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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Scott Shorr
Alicia Wilson
Julian Marrs
Hon. Melvin Oden-Orr
Scott O'Donnell
Michael Shin
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams

Members Absent:

Hon. D. Charles Bailey, Jr.
Nadia Dahab
Hon. Norman R. Hill

Guests:

John Adams, Oregon Tax Court
Aja Holland, Oregon Dept. of Justice
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 (ORCP 35) • Law School Education on ORCP • 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ORCP 71	• Annotated ORCP • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • UTCR 5.100	•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 February 10, 2024, Minutes & March 9, 2024, Minutes

Judge Norby made a motion to approve the minutes of February 10, 2024 (Appendix A), and March 9, 2024 (Appendix B). Judge Shorr seconded the motion, which was approved unanimously by voice vote with no abstentions.

B. Council Funding/Executive Director Stipend

Mr. Andersen reported that both he and Judge Norby had sent letters to Philip Lemman of the Oregon Judicial Department, who had responded with an e-mail (Appendix C) indicating that the Legislature had increased the Council's 2023-25 budget appropriation with a one-time increase of $7,500, but that the Council would need to ask for an increase in the 2025-27 biennium. Judge Peterson indicated that Council staff would work on preparing information for that request.

III. Old Business

A. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson indicated that his schedule had not allowed him to finalize the staff comments in the time since the last Council meeting.

B. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby referred the Council to the materials that the committee prepared for this month's meeting (Appendix D). She stated that the committee's main task was to respond to the concern that there was no provision in the rule to remove an abusive litigant designation. Language to that effect is now located in new section I of the proposed rule, which allows for vacating the pre-filing order and setting aside the designation, in effect allowing the designation to be "undone." In order to have the pre-filing order set aside, an application must be filed in the court that entered the order, either in the action in which the pre-filing order was entered or contemporaneously with the request to the presiding judge to file new litigation. The application must be accompanied by evidence in the form of a declaration or exhibits that support the premise that there has been a material

change in the facts on which the order was granted and that justice would be served by vacating the order. Subsection I(2) allows the court to vacate a pre-filing order and set aside the designation on a showing of material change in the facts on which the order was granted, and a showing that justice would be served. An evidentiary hearing on an application may be set at the court's discretion, because a hearing may not be necessary if the declaration is compelling enough. Subsection I(3) provides that, if an application to vacate a pre-filing order and set aside the designation is denied, the applicant cannot file another similar application to set it aside for one year. This is in recognition that, for prolific filers, the courts do not want to be receiving applications to set aside weekly or monthly. The committee thought that a year seemed like a reasonable time frame within which to try again. The committee believes that adding this section will be an improvement to the rule and, even if the rule does not prevail with the Council and is later adopted by local jurisdictions, those local rules will be better because of the Council's work.

Judge Norby related that she had a litigant in her courtroom the previous day who she had considered deeming vexatious or abusive. He was a designated heir who had reopened a probate case three years after it closed because he had changed his mind about what he had previously accepted as his large inheritance, after learning that others had received more. He was somehow allowed to reopen the case without going through the competency exam that typically occurs when someone does not have an attorney. He then proceeded to send motions to compel to everyone ever involved in the case, including the attorneys, who each received 38 motions to compel within the last month, and who have all had to show up in court to argue their position. At the end of one of those hearings, Judge Norby was being asked to also to set aside the order that reappointed the person as personal representative, and the litigant then spent two hours arguing his motions. Judge Norby stated that she had considered designating this litigant vexatious, because this was not the first time her county has seen him in court in a similar posture. However, the reason she did not is because of all of the guardrails that are being included in the proposed rule that is being drafted by the committee. According to the draft rule, it would not have been appropriate to deem the litigant abusive or vexatious. So, instead of doing what she might have done prior to the Council's consideration of an abusive litigant rule, she decided to wait and see whether it might be more appropriate to do so if he decides to inappropriately use the court system in the future in a way that contravenes the parameters of the proposed rule. Judge Norby stated that she is aware that there is some concern that the proposed rule would limit people's access to the courts. However, she thought that it was interesting that she, who is very aware of the current processes that are being used to deem litigants as vexatious and who would otherwise have done so, decided not to do so in this case because of the guardrails that have been discussed by the Council.

Mr. Andersen asked Judge Norby whether she agreed that judges have the inherent authority to impose a $5,000 enhanced prevailing party fee, or whether the prevailing party needs to file a motion to receive that fee. Judge Norby stated that she does not have an opinion on that. She stated that she would need to have it argued, and that she has never done it on her own motion, but that does not mean that it cannot happen. Mr. Andersen asked whether it would be easier to flag an abusive litigant as one who has been assessed a $5,000 enhanced prevailing party fee. Judge Norby pointed out that there is no such thing as a prevailing party fee in probate, family law, or juvenile law. She would therefore argue that the answer would be no, although, in other civil proceedings, that might be a tool that judges could use. However, she opined that this is a very limited way of looking at abusive litigants.

Mr. Andersen expressed concern about how involved the process will be to allow due process to a person who is considered to be an abusive litigant, and how the process will be triggered. He asked what suspicion would be required to rise to the level of a hearing that would initiate all of the due process protections on the suspected abusive litigant. Judge Norby stated that the process is a single hearing. Mr. Andersen stated that he was not asking about the hearing itself but, rather, how those who are suspected to be abusive litigants are swept up out of the pool of litigants and screened to be put through a hearing process. Judge Norby stated that the committee had worked hard this biennium on identifying what can qualify as an abusive litigant. She stated that she had previously created and shared a chart for the Council to look at with a list of people who had qualified in the past. Judge Peterson noted that a judge can, on the judge's own motion, start the process to designate someone as an abusive litigant, as can any party in a particular litigation.

Mr. Goehler stated that he is a fan of the rule and that he likes the procedures in section I. He did wonder why it is called an application and not a motion. He also wondered whether Rule 71 for setting aside orders and judgments would also apply, and suggested that the rule might need to include language to ensure that the two rules do not overlap. Judge Norby stated that the reason that it is an application is that the process may be happening outside of the context of an active case or an open case. She stated that, if the process is happening because a person is seeking permission from the presiding judge to file their next case, then she supposed that it could be called a motion. The committee wanted to make sure that the process to remove the abusive litigant designation could be an option that could happen on its own, without the need for a new case to be filed. She stated that she could envision a case in which a person may have been filing abusively due to a mental health issue that has since been addressed who may want to remove the abusive litigant designation even if they were not currently pursuing litigation, for example.

Mr. Goehler stated that he is reading the language in the proposed rule as, "in addition to Rule 71," so mistake, error of law, and other reasons for getting an order or judgment set aside would still apply. He stated that he is just thinking about how this might get interpreted in the future. Judge Norby stated that a designation is not a judgment in the sense of a judgment that resolves the case. Mr. Goehler opined that it is an order that is entered, and an order would be subject to Rule 71. Judge Norby asked whether Mr. Goehler was suggesting a reference to Rule 71 in Section I. Mr. Goehler stated that he was not sure, but he thought that the judges on the Council might have thoughts about it. Without any mention, his sense would be that the two would be interpreted harmoniously and that they would not be in conflict. Judge Norby stated that there was no intention to create conflict, but that the committee would take a look and create a cross reference, if appropriate.

