

**MINUTES OF MEETING  
COUNCIL ON COURT PROCEDURES**

Saturday, February 9, 2008, 9:30 a.m.  
Oregon State Bar Center  
16037 SW Upper Boones Ferry Rd  
Tigard, OR 97224

**ATTENDANCE**

Members Present:

Brian S. Campf  
Brooks F. Cooper  
Don Corson  
Kristen S. David  
Dr. John A. Enbom  
Martin E. Hansen  
Hon. Daniel L. Harris\*  
Hon. Robert D. Herndon  
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  
Hon. David Schuman  
John L. Svoboda  
Mark R. Weaver  
Hon. Locke A. Williams

Members Absent:

Eugene H. Buckle  
Hon. Jerry B. Hodson  
Hon. Rives Kistler  
Shelley D. Russell

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

\*Appeared by teleconference

| ORCP Discussed this Meeting | ORCP Discussed & Not Acted Upon<br>this Biennium | ORCP Amendments to be<br>Published this Biennium |
|-----------------------------|--|--|
| ORCP 1                      | ORCP 7   |  |
| ORCP 7                      | ORCP 7F(2)(a)                                    |  |
| ORCP 7D(3)(b)               | ORCP 9F  |  |
| ORCP 7D(4)(a)               | ORCP 18B   |  |
| ORCP 9                      | ORCP 19B   |  |
| ORCP 9F                     | ORCP 21A   |  |
| ORCP 18A                    | ORCP 25  |  |
| ORCP 18B                    | ORCP 38B   |  |
| ORCP 25                     | ORCP 38C   |  |
| ORCP 27                     | ORCP 43B   |  |
| ORCP 38B                    | ORCP 44B   |  |
| ORCP 38C                    | ORCP 47C   |  |
| ORCP 44                     | ORCP 51  |  |
| ORCP 44A                    | ORCP 54  |  |
| ORCP 51                     | ORCP 55H   |  |
| ORCP 54                     | ORCP 57  |  |
| ORCP 54A                    | ORCP 57D(2)-(4)                                  |  |
| ORCP 54E                    | ORCP 58B(5)                                      |  |
| ORCP 57                     | ORCP 59H   |  |
| ORCP 57D(2)-(4)             | ORCP 61  |  |
| ORCP 58                     |  |  |
| ORCP 59                     |  |  |
| ORCP 61                     |  |  |
| ORCP 67C                    |  |  |
| ORCP 68                     |  |  |

I. Call to order (Mr. Corson)

Mr. Corson called the meeting to order at 9:31 a.m.

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of January 12, 2008, Minutes

Mr. Corson called for a motion to approve the amended January 12, 2008, 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 reported that David Nebel had received an e-mail from the State's Department of Administrative Services (DAS). DAS feels that the Council should not be subject to the performance measure system, but stated that it is ultimately up to the Legislative Fiscal Office (LFO). Mr. Corson will work with Mr. Nebel and Prof. Peterson and the LFO and will report on the results at the next meeting.

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

Mr. Corson reported that the contract has been signed by all parties. The Council can soon begin processing travel reimbursement requests.

C. Report: Website/Inquiries (Ms. David/Ms. Nilsson/Prof. Peterson)

Ms. Nilsson briefly reviewed the Website/Inquiries Update (attached as Appendix A). She noted that the search engine is functional and will be an even greater asset once all the Council's past minutes have been uploaded to the website. Prof. Peterson briefly summarized the inquiries received by the Council.

V. Old Business

A. Committee Reports

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

Mr. Cooper discussed his committee's report (attached as Appendix B).

He stated that it is the committee's feeling that there is a substantive impediment to the Council modifying ORCP 7 to mirror the federal court service rules. The committee also raised concerns that instituting such a rule would result in an increase in motion practice. The main substantive concern is with the "relation back" rule contained in ORS 12.020. Mr. Rees stated that he is a member of the OSB Procedure and Practice Committee and that committee is studying the issue and considering recommending an amendment to ORS 12.020. Mr. Cooper stated that he is willing to speak with the OSB committee regarding the issue.

There was no objection to the Council accepting the committee's report. No further action will be taken regarding this suggested amendment.

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

Mr. Libmann stated that the committee is still working on the issue and will have a report available before March's meeting.

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

Ms. O'Leary reported that the committee had drafted two proposed amendments to ORCP 18B (attached as Appendix C). The amendments would both modify the rule so that the prayer for specified money damages is not required in the initial complaint.

