is to create a process to allow judges to create additional obstacles to litigants who they have determined to be abusive or vexatious. Judge Norby stated that Mr. Larwick could call it an obstacle, but that it is a pre filing review that requires a presiding judge to look at any new cases filed to see if they have colorable merit. If the cases do have merit, they are allowed to be filed; if they do not, they are not allowed to be filed.

Mr. Larwick stated that, as he listened to Judge Norby's opening remarks about litigants creating unnecessary litigation that causes a drain on court resources and on the parties, as a plaintiffs' lawyer, all he could think about is insurance defense practices that intentionally delay and create unnecessary litigation costs that cause a huge strain on the court system on a much larger scale than anything that has been discussed so far. Judge Norby stated that a strain on the court system has never been her top concern. Her top concern is about the injustice and the cruelty and the ability to make judges a part of that when a person is using the court to target another person just to harm them. The way she has typically seen it happen is that a plaintiff files a case without an attorney, and is able to get filing fees waived. The defendant is sometimes able to get a fee waiver, sometimes not, and sometimes must hire a lawyer, depending on how many times they have been through the process. Judges are then forced to repeatedly preside over these cases, which means that they are the ones making this targeted person go through the processes over and over again with no recourse, at their expense, their children's expense, and the expense of justice not working and the judge being part of it. Her main concern is the injustice of it all. Mr. Larwick stated that, as long as the rule is broad enough to capture insurance companies that use those same practices to their advantage, so that it is not just against plaintiffs, then he could be persuaded. Judge Norby stated that Ms. Holley and Ms. Dahab had helped to broaden the rule to ensure that it can be used both by plaintiffs who bring claims and also by defendants. One of the goals this biennium was to include plaintiffs' bar members in the committee in order to ensure that the rule was

more neutral and could be used by a broader swath of people. Mr. Larwick asked whether the concept of the rule includes a mechanism for removing the "scarlet letter" of being declared an abusive litigant. Judge Norby stated that it does not at the moment, but that it could. She stated that she had, in fact, found a rule in another jurisdiction that includes such a mechanism.

Ms. Holley stated that she understands the concerns that led to the desire to create this rule, and that she is sympathetic to the worry that the court is being complicit in abusive litigation. She stated that she believes that Mr. Larwick's perspective is how many plaintiffs experience the court system as also being somewhat complicit in harms that occur to plaintiffs. Because the abusive litigant problem primarily occurs with self-represented litigants, she wondered whether some kind of notice to self-represented litigants might be a better first step than an ORCP. In the interest of transparency to self-represented litigants, she does not necessarily think the ORCP are the most accessible instruction to them about the potential that they could be labeled abusive, because she is not confident that self-represented parties access the ORCP in the same way that lawyers do. She stated that she understands the danger of less balanced SLR being created but, because this is not an "attorney problem," she tends to think that there are other steps that could be more effective and invite fewer potential barriers.

Judge Norby responded to Ms. Holley's statement about self-represented litigants not being familiar with the ORCP. She agreed; however, she noted that court staff becomes quite familiar with both the ORCP and the Uniform Trial Court Rules (UTCR), and the people who assist self-represented litigants most are court staff. If there is something in the rules about which court staff can inform self-represented litigants, court staff will. However, if there is no process that exists, they will have nothing to tell them. Ms. Holley pointed out that court staff would also be familiar with forms. She thought that there might potentially be some notice of what already exists, and perhaps judicial education about what already exists might be a way to help mitigate the problem. Judge Norby stated that the problem is that what already exists is being interpreted so differently by so many different judges with different levels of experience, so any notice about procedures and consequences would be likely to be incorrect if there are not consistent practices.

Judge Norm Hill stated that he believes that Ms. Holley's comment actually highlights another benefit to having a rule. If the Council is just relying on the inherent power of the court to deal with this issue without a specific rule, it creates two problems. The first is that it is no longer completely evident what the inherent authority of a judge is–it seems to change frequently. More significantly, having a judge exercise something that is described as inherent authority fuels the paranoia of the very people who are abusing the court system and turns a judge into the "bad guy" who is involved a grand cabal that is targeting them. Judges would have a much easier lift if there is a concrete rule that allows them to find

facts that a litigant fits within. Judge Norm Hill stated that he did not fully understand Mr. Larwick's concern about insurance defense attorneys causing delays. He stated that he sees this as a different problem than what the Council is trying to solve with the abusive litigant rule: vexatious litigants.

Judge Peterson remarked that some judicial districts do not end at county lines, so an SLR for certain judicial districts would encompass several counties. He stated that, if an ORCP about abusive litigants were to be created, one positive aspect would be that it would get flagged in the Odyssey system so that abusive litigants would be red flagged beyond the district in which the presiding judge had named them as abusive. With regard to the fact that self-represented litigants do not read the ORCP, many lawyers do not read the ORCP either. However, having a rule means that at least it is a written law and is available for people to find. Judge Peterson agreed with Mr. Goehler that having uniformity is a good idea.

Ms. Dahab stated that she appreciates the concerns that the proposed rule is intended to address. She noted that she continues to have the same concerns that she has previously expressed and that others have articulated about the potential unintended consequences of the rule and the harms that might flow from it. Ms. Dahab asked Judge Norby to elaborate on her earlier comments about different judicial interpretations and how courts are concerned about what they can and cannot do with respect to abusive litigants. Judge Norby noted that she had first encountered an issue with an abusive litigant in her first six years on the bench. She stated that she could not speak for other judges, but that she was still quite overwhelmed trying to master the everyday tasks of a judge–how to communicate with the people in front of her, how to troubleshoot problems, how to learn all of the different areas of law that she needed to know as a general jurisdiction judge, how to manage self represented litigants, and all of the other things that judges need to master. At that time, she hardly had the bandwidth to identify the problem, let alone understand whether there was something she could do about it. When she encountered the problem again, she started to ask colleagues if there was something that could be done about the problem, and she received a range of answers. She talked with judges from other jurisdictions at conferences and events as well, and received inconsistent responses. Some judges stated that there was a process in federal law, so she started to look there, as well as at case law. There is not just one federal process but, rather, different ways to handle abusive litigants in different federal jurisdictions. Different judges view the process differently: some think that it requires a hearing and some think that a party can just be declared vexatious, especially when they have no attorney.