Ms. Wilson asked whether a person who was designated as an abusive litigant when they were self represented could later have an attorney file a new case on their behalf. Norby stated that, if they have the designation, they would have to run the case by the presiding judge, whether they had an attorney or not. She noted anecdotally that it is largely people without attorneys who tend to be abusive litigants. She could, however, think of two situations where abusive litigants who used probate court, restraining orders, and other family law venues to attack each other, would serially hire attorneys. Those attorneys would get involved, unaware of the history, until eventually withdrawing on discovering that history of the previous litigation. Judge Norby stated that she thinks that it might have been helpful to the attorneys themselves to have known about an abusive litigant designation. Even when there is an attorney, she stated that she is not certain that the responsibility can be put on the attorney to know everything that is happening from just one or two meetings with their client. She understands that, in principle, having an attorney would mean that a litigant is more trustworthy, and she knows that there are attorneys who can take on a client who is otherwise abusive and find a valid case to file. However, attorneys are constrained by the facts of which they are aware. Ms. Wilson stated that she is concerned about a litigant having to wait a year because of the statute of limitations. Judge Norby pointed out that the year limitation is just for applying again to remove the designation, and that it does not prevent a litigant from asking the presiding judge for permission to file a case. She stated that, if Ms. Wilson had a different suggestion for a timeline that would still balance the interest of not having someone repeatedly asking to remove a designation, the committee would certainly consider it.

Ms. Johnson stated that section E appears to prevent an abusive litigant from filing any new action or claim in the court, even if that action was wholly unrelated to the reason why the person was designated an abusive litigant. She stated that she could imagine some sort of family situation where the spouses are using litigation to attack each other and get designated as abusive by the court,

then one of the parties gets hit in a crosswalk and needs to file a personal injury case. Judge Norby opined that there would be no chance that the presiding judge would deny that request. She noted that a pre-filing order does not stop a litigant from filing; it simply says that, in order to file, the litigant must run the complaint by the presiding judge first. That process usually would take less than an hour. Ms. Johnson noted that self-represented litigants may be unsophisticated, and that this is an additional obstacle to access to the courts for someone whose new claim or new issue is wholly unrelated to their abusive litigant designation. She stated that her worry is that there cannot be a solution to the issue that she has identified. In terms of guardrails, if the abusive litigant designation arises out of a particular entrenched relationship between two parties, the rule seems to not be aware of the fact that there may be some separate, wholly independent events that could happen to that person for which they deserve full access to the courts. She stated that she does not know if the abusive litigant designation can be tied to a type of dispute as opposed fully covering that person in all claims that they might have going forward in their entire life unless and until they get this designation removed.

Judge Norby stated that she understands Ms. Johnson's point and that it is a valid one. She pointed out that the order that the person gets that designates them as an abusive litigant will explain what they need to do in order to file another case. She stated that it is not like the Council is trying to hide the ball. She noted that she is concerned about people who do not have lawyers not understanding the rules, but she thinks that people who use the courts can at least be expected to read the orders that they receive. Ms. Holley noted that subsection D(2) reads, "If, after considering all of the evidence, the court designates a party as an abusive litigant, the court must state its reasons on the record or in its written order. The court's order must be narrowly tailored to protect parties or persons targeted by abusive litigation and to the disallowed topic or issues." She stated that she believes that this language is intended to address Ms. Johnson's concern. Mr. Larwick asked Ms. Holley whether the committee was trying to create a rule that encourages the court to limit the order to the parties involved who were subjected to the abuse. Ms. Holley stated that this was her thought when she wrote that language–to have a narrow rather than a broad designation. She stated that she had talked to Judge Jay McAlpin about the issue, who stated that he was generally in favor of relying on the flexibility that the courts have now rather than creating a rule. Judge McAlpin stated that he and Judge Debra Vogt were recently discussing the fact that one version of an abusive litigant is the person who sues every political figure in the county, i.e., a series of defendants rather than one. The language in subsection D(2) would not address that issue, and that is an argument for relying on the flexibility that exists now rather than a rule.

Mr. Larwick noted that self-represented litigants seem to be a big focus of the proposed rule, because most of the discussion over the previous biennium and this one have been focused on self-represented litigants not following the rules.

He stated that he is skeptical that self-represented litigants would follow this proposed rule. When reading this version of the proposed rule, it seems to him that the shortest route for someone who has been labeled abusive would be to go to section H, just filing the claim and not attempting to get the label removed. That would trigger a court process where the action is stayed until a determination is made on whether the person can file the case. Judge Norby stated that section H is really built for instances when the court misses the abusive litigant designation and lets a case slip through. The idea is that court staff will be aware of the vexatious litigant designation and would not accept new filings unless they came with the authorization of the presiding judge. But, as the Council is aware, there is staff turnover and problems with the Odyssey filing system that might allow a case to slip through. The expectation is that court staff would not be allowing that to happen. Mr. Larwick stated that he is against the rule generally.

Judge Jon Hill stated that he is in favor of the rule, but that he wanted to further discuss the issue of an abusive litigant who would like to file a new claim and who is represented by counsel. He stated that this gives him pause, because a lawyer goes through a claim carefully from the beginning before filing a case. He did state that he prefers a statewide rule even though there is already existing case law. Judge Norby stated that the reason that she has been so focused on trying to create a fair and balanced rule for two biennia is to have a uniform guideline for judges. While judges already have the discretion to designate a litigant abusive, the judges who are doing it now are all experienced. Judge Norby stated that she is writing this rule with less experienced judges in mind. She stated that she recently spoke with a retired judge who did not even know that judges already have the authority to designate a litigant as abusive. Judge Norby does not want younger judges, or any judge, to feel like they are being used as a pawn of an abusive litigant to enable that litigant to further abuse someone through the justice system.

Ms. Wilson asked whether lawyers would be able to look up whether a litigant has been designated as abusive. Judge Norby stated that she had worked with Aja Holland from the Oregon Judicial Department last biennium to work out a way for there to be an entry in Odyssey to flag the abusive litigant designation. Ms. Holland stated that the discussion last biennium was to flag the party record, which would be in the business process that accompanies the rule. She did not think there would be anything in the rule itself that talks about flagging the party record. She also did not think that it would be something that attorneys would see from their version of Odyssey when they log in but, rather, something that only court staff could see. She was uncertain whether there would be a way to flag it for attorneys to see, but she could talk with the Odyssey staff to determine that. Judge Norby noted that it might be possible to keep local lists available for attorneys, since the lists would be so short. She stated that presiding judge orders are currently difficult to find, but she could envision a simpler way to access them.

Ms. Wilson envisioned a scenario where her client, who has been labeled an abusive litigant, gets sued and then wishes to file a third-party complaint or file motions. She stated that it seems like the proposed rule would require pre-clearance with the presiding judge to do so unless the designation had been overturned. Judge Shorr stated that he has the same question, since the rule talks about initiating litigation. Ms. Holley stated that subsection D(2) was intended to address that, in that the order would be limited to repeating similar events. Her concept was to focus on the person who has a legitimate dispute in one area of law but also harasses people in another area, so the order should be narrowly tailored to protect parties against the bad acts, not to just broadly say "this is a bad person, and they are not allowed in the courthouse." Judge Norby thanked Ms. Holley for the excellent example and for helping her understand what needs more clarity in the rule. Judge Peterson pointed out that it appears that the restriction is on initiating an action, since section E refers to commencing an action and section H refers to initiating new litigation. He stated that it does not seem like the rule would impact someone needing to file a counterclaim. Judge Norby agreed, but stated that the language needs to be made more clear. Ms. Johnson stated that section D(2) seems inconsistent with section E, which states that someone who has been deemed to be an abusive litigant will be prevented from commencing any new action or claim in the courts unless they get that designation removed. She stated that, if an order is narrowly tailored to prevent a party for bringing another specific claim, but the pre-trial order prohibits the party from commencing any new action or claim in the courts, that broader language does not match. Judge Norby thanked Ms. Johnson for pointing out that inconsistency. She stated that she would re-read the rule in light of the questions that have arisen during this discussion and take it back to the committee for more work.

