

**MINUTES OF MEETING  
COUNCIL ON COURT PROCEDURES**

Saturday, January 12, 2008, 9:30 a.m.

(Minutes amended 1/31/08)

University of Oregon  
William H. Knight Law Center  
3<sup>rd</sup> Floor Faculty Lounge  
1515 Agate Street  
Eugene, Oregon

**ATTENDANCE**

**Members Present:**

Eugene H. Buckle  
Brian S. Campf  
Don Corson  
Kristen S. David  
Dr. John A. Enbom  
Martin E. Hansen\*  
Hon. Robert D. Herndon  
Hon. Jerry B. Hodson\*  
Hon. Lauren S. Holland  
Hon. Rodger J. Isaacson\*  
Hon. Mary Mertens James\*  
Alexander D. Libmann  
Hon. Eve L. Miller  
Leslie W. O'Leary\*  
David F. Rees\*  
Shelley D. Russell\*  
Hon. David Schuman  
John L. Svoboda  
Mark R. Weaver  
Hon. Locke A. Williams

**Members Absent:**

Brooks F. Cooper  
Hon. Daniel L. Harris  
Hon. Rives Kistler

**Guests:**

David Nebel, Oregon State Bar  
Professor Maury Holland  
Dean Margaret Paris

**Council Staff:**

Mark A. Peterson, Executive Director  
Shari C. Nilsson, Administrative Assistant

\*Appeared by teleconference

ORCP Discussed this Meeting		ORCP Discussed & Not Acted Upon this Biennium	ORCP Amendments to be Published this Biennium
ORCP 1	ORCP 44	ORCP 7F(2)(a)	
ORCP 7	ORCP 44A	ORCP 19B	
ORCP 7D(3)(b)	ORCP 47C	ORCP 38B	
ORCP 7D(4)(a)	ORCP 54A	ORCP 38C	
ORCP 7F(2)(a)	ORCP 54E	ORCP 43B	
ORCP 9F	ORCP 55H	ORCP 44B	
ORCP 18A	ORCP 57	ORCP 47C	
ORCP 18B	ORCP 57D(2)-(4)	ORCP 58B(5)	
ORCP 21A	ORCP 58	ORCP 59H	
ORCP 27	ORCP 59		
ORCP 38B	ORCP 61		
ORCP 38C	ORCP 68		

I. Call to order (Mr. Corson)

Mr. Corson called the meeting to order at 9:40 a.m.

II. Introduction of Guests

The Council's guests were welcomed and introduced. They were: Margaret Paris, Dean of the University of Oregon Law School; and Maury Holland, Professor of Law Emeritus at the U of O Law School and former Executive Director of the Council on Court Procedures.

III. Approval of December 8, 2007, Minutes

Mr. Corson called for a motion to approve the amended December 8, 2007, minutes which had been previously circulated to the members. The motion was made and seconded and the amended minutes were approved by the membership with no further amendments or corrections.

IV. Administrative Matters

A. Update: Performance Measures (Mr. Corson)

Mr. Corson stated that the Department of Administrative Services sent an e-mail stating that they are still working on whether the Council should be exempted from performance measures and, if not, what measures are appropriate. This item will remain on the agenda for an update at the next meeting.

B. Update: Contact with Legislators (Mr. Corson)

Mr. Corson worked with the membership to assign contact persons for each legislator who did not have a member already assigned. He suggested that for January, members should hold off on mailing updates to legislators who have already been contacted. Members should make initial contact with legislators who have not already been contacted. The matrix of legislators and Council contacts is attached as Appendix A.

C. Update: Contract with Northwestern School of Law (Mr. Corson)

Mr. Corson stated that the Dean of Northwestern School of Law has signed the contract and it is in the hands of Legislative Counsel for signature. Mr. Corson will follow up and report on progress at the next meeting.

D. Website (Mr. Corson/Prof. Peterson)

1. Forwarding Website Inquiries to Listserve

In response to an issue raised by Judge James, Council members agreed that forwarding web inquiries from potential future litigants to judges and attorneys is not a good idea. Mr. Corson suggested that only questions regarding ORCP get forwarded to the Council and that there be a small website committee that would deal with the other inquiries. Prof. Peterson stated that he does not feel that a committee is necessary. Mr. Corson stated that he would be pleased if Prof. Peterson would serve as a screening point and bring only rule-relevant inquiries before the Council. Ms. David suggested that Prof. Peterson and Ms. Nilsson deal with daily contacts and that, if there are any questionable inquiries, those inquiries can be raised with the chair and vice chair and Ms. David (as a resource) before coming before the Council. Any rule questions should go to the Council.

Judge Holland expressed concern that the Council refrain from issuing anything that could be construed as an advisory opinion. Prof. Peterson stated that in response to inquiries, he sends any legislative history available, including copies of minutes. He gives no answers or advice. Judge Holland wondered if the Council references certain minutes, the Council might be seen as “backing” those minutes and the inquirer might assume that they are the only ones relevant.

Judge Miller stated that perhaps a disclaimer is needed for any response which states that the Council is not giving legal authority or advice and that the Council does not guarantee that any minutes provided are the only ones which exist on the subject. Judge Schuman stated his concern that even notification from the Council on sections of history that might be relevant might be close to the line in providing assistance with formulating a legal argument. Mr. Svoboda suggested that all inquiries be referred to the website and Council history available at law libraries and that no history be pulled. Ms. David suggested that we also list on the website where past Council history not contained on the website can be found.

Prof. Peterson stated that inquiries are a good way to get appraised of problems with the rules. Mr. Buckle stated that the goal of the rules is that they are unambiguous on their face and that the Council should look into instances where there is an ambiguity, but not advising inquirers.