Mr. Andersen asked Judge Norby to confirm that she has dealt with a case of an abusive litigant just six times in her 18 years on the bench. He noted that this is only once every three years. She stated that this is an approximate number, but that it is probably close to accurate. She stated that it is not common but, when it happens, it is very obvious. It is so obvious that judicial clerks ask the judges why

they cannot do anything about it. Mr. Andersen stated that Judge Norby had cited about half a dozen states that have adopted a rule. He asked about the other 44 states that have not adopted a rule. Judge Norby stated that she had not researched every state, so she did not know whether they had all considered adopting a process. She stated that there may be more states or jurisdictions that have rules, and that her list is not exclusive. She did not think it was worth the committee's time to try to give an explanation for every jurisdiction that does not have a rule on abusive litigants. Mr. Adams mentioned that a 2023 article from the National Center for State Courts shows that there are potentially 12 states that have vexatious litigant rules.

Mr. Andersen asked why the current sanction of up to $5000 for filing a frivolous lawsuit is not adequate. Judge Norby stated that self-represented litigants do not know about that sanction and, even if they did know about it, the majority would not care because they are judgment proof. Mr. Andersen asked how a rule that self-represented litigants would not read would change that ignorance factor. Judge Norby stated that it would not, but that it would allow judges to take action in a balanced and fair way to try to limit the damage to the targeted party who is being abused. Mr. Andersen asked why the existing sanctions already in the statutes do not accomplish that. Judge Norby stated that she cannot speculate as to why abusive litigants keep filing frivolous lawsuits and why those sanctions are not asked for or are not imposed; she can only say that abusive litigants do continue to file cases and that sanctions either are not asked for or are not imposed or, if they are imposed, they are not paid. Mr. Andersen asked how a new abusive litigant rule being adopted would change this. Judge Norby stated that a pre-filing review would allow judges to stop the ongoing repetition of the same cases being filed against the targeted people who are being abused. Judge Peterson clarified that the $5,000 sanction is part of ORS 20.190, the enhanced prevailing party fee.

Judge Norby stated that her take from this discussion is that Council members are thinking more deeply about the reasons for a potential rule on abusive litigants, which is what she wanted, and she appreciates this. She stated that, during her tenure on the Council so far, the Council has only amended rules, not created new ones. She has always been focused on the content of rules, and she had done that with this rule as well. However, she realized after the last meeting that the first step should be discussing whether a rule is needed, why it might be needed, and the potential for compromise to try to get the rule right. She stated that she understands that there are still concerns, and that she would like to try to draft a procedure whereby the abusive litigant designation could be removed and bring the draft rule back to the Council for discussion. She would also like to hear from OADC.

2. Composition of Council

Mr. Kekel reported on behalf of the committee, as Judge Bailey was unable to attend the meeting. The committee met and discussed the history of the Council. Some concerns have been raised about adding family law practitioners to the Council, specifically concerns about whether it would create a politicization of the Council by removing a plaintiffs' lawyer and a defense lawyer and adding two family law lawyers who are, arguably, neither. This might affect the dynamics of the Council. Mr. Kekel reported that the OADC is aware of this issue and that its board would like to have the opportunity to present its view to the committee. It is his understanding that OTLA has also been discussing the issue. Mr. Kekel stated that the committee's plan is to get input from both organizations and to meet again and report back to the Council.

Ms. Johnson stated that OTLA also has some concerns. She noted that, in the past, when the Council has been perceived to be perhaps a little lopsided, it has jeopardized the working of the Council. She stated that she had mentioned to Judge Bailey that both OTLA and OADC have family law members, and that OTLA has probate law members. She recalled the committee had considered asking OTLA and OADC to look more deeply into their memberships to recommend a broader spectrum of civil lawyer representation as potential Council members.

3. Electronic Signatures

Judge Peterson reminded the Council that, at the last meeting, it had approved preliminary language from the committee for an amendment to ORCP 1 regarding electronic signatures. He pointed out that it is a better practice to put any language for an amendment into standard Council format before sending it to the agenda for the September publication meeting. Accordingly, Ms. Nilsson took the language approved by the Council at the last meeting and put it into the Council's format (Appendix C), including additional suggestions from staff. Some of these suggestions are to bring the rule into conformity with Council standards, such as eliminating the word "shall." Judge Peterson explained that staff had also suggested adding a definition for affidavits, since the new language discusses affidavits but the rule does not define them. Definitions for "signatures" and "signed" are also included, because those terms are also referenced in the rule.

Judge Peterson noted that staff had two questions for the Council. In subsection E(3), the "under penalty of perjury" language immediately precedes the signature. However, for declarations made outside of the United States, that language follows the signature. He wondered whether that inconsistency should be fixed. He also wondered whether the reference to "except a summons" in section E should be removed. He stated that, at the time that Rule 1 was last revised, the Council believed absolutely that a summons had to be a paper document that made contact with a defendant's hand. However, since the Council made changes

to Rule 7 D allowing for the electronic service of summonses, it might be appropriate to no longer exclude summonses in section E, since it is no longer technically correct. Ms. Weeks thanked Judge Peterson for bringing up the issue of removing summonses from the language in section E. She stated that this seems to be a good revision, since summonses are not always paper documents now.

Judge Peterson pointed out that the limited license paralegal committee may also be making changes to Rule 1, so this may not be the final version of the rule that is published in any case.

4. Law School Education on ORCP

Judge Peterson reported that he had connected with both his former colleague at Willamette University College of Law and with Judge James Edmonds, who teaches a class called Pre-Trial Litigation. The class is three credits and it does discuss the ORCP. The class is capped at 19 students per year, because Judge Edmonds does not grade on a curve and, with 20 students or more, grading on a curve is required. This means that just 19 students a year at Willamette are being exposed to the ORCP. Judge Peterson stated that, when he taught the ORCP at Lewis & Clark, there were typically about 35 students in the class. That class is not currently being taught at LC; however, there will be a pre-litigation class taught there next year. Judge Peterson acknowledged that not every student who is admitted to law school should necessarily be geared up for litigation, because many of them do not go that route. However, it seems to him that, whether it is 19 or 35 students that are being exposed to the ORCP, that is a little short of the mark. Ms. Johnson stated that a pre-trial litigation class is offered every other year at the University of Oregon School of Law, but she was not aware of the student headcount.

Mr. Andersen asked whether the U of O law school teaches the federal rules of civil procedure in the first year. Judge Peterson stated that it is his understanding that pretty much every law school in America teaches the federal rules of civil procedure in the first year, when students do not understand anything about either procedure or any of the substantive issues of the many cases that are being used to point out these specific rules of civil procedure. He stated that he found many students saying, “This finally makes sense to me,” after taking his ORCP class.

Mr. Andersen reminded the Council that part of the impetus for this discussion is also education of attorneys. He stated that he has heard from Beth Barnard, Executive Director of OTLA, who said that a joint program between OTLA and OADC is definitely in the works and that they welcome a presentation from the Council on the ORCP. A date is yet to be determined. Mr. Kekel stated that he had spoken to OADC and that this is also his understanding. OADC is also interested in having a presentation on the ORCP for defense counsel, perhaps at its annual

meeting, and OADC's board will be discussing the subject at its upcoming board meeting.