Judge Norby stated that this has been the most productive discussion regarding the abusive litigant rule that the Council has had, and she thanked Council members for their thorough reading of the draft and for their feedback. She pointed out that, when judges designate litigants as abusive now, they are not considering many of the factors in the proposed rule. The current lack of a defined process is much more chaotic. Her argument would be that, if the Council can find clarity in a rule, especially on the points that have been raised at this meeting, it would be better than having judges designate litigants as abusive without having such clarity.

Mr. Andersen posited a scenario where a person has been designated an abusive litigant and comes to an attorney with a valid medical malpractice case. The person has not been able to find an attorney until shortly before the statute of limitations is about to expire, and the attorney wishes to file to prevent the statute from expiring. Mr. Andersen asked whether the person would be prohibited from filing by the court clerk. He asked how it would be dealt with in the electronic filing system. Judge Norby stated that she would like to discuss that kind of scenario more with the committee before the next Council meeting and

bring it back to the Council for further discussion. Ms. Holley stated that it should be covered by the relation back language in subsection F(3). Mr. Andersen asked to what date it would relate back if the case has not been filed. Ms. Holley stated that it would relate back to the date that the application for the exception was filed. Mr. Andersen asked how a motion could be made on a case that has not been filed. Ms. Holley stated that this is why it is called an application, because the contemplation is that an application for an exception can be made without a case being filed. Mr. Andersen asked how the average medical malpractice attorney would be expected to know that the client has been deemed a vexatious litigant. Judge Norby noted that this question had just arisen, and that the committee would discuss it and have more information at the next Council meeting.

Mr. Larwick stated that he had compared the language of subsection F(3) to the statuary language of ORS 12.020 (A) and ORS 12.020 (B). He opined that the language seems inconsistent, because the time for commencing an action is the time when the complaint is filed. He stated that, if the summons and complaint is served within 60 days, it relates back to the date the complaint is filed, and subsection F(3) seems to suggest that it would relate back to the date that the motion is filed to allow the filing of the complaint, which is a little bit different from the statutory language. He stated that he is not certain what effect a proposed rule change can have on a statute. Judge Norby stated that the intent is to try to define "complaint filed," and that the Council's rules become statute if they are not modified or rejected by the Legislature, so the rule and the statute would have to be read together. Ms. Holland stated that she and Judge Norby had discussed this issue a bit last biennium. The relation back language in last biennium's version of the rule was based in part on a Uniform Trial Court Rule (UTCR) that allows relation back when a filing is rejected. Ms. Holland stated that *Otnes v. PCC Structurals*, 367 Or 787 (2021), ruled that the UTCR and the statute should be read together, and validated the relation back definition in the UTCR. Judge Norby stated that the relation back language had been slightly changed, but only to tighten it up a bit.

Ms. Johnson thanked Judge Norby and the committee for their hard work on the proposed rule and for addressing the concerns that have been raised. She stated that she wanted to highlight for those who do not do medical malpractice cases, that very few lawyers in the state of Oregon do this work, and very many potential clients go unrepresented. She noted that one of the things that lawyers will consider when taking a case is how close it is to the statute of limitations. If there are any complications or any additional hurdles in taking those cases, they are often rejected. She stated that this is just something to think about. Judge Norby stated that the bookend to that is that no one is currently aware of who the litigants are throughout the state that have been declared abusive. She only knows the ones that she herself has designated. No one knows what could happen tomorrow for people who are so designated without a process or a way to track them. Judge Norby opined that this is, for her, another argument in favor of

creating a rule, as long as concerns can be resolved in an appropriate way.

Mr. Andersen asked whether any Council member wished to make a motion. Judge Norby suggested that the committee take the ideas from today's discussion and do more work on a better product to bring back to the Council next month. Mr. Larwick suggested taking a straw poll to see whether people are generally in support of creating a new rule. He stated that he did not know if he needed to make a motion for that but, if he did, it would be a motion to vote to potentially disband the committee. Judge Norby suggested that the committee would meet whether a straw poll was taken or not. She stated that the committee's work product would be helpful to Oregon's judicial districts later, even if the Council does not adopt the proposed rule. She suggested allowing the great minds of the committee to continue to do the work that they want to do. Mr. Andersen asked whether there would be a second to Mr. Larwick's potential motion. No Council member stated that they would second the motion.

2. Composition of Council

Judge Bailey was not present and the committee did not report.

3. Law School Education on ORCP

Judge Peterson stated that he did not have much to report on this topic. He noted that the Council does not have a headcount on how many students are able to take the University of Oregon School of Law's Oregon civil procedure class every other year. He asked Ms. Johnson if she would be willing to reach out to the school to get that information. She agreed. Judge Peterson also stated that he had tried to reach out to Judge James Edmonds at Willamette University College of Law to further discuss the class that he teaches there, but that he had been unable to connect to discuss whether Judge Edmonds would be willing to teach more than one class per year. He stated that he had also been unable to connect with Karen Lee at the Oregon State Bar to further discuss continuing legal education efforts about the ORCP.

Mr. Andersen asked Mr. Kekel whether he had heard anything further about the Oregon Association of Defense Counsel's efforts to schedule a joint CLE with the Oregon Association of Trial Lawyers. Mr. Kekel stated that he had not, but that he would reach out to the president of OADC to inquire.

4. Refining Rule 1

Judge Oden-Orr was not present and the committee did not report.

5. ORCP 55

Ms. Nilsson explained that the Council had voted to adopt the committee's proposed changes to Rule 55 at the last meeting. Ms. Nilsson had put those changes into Council format so that the Council could look at them one more time at this meeting to make sure that everything looked correct (Appendix E). In the meantime, Judge Peterson brought up an additional issue to Judge Norby and they wanted to discuss that issue with the Council today.

Judge Norby stated that Judge Peterson had asked her to take a look at a letter that former Council chair Don Corson had sent to the Council two biennia ago, when the Council had published a proposed change to Rule 55, to ensure that the issue that concerned Mr. Corson at that time would not come up again with the current proposed revisions. Mr. Corson's concern with that published amendment was that an objection would stay an obligation to comply with a subpoena duces tecum, and Judge Norby stated that she does not think that this problem exists with the current proposed rule. However, she stated that Judge Peterson also wished to ask the Council whether there are any concerns about whether a motion to quash somehow stays a subpoena either to testify or to produce documents, because that would be a serious issue. Judge Peterson noted that the proposed change to Rule 55 does away with objections and relies exclusively on motions to modify or motions to quash. He stated that he thought that Mr. Corson was fine with an objection staying a request for production of things, but did not agree with anything staying an obligation to appear and testify, which could raise a fair amount of havoc.

Judge Norby stated that her reading of the letter was that Mr. Corson disagreed with staying a subpoena to produce things, as he was describing situations where the stay could actually prevent any access to the things. As she read Mr. Corson's letter, that was one of his primary concerns, and she feels that the current proposed amendment deals with that concern. She pointed out that this concern already existed in the language before Rule 55 was reorganized, but the previous language of the rule was so confusing that it just went unnoticed. She echoed Judge Peterson's question about whether the Council is concerned about motions to quash either subpoenas to appear and testify or subpoenas for the production of things not staying the obligation to appear or to produce. Judge Peterson stated that he just wanted to raise the issue, since an objection under the existing rule would stay a requirement to produce documents, and that is currently handled differently than a subpoena to testify, where the motion does not stay obedience. This is a policy change to which he does not object, but he wanted to ensure that it is the Council's intention.