Mr. Libmann stated that he does not agree with the suggested amendments and that he had received approximately 25 responses from attorneys with the defense bar regarding the matter. The concerns raised include:

- that the change would be a hindrance to Oregon's open court system;
- that the change would affect the \$50,000 arbitration limit issue;
- that there could be confusion as to how to enforce the filing of the amended pleading; and
- that the change may lead to increased motion practice.

Mr. Corson inquired as to how other states handle the issue. Ms. O'Leary stated that she researched other states' practices and that most states do not require pleading the amount of damages in the initial complaint. Some states specifically require that the amount *not* be pleaded. She stated that one reason for this seems to be the concern for the reputation of doctors in medical malpractice cases. She did not find a state other than Oregon that requires the amount to be stated in the initial pleading.

Mr. Rees stated that UTCR 13.060 requires that the words “claim not subject to mandatory arbitration” or “claim subject to mandatory arbitration” be inserted into the pleading title. He also stated that the motion practice issue exists under the current rule and that he sees the change as more of a discovery issue than an issue of access to open courts. He stated that pleading damages is not required in federal court and that there does not seem to be a policy concern there.

Mr. Libmann emphasized that Oregon has a policy favoring open access to the courts. He stated that a two-step process of pleading damages would create a system which attorneys may understand but that the public likely will not. Mr. Svoboda stated that excluding a demand for punitive damages from the initial pleading is Oregon’s current practice as mandated by statute. Mr. Libmann responded that this mandate is only for punitive damages, not for economic or non-economic damages.

Mr. Hansen expressed concern that, even if damages were not pleaded initially, the press would have no problem figuring out the rule change and 14 days later looking for the amended pleading which states damages. He also expressed concern over the increased motion practice issue. He stated that he believes that the Council first needs to understand *why* Oregon requires that damages be pleaded initially.

Ms. David stated that she received five telephone calls from attorneys raising the following concerns:

- that the change would be a step away from Oregon’s requirement to plead the ultimate facts;
- that there would be a timing issue regarding removing cases to federal court (when would the 30 days start?);
- that clerks would not go back and insert the amount of damages into the Oregon Judicial Information Network system;
- that it would be difficult to be unable to inform clients of the amount of damages sought against them right away; and
- that *pro se* litigants may not understand the rule.

Judge Miller stated that there are legitimate pros and cons on both sides. She remarked that the significant question is which process is more onerous to litigants and litigators, and wondered whether more research is warranted.

Mr. Libmann also raised the issue of insurance defense. He stated that timing is important in the insurance company analysis regarding policy limits and excess claims and, if no amount is listed in the complaint, that could affect the timing. The attorneys he communicated with stated that,

if a rule change is made, they would like firm dates with firm consequences and no ambiguity. Mr. Corson stated that the informality of version 1 of the change is a concern and suggested that, if a motion were to be made, it should be made on version 2. Prof. Peterson wondered if version 1 might create ORCP 67C problems in setting the upper limit of a jury award if the amount is not stated in a pleading.

Judge Herndon wondered whether the contemplated change is improving or streamlining the process or, rather, making it more complicated. His preference is to leave the rule as is. Judge James agreed and stated that any rule change that makes a litigant file and serve more papers doesn't advance the purpose of the Council. Dr. Enbom stated that he feels that a two-step process is probably unnecessary and that there will be no significant difference with press coverage.

Ms. O'Leary moved to vote on version 2. Mr. Hansen seconded the motion. Judge Miller wondered whether the language in version 2 was ambiguous. Mr. Corson suggested, without objection, that before a vote is taken version 2 should be amended to add to line 10 of the proposed new language the phrase "within 14 days of filing the original pleading." A vote was taken on the amended version 2 and the results were 6 yeas and 13 nays. The motion therefore did not pass. No further action will be taken on this issue.

4. ORCP 27 and 68: Probate Court Matters (Mr. Cooper)

Mr. Cooper submitted a progress report from his committee (attached as Appendix D). This report states that the committee had decided not to make any changes to ORCP 25, ORCP 51, ORCP 54, or ORCP 57. The committee will be proposing a change to ORCP 27 that would require certain types of notice after a guardian *ad litem* is appointed.

The committee will also be proposing changes to ORCP 68 to make the language regarding attorney fees less ambiguous. The committee will issue another report and proposed changes before the March meeting.

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

Mr. Campf reported that the committee has nothing to report at the present time. The committee remains open and welcomes the input of Council members.

