

**MINUTES OF MEETING  
COUNCIL ON COURT PROCEDURES**

Saturday, October 13, 2007  
(Amended October 30, 2007)

9:30 a.m.

Oregon State Bar Center  
5200 SW Meadows Road  
Lake Oswego, Oregon

Members Present:

Eugene H. Buckle  
Brian S. Campf  
Brooks F. Cooper  
Don Corson  
Kristen S. David  
Hon. Daniel L. Harris\*  
Hon. Jerry B. Hodson  
Hon. Lauren S. Holland  
Alexander D. Libmann  
Hon. Eve L. Miller  
Leslie W. O'Leary  
David F. Rees  
Shelley D. Russell  
John L. Svoboda  
Mark R. Weaver

Members Absent:

Dr. John A. Enbom  
Martin E. Hansen  
Hon. Robert D. Herndon  
Hon. Rodger J. Isaacson  
Hon. Mary Mertens James  
Hon. Rives Kistler  
Hon. David Schuman  
Hon. Locke A. Williams

Guests:

David Nebel, Oregon State Bar

\*by teleconference

Also present were Mark A. Peterson, Executive Director, and Shari C. Nilsson, assistant to Mark Peterson.

ORCP Changes Considered

ORCP 7  
ORCP 18A  
ORCP 18B  
ORCP 21A  
ORCP 22C  
ORCP 23  
ORCP 27  
ORCP 43  
ORCP 44A  
ORCP 44C

ORCP 55H  
ORCP 54A  
ORCP 54E  
ORCP 57  
ORCP 58  
ORCP 59H  
ORCP 61  
ORCP 57D(2)  
ORCP 58B(5)

## **Item I: Call to Order**

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

## **Item II: Introductions**

All members and guests briefly introduced themselves.

### **Item IIA: Roster**

The updated member roster was handed out and two corrections were noted.

## **Item III: Approval of December 9, 2006, and September 15, 2007, minutes**

Mr. Corson called for motions to approve the December 9, 2006, and September 15, 2007, minutes. The motions were seconded and each set of minutes was approved by the membership.

## **Item IV: Elections of Officers**

Mr. Corson was nominated as chair. The nomination was seconded and duly carried. Mr. Buckle was nominated as vice-chair. The nomination was seconded and duly carried. Dr. Enbom was nominated as treasurer. The nomination was seconded and duly carried.

## **Item V: Report: Council on Court Procedures Website**

Mr. Cooper and Ms. David reported on the work that they have been doing on the Council website. Mr. Cooper indicated that he has spoken with Lewis and Clark Law School and they have agreed to host the site. The web address which currently resides on the Oregon government website will redirect visitors to the Council's site.

Ms. David showed the Council a prototype of the new website. She indicated that she will be working with Prof. Peterson and Ms. Nilsson to gather materials to include on the site. These materials will include agendas, minutes, a membership roster (without contact information), an explanation of what the Council does, and some disclaimer language for *pro se* litigants who may visit the website that makes clear that the Council is a rulemaking body and not a place seek redress for what litigants may feel was judicial error in a judge's application of the law or rules.

Mr. Buckle inquired as to who is the target audience of the website. Mr. Cooper stated that there is a legislative mandate for the Council to provide a website for the citizens of the State of Oregon; therefore, our target audience is the public. Mr. Cooper will be contacting organizations with whom we wish to have links to our website (state agencies, bar associations,

etc.).

Mr. Cooper discussed creating an e-mail address for information on the Council. There was some discussion about whether that address should be directed to the Executive Director or to the entire Council via the listserv. Judge Holland asked who would be responsible for responding to those e-mails. Mr. Cooper stated that the e-mail would be for general informational purposes and that, if there is a matter a person would like the Council to address, they will need to do so in writing. Mr. Corson suggested that we try setting the e-mail to forward to the listserv and see what volume of mail results. Ms. David stated that members can set filters in their e-mail programs that will allow these mails to go to a specific folder so that they may be reviewed as members have time. Ms. David can assist in setting up these filters.

Mr. Cooper and Ms. David showed the logo that was created for the Council. Judge Holland suggested that the Council not use the photograph of Portland displayed on the prototype website since the Council is a statewide organization. Ms. David indicated that it was a stock photo the creators had on hand and it will be changed.

Mr. Corson inquired as to whether the ORCPs will be available on the website. Ms. David indicated that there will be a link to them. Mr. Cooper stated that the website hopefully will be “live” by the November meeting, but it will be by December at the latest. Mr. Corson asked him to let the Council know when it is up and running. There was discussion on how to publicize the website. Prof. Peterson agreed to write informational pieces for publications such as the OSB Bulletin and local bar association publications.