Judge Norby noted that the proposed amendment adds emphasis language that says that each subpoena must state that all subpoenas must be obeyed unless a judge orders otherwise and that disobedience of a subpoena is punishable by a fine or jail time. The intention was to emphasize the need to comply with

subpoenas. The only lingering issue is to ensure that there are no potential problems with stays, or the lack of stays, and to avoid having such problems arise when the draft rule is published. Ms. Johnson offered to run the proposed rule by Mr. Corson. Judge Norby stated that she would appreciate that.

Ms. Wilson stated that she appreciated the chance to review the text of the rule. She noted that subparagraph B(3)(b)(i) of the current rule that defines "law enforcement agency" is pretty narrow and wondered whether the definition should be broadened to add parole officers, probation officers, and police officers commissioned by universities. Judge Norby stated that she did not know when this definition was written but, if the Council wanted to expand it, that would be easy enough. Her impression is that the definition is geared toward places where people are working around the clock and may not be reachable for service, which may or may not include campuses or probation offices. Mr. Shields stated that there is probably an existing definition statute that defines law enforcement agencies. Judge Norby noted that parole and probation officers in Clackamas County are part of the County Sheriff's Office. Mr. Goehler stated that ORS 131.930(3) defines a "law enforcement agency" as an agency employing law enforcement officers to enforce criminal laws.

Judge Norby stated that the committee would take another look at the rule and report at the next Council meeting.

6. Uniform Collaborative Law Act

Ms. Wilson stated that she was going to do some work on how the Uniform Collaborative Law Act might be incorporated into the ORCP, and she needs more time to research this. Ms. Johnson stated that she was going to talk to the Commission on Uniform State Laws but that she had not yet done so. They will report back at the next Council meeting.

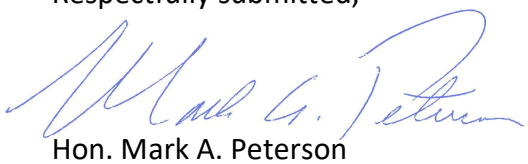
IV. New Business

Judge Peterson reported that he would be making a presentation to the Oregon State Bar Board of Governors' Public Affairs Committee's Legislative Forum on April 15, 2024, regarding including the Council's proposal to amend ORS 45.400 to change the requirement for motions to allow remote testimony that currently specifies 30 days as the default. He stated that the hope is to include the suggestion in the Bar's law improvement package. Judge Peterson will report back to the Council at the next meeting.

V. Adjournment

Mr. Andersen adjourned the meeting at 10:43 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

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

ATTENDANCE

Members Present:

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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.

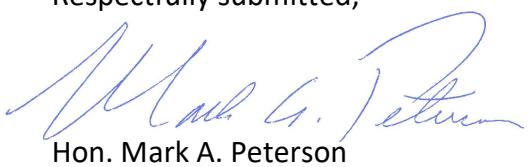
IV. New Business

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, March 9, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

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

Members Absent:

Hon. D. Charles Bailey, Jr.
Scott O'Donnell
Michael Shin
Stephen Voorhees
Hon. Wes Williams

Guests:

John Adams, Oregon Tax Court
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
• Law School Education on ORCP • ORCP 1 • Limited Practice Paralegals • Signing Documents • 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 • ORCP 55	

I. Call to Order

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

II. Administrative Matters

A. Approval of February 10, 2024, Minutes

Mr. Andersen asked whether anyone had corrections to the draft minutes from February 10, 2024 (Appendix A). Judge Peterson stated that he had a few corrections:

- On page eight, in the second full paragraph, the line that reads, "If there is something in the rules about which that they inform self-represented litigants, court staff will," should be changed to read, " If there is something in the rules about which staff can inform self-represented litigants, court staff will."
- On page nine, in the first full paragraph, the word "with" is repeated, so the second instance should be deleted.
- On page 12, in the first full paragraph under Law School Education, the second sentence states "is does" instead of "it does."

The Council took a voice vote to approve the minutes with the corrections proposed by Judge Peterson. The vote was unanimous in favor of approval; however, a motion and second were not obtained prior to the vote. The vote will need to be re-taken next month.

III. Old Business

A. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson apologized for not having the staff comments ready for review by the Council at this meeting. He stated that, when the comments have been finalized, they will be sent for review by the members of the last Council whose terms have expired, as well as the members of the current Council.

B. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby explained that she had been busy with volunteer obligations to other organizations the past month. She stated that her plan is to convene the committee in the coming month in order to try to create a provision for removal of the abusive litigant designation, as that had been requested at the last Council

meeting. She agreed that this would improve the rule. She noted that Mr. Kekel had attended the Oregon Association of Defense Counsel board meeting, and she asked him to report on what the OADC board had discussed regarding a potential rule about abusive litigants.

Mr. Kekel stated that the proposed abusive litigant rule was indeed on the agenda at the last OADC board meeting. He reported that, overall, the OADC board would support such a rule, depending on the final wording. He stated that the board trusts that the Council will craft a rule that is fair and balanced.

2. Composition of Council

Judge Bailey was not present at the meeting and there was no report from the committee.

3. Law School Education on ORCP

Judge Peterson stated that he had no new information about the law schools. He summarized the state of law school education on the ORCP as Willamette University College of Law offering a pre-trial litigation class to 19 students per year; Lewis & Clark Law School not offering a current class on the ORCP but planning to offer a new class in the future; and the University of Oregon School of Law offering a civil litigation class every other year to an unknown number of students. He asked anyone with any thoughts about how the Council can encourage the law schools to provide more practice-ready education for their students to let him know.

Judge Norm Hill suggested speaking with Judge James Edmonds again. He noted that Willamette's program is limited because it is experiential, but that it may be possible to increase the number of students by modifying the nature of the program, or perhaps teaching it in both spring and fall. Judge Peterson stated that he would be happy to circle back with Judge Edmonds but, as a former Oregon Pleading and Practice instructor himself, he was not certain how popular the suggestion of teaching it twice a year would be.

Mr. Andersen asked whether Mr. Kekel had heard anything from the OADC about when a joint continuing legal education (CLE) presentation between OADC and the Oregon Trial Lawyers Association might be held. Mr. Kekel stated that this had been discussed at the OADC board meeting, but that no date had been mentioned. However, he reported that both organizations are working diligently to put the program together.

Judge Peterson stated that he would also be following up with Karen Lee at the Oregon State Bar's CLE department about the Bar including more information about the ORCP in its CLE programming. He reminded the Council that the Bar

used to do a lot of original CLE programming, but much of that is now jobbed out to national concerns. Most of the CLE programming the Bar does now is in conjunction with bar sections. Ms. Lee did indicate that she would talk with the bar sections about whether they could figure out how to include the ORCP in the CLEs that they present. Judge Peterson stated that he told Ms. Lee that there will likely be available presenters from the Council if bar sections elect to do this.

4. Limited Practice Paralegals

Judge Oden-Orr referred the Council to Appendix B, which included an updated proposal from the committee for language in Rule 1 to incorporate limited license paralegals. He reminded the Council that the committee had previously proposed language that was similar to language used by the Uniform Trial Court Rules Committee, but there were some lingering questions about whether that was sufficient. He stated that the committee had looked at action taken during the 2023 legislative session and found that a number of laws had been amended to incorporate what is referred to as "associate members of the bar," which is currently a term that only refers to limited license paralegals. The way that the Legislature has chosen to incorporate them is not by reference to their licensed paralegal designation, but by their status as associate members of the bar. For that reason, the committee is recommending that language. However, the committee's suggested language includes references to "lawyers" and "counsel" as well as "attorneys," since the ORCP also uses those terms in various places.