Mr. Corson summarized the Council’s decision as follows: 1) Prof. Peterson and Ms. Nilsson will handle any rule inquiries by referring the inquirer to the website and hard copy Council history to do their own

research; 2) any ambiguous inquiries will be shared with the chair and vice chair and Ms. David (and anyone else who wishes to volunteer); and 3) rule change inquiries will be brought to the attention of the entire Council.

Judge Miller suggested that the Council keep a hard copy of any inquiries and responses. Judge Holland emphasized again that we not give references to specific minutes that may be relevant. Mr. Corson stated that it is the best practice not to refer to anything specifically. Prof. Holland stated that most inquiries he received during his tenure with the Council were from convicts looking for assistance with problems with their sentencing judges.

Mr. Corson stated that the Council's function is as a rulemaking body, not a legal research resource. Judge Miller talked about the line between public relations and rulemaking and again suggested that we refer inquiries only to the website and to the legislative history available in the libraries. Judge Herndon restated Prof. Peterson's question about whether it would be all right to cite to specific minutes if an inquiry was made about what happened with a rule during a specific year. Mr. Buckle and Judge Miller both stated even in that case, the person should be referred to the website and/or Council history. Dr. Enbom emphasized the difference between outreach in looking into potential problems with rules and providing advisory opinions on what a rule means.

Judge Miller suggested letting the inquirer know that the issue is interesting and that the Council will look into it, but with no promise that the Council will respond directly to them. Judge Williams asked whether the website contains a way to submit inquiries. Ms. Nilsson stated that there is a form available.

## 2. Response Letter to Website Inquiries

Included in the meeting packet were samples of response letters to inquiries received from the public. Mr. Corson asked that if any Council member would like to modify the Council's form responses, he or she should send suggestions for changes to Ms. Nilsson. These sample letters are attached as Appendix B.

## V. Old Business

### A. Committee Reports

#### 1. ORCP 7: Duty to Save Costs of Service Protocol (Mr. Cooper)

Mr. Cooper was absent. This item will carry over to the next meeting.

2. ORCP 18A: Allow Optional Form Pleadings for Personal Injury (and Other) Complaints (Mr. Libmann)

Mr. Libmann provided a report from his committee, attached as Appendix C. He stated that, after much deliberation, the committee is supportive of the idea of form pleadings in some instances. He stated that the reasoning of the committee was twofold: 1) access to justice, specifically in rural counties; and 2) to facilitate judicial economy by reducing the number of Rule 21 motions filed. He stated that the committee feels there is merit to the suggestion and recommended further investigation.

Judge Holland stated that the committee was initially skeptical but, given the apparent direction from the legislature regarding domestic relations form pleadings for *pro se* litigants, it is something to consider. She stated that adoption of form pleadings did not seem to encourage frivolous filing of cases and that frivolous filers will find a way to file cases, even in the absence of form pleadings.

Mr. Libmann stated that the committee did not want to apply these pleadings with a broad brush stroke and suggested a financial cap instead of particular case types. Prof. Peterson reported that the new jurisdictional limit for the small claims department is \$7,500.

Mr. Corson asked about the nature of further research and who would do that research. Judge Holland suggested that the committee continue to do the research but that perhaps some additions could be made to the committee to ensure that both the plaintiff's and the defendant's bar are well represented. She stated that it is not an issue that would move forward quickly. Mr. Libmann stated that the issue is complicated and that the addition of a plaintiff's attorney would be welcomed but that the committee should be kept small. He stated that attorney Danny Lang continues to be actively interested in the issue. Prof. Peterson stated that Mr. Lang had also asked the Uniform Trial Court Rules Committee to address this issue and that the UTCR Committee responded that it was too big of an issue for them to undertake at this time. Judge Holland stated that any UTCR changes would also need ORCP amendments.

Judge Miller suggested that this might be a 5-year project rather than something that can be proposed this biennium. She suggested getting input from the UTCR Committee and other committees or organizations that might have an interest in the impact of adopting some level of form pleadings. Judge Holland seconded that it would be a slow process and

inquired whether the Chief Justice should be approached for input as well. Judge Miller stated that a short-term goal might be to put together a presentation for bar committees or organizations. Judge Holland stated that we might come up with a procedure that might be acceptable to the Council and other parties. Mr. Libmann stated that he hesitates to go too much further on the matter if the Chief Justice might disapprove of the idea. Mr. Corson suggested formulating a general plan before talking to the Chief Justice and interested groups and coming up with a more concrete proposal.

Mr. Corson stated that this is one of the biggest issues the Council has considered. Mr. Buckle suggested that the idea be thoroughly thought through before presenting to bar committees or organizations or the Chief Justice because there are potential ramifications on the integrity of the Council. Mr. Svoboda wondered whether there are any other committees to which Mr. Lang may have proposed this idea and that may have already done work on it. Judge Holland will find out and report to the Council.

Ms. O'Leary joined the committee. This will remain an active agenda item and the committee will report as they have more information.

3. ORCP 18B: Prayer for Damages (Ms. O'Leary)

Ms. O'Leary provided a report from the committee, attached as Appendix D. Before discussion of the report began, Mr. Corson raised an issue similar to the one that attorney Robert Neuberger had raised with Judge Miller regarding publicity in small towns about the amount pleaded, and suggested that the media may be less likely to publicize the amount if it is filed later in a separate pleading.

Ms. David stated that a change in this rule might undermine the concept of appearing/responding within 30 days and that it may place an onerous burden on the defendant if the plaintiff does not file an amended pleading with the amount. Mr. Corson stated that if the plaintiff fails to file the amended pleading it is a problem for the plaintiff, not the defendant. Judge Herndon questioned whether there is a widespread problem.

Mr. Weaver stated that he has seen attorneys avoid the rule by pleading "an amount to be determined," which puts the burden on the defense to force the plaintiff to specify the amount. It was noted that such a practice does not comply with Rule 18B.