Judge Peterson asked anyone who had a suggestion about what, if anything, the Council should communicate to the three law schools in Oregon, to please let him know. He then reminded the Council that, at the last meeting, he was asked to follow up with the Oregon State Bar regarding continuing legal education (CLE) programs. He stated that he had spoken with Karen Lee, who is in charge of the Bar's CLE programs. Much of the Bar's CLE programming has changed over the years, and a lot of it is provided by outside sources. Most of the Bar's programming is co-sponsored by Bar sections. Ms. Lee stated that the department will discuss adding a an hour or two of the ORCP to day-long CLEs, similar to how ethics is handled. This will be suggested to the different Bar sections in terms of their programming. Judge Peterson stated that he had suggested to Ms. Lee that finding people to prepare the materials and do the presentation is the biggest hurdle to overcome, and the Council does have people available to do both of those things. He stated that he would keep the Council informed about his discussions with Ms. Lee.

5. Limited Practice Paralegals

Judge Oden-Orr stated that the committee was leaning toward recommending an amendment to Rule 1, but that there were still some questions about some other provisions of the rules and whether such an amendment would encompass all of those issues. He stated that the committee would meet again and report back at the next Council meeting.

6. ORCP 14/39 E

Mr. Goehler reported that the committee had formulated a working draft and that he had sent the draft to Ms. Nilsson to put into Council format. He stated that, at this point, the draft (Appendix D) is ready to be considered by the entire Council.

Mr. Goehler reminded the Council that the issue at hand is dealing with the practice of getting assistance from a judge during a deposition to resolve a dispute that may have come up during the course of the deposition. Rule 39 requires a motion for assistance, but Rule 14 states that all motions must be in writing. The committee looked at both rules to see what would need to be done to allow for the practice of getting a judge on the phone or otherwise to assist during the course of a deposition without having to file a written motion.

Turning first to Rule 14, one of the things the committee did was to make a fairly simple change from the rule's current requirement that, except for during trial, motions must be in writing. The change is to say that, unless the motion is made

during trial, in open court, or during a deposition, it must be in writing. One issue for discussion by the Council is whether to include "open court." The thought behind it is motions such as a motion for continuance made during, perhaps, a hearing, not a trial. Mr. Andersen asked why the words "open court" were chosen instead of just "court." Judge Norby stated that there are many things that happen in the office space that exists "in court." The phrase "open court" denotes being on the record in a courtroom, as opposed to anywhere else in the court building. Mr. Andersen wondered whether a judge could look at the proposed language while in chambers and suggest that, while the jury is in recess, the parties go into open court and put something on the record. He wondered whether that would be a good thing or a bad thing. Judge Norby opined that this would be a good thing, because she does not think that a motion should be made off the record. She stated that the things she was thinking about with open court were things like motions to change a date to give a tenant time to fix a problem during a first appearance in an eviction case. That is not a trial, but it happens in open court, and these are the kinds of motions she wants to be allowed without having to be in writing.

Judge Peterson stated that this is a case where the rules are not consistent with practice. He noted that judges do hear motions in open court on the record, and not necessarily at trial, and grant them routinely. He stated that he was not sure that "open court" is necessarily the best phraseology, but the idea behind it is that it needs to be a scheduled hearing where there is a record and that everyone has a right to be heard. Judge Oden-Orr stated that perhaps "on the record" would be a more clear term. Mr. Andersen noted that, in the days of actual court reporters, as opposed to electronic recording, sometimes the judge would have a court reporter come back to chambers and make a record. He stated that he did not know if that is even an option now. Judge Norby stated that it is not an option now. She stated that the only other place she could imagine motions happening outside of court would be at civil commitment hearings in hospitals; that would be on the record, but it would not be in court, per se.

Mr. Larwick stated that, if the rule were broadened to include everything that is on the record, the requirement for written motions would be eliminated altogether. He also expressed concern about oral motions on the fly in hearings, because it is easy for him to imagine a situation where a defendant files a Rule 21 motion against a complaint and then, at a hearing, recasts it as a summary judgment motion, not giving the plaintiff enough time to respond appropriately. He stated that he is in favor of the writing requirement, just to further due process. Mr. Goehler stated that he thought that this would be covered by Rule 47's fairly strict timelines. He opined that a motion for summary judgment with no response would not be granted on the fly, and that the other rules that are more specific, like Rule 21 and Rule 47, will carry the day. Judge Peterson pointed out that UTCR 5.030 allows 14 days for a response as well. Mr. Larwick asked whether this is also true for motions made during a deposition, or whether the UTCR would

have to be changed with regard to response times. Ms. Holland stated that she could not say for certain without the UTCR Committee taking a look at the Council's final language is, but that the UTCR Committee would adjust to whatever the Council does. Judge Norby stated that she has not done a deposition in a very long time, but it seems to her that, because judges are not there in the room during a deposition, there would not be a lot of that going on.

Ms. Holley asked whether it made sense to adjust the language to say "evidentiary motions made an open court." She asked whether that is the limited role of such oral motions, or whether there are other kinds. Judge Norby stated that they can also be related to scheduling or permission to appear remotely at an upcoming hearing. Mr. Andersen stated that he was still troubled by the phrase "in open court," and that he did not think that it was necessary. He thought that "unless made during trial or during a deposition" would be more appropriate, or perhaps "unless made during trial, during a hearing, or during a deposition."

Judge Oden-Orr stated that the question about response times made him think that, if someone makes a motion for judicial assistance during a deposition, it provides a basis for stopping the deposition that day to allow the parties to get judicial assistance. Then, once the court rules, the deposition can be continued. Mr. Goehler stated that his experience has been that, when an issue arises in a deposition, the parties simply call a judge, who can make a ruling on, for example, whether or not the deponent must answer a question. Going strictly by the existing rules, a written motion would need to be filed, the deposition stopped, a hearing held some time down the road, and the deposition resumed perhaps months later. This is an effort to get the rules to match what is happening in reality.

Judge Norm Hill agreed with Mr. Goehler that there is a need to fix the rules to preserve exactly what he described. It is a way to avoid parties abusing the rules by instructing a deponent not to answer when the deposition is not going well in order to continue the deposition. Judge Norm Hill stated that he is less concerned about the issues of timing and response, because those are already built into other rules and the court has the inherent authority to modify those. He liked the committee's language, and thought that Mr. Andersen's modification helped to make it more clear that it refers to motions that are made in front of the judge in a live proceeding that is on the record.