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

Mr. Buckle was absent. Mr. Rees reported that the committee is close to presenting a proposal for change and that their report will be forthcoming.

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

Judge Harris reported that, based on Council feedback, the committee has narrowed the scope of their considered changes to:

- making changes to ORCP 58 to clarify and clean up the language;
- amending ORCP 59; and
- modifying ORCP 57F regarding alternate jurors.

ORCP 61 will not be the subject of a proposed amendment. Judge Harris stated that he believes the committee will have a progress report and proposed amendments to ORCP 58 and 59 before March's meeting.

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

There was no objection to the Council accepting the committee's report which was presented after January's meeting (Appendix E). The report recommended making no amendment to ORCP 57D(2)-(4).

9. E-Filing (Mr. Cooper)

Mr. Cooper reported that there is a great deal of sub-ORCP level work happening regarding e-filing. The committee will most likely propose ministerial amendments to ORCP 1 and ORCP 9 to define electronic items as "documents." Inserting a definitional change at the beginning of these rules will help to avoid the confusion of doing so in every rule. The committee will present proposed language to the Council before the March meeting.

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

Ms. O'Leary reported that the committee has met and has identified two concerns:

- whether a rule change would affect the substantive rights of doctors and plaintiffs; and
- whether a rule change would be legal because of HIPAA – can a

state court make an order directing such communications?

She stated that these issues have been resolved in the New Jersey Supreme Court and that the committee is uncomfortable making a rule which it knows will be litigated. Ms. O'Leary noted that generally the defense bar wants a means to talk to a plaintiff's physicians while the plaintiff's bar opposes a rule facilitating such discussions. It may be difficult to achieve a supermajority to pass an amendment.

Ms. David stated that the committee had lengthy telephone conversations regarding the pros and cons and that Judge Herndon raised the concern that physicians also need a voice in this discussion. She wondered if the Council should let the courts and the legislature know that they need to deal with this issue. She stated that Susan Grabe with the OSB and Mr. Nebel had suggested that it may be an OSB Public Affairs issue.

Dr. Enbom stated that the Oregon State Bar - Oregon Medical Association Joint Medical Profession Committee had disbanded about three years ago because of a lack of interest and communication. He stated that HIPAA greatly concerns doctors and that violation of HIPAA has huge repercussions. Prof. Peterson wondered whether it would be appropriate for the Council to make a rule change in order to create a clear path and stated that, if HIPAA does not dictate a particular outcome, under the Supremacy Clause it is a completely procedural issue.

Ms. David wondered whether procedurally the Council could add a subpart that states that a defendant needs to submit a motion to go before a judge for *ex parte* contact, because that is what is already happening. Ms. O'Leary stated that there are different interpretations on whether HIPAA trumps all other laws. She believes that it will ultimately be clarified by the Oregon Supreme Court as it was by the New Jersey Supreme Court. She expressed concern that a rule change is not simple and that it would be impossible to craft a rule that would not be appealed later. Ms. O'Leary pointed out that the state court cannot do anything that is less protective than HIPAA.

Ms. David wondered whether having a series of public meetings involving the Oregon Medical Association, the Oregon Association of Trial Lawyers, the Oregon Association of Defense Counsel, patient representatives, and other interested parties would be a good way to move forward. She proposed crafting a procedure by which parties would go to court and establish by evidence why they need *ex parte* contact.

Judge Herndon stated that the issue has not yet reached the Supreme Court possibly because, although the rule is imperfect, things tend to work themselves out. He wondered if this is a solution in search of a problem and expressed that a rule change would be a huge undertaking.

Mr. Corson's impression is that motions are being made and ruled upon and that a rule change may be unnecessary. Mr. Cooper stated that the bench and bar may benefit from a rule change that says that there will be no *ex parte* contact unless ordered by a court. This would avoid discussions taking place without the other party's knowledge.

Mr. Corson suggested that the committee have more discussion on this issue and make recommendations at the next meeting. Judge Holland stated that it might be best to bring in other interested parties before the committee determines how to proceed. Mr. Corson wondered if the committee is willing to do this before their next meeting. Ms. David expressed concern that the discussion would need to be limited because there are so many parties that wish to have input on the issue. Mr. Corson suggested inviting one representative from each organization. Judge James suggested forming a focused question first before holding such a public meeting.

The committee will do further research and report back at the March meeting.