Judge Isaacson mentioned that Mr. Neuberger had previously indicated

interest in addressing the Council on this matter. Judge Miller and Mr. Corson spoke with Mr. Neuberger, who stated that he would not push the issue hard if there is not much support. Dr. Enbom asked whether the committee had considered Mr. Neuberger's concern, and Ms. O'Leary indicated that the committee had done so.

Mr. Corson stated that he is willing to submit a proposal if the committee is willing to consider the issue further. The committee agreed that the issue is not resolved completely and invited Mr. Corson to submit a proposal for the committee to consider.

4. ORCP 21A, 27, 44A, 55H: Probate Court Matters (Mr. Cooper)

Mr. Cooper was absent. Ms. David stated that the committee is working on a report and proposing changes. Judge Holland indicated that the committee is also considering a change to Rule 68. This item will carry over to the next agenda.

5. ORCP 54A: Voluntary Dismissals (Mr. Campf)

Mr. Campf previously provided a report (attached as Appendix E) on the committee's discussion of voluntary dismissals in the case of requests for trial de novo appeals of arbitration awards. It was the committee's recommendation not to take action on this matter. There was no objection to the Council accepting the committee's report.

On the issue of changing the 5 day rule, Mr. Campf stated that the committee feels that it is not clear that there is enough of a problem to justify a change. He stated that the committee would like to continue gathering information and keep the committee open. Judge Holland stated that she brought up the issue at a judges' meeting and noted a discrepancy between judicial viewpoints. She stated that it would be a good idea to continue looking at the issue. This item will carry over to the next agenda.

6. ORCP 54E: Offers of Settlement (Mr. Buckle)

Mr. Buckle provided a series of e-mails between his committee members, and his committee's proposed changes to ORCP 54E (attached as Appendix F). The committee is proposing two changes: 1) re-titling the rule "Offer to Allow Judgment"; and 2) adding language to ORCP 54E(1) which states that, when one serves an Offer to Allow Judgment on another party, the Offer may not be filed with the clerk or given to the judge, to protect the integrity of the judge.

Judge Miller inquired as to why ORCP 54E(2) only allows three days for the acceptance of an Offer to be filed. Prof. Peterson indicated that it is existing language in the rule, not a change the committee proposed. Mr. Corson stated that there is a movement afoot in the new federal rule amendments to eliminate any short time limits and to streamline deadlines, often in multiples of seven. Mr. Buckle asked whether anyone has experienced problems with the three day limit and stated that, if the three days were changed, the 10 day limit should also be pushed back. Judge Herndon stated that he had received no complaints about the three days. Prof. Peterson stated that an Offer is deemed withdrawn after the three days, so a late acceptance of an Offer could potentially come too late.

Mr. Weaver stated that an Offer is usually just formalizing settlement discussions that have already taken place between the parties. He wondered whether language is necessary regarding arbitration. Mr. Rees stated that the issue is already covered by UTCR 13.130, which precludes providing settlement information to the arbitrator unless the parties agree. Judge Holland wondered what the procedure would be if the Offer is not accepted and comes into play. Mr. Rees stated that an Offer should be filed if and only if it is accepted.

Mr. Buckle wondered if the Offer ultimately should be filed if the judgment is less than the Offer. Judge Holland asked what the fallback procedure is if disputes arise over acceptance of the Offer. Mr. Rees stated that the Offer cannot be filed before it becomes germane to the attorney fee issue. Judge Williams suggested having the Offer filed in a confidential envelope that is not to be opened until after trial.

Prof. Peterson also raised the possibility of amending ORCP 54E(3) regarding the language: "...and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, ...." Prof. Peterson stated that prevailing party fees are not "incurred" after the date of the offer, and suggested changing the order to: "...and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, or attorney fees incurred after the date of the offer; or prevailing party fees ...." The committee will look into an amendment.

Mr. Corson suggested that the committee come to the next meeting with finalized proposed changes. Judge Holland asked that the changes be put into proper format. Prof. Peterson stated that he and Ms. Nilsson will

distribute information on proper format and a sample. This item will carry over to the next agenda.

7. ORCP 57, 58, 59, 61: Jury Improvement (Judge Harris)

The committee provided a report, attached as Appendix G. Judge Harris was absent and Judge Miller spoke on behalf of the committee. Judge Miller stated that the committee is excited about the areas identified in the report and that they are open to suggestions over and above those in the report. The committee thinks that these changes will be able to be proposed in this biennium.

The committee's first item was amending ORCP 59 to make written jury instructions required. Judge James stated that Marion County has a requirement that jury instructions must be submitted via e-mail or disk the day before trial. Judge Isaacson asked whether that also applies to criminal trials in Marion County, to which Judge James stated yes. Judge Miller stated that such a rule may not work in Clackamas County, where cases may get assigned the day before trial. Judge Miller stated that UTCR 6.060 addresses proposed jury instructions and UTCR 6.070 addresses actual jury instructions. She suggested making changes to the ORCP to coincide with the UTCR and inquire whether changes to the UTCR are planned. Mr. Buckle asked whether there are any lawyers without access to the technology to e-mail or provide a disk with instructions. He and Judge Miller then suggested that perhaps specific technology issues are better handled by SLR.

The committee's second item (ORCP 58) will be held over for discussion at the next meeting.

The committee's third item is applicability of the ORCP to criminal trials. Judge Isaacson stated that it is his understanding that the extent to which the ORCP are applicable to criminal matters is by statute, not rule. Judge Miller stated that Judge Harris will contact the Criminal Law Section of the OSB regarding this issue. The item will be held over for discussion at the next meeting.

The committee's fourth item concerns selecting alternate jurors. Judge Miller stated that the committee had talked about the possibility of the jurors not knowing who the alternates were. She pointed out that the jury boxes typically do not allow seating for the alternate jurors, who must sit outside of the box. She stated that Judge Harris talks with the attorneys before the trial and names two alternates without telling the jury panel.