Judge Peterson suggested that, if the Council does make this rule change, the UTCR Committee might want to change UTCR 5.030 to refer to response times for written motions, so that it is clear that the response times are for written motions, as opposed to oral motions. Ms. Holland stated that she believes that the rule may now imply that it is only about written motions, but agreed that there could be ambiguities there, so the UTCR Committee may want to take another look at it. Judge Norby noted that this may harken back to the concern

about trying to raise a motion orally that really should have been in writing. She stated that the natural response to that from the opposing party would be, “But we have 14 days to respond.” She liked Judge Norm Hill’s suggestion about “court proceedings,” and suggested that a good substitute for the committee’s “open court” language might be “in court proceedings on the record.” Mr. Andersen stated that the only problem with that language is that, when a judge is called during a deposition, there is no court record of that. Judge Norby pointed out that depositions are already mentioned separately. Mr. Andersen concurred.

Judge Norm Hill refined his language to read, “Unless made on the record during a court proceeding, or during a deposition in accordance with Rule 39 E, every motion must be in writing.” Judge Peterson stated that he likes the, “on the record” language. If it happens during a court proceeding, it would appear that would be with notice to both sides so that everyone has a due process opportunity to participate. Judge Norby agreed. Mr. Goehler also agreed. He stated that he is always impressed by the Council’s process of working through changes on drafts to come up with the best product.

Judge Norby made a motion to put the draft amendment of Rule 14, as amended by Judge Hill and including staff suggestions, on the September publication agenda. Judge Jon Hill seconded the motion, which was passed unanimously by voice vote with no abstentions.

Mr. Goehler explained that Ms. Nilsson had also put the committee’s draft of Rule 39 into Council format, and that staff had made grammatical and formatting changes to that rule as well. The committee’s suggested changes can be found in new subsection E(2), with the new lead line “Court assistance via remote means.” The language in that new subsection allows for court assistance via remote means, incorporating by reference the definition of remote means as the Council defined it in Rule 39 last biennium. The effect is to say that the kinds of things that a judge can do in subsection E(1) by motion can also be done by remote means.

Judge Peterson stated that the staff changes were largely to make internal references consistent with Council format and to remove unnecessary uses of the word “such.” He reminded the Council that staff looks through every rule that the Council modifies each biennium in an effort to make all of the rules more consistent.

Judge Jon Hill made a motion to put the draft amendment of Rule 39, including staff suggestions, on the September publication agenda. Mr. Kekel seconded the motion, which was passed unanimously by voice vote with no abstentions.

7. ORCP 31

Although the Rule 31 committee had disbanded, Judge Peterson wanted to circle back and report on his follow-up conversation with Judge Edmonds, who had originally suggested modifying Rule 31. He stated that he had a good conversation with Judge Edmonds, who stated that he would actually be interested in joining the Council. Judge Edmonds did note that he believed that his suggestion would not require additional litigation and that everything could be done in one lawsuit. Judge Peterson countered that it seemed that the new parties did not have any claim that related to the original lawsuit. He suggested that the really simple case that the plaintiff filed suddenly got hijacked by the bond company to include other claims in it, and there was a certain fairness issue there. Judge Peterson stated that they discussed that some parties believe that they can add additional parties into litigation without asking permission, and it is not supposed to work that way. Judge Peterson stated that Judge Edmonds understands that the Council did not move his suggestion to an amendment, and why it did not.

8. ORCP 55

Judge Norby reminded the Council that a desire had been expressed at the last Council meeting for the draft to be broadened to include not just e-mails, but also other electronic means of serving subpoenas to cooperative witnesses. She referred the Council to the committee's updated draft (Appendix E).

Judge Peterson stated that the original proposal was to not limit subpoenas to postal mail, which has a 10-day limitation, plus an additional three days. He pointed out that, in paragraph B(2)(c), there is a choice of mail or e-mail, but in subparagraph B(2)(c)(iii) there is a reference to electronic transmission. He stated that it might be good to add a reference to electronic transmission in paragraph B(2)(c) as well. Judge Norby agreed that a change could be made so that the paragraph reads something like, "may be mailed or sent by electronic transmission to the witness." Judge Peterson stated that he appreciated all of the additions, starting with part B(2)(c)(i)(A), that Judge Oden-Orr had thoughtfully drafted.

Judge Peterson wondered whether the Council should have a more robust discussion on what constitutes confirmation of receipt. He recalled that Ms. Weeks had expressed frustration about willing witnesses who agree to appear without the need for service by a process server, but who then will not sign the return receipt when the subpoena is mailed by certified mail. He noted that the committee discussed whether priority mail with tracking could be used as an alternative, and whether the attorney or the attorney's assistant could file a declaration that they had done everything that they said they were going to do beginning at new part B(2)(c)(i)(A). Judge Peterson stated that he was finally able to speak with someone at the U.S. Postal Service, who said that they still do

certified mail with a return receipt, as well as restricted delivery, and that they do attempt to collect a signature. The person will either sign or refuse the mail, or it will not be claimed because nobody is home to receive mail. If the subpoena was sent by certified mail, that would only indicate from a disinterested party, the U.S. Postal Service, that the envelope that included the subpoena was delivered to the addressee's address; however, it would not indicate that the intended recipient had received it. The same issue exists if the subpoena is sent by electronic means. So, what constitutes sufficient proof that the intended recipient has, indeed, received the subpoena?

Judge Norby stated that she thought that the language in the draft was appropriate because this is a limited section regarding a witness who has already been fully consulted, who is cooperative, and who helped to arrange the date and time of appearance. She stated that it does not require the same standard of tracking as in other subpoenas. She stated that the committee had some consensus that, if the subpoena has been sent and it arrived, this should be sufficient under these limited circumstances. Judge Peterson stated that he is not arguing that point; he just wanted the Council to be aware that the declaration of the attorney or of a person in the attorney's office attesting to the facts of the sending and delivery of the subpoena is what would be used in this circumstance. The attorney would no longer be waiting for that person to be home to get the certified mail and then be willing to sign the little green postcard that is attached on the back. The declaration is going to be good enough to potentially hold the person in contempt for not showing up, and Judge Peterson wanted to make sure that the Council thinks that this is appropriate. He stated that he does think that it solves the practical problem of a willing witness who suddenly, for whatever reason, does not want to sign a return receipt.

Ms. Weeks stated that, in her experience, almost every witness who has ever been willing suddenly becomes unwilling once the subpoena has been sent. She stated that she does not have a great solution to the problem. She likes restricted delivery, and she will probably suggest it to the attorneys she works with. At the same time, she thinks that there are a lot of people who are wary of anything that requires a signature by the U.S. Postal Service and, therefore, may just leave that piece of mail unclaimed. The next best option in that circumstance would be to use a process server. There is a fine line of when to engage the process server, which is more or less a question about how much money to spend in a case, as opposed to what the rules cover, but those are the troubles of the front line paralegal.