#### **Item VI A: Old Business (ORCP 63 and 64 and ORS Chapter 138)**

Prof. Peterson reported on a matter from December, 2006, minutes, that was raised by James Nass at the Court of Appeals. Prof. Peterson stated that criminal statutes link to and use the ORCPs regarding motions for new trial. The problem was that, if a motion for new trial is filed and someone files a notice of appeal, the trial court is without jurisdiction to rule on the motion for new trial. The Council addressed the problem and made modifications to ORCP 63 and ORCP 64 last biennium.

#### **Item VI B: Possible amendments for which committees were formed**

##### **Item VI B1: E-Filing**

Committee Members: Mr. Cooper (chair), Ms. David, Judge Holland, Mr. Libmann, Ms. Russell

Mr. Cooper reported that a meeting was held. All members except Judge Holland were able to attend. The Committee will meet again and report at the November meeting.

**Item VI B2: ORCP 7 – Duty to save costs of service protocol**

Committee Members: Mr. Cooper (chair), Mr. Hansen, Judge Herndon

Mr. Cooper indicated that the Committee has met and will report at the November meeting.

**Item VI B3: ORCP 57D(2) - (4) – Clarify peremptory challenges for third parties**

Committee Members: Mr. Hansen (chair), Judge Herndon, Mr. Svoboda

Mr. Hansen and Judge Herndon were absent. Mr. Svoboda indicated that the Committee has held no meetings so far.

**Item VI B4: ORCP 19B – Affirmative Defenses**

Committee Members: Ms. David (chair), Mr. Campf, Judge Hodson

Ms. David indicated that the Committee has met and will report at the November meeting.

**Item VI B5: ORCP 21A, 27, 44A, 55H – Probate Court Matters**

Committee Members: Mr. Cooper (chair), Ms. David, Judge Holland

Mr. Cooper indicated that the Committee will meet and report at the November meeting. Ms. David volunteered to join the Committee as a member of the defense bar.

**Item VI B6: ORCP 57, 58, 59, 61 – Jury improvement**

Committee Members: Judge Harris (chair), Mr. Buckle, Judge Miller, Ms. Russell

Judge Harris was absent at the September meeting, so there was no report. Mr. Buckle agreed to serve on the Committee, as did Judge Miller.

**Item VI B7 (was VI C2): ORCP 18B – Amount of Damages Sought**

Committee Members: Ms. O’Leary (chair), Judge Isaacson, Mr. Libmann, Judge Miller

Ms. O’Leary indicated that the Committee has met, will meet again, and will report at the November meeting. Ms. O’Leary asked Prof. Peterson if he could investigate when the issue was raised with the Council in the past. Prof. Peterson indicated that he believed it

was about 1989, and agreed to look for material related to the past discussion.

**Item VI B8 (was VI D4): Limits on lengths of depositions**

Judge Miller and Judge Hodson indicated that they have not seen a problem with depositions lasting longer than 7 hours, and Judge Miller stated that if an attorney believes that a deposition is abusive, they have the option to go to a judge. Ms. Russell stated that the 7 hour rule in federal cases can be extended by agreement of the parties if necessary.

Mr. Svoboda inquired as to whether it might be more difficult for a judge to stop a deposition since they do not know all of the facts. He indicated that it might be easier to get permission to extend a deposition rather than getting a judge to stop one. Judge Miller replied that judges can use their common sense, even if not all the facts are known, and they decide on a case-by-case basis. Judge Holland inquired as to whether there was a sense from attorneys about whether it would be a helpful rule. Many attorneys on the Council indicated that they have had depositions that lasted more than 7 hours.

Ms. David stated that it is an issue most attorneys can manage on their own. She stated that the ORCPs are practical guidelines for attorneys and wondered if language could be added to reconfirm that attorneys can contact the court in the case of an abusive deposition. Ms. O’Leary raised the concern that if a deposition limit were imposed, new attorneys may think that they are “entitled” to a deposition of that length. Judge Miller concurred.

After lengthy discussion it was decided that changing the rule would be akin to solving a problem that does not exist. The decision was made not to form a committee.