Mr. Corson spoke of a procedure in which the court would draw names at the end of the trial to determine which jurors were alternate. Judge Isaacson suggested discussing with criminal attorneys and judges to see whether there are any constitutional issues which might arise regarding alternate jurors. Judge James stated that prosecutors in her court might have a problem with not selecting or identifying the alternates until the end of the trial, since juror selection is a part of trial strategy and they would not like a “strong juror” being eliminated at the end of trial. Mr. Corson stated that the ORCP are not binding on criminal cases unless it is specified by statute. Prof. Peterson concurred. Mr. Buckle stated that he would want to know in advance who the alternate jurors were. He agrees that it is a strategy issue. Judge Miller stated that the committee is trying to see it from a juror’s standpoint and what would make the jurors comfortable. Judge Herndon suggested letting the attorneys know which jurors are alternates but not telling the jurors. Judge Holland wondered whether this is a problem. She stated that her court has alternate jurors often and she has never seen an alternate act any less conscientious than a regular juror. She stated that the jurors are adults and have the right to know. Judge Williams stated that the issue has never come up with alternate jurors in his court and wondered whether the issue is a perception or whether there is empirical evidence that it is a problem. Judge Miller stated that it was a suggestion from Judge Harris, who has been involved in juror studies and surveys. Mr. Corson suggested that the committee discuss the issue further and that it be raised again at the next meeting.

The committee’s fifth item was guidelines governing contact between the court and jurors after the verdict. Judge Miller did not have a chance to contact Judge Henry Kantor. After some discussion regarding whether there are statutes governing contact between judges, attorneys, and jurors (or merely ethical rules) Mr. Corson suggested that the committee continue discussing the matter and whether it is an ORCP issue. The item will be raised again at the next meeting.

8. ORCP 57D(2)-(4): Peremptory Challenges for Third Parties (Mr. Hansen)

The committee provided a report too late to be brought to the meeting. Mr. Hansen indicated that the committee has contacted judges regarding whether there is a uniform method of awarding peremptory challenges in third party cases and whether there is a need for a rule change. The consensus appeared to be that it is done on a case-by-case basis and that there is no need for a rule change. The committee’s recommendation is to take no further action. The report will be made available at the next meeting for further discussion on whether the Council wishes to adopt the

report.

9. E-Filing (Mr. Cooper)

Mr. Cooper was absent. This item will carry over to the next meeting.

B. Requests for possible amendments from the OSB Judicial Administration Committee (Mr. Corson)

1. ORCP 7D(4)(a): DMV service requirement

Mr. Corson spoke with Mike Bloom of the Oregon State Bar Judicial Administration Committee. Mr. Bloom stated that the Committee feels that the DMV service issue can be a trap area for attorneys and that the Council should look into it. Prof. Peterson found the case to which Judge Miller was referring at the December meeting: *Mitchem v. Rice*, 142 Or App 214, 219 *affirmed on reconsideration* 143 Or App 546, 550 (1996). He stated that the ORCP language today is different following the 1997 amendment to ORCP 7D(4) and that the problem may no longer exist. Mr. Svoboda suggested that someone contact the Professional Liability Fund to determine whether any complaints or cases have been filed which would indicate that this is a continuing problem. Prof. Peterson agreed to do so. The item will carry over to the next meeting.

2. ORCP 47C: Page limit or word count for summary judgment motions

Mr. Corson indicated that Mr. Bloom stated that this issue is not particularly important to the Judicial Administration Committee at this time. The Council agreed not to consider the matter further.

C. ORCP 44: Prohibit *Ex Parte* Conversation with Treating Physicians (Ms. O'Leary)

Ms. O'Leary was unable to meet with the attorneys who brought this item to the Council's attention, but she was able to do some research. She found that Judge Henry Kantor issued an opinion in *Poppino v. Columbia Neurological Association* which held that the court does not have the authority to allow *ex parte* contact because of HIPAA. Ms. David indicated that she has lengthy research devoted to this issue with conflicting judicial opinions in many cases. She does not necessarily believe that it is an issue that the Council can resolve. Ms. O'Leary believes that the issue is worthy of setting up a committee and volunteered to chair the committee. The committee's goal would be to determine whether the court, the legislature, or the Council would be the best vehicle for change. A

committee was formed consisting of Ms. O’Leary, Ms. David, Judge Herndon, Judge Hodson, and Judge Holland. This item will carry over to the next meeting.

D. ORCP 54A: Confidentiality Agreement at Settlement (Ms. O’Leary)

Ms. O’Leary was unable to meet with the attorneys who brought this item to the Council’s attention. She will do so and report at the next meeting.

E. ORCP 38B and C: Uniform Interstate Depositions and Discovery Act (Prof. Peterson)

Prof. Peterson provided a draft letter to the Oregon Law Commission regarding this matter, attached as Appendix H. Mr. Corson asked that suggestions for the letter be passed to Prof. Peterson and they will finalize the letter.

VI. New Business

A. ORCP 7D(3)(b) (Prof. Peterson)

An attorney contacted Prof. Peterson regarding primary vs. secondary methods of service on corporations. ORCP 7D(3)(b)(ii) provides that service may be obtained by mailing a copy of the summons to the corporation but does not specify the method of mailing. Ms. David asked whether copying the part of ORCP 7D(3)(a)(i) regarding method of mail service on an individual would be appropriate. Judge Miller expressed concern that confusion is created by having that information regarding individual service but not corporate service. Prof. Peterson stated that the correct mailing method *is* specified under ORCP 7D(2)(d)(i) but that is not referred to in the corporate section. Judge Herndon suggested that a simple repair would be to add language under ORCP 7D(3)(b)(ii) that states “service as provided by paragraph D(2)(d)(i).” Prof. Peterson will circulate a suggested change in proper format before the next meeting.