Judge Oden-Orr suggested adding language such as, "or any subsequent indication from the person of receipt," in the event that the witness lets the person who sent the subpoena know that they received it. Judge Peterson asked whether, in terms of the temporal part of it, a second declaration would be required. The first declaration would attest that all of the criteria starting with part B(2)(c)(i)(A) had

been satisfied. The second would state that the witness had responded and indicated they received the subpoena, which would, of course, happen afterward.

Judge Bloom stated that he agrees with the concept of electronic service, and that there should not be a problem with people who are agreeing to accept it. The confirmation provided in the draft rule covers that. However, the problem with including language such as that proposed by Judge Oden-Orr is that it creates another battleground, because the person who says to the server, “I got it,” can later say, “I never said that.” He also stated that he does not think that it solves the problem the Council is trying to solve, which is to make service easier when a witness agrees to accept service. Judge Norby stated that Judge Bloom has a really good point, and that she would not want to have to decide whether the witness really said they had received the subpoena. Judge Oden-Orr stated that he had envisioned receiving an e-mail from a witness confirming receipt that could be included as an exhibit. Judge Norby stated that such an e-mail would be something that a lawyer or staff person might add to a declaration but, since it is just an extra way to do it, perhaps it does not need to be added to the rule.

Judge Peterson stated that he had recently had a conversation with an attorney from central Oregon who was frustrated because a young attorney continually insisted on serving him by e-mail when he had not consented to it. The young lawyer, not having read all of Rule 9 carefully, claimed he was entitled to do so. Judge Peterson and the central Oregon attorney had a discussion about Rule 9 and the fact that people can get a large volume of e-mails per day, and how it is easy to miss something when sorting through them. This is why Rule 9 reads the way it does. The proposed change to Rule 55 allows for a declaration under penalty of perjury that the attorney had an agreement with the witness to be served by e-mail, and that the subpoena was served in exactly the agreed-upon way and, therefore, no confirmation is needed. The problem seems to be that people may say that they will confirm receipt, but that they do not do so. So this change would effectively allow the declaration to carry the day, and this is a policy choice that the Council needs to be comfortable with.

Mr. Andersen asked about the witness who claims that the e-mail must have gone into their spam folder and that they did not receive it. It would seem to him that this would be a valid defense for a witness who comes to court on a contempt charge and says, “I didn't see it.” Judge Peterson stated that the Council has talked about this in the past with Rule 9 and read receipts, people who have other people read their e-mail, and other scenarios. The question is whether someone can be required to abide by a subpoena when they have not been personally and conventionally served, and that is what we are doing here. If the witness has agreed to it, they should have been looking for the subpoena in their e-mail. If they did not see it, they should have checked their spam or contacted the attorney. To be clear, Judge Peterson thinks that it would be great for practice to not have these so-called willing witnesses back out at the last minute, as it is

frustrating for practitioners. However, attorneys need to be comfortable with either setting over the trial or holding the witness in contempt. The witness could potentially dispute the declaration and say they never agreed to be served by e-mail, although there is information in the declaration that they have confirmed their e-mail address.

Mr. Andersen stated that, in practice, if he sends a subpoena by e-mail, and the person does not respond to the e-mail, he sends another e-mail or calls the person. If he still gets no response, he sends a process server. He stated that he would not rely on his own declaration that the person said they would receive the subpoena by e-mail without proof that they have actually opened the e-mail. He stated that he did not know that a rule could be crafted that covers those points. He stated that he thinks that it is pretty shaky to go to court on just the attorney saying that they sent the subpoena and the witness agreed to receive it. He asked for suggestions on how to tighten up the language so that the rule tells us when we can actually rely on receipt.

Judge Norby stated that the proposed change does not do that, but the rule already does it. The change only allows for a slightly lesser standard if the witness is agreeing and cooperative. Ms. Holley suggested adding language that suggests that the attorney or the attorney's agent certifies that the witness confirmed in writing that they received the subpoena, without regard to how the subpoena was sent. Judge Norby asked whether Ms. Weeks thought that this would solve the problem, or whether it would be better to leave it as it is. Ms. Weeks stated that she thought that this would solve the problem.

Judge Norm Hill stated that he likes Ms. Holley's suggestion. He suggested that the most important value that the Council needs to accomplish with this rule change is certainty. The confirmation in writing that the witness has received the subpoena provides that certainty. Judge Norm Hill stated that it seems to him that this is the functional equivalent of service that is accomplished by getting the green return receipt postcard back. Getting something back in writing confirming that a witness has actually agreed to appear and received the subpoena accomplishes what needs to be accomplished, and crafting that certainty has to be the primary value.

Judge Peterson stated that he liked the rule as it was written, but he was concerned about whether it would work. He thought that the language about the variety of tracking services that confirm delivery should be removed, because that would basically mean the postal service delivered it to that address at a certain time and date, but that does not mean that the person received it. He suggested that the committee work on changing that language. He acknowledged the desire of the Council to not have people engage in evidentiary disputes about who said what, and that a response by e-mail, text message, or another documentable way is important.

Mr. Goehler acknowledged Judge Peterson's remark that valid service of a subpoena may be relevant for holding the witness in contempt. He noted that the other consequence may be that the witness is unavailable for hearsay purposes. He stated that he could envision the scenario that, the lower the standard goes, the more likely the witness can be unavailable. He pointed out that the Council needs to make sure that the standard is rigorous enough so that we are not creating an easy road to witness unavailability for hearsay purposes.

Judge Shorr pointed out that part B(2)(c)(i)(D) states that the mail or electronic transmission used to deliver the subpoena must contain no typographical or other errors. He asked whether it should read "no typographical other errors affecting delivery." Judge Norby stated that the intent was that the e-mail address could not be spelled incorrectly, for example. Judge Shorr stated that it was perhaps obvious, because it could happen with mail as well. Mr. Andersen stated that Judge Shorr raised a good point; although it may be assumed, perhaps it should be worded to the effect that a transmission contained no typographical or other errors affecting delivery. He also stated that there is a detailed process for receipt of mail in subparagraph B(2)(c)(iii), and that he thinks that there should be a similar, detailed process for receipt of e-mail. Ms. Nilsson agreed that it seemed a bit incongruous that there is a detailed procedure for mail but not for e-mail or for any other method of transmission.