Judge Bloom stated that he thinks that the change is good. However, he expressed concern about the term "practicing law." He admitted that he was ignorant as to whether the wording of the law that allows licensed paralegals to provide legal services uses the term "practicing law," or whether it just says "provide legal services" or "provide limited legal representation." Judge Oden-Orr pointed out that the new Oregon Revised Statutes (ORS), in a number of places, refer to the limited practice paralegals as "law practitioners." He therefore assumed that it was appropriate to refer to what they do as practicing law and, in this instance, within the scope of their practice. Mr. Shields stated that his recollection is that the rules for admission do refer to these paralegals as practicing law. Part of that is simply because, the way the Bar's authority is defined, it only has the authority to regulate the practice of law. If something is not the practice of law, the paralegal would not need to be licensed to do it, and it would be outside of the scope of what the Bar could regulate.

Ms. Johnson asked whether the ORCP defines "associate member" anywhere, or whether there should be a reference to the definition of that term in the ORS. Mr. Shields stated that ORS 9.241(3) contains that definition. Judge Oden-Orr stated that he does not believe that there needs to be a reference to the ORS in ORCP 1, because this change to the ORCP is consistent with the ORS, and he believes that this consistency is sufficient. Mr. Goehler stated that he does not think there is

any ambiguity, because the statute says, “practicing law,” and this is the only place in the ORCP that makes reference to associate members.

Judge Oden-Orr made a motion to adopt the committee’s recommended language, “All references in these rules to “attorney,” “lawyer,” or “counsel” includes an associate member of the Oregon State Bar practicing law in the member's approved scope of practice.” Judge McHill seconded the motion, which passed unanimously by voice vote with no abstentions.

Judge Peterson then directed the Council’s attention to the alternative draft of Rule 1 in Appendix B that also includes green highlighted staff suggestions. He stated that these changes incorporate the committee’s changes that were just adopted by the Council, but without changing section numbers. Another change would be to move all definitions to the same section. Judge Peterson pointed out that the current definition of “declaration” is somewhat circular, and that staff had made a suggestion for improvement. Affidavit is also defined, as it was not previously in the rule. Judge Peterson asked the Council to look over those suggestions and provide feedback.

Judge Bloom appreciated the attempt to correct the circular definition of a declaration; however, he pointed out that a declaration can be more than a written statement of facts. A declaration can be a declaration of expert opinions, for example. He suggested that the definition should be as close to affidavit as possible, with the exception of the swearing in or notary. Mr. Goehler echoed Judge Bloom’s comments. He also wondered whether there is a difference between a written statement and a printed statement. He suggested taking a step back and examining the language carefully to make sure it is correct before making changes.

Judge Peterson observed that the entire Council is smarter than any single member. He agreed with both Judge Bloom and Mr. Goehler that it makes sense to take a more careful look, and that the staff’s suggestions are not quite ready for prime time. He suggested that it might be worth forming a short-term committee to take a look at the language. Judge Oden-Orr agreed to chair a committee. Mr. Goehler, Judge Norm Hill, Judge Peterson, and Ms. Wilson agreed to serve on the committee.

5. ORCP 14/39 E

Ms. Nilsson explained that, at its last meeting, the Council had voted to send the committee’s language on Rule 14 to the September publication agenda. The Council had also agreed to send the committee’s language on Rule 39, with a recommended amendment by Judge Norm Hill, to the September publication agenda. Ms. Nilsson stated that she had put both rules into Council format and that those rules were included on the agenda for the Council to take a look at now

to make sure that they are correct. She also pointed out that staff had made a few additional suggestions for improvement to Rule 39, highlighted in green. The changes are not significant and are mostly to make the rule consistent with Council format. Mr. Goehler stated that he agrees with the staff suggestions.

Judge Oden-Orr stated that he would suggest leaving out the word "that" in the second sentence of section B, so that it would read, "The deposition will be taken on the terms the court prescribes..." The Council agreed.

Judge Jon Hill made a motion to adopt all staff changes to Rule 39, with the exception of the word "that" in section B. Mr. Goehler seconded the motion, which passed unanimously with no abstentions.

6. ORCP 55

Judge Norby stated that, at its last meeting, the Council had a characteristically thoughtful conversation about the nuances of the most recent draft of Rule 55 concerning friendly subpoenas to willing witnesses. Committee members subsequently corresponded by e-mail about the different topics that were discussed at the Council meeting, rather than having a committee meeting. Those e-mail communications were very fruitful. The committee tried to implement everything that was discussed at the last Council meeting, including trying to remove any risk of creating a situation where a declaration from the person who sent the subpoena claimed something that a witness later disclaimed. The committee also tried to capture all forms of electronic transmission, not just e-mail and text messages. The idea there is to avoid having to redraft the rule any time some new kind of electronic transmission form is created. Judge Norby stated that she believes that the changes made by the committee (Appendix C) respond to all of the Council's comments at the last meeting. She asked for comments and feedback.

Judge Norm Hill asked about the language in proposed part B(2)(c)(i)(F) that says that the party, "has specific, written, recorded, or electronic proof that the witness actually received the subpoena." He stated that he knows what direct evidence and circumstantial evidence are, but he does not know what specific evidence is. He expressed concern that, by using this language, the Council might be creating ambiguity. There could be a fight over what that evidence is. As a judge, he does not know how that might play out. Judge Norby asked whether Judge Norm Hill had a specific suggestion on how to improve the language. Judge Norm Hill stated that he could not provide specific language without knowing exactly what the Council is trying to accomplish with the language in the draft. Judge Norby stated that the idea is to allow the person who makes a declaration to promise that there is proof that the other person received it. That proof could come in the form of a recorded session where the person admits to having received the subpoena, an e-mail where the person writes that they received it, or

some other electronic form of proof. Judge Norm Hill asked why the Council would want to open it up further. He suggested that this part of the rule is similar to the green return receipt with certified mail: you either have it, or you do not. The person simply has to have some written, recorded, or electronic confirmation from the witness that they received the subpoena. Judge Norm Hill stated that it is important to make sure that the rule has certainty.

Judge Jon Hill asked whether removing the word "specific" would accomplish what Judge Norm Hill was suggesting. Judge Norm Hill stated that it would not, because what is making him uncomfortable is that the language says that the person has to "have proof." He does not know whether that means that an argument can be made circumstantially that it is likely that the person got it. He would be more comfortable with a bright line rule that says confirmation from that witness is required. That confirmation can be in a multitude of forms, but it has to be their confirmation, because he does not want any gray areas.

Judge Norby noted that part of the conversation at the last Council meeting was about the fact that postal workers who are delivering certified mail sometimes note on the green return receipt card that they delivered the mail, rather than getting an actual signature on the card, because the person refuses to sign it for some reason. That is a return receipt; however, it is not signed by the person who received it but, rather, by a postal worker. Judge Norm Hill stated that he was just using the green card as an example, but that what he was trying to emphasize is that there should be a bright line rule. He acknowledged that Judge Norby is right, and that there will be circumstances where the person actually received the subpoena and the lawyer will not be able to prove it. He stated that he would rather have those circumstances than a situation where a practitioner is not entirely sure whether the subpoena has been served or not. Judge Norby asked whether Judge Norm Hill believes that a green postcard with a confirmation written by the postal delivery person is sufficient proof of service. Judge Norm Hill stated that it probably is not. Judge Norby stated that this was one of the problems that the committee was trying to solve from the beginning. Judge Norm Hill replied that he would probably be in favor of a rule that says that a card signed by a postal worker is not enough, because he thinks that there should be a premium placed on certainty. As a lawyer, and as a judge, he wants to know when he can count on the subpoena being enforced. He stated that he is trying to build in the equivalent of personal service with a process server when a witness has agreed to appear without personal service. He thinks that the requirement should be as strenuous as getting confirmation back from that witness that they have received the subpoena.