B. Certified Process Servers (Prof. Peterson)

Prof. Peterson stated that he had received an inquiry from a lobbyist regarding requiring certification of process servers in Oregon. The Council agreed that, although a change would need to be made in ORCP 7F(2)(a)(i) if certification were required, the changes needed to require certification are beyond the Council’s purview. Prof. Peterson has already indicated such to the inquirer.

C. ORCP 9F: Consensual E-Mail Service (Prof. Peterson)

Prof. Peterson received an e-mail from a law firm asking for clarification of ORCP 9F in terms of what an e-mail receipt is. The inquirer specifically asked about the difference between a “delivery receipt” and a “read receipt.” Judge Miller wondered whether, since the attorneys have to agree on e-mail service, they can also agree amongst themselves as to what would constitute an e-mail receipt.

Prof. Peterson suggested that the language could be amended to read “proof of receipt as agreed by the parties.”

Ms. David and Mr. Cooper will investigate the differences between various methods for obtaining a receipt and bring that information to the next meeting for further consideration.

VII. Adjournment

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

Respectfully submitted,

Mark A. Peterson  
Executive Director

## Matrix of Council Members Contacting Legislators

District	Legislator	COCP Member
HD 1	Wayne Krieger ( R )	Don Corson
HD 2	Susan Morgan ( R )	Don Corson
HD 3	Ron Maurer ( R )	Kristen David
HD 4	Dennis Richardson ( R )	Mark Weaver
HD 5	Peter Buckley ( D )	Mark Weaver
HD 6	Sal Esquivel ( R )	Mark Weaver
HD 7	Bruce Hanna ( R )	Don Corson
HD 8	Paul Holvey ( D )	Don Corson
HD 9	Arnie Roblan ( D )	Eugene Buckle
HD 10	Jean Cowan ( D )	Dr. John Enbom
HD 11	Phil Barnhart ( D )	Hon. Lauren Holland
HD 12	Terry Beyer ( D )	John Svoboda
HD 13	Nancy Nathanson ( D )	John Svoboda
HD 14	Chris Edwards ( D )	Don Corson
HD 15	Andy Olson ( R )	Hon. Mary Mertens James
HD 16	Sara Gelser ( D )	Dr. John Enbom
HD 17	Fred Girod ( R )	Eugene Buckle
HD 18	Vic Gilliam ( R )	Dr. John Enbom
HD 19	Kevin Cameron ( R )	Hon. Mary Mertens James
HD 20	Vicki Berger ( R )	Don Corson
HD 21	Brian Clem ( D )	Hon. Mary Mertens James
HD 22	Betty Komp ( D )	Hon. Mary Mertens James
HD 23	Brian Boquist ( R )	Hon. Locke Williams
HD 24	Donna Nelson ( R )	Kristen David
HD 25	Kim Thatcher ( R )	Hon. Mary Mertens James
HD 26	Jerry Krummel ( R )	N/A
HD 27	Tobias Read ( D )	Dr. John Enbom
HD 28	Jeff Barker ( D )	Don Corson
HD 29	Chuck Riley ( D )	Eugene Buckle
HD 30	David Edwards ( D )	Don Corson
HD 31	Brad Witt ( D )	Eugene Buckle
HD 32	Deborah Boone ( D )	Kristen David
HD 33	Mitch Greenlick ( D )	Leslie O'Leary
HD 34	Suzanne Bonamici ( D )	Hon. Jerry Hodson
HD 35	Larry Galizio ( D )	Alexander Libmann
HD 36	Mary Nolan ( D )	Leslie O'Leary
HD 37	Scott Bruun ( R )	Hon. Eve Miller
HD 38	Greg Macpherson ( D )	Hon. Eve Miller
HD 39	Wayne Scott ( R )	Hon. Robert Herndon
HD 40	Dave Hunt ( D )	Kristen David
HD 41	Carolyn Tomei ( D )	Brian Campf
HD 42	Diane Rosenbaum ( D )	Dr. John Enbom
HD 43	Chip Shields ( D )	Don Corson
HD 44	Tina Kotek ( D )	Shelley Russell
HD 45	Jackie Dingfelder ( D )	Eugene Buckle
HD 46	Ben Cannon ( D )	David Rees
HD 47	Jeff Merkley ( D )	Don Corson
HD 48	Mike Schaufler ( D )	Eugene Buckle
HD 49	Karen Minnis ( R )	n/a
HD 50	John Lim ( R )	Eugene Buckle

## Matrix of Council Members Contacting Legislators

HD 51	Linda Flores ( R )	Kristen David
HD 52	Patti Smith ( R )	Dr. John Enbom
HD 53	Gene Whisnant ( R )	Martin Hansen
HD 54	Chuck Burley ( R )	Martin Hansen
HD 55	George Gilman ( R )	Leslie O'Leary
HD 56	Bill Garrard ( R )	Hon. Rodger Isaacson
HD 57	Greg Smith ( R )	Leslie O'Leary
HD 58	Bob Jenson ( R )	Leslie O'Leary
HD 59	John Huffman ( R )	Leslie O'Leary
HD 60	Tom Butler ( R )	Leslie O'Leary