Judge Norm Hill stated that he was getting the sense that we are making this too hard. People accept service of summons all the time, and lawyers and staff get something in writing back from them saying that they have been served and have accepted service. For a witness who has agreed to show up, if you do not get something back from them that says that they have agreed to receive the subpoena by electronic or other means and agreed to appear, and that they have then received the subpoena, you do not have service. Tracking and seeing the e-mail opened or the mail delivered seems to him to be more complex than necessary. It should be simply that you get something in writing from the witness confirming that they have received the summons and that they will appear. If you have that, then you have service by alternative means. If you do not, then you call the process server. Judge Norby agreed with Judge Norm Hill that this is a good suggestion for the committee to work with.

9. Uniform Collaborative Law Act

Ms. Wilson was not present at the meeting and the committee did not report.

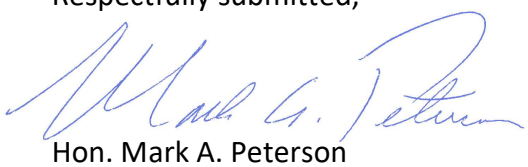
IV. New Business

No new business was raised.

V. Adjournment

Mr. Andersen adjourned the meeting at 11:42 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

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 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

CONCERN	AUTHORITY	COUNTERPOINTS
Unconstitutional	Wolfe v. George, 486 F.3d 1120 (9th Cir. 2007) Perry v. US, 548 Fed. Appx. 614, 616 (No. 2013 -5125); Martin–Trigona v. Shaw, 986 F.2d 1384, 1387–88 (11th Cir.1993).	• "The state has an interest in protecting defendants from harassment by frivolous litigation, just as it has an interest in protecting people from stalking." • "When no bond is required, the California prefiling order does little more than require *sua sponte* review of a vexatious litigant's complaint to see whether it states a claim before imposing the burden of litigation on a defendant. The defendant could move to dismiss for the same reason, so the statute is not a substantial or irrational bar to access." • "The Double Jeopardy and Ex Post Facto Clauses do not apply because the vexatious litigant statute does not impose criminal penalties." • "The Eighth Amendment does not apply because security, if required, is not a fine or punishment." • "The proper course of action is for courts to require parties to abide by the terms of pre-filing injunctions. Martin–Trigona v. Shaw, 986 F.2d 1384, 1387–88 (11th Cir.1993). ("The injunction entered by the Connecticut district court and upheld by the Second Circuit is a reasonable response to the abusive litigation of [plaintiff] ... and it will be enforced in this circuit as it has been in others.")
Disparate Impact on Vulnerable Litigants/ Favors the Privileged		• There is no indication that interrupting and scrutinizing bad faith claims creates a risk to vulnerable populations. Literature reviewing Vexatious Litigant rules nationally and globally **contains examples of *privileged* parties being designated vexatious in order to protect *vulnerable* parties**. See. e.g. Cult Awareness Network v. Church of Scientology Int'l, 685 N.E. 2d 1347 (1997): "The Constitution affords protection to the honest litigator in search of resolutions to true legal disputes; however, it does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause." • Literature on the process does not note any risks to vulnerable populations. *See e.g.* https://en.wikipedia.org/wiki/Vexatious_litigation; Legal Bullying: Abusive Litigation, Canadian Quarterly 22 C.F.L.Q. 337(2004); An Ultra-Aggressive Use of Investigators and the Courts, https://web.archive.org/web/20210308060210/https://www.nytimes.com/1997/03/09/us/an-ultra-aggressive-use-of-investigators-and-the-courts.html; Validity, Application and Construction of State Vexatious Litigant Statutes, 45 American Law Reports (A.L.R. 6th 493) 2009; Unnecessary, Frivolous or Vexatious Actions, 1A Corpus Juris Secundum C.J.S. Actions §72; Courting Trouble: A Unique Law Turns the Tables on Those Who File Numerous or Frivolous Lawsuits, Los Angeles Times, November 1995. • Creating an objective process minimizes risk that its use could be distorted by implicit bias.

Risk of Weaponization	ORPC 3.1	• Applies the same standard as the mandate in ORPC 3.1 that requires lawyers to only bring cases that are not frivolous. Extends that standard to self-represented parties. • No reports of weaponization in other jurisdictions with Abusive Litigant rules: California, Florida, Hawaii, Ohio, Idaho, Georgia, Texas, the United Kingdom, Scotland, Ireland, Australia, New Zealand, Canada, India, and US federal courts.
Solutions Already Exist		• SLAPP suits require victims of bullying to hire lawyers and litigate further, and remedies are limited and long delayed. • Oregon's case law process is not standardized; its scope and implementation do not currently identify any set protocol. Consequently, there is also no protocol for un-doing a VL designation. A statewide procedural rule would correct these deficiencies. • Alternatives were insufficient to reduce legal bullying in more than a dozen other jurisdictions which created Vexatious Litigation rules. https://en.wikipedia.org/wiki/Vexatious_litigation
No Need to Codify	ORCP 1A vs. ORS 3.220(1) & UTCR 1.050 (SLR Authority)	• "These rules govern procedure and practice in all circuit courts of this state." • Advantages of codification are: (1) uniformity, (2) ease of accessibility by bar & public, (3) transparency, (4) inclusivity of Council member's ideas, including ability to ensure terms & safeguards that may be missed in a Supplementary Local Rule. (e.g. ability to appeal order; ability to vacate AL designation.) • If no ORCP materializes, then separate SLRs will likely be adopted by each Circuit: "*A circuit court may make and enforce all rules necessary* for the prompt and orderly dispatch of the business of the court and not inconsistent with applicable provisions of law, the Oregon Rules of Civil Procedure or rules made or orders issued by the Chief Justice of the Supreme Court or the presiding judge for the judicial district." CCP's breadth of input would be lost.
Overreach by Council	Heritage Prop. v. Wells Fargo, 318 Or App 484-5, (2022). ORS 1.735(1) ORCP 79	• "The Council may determine the procedural steps that a litigant must follow to enforce their rights but may not change the underlying rights themselves." • Court of Appeals denied a challenge to a CCP amendment to ORCP 71B(1)(c) concluding that the 2010 amendment did not change the substantive rights of litigants and fell within the mandate of ORS 1.735(1). • The process of issuing other injunctions is governed by ORCP. Abusive Litigant Rules allow *pre-filing injunctions to prevent abusive court action* and create a clear method to overcome them.

The Case for a Rule on Abusive Litigant Process

Across the world, the nation, and throughout Oregon, the modern era is marked by an epidemic of antagonism, exacerbated by habitual blurring of the nature of truth, and by diminishing confidence in justice and the courts. Courts are seen as enabling and facilitating legal bullying by refusing to acknowledge that it occurs, and neglecting to call it out or create a transparent process to protect against it.

This happens through abuse of the restraining order process, family law process, neighbor disputes, partner disputes in corporations, among many other claims. (Below.)