**Item VI C: Possible amendments held over until October meeting**

**Item VI C1: ORCP 58B(5): Clarifying standard for rebuttal evidence**

Committee Members: Judge Miller (chair), Ms. David, Ms. O’Leary, Mr. Svoboda, Mr. Weaver

The question was raised as to whether this is an issue to be addressed in the ORCPs. Judge Miller indicated that it is a matter of the judge’s discretion as to whether something is allowed as rebuttal evidence. She was concerned that a rule would tie judges’ hands. Ms. Russell stated that it might be better addressed in a CLE. Mr. Svoboda wondered if it is more an ORCP issue or, rather, an evidentiary code issue. Prof. Peterson pointed out that ORCP 58B(5) does address evidence and the order of trial. Judge Harris stated that there is no basic definition of rebuttal in the ORCPs. After discussion, a Committee was formed.

### **Item VI C3: ORCP 54E: Offers of Settlement**

Committee Members: Mr. Buckle (chair), Mr. Rees, Judge Hodson, Ms. O’Leary

Judge Miller stated that she does see unaccepted offers of compromise in her court files. Mr. Cooper stated the plaintiff’s bar may feel that an ideological reason to file an offer of compromise prior to acceptance may be an expectation that the information in the offer *will* influence the judge. Mr. Buckle stated that he has filed unaccepted offers in the court file in order to get on the record the date that the offer was made. Mr. Corson wondered how a rule would be enforced. Prof. Peterson stated that a 54E offer can be a weapon to be used between attorneys rather than a negotiation – it changes the amount of recovery necessary to prevail. Corson stated that there is no authority to file an offer if it is not accepted.

There was general discussion that the proposed requirement of payment to be made within thirty days of acceptance of the offer misapprehends the rule – it is an offer of judgment and not of payment. A judgment-proof litigant can utilize an ORCP 54E offer to settle litigation

Finally, Prof. Peterson observed that *Delcastillo v. Norris*, 197 Or App 135, 140-141 (2005), applies a fairly bright line determination as to whether a Rule 54E offer or a verdict is more favorable. In that case the verdict was less than the Rule 54E offer and cut off the Plaintiff’s entitlement to costs incurred after the offer. The Plaintiff argued that, as the offer was less than the personal injury protection (PIP) lien, she would have recovered nothing while the jury awarded her \$1,500 in non economic damages which she was able to retain. Council members questioned whether the *Delcastillo* holding is good policy. Mr. Buckle noted that his Rule 54E offers are broken down to address each part of a plaintiff’s claim including attorney fees. Judge Miller and Mr. Rees believed that the policy in ORCP 54E might be better served with a rule that compares a plaintiff’s net outcome under the offer and under the verdict. A Committee was formed.

### **Item VI C4: ORCP 59H – Non-requested jury instructions which were not given**

Prof. Peterson indicated that ORCP 59H is applicable to criminal trials. *See* ORS 136.330(2). Prof. Peterson observed that, according to *State v. Toth*, 213 Or App 505, 510 (2007), if a party does not request a specific instruction, the error is reviewable so long as: 1) it is an error of law; 2) the legal point is not in dispute; and 3) the appellate court does not need to go outside the record. Judge Miller indicated that she feels that in criminal cases it is incumbent on the judge to make sure all relevant instructions are included, but in civil cases the attorneys miss instructions at their own peril. Mr. Corson wondered if anyone has seen a case of “sandbagging” for tactical advantage on appeal. Everyone agreed that it would be an incredibly risky strategy and that nobody has seen it happen. After discussion it was decided that the rule should be left as it is so that

criminal defendants do have a chance for review if their trial attorneys fail to request an instruction that should have been requested. No committee was formed. Mr. Corson will report to Judge Barron.

**Item VI C5: ORCP 18A – Adopt federal style notice pleading**

Mr. Corson stated that federal court is much more expensive than Oregon state court due to expert costs, travel, etc. Oregon has a less expensive process with less discovery. It was noted that Oregon’s ultimate fact pleadings are a form of discovery. Judge Miller suggested that fact pleading makes you a better lawyer as you have to have a better grip on the elements of your case and the facts that will support your proof.

After discussion, no committee was formed.

**Item VI D: Revisit possible amendments that did not gather sufficient interest at the September 15, 2007, meeting to warrant further investigation**

**Item VI D1: ORCP 43 – E-Discovery**

Prof. Peterson reviewed the highlights of the Advisory Committee Notes to the 2006 Amendment of FRCP 34, relating to e-discovery. It was noted that ORCP 43A defines “documents” to include electronic documents. Oregon also allows the requesting party to designate the form of the document requested. Mr. Cooper felt that the rule is comprehensive enough, and can include on-site inspections. No committee was formed.