<b>District</b>	<b>Legislator</b>	<b>COCP Member</b>
SD 1*	Jeff Kruse ( R )	Eugene Buckle
SD 2*	Jason Atkinson ( R )	Kristen David
SD 3	Alan Bates ( D )	Mark Weaver
SD 4	Floyd Prozanski ( D )	Hon. Lauren Holland
SD 5*	Joanne Verger ( D )	Don Corson
SD 6	Bill Morrisette ( D )	John Svoboda
SD 7	Vicki Walker ( D )	John Svoboda
SD 8	Frank Morse ( R )	Hon. Locke Williams
SD 9*	Roger Beyer ( R )	Eugene Buckle
SD 10	Jackie Winters ( R )	Hon. Mary Mertens James
SD 11	Peter Courtney ( D )	Hon. Mary Mertens James
SD 12*	Gary George ( R )	Hon. Locke Williams
SD 13	Larry George ( R )	Dr. John Enbom
SD 14*	Mark Hass ( D )	David Rees
SD 15	Bruce Starr ( R )	Leslie O'Leary
SD 16	Betsy Johnson ( D )	Martin Hansen
SD 17	Brad Avakian ( D )	Hon. Jerry Hodson
SD 18*	Ginny Burdick ( D )	David Rees
SD 19	Richard Devlin ( D )	Hon. Eve Miller
SD 20	Kurt Schrader ( D )	Kristen David
SD 21*	Kate Brown ( D )	Brian Campf
SD 22*	Margaret Carter ( D )	Shelley Russell
SD 23*	Avel Gordly ( D )	David Rees
SD 24	Rod Monroe ( D )	Leslie O'Leary
SD 25*	Laurie Monnes Anderson ( D )	Mark Peterson
SD 26	Rick Metsger ( D )	Kristen David
SD 27*	Ben Westlund ( D )	Martin Hansen
SD 28*	Doug Whitsett ( R )	Hon. Rodger Isaacson
SD 29*	Dave Nelson ( R )	Dr. John Enbom
SD 30*	Ted Ferrioli ( R )	Brooks Cooper

\* Indicates election in 2008

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# Council on Court Procedures

*Established by the Oregon Legislature in 1977*

**Mark A. Peterson**  
*Executive Director*

1018 Board of Trade Bldg  
310 SW Fourth Avenue  
Portland, OR 97204-2305  
Telephone: (503) 768-6500  
Fax: (503) 768-6540  
E-mail: mpeterso@lclark.edu

**Don Corson**  
*Chair*

**Eugene H. Buckle**  
*Vice Chair*

**John A. Enbom, MD**  
*Treasurer*

**Maurice J. Holland**  
*Executive Director (1992-2005)*

**Douglas A. Haldane**  
*Executive Director (1982-1988)*

**Fredric R. Merrill**  
*Executive Director  
(1977-1981; 1988-1992)*

---

Date

Name  
Address  
City, State Zip

Dear \_\_\_\_\_:

The Oregon Council on Court Procedures is in receipt of your letter dated \_\_\_\_\_ concerning \_\_\_\_\_.

The Council on Court Procedures is a state agency which drafts and amends the rules of procedure which govern civil cases in the circuit courts of Oregon. It is not a law firm, and does not provide legal advice or services. Therefore, the Council cannot assist you with the problems referred to in your email.

You should be aware that all legal claims have a statute of limitations period. This means that, if a lawsuit is not filed within a specified period of time, you may lose your rights. Different cases have different statute of limitation rules. You should seek legal advice from a lawyer who handles cases like yours. You may wish to contact the Oregon State Bar Lawyer Referral Service at (503) 684-3763 in the Portland metro area, or (800) 452-7636 statewide. You may also visit their website at: <http://www.osbar.org/public/legallinks.html>. A modest means program is available for certain case types.

Good luck in securing legal assistance.

Sincerely,

MARK A. PETERSON  
Executive Director  
Council on Court Procedures

MAP:scn

---

# Council on Court Procedures

*Established by the Oregon Legislature in 1977*

**Mark A. Peterson**  
*Executive Director*

1018 Board of Trade Bldg  
310 SW Fourth Avenue  
Portland, OR 97204-2305  
Telephone: (503) 768-6500  
Fax: (503) 768-6540  
E-mail: mpeterso@lclark.edu

**Don Corson**  
*Chair*

**Eugene H. Buckle**  
*Vice Chair*

**John A. Enbom, MD**  
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The Council on Court Procedures is a state agency which drafts and amends the rules of procedure which govern civil cases in the circuit courts of Oregon. It does not discipline attorneys. Therefore, the Council cannot assist you with the problems referred to in your email.

If you wish to file a complaint against an attorney, you may contact the Oregon State Bar at (503) 620-0222 in the Portland metro area, or (800) 452-8260 statewide. You may also visit their website at: <http://www.osbar.org/public/legalinfo/1174.htm>.

Sincerely,

MARK A. PETERSON  
Executive Director  
Council on Court Procedures

MAP:scn

---

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Date \_\_\_\_\_

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Address \_\_\_\_\_  
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Dear \_\_\_\_\_:

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If you wish to file a complaint against a judge, you may contact the Oregon Commission on Judicial Fitness and Disability at (503) 626-6776. You may also visit their website at: <http://www.ojd.state.or.us/aboutus/cjfd/index.htm>.

Sincerely,

MARK A. PETERSON  
Executive Director  
Council on Court Procedures

MAP:scn

Council on Court Procedure; January 2008  
Sub-committee on Adoption of Form Pleading  
Alex Libmann, Brooks Cooper, Hon. Lauren Holland  
January 4, 2008

Proposal:

Should Oregon adopt optional form pleading as an alternative to the present requirement that matters be pled on a case by case basis?

Conclusion:

The subcommittee recommends that additional active research be conducted regarding adoption of form pleading.

Discussion:

The proposal under consideration arose from the following facts. Attorney Danny Lang proposed that Oregon adopt form pleading. Mr. Lang opined that individuals were denied access to justice because some attorneys were unwilling to accept representation. Additionally, Mr. Lang felt form pleadings would assist in reducing malpractice traps associated with last minute filings with the court.

The subcommittee found there was merit to the proposal based both on access to justice theory and on quality of pleading issues. On that basis, the subcommittee felt further exploration of the form pleading adoption should be considered.

On the other hand, the subcommittee notes concern about implementation of form pleading in the context of Oregon code pleading. ORCP 18.