The use of litigation to bully has been recognized and addressed by many other jurisdictions, including California, Florida, Hawaii, Ohio, Idaho, Georgia and Texas. Other nations include United Kingdom, Scotland, Ireland, Australia, New Zealand, Canada and India, as well as our own nation. (28 U.S.C. §1927)

An excellent summary of the evolution of processes to fairly protect against legal bullying appears in Wikipedia at:

https://en.wikipedia.org/wiki/Vexatious_litigation

Excerpts from Wikipedia's Notable Abusive Litigants List

- The Church of Scientology. "Plaintiffs (Scientologists) have abused the federal court system by using it, *inter alia*, to attempt to destroy their opponents, rather than to resolve an actual dispute over trademark law or any other legal matter. This constitutes 'extraordinary, malicious, wanton and oppressive conduct.' As such, this case qualifies as an 'exceptional case' and fees should be awarded pursuant to the Lanham Act... It is abundantly clear that ***plaintiffs sought to harass the individual defendants and destroy the church defendants through massive over-litigation and other highly questionable litigation tactics. The Special Master has never seen a more glaring example of bad faith litigation than this***."
- Jonathan Lee Riches, former prisoner who ***filed over 2,600 lawsuits over six years***.
- Lawrence Bittaker, who together with his partner Roy Norris was convicted of torturing, raping and murdering five young girls in 1979, ***filed 40 separate frivolous lawsuits against the state of California, including one claiming "cruel and unusual punishment" after being served a broken cookie***. In 1993, he was declared a vexatious litigant and was forbidden from filing lawsuits without the permission of a lawyer or a judge.
- Alexander Chaffers, ***a solicitor*** whose actions led to the first British law against vexatious litigation, the Vexatious Actions Act, 1896. Chaffers became notorious after ***accusing the wife of Travers Twiss of being a prostitute, and subsequently issued 48 proceedings against leading members of Victorian society in the 1890s***. Costs awarded against Chaffers were never paid. After the act was passed, he became the first person to be declared a habitually vexatious litigant and barred from future litigation without judicial permission.

- Leo Stoller, a trademark troll, was declared a vexatious litigant by multiple U.S. federal courts including the Supreme Court in 2007. https://en.wikipedia.org/wiki/Trademark_troll
- Isaac Wunder, who gave his name to the Isaac Wunder order which may be issued in Ireland to vexatious litigants. https://en.wikipedia.org/wiki/Isaac_Wunder_order
- David James "Indian Chief" Lindsey, a Melbourne man so declared after repeatedly suing doctors, insurance firms and companies such as Carlton & United Breweries for smoking-related damages. On February 21, 2006, ***the Supreme Court of Appeal gave him leave to sue Philip Morris, demonstrating that a vexatious litigant is not completely blocked from launching further court action***.

This problem exists in Oregon, as it does across the country and across the globe. Every biennium, respondents to Council outreach questionnaires ask us to address it. Oregon's trial courts follow a process that has been specifically approved and held constitutional by the 9th Circuit in Wolfe v. George, 486 F.3d 1120 (9th Cir. 2007); *see also* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Circuit 2007). That process was used in in Woodroffe v. State of Oregon, 15CV1047, (not appealed), Mouktabis v. Amarou et. al., 22CV02898, #A180428 (appeal in tenuous status due to appellant not following appellate rules of procedure), and Torosian and Torosian, 22DR10614, (not appealed), among many other cases that are unpublished and therefore difficult to locate. The process itself, though, is not standardized; its parameters and use do not currently identify any set protocol. Consequently, there is also no protocol for un-doing the designation. A statewide procedural rule would correct these deficiencies.

Council inaction will not "kill the rule." It will "kick the can" to SLR committees of each Judicial District, which will result in variations in definitions of "abusive" and procedural provisions across the state, at the discretion of the Presiding Judges of each Circuit Court.

Council action will ensure that voices from bar members on both sides of the table help shape the rule and process, will allow for better accessibility and more transparency in broadly published and easily accessible volumes of statutes and rules, more consistency in application, and smoother implementation due to the inclusion of Odyssey savvy representatives from Salem who work closely with the Council.

If the Council hesitates due to concern that the rule will not be "perfect," I offer the wise words of Vince Lombardi: "Perfection is unattainable, but by pursuing perfection, we can capture excellence."

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

A Scope. These rules govern procedure and practice in all circuit courts of this state, except in the small claims department of circuit courts, for all civil actions and special proceedings**,** whether cognizable as cases at law, in equity, or of statutory origin**,** except where a different procedure is specified by statute or rule. These rules [*shall*] also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of circuit courts and for all other courts of this state to the extent they are made applicable to those courts by rule or **by** statute. Reference in these rules to actions [*shall include*] **includes** all civil actions and special proceedings**,** whether cognizable as cases at law, in equity**,** or of statutory origin.

B Construction. These rules [*shall*] **will** be construed to secure the just, speedy, and inexpensive determination of every action.

C Application. These rules, and amendments thereto, [*shall*] apply to all actions pending at the time of or filed after their effective date, except to the extent that**,** in the opinion of the court**,** their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

D "Rule" defined and local rules. References to "these rules" [*shall*] include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" [*shall*] mean only rule or rules of pleading, practice, and procedure established by ORS 1.745, or promulgated under ORS 1.006, 1.735, 2.130, and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

E Use of declaration under penalty of perjury in lieu of affidavit.

[*E(1) **Definition**.*] **E(1) Definitions.**

E(1)(a) As used in these rules, "signature" and "signed" mean the person's name subscribed on the document.

E(1)(b) As used in these rules, "affidavit" means a written or printed statement of facts, made and confirmed by the oath or affirmation of the party making it, subscribed before a person authorized by law to administer oaths in the place where the affidavit is subscribed.

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

E(2) **Declaration made within the United States.** A declaration made within the United States must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury."

E(3) **Declaration made outside the boundaries of the United States.** A declaration made outside the boundaries of the United States as defined in ORS 194.805 (1) must be signed by the declarant and must include the following language in prominent letters immediately following the signature of the declarant: "I declare under penalty of perjury under the laws of Oregon that the foregoing is true and correct, and that I am physically outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. Executed on the _____ (day) of _____ (month), _____ (year) at _____ (city or other location), _____ (country)."

F Electronic filing. Any reference in these rules to any document, except a summons, that is exchanged, served, entered, or filed during the course of civil litigation [*shall*] **will** be

construed to include electronic images or other digital information in addition to printed versions, as may be permitted by rules of the court in which the action is pending.

G Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D, subsection (3), paragraph (a), subparagraph (iv), part (A), as ORCP 7 D(3)(a)(iv)(A).