Ms. Nilsson suggested the following language: "The party has written, recorded, or electronic confirmation from the witness that they received the subpoena." Mr. Goehler, Judge Bloom, Ms. Wilson, Mr. Larwick, and Ms. Holley stated that they liked that language. Judge Norm Hill stated that Ms. Nilsson's language allayed his concern.

Ms. Johnson stated that, although this part of the rule was not under consideration by the committee, she wanted to ask about paragraph B(2)(c)(i). She pointed out that non-personal service on individuals waiving personal service seems to be limited to parties with attorneys, and she did not know if that is something that the Council wanted to address. Judge Norby stated that the Council has been trying for some time now to make the rules inclusive of self-represented litigants; however, she is uncomfortable softening the rules for subpoenaing witnesses in a way that would force self-represented litigants to try to interpret them. She feels comfortable with witnesses agreeing with an attorney or an attorney's agent, who has rules of ethics that they have to follow. She wondered what other Council members feel about this. Ms. Johnson stated that she appreciates Judge Norby's view, and defers very strongly to the judges on the Council and their experience dealing with self-represented litigants. She stated that she was just curious, as she knows that the Council strives to make the rules as accessible as possible to self-represented litigants. Mr. Goehler opined that self-represented litigants should get court-issued subpoenas. Judge Norby agreed. Mr. Andersen asked whether the rule needed to be tweaked to make that clear. Judge Norby opined that the language in the rule seems to make it clear already.

Judge Jon Hill made a motion to adopt the language proposed by the committee, with Ms. Nilsson's suggested language change. Mr. Andersen seconded the motion, which was approved unanimously by voice vote with no abstentions.

7. Uniform Collaborative Law Act

Ms. Wilson reminded the Council that respondents to the Council survey had suggested that the Council should adopt the Uniform Collaborative Law Act (UCLA). Ms. Wilson had agreed to gather some information about the UCLA. She stated that she has discovered that there are many Oregon practitioners who practice according to the UCLA, and that the Oregon Association of Collaborative Professionals (OACP) has been formed for these practitioners. She stated that this type of law is appropriate for cases where there will be an ongoing relationship, such as family law matters, employment matters, or perhaps wills and trusts where there is family involved. She stated that she had spoken with some members of the OACP, who stated that they were going to discuss the Council and the ORCP at a board meeting, and perhaps recommend that the Council adopt some rules related to collaborative law practice.

Ms. Wilson explained that the Uniform Law Commission created the UCLA, and that the Commission has recommended that jurisdictions adopt the UCLA either by statute or by rule. The person that Ms. Wilson spoke with at the OACP did not have a clear recommendation as to whether a statute or rule was more appropriate, but did think that there are currently barriers to full participation using the collaborative approach. Each party voluntarily enters into an agreement to use the collaborative law process, and the lawyers must withdraw afterward if they do not come to an agreement through that process. One of the things that

the OACP would like to see enshrined into a rule would be a stay, because it is currently somewhat impractical to try to use the collaborative law process when a case has already been filed. The other thing that the OACP thought would be helpful would be for the rules to make it clear what happens when there is a termination of the collaborative law practice, because there is certain information that is exchanged that is privileged or that would not be admissible later in court, and the new lawyers that the parties engage for litigation might not understand what should or should not be used from the collaborative law process. The OACP stated that it is willing to send some practitioners a Council meeting if the Council is interested in hearing more information from them.

Mr. Andersen stated that he had not heard of the UCLA until it came up in the survey at the beginning of this biennium. He asked for a more broad overview of how it works and what the benefit is. Ms. Wilson stated that it provides a sort of hybrid mediation process for the parties to voluntarily enter into. Each party has a lawyer, but they have meetings where they try to come together to resolve the issues as a team. The team might also hire an expert to give them information when needed. Mr. Andersen asked how it would work any differently than two attorneys talking to each other and saying, “Let's just start negotiations.” Ms. Wilson stated that each attorney has to be certified in this type of collaborative law approach. It is an attempt to avoid the pitfalls of litigation being adversarial. One difference would be that both attorneys would have to withdraw if the agreement did not come about, and the information disclosed in the meetings is supposed to be privileged and not allowed to be used in later litigation.

Judge Norm Hill stated that he could see the potential application to family law cases, but he was struggling to figure out how this is different from what most family law lawyers do already. In other words, he was struggling to see the value of creating a label for what already happens. Good lawyers get together, they negotiate individually, sometimes they have individual meetings, sometimes they hire joint experts if they think it is appropriate, and they either stipulate to or separately hire parenting evaluators. He wondered why the Council would want to create a situation where the same lawyers doing what they have always done would have to then withdraw if they cannot reach an agreement. Judge Norm Hill stated that, at least in the Oregon context, this feels like a solution in search of a problem, but that could be because he does not fully understand the context.

Mr. Shields stated that his understanding is that the requirement for the attorneys to withdraw in collaborative law is kind of the teeth to get the parties to participate in the process in good faith. Both parties are almost agreeing to tie their own hands a little bit when they go into the process, knowing that, if they cannot work it out, they have to start all over with two new attorneys. Judge Norm Hill stated that this is not the part he is struggling with; he is struggling with how the collaborative process is different than what it would be if there was not such a process.

Judge Peterson confessed ignorance about the UCLA, but offered two observations. He first wondered whether Oregon has actually adopted some or all of the UCLA. He also observed that the requirement of mandatory withdrawal of the attorneys if the collaborative process fails seems to him to need to be included in either a Bar rule or a statute. In terms of putting an automatic stay on litigation, that could get in the way of Uniform Trial Court Rules. He stated that this does not mean that the Council cannot take any action, but there may be some statutory requirements that would be trampled on by staying litigation, because it strikes him that this is something that may arise after the case is filed, if the parties decide to utilize the collaborative process.

Ms. Johnson stated that there is a body called the Commission on Uniform State Laws that meets to consider various uniform laws. She noted that this would seem to be within their province, since it is a specific commission that is set up per statute (ORS 172.010, *et. al.*) for when the state is considering adopting a uniform law. Their task is to consider uniform laws and to make recommendations to the Legislature. Ms. Johnson wondered whether this is even something the Council should be considering. Mr. Andersen asked Ms. Johnson to summarize that statute. Ms. Johnson stated that the Commission consists of three members of the bar, who are appointed by the governor for a term of four terms each, or until their successors are appointed and qualify, plus a resident of the state who is a life member of the National Conference of Commissioners on Uniform State Laws. The Commission must meet at least once in every two years, attend meetings of the National Conference of Commissioners on Uniform State Laws, and make recommendations to the Legislature about whether the state should or should not adopt uniform laws. Ms. Johnson stated that she does not believe that it is within the bailiwick of the Council to consider whether to adopt a uniform set of laws.

Judge Peterson stated that, in terms of the privilege of the discussions of the collaborative attorneys after they have withdrawn from the collaborative process, he does not believe that this is the purview of the Council either but, rather, something that would need to be dealt with statutorily.

Ms. Wilson stated that, if the Council wanted to hear from someone from the OACP, she would be willing to arrange that but, if the Council feels that it would be a waste of time, she would not pursue it. Ms. Johnson stated that she would be willing to contact someone on the Commission on Uniform State Laws to find out whether they have already considered the UCLA.