Finally, the access of justice issue was felt to be a significant factor in favor of further investigation of form pleadings. The difficulty of obtaining legal representation in rural counties further supports adoption of form pleadings. Pro-se parties using form pleadings would be less likely to initiate Rule 21 and summary judgment motions from opposing counsel. Consequently, judicial economy might be favorably affected by form pleadings. In conclusion, the subcommittee feels form pleading is worthy of further consideration and consultation with the Chief Justice is appropriate.

Alex Libmann

## **COUNCIL ON COURT PROCEDURES RULE 18(B) COMMITTEE REPORT**

Committee Members: Judge Isaacson, Judge Miller, Alex Libman, Leslie O’Leary

The committee has met by phone several times to discuss a proposal to amend ORCP 18(B) to remove the requirement that parties plead dollar amounts in their complaints, cross-claims, etc. The committee has researched equivalent rules in other jurisdictions and has solicited comments from members of the plaintiff and defense bar and from the judiciary.

Proponents of the amendment believe the rule is necessary because in high damage cases, the filing of a complaint with an artificially high pled dollar amount will draw unwanted and adverse publicity. In addition, the plaintiff is frequently harassed in deposition and at trial over the amount of damages alleged. Ultimately, it should be up to the jury to decide how much to award the plaintiff independent of what the complaint alleges. Advocates of the rule change state that due process concerns by the defendant can be eliminated by allowing the defendant to serve a demand for the amount of damages alleged sometime after filing and service of the Complaint.

Opponents of the amendment argue that the potential for bad publicity arises only in a small number of cases and affects only a small percentage of the claims filed. The majority of cases are run-of-the-mill personal injury, property damage, breach of contract, motor vehicle collision actions, in which it behooves both parties to plead the amount of damages in the Complaint. If a claim exceeds the defendant’s insurance policy limits, it triggers duties of the insurer to inform the defendant of this fact so that the defendant knows to seek counsel to protect against the potential of an excess verdict. Similarly, how a client chooses to defend the case often depends on the size of the claim. When the defendant and his/her insurance carrier know what the exposure is, the cases are resolved much more quickly than they might otherwise be in the face of uncertainty.

Furthermore, unlike states without a dollar amount requirement, Oregon is not a “notice pleading” jurisdiction. Removing this level of detail from the complaint would lead to more formal and costly discovery. In addition, some lawyers are worried that requiring defendant to serve another document demanding the amount of damages would impose yet another layer of bureaucracy to the litigation.

Judges comment that they are very liberal about allowing parties to amend their Complaints up to and during trial to provide a more precise allegation of damages sought.

The committee felt that amending Rule 18 would do more harm than good. Furthermore, the Council considered and rejected an identical proposal back in 1990, based on the same arguments. Accordingly, the committee does not recommend amending Rule 18.

Council on Court Procedures: November 2007  
**Subcommittee on ORCP 54A (Voluntary Dismissals)**

Brian Campf (Chair), Hon. David Schuman, Hon. Mary James, Martin Hansen

Proposal:

Should ORCP 54A be revised to provide that if a plaintiff in an action subject to mandatory arbitration requests a trial de novo appeal of an arbitration award, the court may only allow a voluntary dismissal with the stipulation of all adverse parties or must reinstate the arbitration award?

Conclusion:

The subcommittee recommends that ORCP 54A not be revised as proposed.

Discussion:

The proposal under consideration arose from the following facts. A mandatory arbitration resulted in a defense verdict. The plaintiff's attorney appealed the award with a request for a trial de novo. One week later, the plaintiff's attorney voluntarily dismissed the case. The court awarded the defendant costs under UTCR 13.250, and held that the dismissal would be without prejudice and that the arbitration award would not be reinstated.

The subcommittee found that the proposal would result in a substantive change, not a procedural one, because it would materially impact upon the parties' legal outcomes. On that basis, the subcommittee recommends that the Council not proceed on the matter.

Also, Oregon's voluntary dismissal rule, ORCP 54A provides, "[s]ubject to the provisions of Rule 32D [dismissal of class actions] and of any statute of this state, an action may be dismissed..." Significantly, ORCP 54A addresses the dismissal of all actions, not specifically those that are subject to arbitration. Therefore, the subcommittee found that the ability of a party to dismiss a case that has been arbitrated is best addressed in the arbitration statute, and not in the dismissal of actions rule.

From: Eugene Buckle  
To: Council on Court Procedures  
Date: January 11, 2008

All

Here is 54E committee's proposed amendment to ORCP 54E.

Also attached is an e-mail string which will be our "legislative history" on the amendment (although I'm not real clear on how/where that legis hx will be kept).

54E [Compromise] Offer to allow judgment; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim, but shall not file with the court clerk or provide to any assigned judge, an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified.

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

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From: "Eugene Buckle"  
To: "David Rees"  
Sent: January 9, 2008

Thanks David. I agree with you that an unaccepted offer of compromise should not be provided to an arbitrator in a court-annexed arbitration. My thinking was just for consistency throughout the ORCP.

I think we include your comments as part of committee's list on the amendments, so, although not in the rule, the thinking is clear for those who look.

Gene Buckle

---

From: David Rees  
Sent: Wednesday, January 09, 2008 12:28 PM  
To: Eugene Buckle  
Subject: RE: 54E committee minutes of 12/3 meeting

Gene,

I agree that we should take the reference to arbitrators out. The UTCRs refer to court-annexed arbitration, but the ORCP do not. I wanted to include the reference to make it abundantly clear that you don't send these to any decision maker in the case unless and until they are accepted. However, with the judge reference as well as UTCR 13.130, it should be very clear that offers of compromise should not be provided to arbitrators in court annexed arbitrations.