MOTIONS

RULE 14

A Motions; in writing; grounds. An application for an order is a motion. Every motion, [*unless made during trial, shall be in writing,*] [*shall*] **must** state with particularity the grounds therefor[,] and [*shall*] **must** set forth the relief or order sought. **Unless made during trial, in open court, or during a deposition, in accordance with Rule 39 E, every motion [*shall*] must be in writing.**

B Form. The rules applicable to captions, signing, and other matters of form of pleadings, including Rule 17 A, apply to all motions and other [*papers*] **documents** provided for by these rules.

DEPOSITIONS ON ORAL EXAMINATION

RULE 39

A When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition on oral examination. The attendance of a witness may be compelled by subpoena as provided in Rule 55. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required:

A(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

A(2) a special notice is given as provided in subsection C(2) of this rule.

B Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition will be taken on [*such*] **the** terms [*as*] **that** the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person on oral examination must give reasonable notice in writing to every other party to the action. The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify [*such*] **the** person or the particular class or group to which [*such*] **the** person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.

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C(2) **Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice:

C(2)(a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant; and

C(2)(b) sets forth facts to support the statement.

C(2)(c) The plaintiff's attorney must sign the notice, and [*such*] **this** signature constitutes a certification by the attorney that**,** to the best of [*such*] **the** attorney's knowledge, information, and belief**,** the statement and supporting facts are true.

C(2)(d) If a party shows that, when served with notice under subsection C(2) of this rule, the party was unable**,** through the exercise of diligence**,** to obtain counsel to represent [*such*] **the** party at the taking of the deposition, the deposition may not be used against [*such*] **the** party.

C(3) **Shorter or longer time.** The court may**,** for cause shown**,** enlarge or shorten the time for taking the deposition.

C(4) **Non-stenographic recording.** The notice of deposition required under subsection C(1) of this rule may provide that the testimony will be recorded by other than stenographic means, in which event the notice must designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedures of Rule 43 apply to the request.

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C(6) **Deposition of organization.** A party may**,** in the notice and in a subpoena**,** name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named **[*shall*] must** provide notice of no fewer than 3 days before the scheduled deposition, absent good cause or agreement of the parties and the deponent, designating the name(s) of one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and setting forth, for each person designated, the matters on which [*such*] **the** person will testify. A subpoena must advise a nonparty organization of its duty to make [*such a*] **this** designation. The persons so designated will testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) **Deposition by remote means.**

C(7)(a) The court may order, or approve a stipulation, that testimony be taken by remote means. If [*such*] testimony is taken by remote means pursuant to court order, the order must designate the conditions of taking and the manner of recording the testimony**,** and may include other provisions to ensure that the testimony will be accurately recorded and preserved. If testimony at a deposition is taken by remote means other than pursuant to a court order or a stipulation that is made a part of the record, then objections as to the taking of testimony by remote means, the manner of giving the oath or affirmation, and the manner of recording are waived unless objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath or by remote means, at the election of the party taking the deposition.

C(7)(b) "Remote means" is defined as any form of real-time electronic communication that permits all participants to hear and speak with each other simultaneously and allows official court reporting when requested.

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D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 will put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent must be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition must retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. On request of a party or deponent and payment of the reasonable charges therefor, the testimony will be transcribed.

D(3) **Objections.** All objections made at the time of the examination must be noted on the record. A party or deponent must state objections concisely and in a non-argumentative and non-suggestive manner. Evidence will be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

D(3)(a) when necessary to present or preserve a motion under section E of this rule;

D(3)(b) to enforce a limitation on examination ordered by the court; or

D(3)(c) to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who will propound them to the deponent on the record.

E [*Motion for court assistance; expenses.*] Assistance from the court; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, on motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in [*such*] **a** manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order

the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in [*section C of Rule 36.*] **Rule 36 C.** The motion must be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it will be resumed thereafter only on order of the court in which the action is pending. On demand of the moving party or deponent, the parties will suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Court assistance via remote means. A court may provide the assistance described in [*section*] subsection E(1) [*above*] of this rule by remote means. "Remote means" is defined in [*section*] paragraph C(7)(b) [*above*] of this rule.

[*E(2)*] **E(3) Allowance of expenses.** [*Subsection A(4) of Rule 46*] **Rule 46 A(4)** applies to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription will be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court [*such*] **the** request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes that the witness desires to make will be entered on the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of [*such*] changes and reasons must promptly be served on all parties by the party taking the deposition. The witness must then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties

waive the statement or the witness is physically unable to make [*such*] **a** statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time if so ordered by the court, after the deposition is submitted to the witness, the party taking the deposition must state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter must certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it must certify, under oath, on the transcript that [*such*] **the** person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of [*such*] **the** recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or [*such*] **the** party's attorney, must certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition must be filed with the court where the action is pending. When a deposition is stenographically

taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition must enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or [*such*] **any** other person as may by writing be agreed on, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed on request of any party under [*such*] **any** terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness will, on the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, [*such*] **the** person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they will be marked for identification and the person producing them must afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials will also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** On payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition must furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses on failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to [*such*] **the** other party the amount of the reasonable expenses

incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable attorney fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena on the witness and the witness**,** because of [*such*] **this** failure**,** does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to [*such*] **the** other party the amount of the reasonable expenses incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable attorney fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I(2) The notice is subject to subsection C(1) through subsection C(7) of this rule and must additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Any objection will be governed by the standards of Rule 36 C. If no objection is filed, or if perpetuation is allowed, the testimony taken [*shall be*] **is** admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code. At any hearing on [*such*] an objection, the burden will be on the party seeking perpetuation to show that:

I(3)(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (1)(e) or ORS 45.250 (2)(a) through (2)(c);

I(3)(b) it would be an undue hardship on the witness to appear at the trial or hearing; or

I(3)(c) other good cause exists for allowing the perpetuation.

I(4) Any perpetuation deposition must be taken not less than 7 days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial on a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination will proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition must be made at the time and noted on the record. The court before which the testimony is offered will rule on any objections before the testimony is offered. Any objections not made at the deposition will be deemed waived.

CCP Summary – Rule 55 Committee

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 within 14 days of receiving the subpoena or before the date and time set for the recipient to appear and testify, whichever comes first. 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 by mail or electronic transmission to a designated address or account that the witness confirmed is accurate; and

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 electronic transmission was sent by the agreed upon date, and

B(2)(c)(i)(D) The mail or electronic transmission used to deliver the subpoena contained no typographical or other errors, and a copy of the electronic transmission is attached to the certification document.

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 data shows that the mail was delivered within the timeframe that was agreed upon.