Judge Jon Hill stated that he thinks that the collaborative process is an interesting idea, but that he is puzzled as to how it relates to the work of the Council rather than the Legislature. Judge Peterson stated that, in terms of having a presentation or attendance by someone from the OACP, it seems like it would be more helpful if they first had a clearer idea of what the Council's mandate is and had some specific suggestions for the Council, rather than to simply have them come in and spend some of our time and their time and then have us tell them

that it seems like it is a matter for the Legislature.

Mr. Andersen asked Ms. Wilson if she saw a way in which incorporating portions of the UCLA could be reduced to drafting rules of civil procedure. Ms. Wilson stated that she would be willing to make an attempt at it, if there are people who want her to. She stated that she tends to agree that it does seem like these provisions would make more sense as statutory matters, especially with domestic relations.

Mr. Andersen asked Ms. Johnson to speak with someone at the Commission on Uniform State Laws, and asked Ms. Wilson to get a little more information from the OACP, but not to ask a representative to appear before the Council just yet. The Council can make a more informed decision after hearing their reports at the next meeting.

IV. New Business

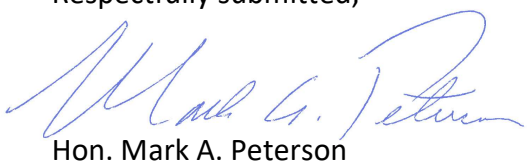
No new business was raised.

V. Adjournment

Judge Peterson reminded the Council that, just because a rule has been put on the agenda for the September publication meeting, no Council member is foreclosed from looking them over and bringing them back for more review at any time before September. He pointed out that it is not a good experience to be amending on the fly at the September meeting when it is time to vote to publish amendments. He asked Council members who see anything they do not like about any rule that has already been agreed on to either bring it to the attention of staff or raise it at the next Council meeting.

Mr. Andersen adjourned the meeting at 10:48 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

Shari Nilsson <>

FW: Stipend for CCP Executive Director

Kelly Andersen <>
To: Shari Nilsson <>

Mon, Mar 11, 2024 at 8:43 PM

Shari,

Can you please include the below email in the April packet?

Thanks.

Kelly L. Andersen

Andersen & Linthorst

Kelly L. Andersen

1730 East McAndrews Road, Suite A

Medford, Oregon 97504

Tel: 541-773-7000

Fax: 541-608-0535

www.andersenlaw.com

From: Phillip Lemman <>
Sent: Monday, March 11, 2024 11:53 AM
To: Kelly Andersen <>; Susie Norby <>
Cc: Mark Peterson <>; John C. Fagan <>; David T. Moon <>
Subject: Stipend for CCP Executive Director

Good morning Mr. Andersen and Judge Norby.

I want to acknowledge receipt of your recent letters supporting an increase in the executive director's stipend and provide some information about how the Council can request that budget increase.

As you may know, the Council is funded by a specific appropriation from the legislature, which passes through the Judicial Department (OJD) budget for administrative purposes. The Judicial Department only serves in a pass-through role – it does not make budget decisions on behalf of the Council.

If the Council wants to modify its budget request to increase the executive director's stipend – or for any other purpose -- it needs to request that the Chief Justice include a "Policy Option Package" (POP) for that purpose in the Chief Justice Recommended Budget. We are in the budget development process now, so I will add a POP request as a placeholder to get that process started, while you provide additional details. In addition, the Council would be responsible for any advocacy it wants to conduct to support that budget request, including appearing at the OJD budget hearings when they are scheduled in 2025.

I am copying John Fagan, the Judicial Department budget director, and ask that you work with him on providing the necessary information to have your POP request included in the Chief Justice Recommended Budget for the 2025-27 budget period. I do not know the internal procedures for the Council approving such a request, so cannot advise you in that regard.

I apologize if that sounds overly bureaucratic, but those are the steps we need to take to formalize your request and transmit it to the legislature for consideration. I do, however, also have some good news to pass along. The recently adjourned 2024 Legislative Assembly increased the Council's appropriation with a one-time increase of $7,500. While that may cover the increased stipend the rest of the current (2023-25) budget period, it **will not** be built into the Council's 2025-27 budget – your POP would need to request the $500/month increase for the 24 months of the 2025-27 budget period. Mr. Peterson can work with Mr. Fagan to ensure that the $7,500 reaches the Council once Governor Kotek signs the bill containing that appropriation.

I hope this information is helpful. Please feel free to contact me or Mr. Fagan if you need additional information.

Sincerely,

Phillip (Phil) Lemman (he/him)

Deputy State Court Administrator

(w) 503.986.5745

(c) 503.580.7365

CCP Summary – Rule 35 Committee Mtg
April 1, 2024 @ 12:30 PM

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

Absent: Judge Bailey, Lara Johnson

Summary

The ORCP 35 Committee met to review the addition of Section I, which was drafted to create a process to "remove the Scarlet Letter" as requested by a Council member at the last CCP meeting. Some thoughtful adjustments were made and the Section was approved.

Judge Peterson raised the issue of whether this biennium's draft Rule 35 has the same expansive reach as the draft from the last biennium, which appeared to make an Abusive Litigant designation a statewide designation. This biennium's rule localizes the designation to the court district in which it is entered but indicates that when one PJ enters a pre-filing order, other PJs in other district courts should be able to access it centrally in order to consider it as a factor if they subsequently consider entering a pre-filing order of their own in a subsequent case. Judge Hill noted that the Odyssey system does not always successfully enable access to litigant-specific information, but it is still worth attempting to make it accessible centrally. Each PJ can make their own decision about what to do with the information that a litigant was designated abusive in another jurisdiction. However, the litigant is not precluded from filing actions in another district court by a pre-filing order and designation in a different district court.

Judge Peterson gave several helpful suggestions to improve other words and phrases throughout the draft. He also raised the specter of the "relation-back" issue that could create a problem in perfecting jurisdiction for cases that are on the verge of passing the statute of limitations and need service to occur to satisfy the requirements of ORS 12.020. After a productive committee discussion, language was added to the "relation-back" section of the rule, to specify a way to satisfy ORS 12.020 by service of the documents delivered to the PJ – which include the proposed pleading for the new action. The fix language now appears in Section F(3).

Ms. Holley noted that the rule as now written is a good one, though she continues to be concerned that it could tempt attorneys to invoke it as a creative strategy rather than as a necessary failsafe. Ms. Holley said that abusive litigation is a problem, but attorneys should continue to deal with it less formally, by prompting judicial action that is not so procedurally restrictive. She also asked whether judicial education on the availability of this remedy would be a better option than the creation of a rule. Judge Norby emphasized that judicial education is overwhelming as it is, and would not be an effective or sustainable approach to the problem of what judges can and should do with abusive litigants.

ABUSIVE LITIGANTS

RULE 35

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

B Definitions.

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

B(2) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

B(3) For purposes of this rule, "security" means an undertaking by an abusive litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

C Factors the Court May Consider.

C(1) To determine whether a party is an abusive litigant as set forth in B(1), in addition to any other indicia of bad faith the court may consider:

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

C(1)(b) whether the litigant had a good faith expectation of prevailing;

C(1)(c) the litigant's motive in pursuing the litigation;

C(1)(d) the litigant's history of litigation and whether it entailed abusive suits;

C(1)(e) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts; or

C(1)(f) any other considerations that are relevant to the circumstances of the litigation.