**Item VI D2: Limit number of cumulative experts on a given issue**

Ms. O’Leary stated that this issue comes up more under the rules of evidence than the ORCPs. Judge Hodson stated that a rule change is not necessary and that judges use their discretion. No committee was formed.

**Item VI D3: No duty to respond to ORCP 43 request for production until answer is filed**

It was noted that sometimes discovery is necessary during motion practice. It was noted that if a plaintiff wants a defendant to file an answer before discovery, they already have the right to seek protection under ORCP 69. No committee was formed.

**Item VI D5: ORCP 18A: Optional Form Pleadings for Personal Injury Complaints**

Committee Members: Mr. Libmann (chair), Mr. Cooper, Judge Holland

The Douglas County Bar Association has raised this issue before, with the Council as

well as the UTCR Committee and the OSB House of Delegates. Judge Holland noted that the legislature has made it clear that the age of the *pro se* litigant is here to stay. However, these types of cases deal with complex issues, expert witnesses, etc. She noted that with other cases in which form pleadings exist, there are no Rule 21 motions but in these more complex cases Rule 21 motions may be appropriate.

Mr. Buckle wondered whether the issue could be handled with local SLRs. Judge Miller and Mr. Corson indicated no. Judge Miller wondered whether this idea was coming from another jurisdiction and Mr. Cooper stated that California is a form pleading state, as opposed to Oregon, a fact pleading state. Prof. Peterson mentioned that effective January 1, 2008, small claims jurisdiction will be raised to \$10,000 (allowing *pro se* litigants to use the currently available form, the Notice of Small Claim) and attorney fees are available by statute for small tort cases.

After some discussion, a committee was formed. Mr. Cooper noted that the Committee could wait to meet until January.

## **Item VI E: New Matters**

### **Item VI E1: Rule Changes**

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#### **Item VI E1(a): Amend ORCP 22C to make consistent with federal rule**

Mr. Buckle received a request to amend ORCP 22C to make it consistent with the federal rule. The suggestion was to change the language so that, after the 90-day deadline, a third party complaint could be filed with the leave of the court **OR** with the agreement of other parties (as opposed the current language which requires leave of the court **AND** the agreement of other parties).

Prof. Peterson indicated that the issue has been discussed by the Council in the last biennium. After discussion it was agreed that the suggested rule change would remove the judge's discretion, including when the case was old and was set for trial, if the parties could stipulate to adding a third party defendant. Mr. Brooks said that the party could always file a new action and move to consolidate pursuant to ORCP 53. No committee was formed.

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#### **Item VI E1(b): ORCP 44A and C – HIPAA**

Mr. Buckle received a request for a change that would make the filing of a personal injury complaint act as a HIPAA release from any health care provider at any time. After some discussion, no committee was formed.

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**Item VI E1(c): ORCP 54A: Voluntary Dismissals**

Committee Members: Mr. Campf (chair), Mr. Hansen, Judge James, Judge Schuman

Mr. Buckle reported that he had been asked to raise a proposed amendment to ORCP 54A. The issue arose from a situation where a plaintiff’s attorney filed a lawsuit well in advance of the statute of limitations, the case went to mandatory arbitration, and there was a defense verdict. The plaintiff’s attorney appealed the award with a request for a trial *de novo*. One week after appealing, the attorney filed a voluntary dismissal. The court said that the defendant could get costs but that the dismissal would be without prejudice and the arbitration award would not be reinstated. Proposed new language for ORCP 54A was as follows:

“However, if a plaintiff in an action subject to a mandatory arbitration program requests a trial *de novo* appeal of an arbitration award, the court may only allow a voluntary dismissal under this rule with stipulation of all adverse parties or must reinstate the arbitration award.”

Ms. David raised the fact that the changes to ORS 12.220 may tie in with this issue. After discussion, a committee was formed.

**Item VI E1(d): ORCP 23 – Motion for Leave to Amend to include punitive damages must be filed within 60 Days**

Mr. Buckle reported the requested change. Prof. Peterson noted that this suggestion had been raised in the last biennium. It was noted that ORS 31.725(3)(b) already makes the timing of the motion to assert a claim for punitive damages, if prejudicial to the non-movant, a basis on which to deny the motion.

After discussion, no committee was formed.

**Item VI E1(e): Production of expert’s file at trial**

Mr. Buckle received a request regarding a rule on the production of an expert’s file at trial that would require an opportunity for the opposing attorney to see the file. The judges on the Council indicated that in their experience they had never had an expert fail to bring their file to court. Ms. David reported that a Marion County judge recently struck three hours of expert testimony because an expert did not bring the file.