---

From: Eugene Buckle  
Sent: Wednesday, January 09, 2008 10:53 AM  
To: David Rees  
Subject: RE: 54E committee minutes of 12/3 meeting

David

Do the 4 rules reference arbitrator anywhere? Should your amendment not have arbitrator in there, as the ORCP apply to lawsuits filed, not arbitrations where a lawsuit is not filed (absent agreement)?

Gene Buckle

---

From: David Rees  
Sent: Friday, January 04, 2008 12:16 PM  
To: Committee  
Subject: RE: 54E committee minutes of 12/3 meeting

Fellow Committee Members,

I have re-read the Bell v. Morales case and spoken with some lawyers involved with that case. I am convinced that there is no real problem with issue number 4 set forth below that merits any changes to Rule 54E.

I have also attached a minor proposed edit to Gene's proposed language regarding 2. It is attached. I also recently noted that UTCR 13.130 specifically forbids disclosure of any offers of settlement to arbitrators in court-annexed arbitration, which further supports our clarification.

I may have to miss the Jan. 12 meeting, but hopefully we can wrap up our committee work before then.

Happy New Year to all,

David F. Rees

---

From: Eugene Buckle  
Sent: Friday, December 07, 2007 2:57 PM  
To: Committee  
Subject: 54E committee minutes of 12/3 meeting

All

Attached is 1st draft of our proposed changes to date. Feel free to wordsmith.

At our 12/3/07 meeting, we discussed

1. Should the "title" of 54E be changed to "Offer to allow judgment"?

2. Should there be a prohibition in the rule against filing an unaccepted offer to allow judgment?

3. Should there be a requirement for payment of an accepted offer within 30 days?

4. Should an offer be structured in such a way as to compare "net" outcome under offer v. verdict?

We decided yes to 1. and 2., no to 3., and David and Leslie are going to explore 4. with their constituents.

We agreed to meet next time and continue to explore 554E issues.

Gene Buckle

## **Jury Improvement Committee Report**

This is to report that the Jury Innovations Committee met on January 10, 2008 for the purpose of establishing a working agenda for this biennium. We agreed to look at possible changes in the following areas:

1. Amend ORCP 59 to make written jury instructions required. At the present time instructions are to be put into written form only "if feasible." By announcing our intentions to amend this rule in this way at this time we will give the judiciary time to prepare for the change, which would take effect in January 2010. Harris agreed to draft proposed new language to ORCP 59B for review by the committee before the next meeting, scheduled for February 6 at 8:15am. Russell will provide to committee members information about how Judge Stewart in federal court approaches this issue.
2. Amend ORCP 58 to improve the language and function of the rule. Harris agreed to prepare a draft of a new proposed rule for the committee's review before the next meeting.
3. Clarify the application of the ORCP to criminal trials. Harris will contact the OSB Criminal Law Section for feedback on this issue. All feedback will be passed on to committee members before next meeting.
4. Amend ORCP 57F to provide for a method for selecting alternate jurors that is more workable and juror friendly. Harris will contact the National Center for State Courts to obtain information about how other states provide for the selection of alternate jurors. We will also examine the federal rules. Will discuss our findings at our next meeting.
5. Guidelines governing contact between the court and jurors after the verdict. Miller will talk with Judge Kantor about guidelines he has developed on this subject and report back before our next meeting.

Our goal is to have any proposed rule changes completed for the full Council's review at the April or May meetings. Thanks to Gene for setting up the conference call and to all committee members for your participation and interest in improving the jury process.

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January 11, 2008

Lane P. Shetterly  
Oregon Law Commission Chair  
Willamette University College of Law  
245 Winter St. SE  
Salem, OR 97301

Re: Uniform Interstate Depositions and Discovery Act

Dear Mr. Shetterly:

The Council on Court Procedures has reviewed the draft (7/27/07 - 8/3/07) Uniform Interstate Depositions and Discovery Act prepared by the National Conference of Commissioners on Uniform State Laws. Oregon's current procedure for issuing subpoenas to take the testimony of a witness or witnesses in this state for use in a civil action pending in another jurisdiction is found in ORCP 38C.

The proposed benefit of the Uniform Act is efficiency and economy. Rather than obtaining a commission or letter rogatory, and filing a miscellaneous action in Oregon, issuance of an Oregon subpoena would be a clerical act. Oregon counsel would not be required; the Uniform Act drafters anticipate that a process server may present an out-of-state subpoena to the clerk and obtain an Oregon subpoena to serve on an Oregon resident (Comment to Section 3). Efficiency and economy are laudable goals. However, the Council has concerns that the restrictions applicable to such subpoenas in Oregon, such as the limitation of ORCP 55F(2) on where a non-party deponent may be required to attend a deposition (the county wherein the person served resides, is employed, or transacts business in person) are not in the Uniform Act. A person residing in Clatsop County could be subpoenaed to appear at a deposition in Harney County. Under the Uniform Act the person served may retain an attorney and move to quash or otherwise limit the subpoena's reach and that ruling would be based on Oregon law and procedure.

Lane Shetterly  
January 11, 2008  
Page 2

The expectation that non-lawyers would obtain the issuance of Oregon subpoenas should also be examined closely. Current practice requires the appearance of a member of the Oregon State Bar to obtain the subpoena. The additional expense is possibly offset by allowing a person who is harmed by the issuance of a subpoena to call the matter to the attention of the Oregon State Bar if there is a violation of the Oregon Rules of Professional Conduct as well as a readily available remedy for any costs incurred. *See* ORCP 17D(1).

The Council has not sufficiently studied the draft Uniform Act to weigh whether potential benefits outweigh possible harms and whether amendments would lessen possible harms. If the Commission decides to consider the Uniform Act, it is respectfully requested that the Commission refer the issue to the Council or involve the Council in its consideration of the matter.

Sincerely,

DON CORSON  
Chair

MARK A. PETERSON  
Executive Director

MAP:scn