C(2) To determine whether a litigant is using court filings to harass, coerce, intimidate, discriminate against, or abuse another party to litigation, the court may consider:

C(2)(a) whether the litigant has been restrained from contact with the opposing party by a court order that is active at the time of the court filings;

C(2)(b) whether the litigant is filing frivolous motions, pleadings, or other documents without any apparent basis in fact or law;

C(2)(c) whether the litigant is attempting to relitigate a resolved claim against the same party who prevailed, without first having diligently pursued appeal;

C(2)(d) whether the litigant has previously been declared a vexatious or abusive litigant in another jurisdiction; or

C(2)(e) any other considerations that are relevant to the circumstances of the litigation.

D Designation and security hearing.

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

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

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

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

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

F Seeking Exception to pre-filing order.

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

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

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

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

F(3) **Relation back.** If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file. Upon request to the presiding judge, in any proposed action with an imminent risk of obsolescence under a statute of limitations, the filing party may be permitted to serve a complete copy of the petition, affidavit or declaration, and proposed pleading, on any party for whom expedited service is necessary to perfect jurisdiction under ORS 12.020.

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

H Cases filed without leave of the presiding judge. If an abusive litigant initiates new litigation without first obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the abusive litigant is subject to a pre-filing order. The notice must be served on the litigant and all parties at the most current address entered in court records. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim unless the abusive litigant files a motion for leave to proceed within 10 days of service of the notice. If

the Presiding Judge issues an order allowing the action to proceed, then the abusive litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading or within 10 days after service of that order, whichever period may be the longer, unless the court otherwise directs.

I Application to vacate pre-filing order and set aside designation.

I(1) **Procedure.** An abusive litigant may file an application to vacate the pre-filing order and set aside the "abusive litigant" designation. The application must be filed in the court that entered the prefiling order, either in the action in which the prefiling order was entered, or contemporaneous with a request to the presiding judge to file new litigation under Section F. The application must be accompanied by evidence in the form of Declarations or Exhibits that support the premise that there has been a material change in the facts upon which the order was granted and that justice would be served by vacating the order.

I(2) A court may vacate a prefiling order and set aside the abusive litigant designation upon a showing of material change in the facts upon which the order was granted and that justice would be served by vacating the order. An evidentiary hearing on an application under this section may be set at the court's discretion.

I(3) An abusive litigant whose application to vacate a prefiling order and set aside the designation is denied will not be permitted to file another similar application for one year after the date of denial of the previous application. An application to vacate under this Section is not required to seek an exception to a pre-filing order under Section F(1).

SUBPOENA

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*] **rule;**

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)(c)(ii), B(2)(d), B(3)(a), or B(3)(b) of this [*rule.*] **rule; and**

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.

Council on Court Procedures
April 13, 2024, Meeting
Appendix E-1

A(2) **Originating court.** A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

A(3) **Who may issue.**

A(3)(a) **Attorney of record.** An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) **Clerk of court.** The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) **Clerk of court for foreign depositions.** A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) **Judge, justice, or other authorized officer.**

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) **Who may serve.** A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) **Proof of service.** Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a

party.

A(6) **Recipient obligations.**

A(6)(a) **Length of witness attendance.** A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) **Witness appearance contingent on fee payment.** Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) **Deposition subpoena; place where witness can be required to attend or to produce things.**

A(6)(c)(i) **Oregon residents.** A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) **Nonresidents.** A nonresident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

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 object, to move to quash, or to move to modify subpoena for production.*** *A person who is not subpoenaed to appear, but who is commanded to produce and*

permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, may object, or move to quash or move to modify the subpoena, as follows.

A(7)(a) ***Written objection; timing.*** *A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.*

A(7)(a)(i) ***Scope.*** *The written objection may be to all or to only part of the command to produce.*

A(7)(a)(ii) ***Objection suspends obligation to produce.*** *Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.*

A(7)(b) ***Motion to quash or to modify.*** *A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of production*.]

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 filed with the court and served on the party who issued the subpoena within 14 days of the date that the subpoena was served and before the date and time set for the recipient to appear and testify. 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.

A(8) **Scope of discovery.** Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

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

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

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

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

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

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

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

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

B(2)(c) **Service on individuals waiving personal service.** If the witness waives personal service, the subpoena may be mailed **or transmitted electronically** 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 the witness agreed to appear and testify if subpoenaed;*] **that:**

B(2)(c)(i)(A) the witness agreed to appear and testify if subpoenaed by a specified date using mail or electronic transmission to a designated e-mail, text message, facsimile, or other electronic account that the witness confirmed is accurate;

B(2)(c)(i)(B) the specific date, time and place for the witness to appear and testify was coordinated with the witness and agreed on;

B(2)(c)(i)(C) The mail or electronic account used to deliver the subpoena contained no typographical or other errors that would affect delivery, and a copy of the electronic transmission is attached to the certification document;

B(2)(c)(i)(D) The mail or transmission was sent by the specific date agreed on;

[*B(2)(c)(ii)* ***Fee arrangements.*** *The party's attorney or attorney's agent made satisfactory*]

B(2)(c)(i)(E) Satisfactory arrangements **were made** with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; and

B(2)(c)(i)(F) The party has written, recorded, or electronic confirmation from the witness that they received the subpoena.

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

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

Rule 7 D(3)(h).

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

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

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

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

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

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

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

postpone the matter to allow the peace officer to be personally served.

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

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

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

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

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

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) **Combining subpoena for production with subpoena to appear and testify.** A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) **When mail service allowed.** A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) **Subpoenas to command inspection prior to deposition, hearing, or trial.** A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must comply with the following:

C(3)(a) **Advance notice to parties.** The subpoena must be served on all parties to the

action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) **Time for production.** The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) **Originals or true copies.** The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) **Application of this section; "confidential health information" defined.** This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) **Qualified protective orders.** A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) **Compliance with state and federal law.** A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected

CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

D(4)(a) **Qualified protective order; declaration or affidavit; contents.** The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that demonstrates:

D(4)(a)(i) **Written notice.** The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) **Sufficiency.** The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) **Information regarding objections.** The party must certify that either no written objection was made within 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) **Inspection requests.** The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI received.

D(4)(b) **Objections.** Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) **Statement to secure personal attendance and production.** The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(8) is insufficient for this subpoena.

D(5) **Mandatory privacy procedures for all records produced.**

D(5)(a) **Enclosure in a sealed inner envelope; labeling.** The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) **Enclosure in a sealed outer envelope; properly addressed.** The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) **Court.** If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) **Deposition or similar hearing.** If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) **Other hearings or miscellaneous proceedings.** If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) **If no hearing is scheduled.** If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) **Additional responsibilities of attorney or party receiving delivery of CHI.**

D(6)(a) **Service of a copy of subpoena on patient and all parties to the litigation.** If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a

copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

D(6)(b) **Parties' right to inspect or obtain a copy of the CHI at own expense.** Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the subpoena at the expense of the party who requested the copies.

D(7) **Inspection of CHI delivered to court or other proceeding.** After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) **Compliance by delivery only when no personal attendance is required.**

D(8)(a) **Mail or delivery by a nonparty, along with declaration.** A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) **Declaration of custodian of records when CHI produced.** CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) **Authority of declarant.** The declarant is a duly authorized custodian of the

records and has authority to certify records;

D(8)(b)(ii) **True and complete copy.** The copy produced is a true copy of all of the CHI responsive to the subpoena; and

D(8)(b)(iii) **Proper preparation practices.** Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) **Declaration of custodian of records when not all CHI produced.** When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the custodian's custody.

D(8)(d) **Multiple declarations allowed when necessary.** When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) **Designation of responsible party when multiple parties subpoena CHI.** If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.