Judge Hodson felt that it is an evidentiary issue, as the work product rule is waived after testimony. Mr. Cooper asked if there needs to be a specific rule.

Ms. David felt that there is an unwritten rule. Ms. O’Leary stated that it could be an evidentiary issue, and also mentioned that it is difficult to define “file” and that a rule might be too cumbersome. Judge Hodson stated that OEC Rule 705 does require an expert to show what the expert relied upon. No committee was formed.

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**Item VI E2: Notification List**

Ms. Nilsson distributed a list of people and agencies that the Council might wish to keep notified of Council matters. Mr. Corson requested that members review the list, let Ms. Nilsson know if they note any personnel changes in any agencies, and make suggestions of additional people/agencies that we may have missed.

**Item VI E3: Council History and Documents**

Ms. David raised the issue of what documents are considered to be part of the public record for the Council, and what documents are available at which locations. She indicated that she has occasionally searched the Council history at the Clackamas County Law Library and used it to argue a rule’s intent.

Prof. Peterson stated that early Council work is at the State Archives and that the records received from the University of Oregon are under lock and key at the Legal Clinic storage space. He stated that, in the past, written reports and information circulated to the members have been included after the minutes.

It was discussed whether revisions become a part of legislative history. Mr. Corson stated that all committee reports should be preserved but that the Council minutes should stand alone. Mr. Buckle wondered whether by preserving so much history we may be detracting from the clarity of the rule. Mr. Corson stated that the goal should be to draft clear rules and to preserve the record. Prof. Peterson said the legislative history is relevant, but only if the text and context of the rule does not reveal the Council’s intent under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-612 (1993). Mr. Cooper asked Prof. Peterson to look at the public records law and see what is required. The Council will discuss this matter at its November meeting.

Prof. Peterson reminded the committees to please date each draft and to use the format from the advance sheets when proposing rule changes.

**Item VII: Appointment of additional committee members and/or new committees**

<p><u>ORCP 7: Duty to Save Costs of Service Protocol</u></p> <p>Mr. Cooper (chair) Mr. Hansen Judge Herndon</p>	<p><u>ORCP 18A: Optional Form Pleadings for Personal Injury Complaints</u></p> <p>Mr. Libmann (chair) Mr. Cooper Judge Holland</p>
<p><u>ORCP 18B: Prayer for Damages)</u></p> <p>Ms. O'Leary (chair) Judge Isaacson Mr. Libmann Judge Miller</p>	<p><u>ORCP 19B: Affirmative Defenses</u></p> <p>Ms. David (chair) Mr. Campf Judge Hodson</p>
<p><u>ORCP 21A, 27, 44A, 55H: Probate Court Matters</u></p> <p>Mr. Cooper (chair) Ms. David Judge Holland</p>	<p><u>ORCP 54A: Voluntary Dismissals</u></p> <p>Mr. Campf (chair) Mr. Hansen Judge James Judge Schuman</p>
<p><u>ORCP 54E: Offers of Settlement</u></p> <p>Mr. Buckle (chair) Mr. Rees Judge Hodson Ms. O'Leary</p>	<p><u>ORCP 57, 58, 59, 61: Jury Improvement</u></p> <p>Judge Harris (chair) Mr. Buckle Judge Miller Ms. Russell</p>
<p><u>ORCP 57D(2): Peremptory Challenges for Third Parties</u></p> <p>Mr. Hansen (chair) Judge Herndon Mr. Svoboda</p>	<p><u>ORCP 58B(5): Clarifying Standard for Rebuttal Evidence</u></p> <p>Judge Miller (chair) Ms. David Ms. O'Leary Mr. Svoboda Mr. Weaver</p>
<p><u>E-Filing</u></p> <p>Mr. Cooper (chair) Ms. David Judge Holland Mr. Libmann Ms. Russell</p>	

### **Item VIII: Schedule future meeting locations**

Future meeting locations and dates were discussed. The following tentative changes were made:

- ▶ the January 12, 2008, meeting will be held in Salem;
- ▶ the March 8, 2008, meeting will be held in Bend;
- ▶ the May meeting was moved to May 3, 2008, to avoid a conflict with Mother's Day weekend, and will be held in Medford/Ashland;
- ▶ the June meeting was moved to June 7, 2008, to avoid conflicts with graduations; and
- ▶ either the October or November, 2008, meeting will be held in Eugene.

These locations are subject to change depending on member and facility availability. A final schedule will be issued as soon as possible.

### **Item IX: Adjournment**

Mr. Corson adjourned the meeting at approximately 12:05 p.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director