B. Non-Committee Matters

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

Prof. Peterson checked with the Professional Liability Fund regarding this issue to help determine whether there is a current problem. He stated that the PLF's preliminary response (*see* Appendix F) is that they have not noticed this as an issue yet. They are still looking in their records and will get back to Prof. Peterson. This issue will carry over to the next meeting.

2. ORCP 54A: Confidentiality Agreement at Settlement (Ms. O'Leary)

Ms. O'Leary is still gathering information on this issue and will report before the March meeting.

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

Mr. Corson and Prof. Peterson worked on a joint letter to the Oregon Law Commission asking that, before the Act be considered for adoption, the Commission might contact the Council to address its concerns.

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

Prof. Peterson submitted a draft proposed amendment to ORCP 7D(3)(b) which clarifies that service of a corporation by mail must be performed according to ORCP 7D(2)(d). The proposal is attached as Appendix G.

Mr. Rees raised a concern about the existing rule's language found on p. 3, lines 1-3 of the proposal. He stated that this language puts an undue requirement on plaintiffs to find addresses for out-of-state corporations which are not registered with the Secretary of State. He suggested less burdensome language such as "plaintiff has reason to believe." Mr. Cooper agreed and suggested that corporate defendants be treated similarly to individual defendants.

After further discussion, the original proposal as submitted was not voted on. Mr. Rees and Prof. Peterson will work on a proposed revision and have it available before the next meeting.

5. ORCP 9F: Consensual E-Mail Service (Ms. David)

In response to an inquiry received by Prof. Peterson, Ms. David reported on her research on the difference between read receipts and delivery receipts. A delivery receipt is notification that an e-mail has been received by the recipient's server. A read receipt is notice that an e-mail has been opened by a recipient. Problems sometimes arise from anti-virus software blocking these messages in order to prevent spam. Users can also manually choose to block sending of read receipts. She stated that, even with some type of delivery or read receipt, there is no guarantee that an e-mail has been read. She equated this with facsimile machines which may have run out of paper and with US mail, which is presumed to have been delivered unless it is returned to sender.

Ms. David suggested that the parties considering changes for e-service should consider instituting a UTCR which provides a remedy for recipients that did not receive an e-mail and ensures that they have their full response time.

Judge Miller wondered whether there is anything that prohibits attorneys from agreeing between themselves to accept e-mail service. Mr. Cooper stated that the ORCP do not contemplate service by e-mail, but that there is nothing to prevent attorneys from so agreeing. He noted, however, that if it is not in the rules, it can lead to disagreement later. Judge James noted that some lawyers will insist that, if the ORCP are not changed, they will not follow a local court rule.

Ms. David stated that the ORCP should not contain specific technical information (such as definitions for read/delivery receipts), as technology changes rapidly and the UTCR are more easily and quickly amended than are the ORCP. She stated that the e-filing group is better equipped to move forward on these matters.

Prof. Peterson pointed out that the Council had amended ORCP 9 in the last biennium to allow e-mail service if the attorneys for both parties agree. He wondered whether a small change which states that the attorneys must also agree on how to consent to e-mail service would address Judge Miller's concern. Mr. Cooper stated that technological issues should not be resolved at the ORCP level. Judge Miller wondered how to insert such language without addressing technology issues. She agreed with Ms. David that the ORCP should contain broad brush rules and that the UTCR should address specific technological issues. Ms. David will check with the UTCR Committee about this issue and relay their response to Mr. Cooper and his e-filing committee.

This issue is ultimately encompassed in the e-filing issue and will be removed from the agenda.

## VI. New Business

### A. Contact with Legislators

Mr. Corson wondered whether Council members should contact their assigned legislators this month since no contact was made in January. Ms. David will draft a letter to her legislators and send it via the listserv for the Council's perusal. Mr. Nebel noted that there is a new legislator in District 60 who is a practicing lawyer. Mr. Hansen stated that he knows this legislator (Cliff Benz) and will add him to his contact list.

B. March Meeting - Hood River

Mr. Corson took an informal poll of Council members to ensure that a quorum will be present for the Council's next meeting in Hood River. It appeared that there will indeed be a quorum.

VII. Adjournment

Mr. Corson adjourned the meeting at 11:19 a.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director

**Council on Court Procedures**  
**Website/Inquiries Update**  
**1/29/08**

1. Website Statistics

a. Visitors

From November 28, 2007, when we began keeping statistics, until January 28, 2008, the website had 195 total visits from 124 unique visitors (Council staff is excluded from these statistics so as not to skew the results.) 51.28% of the visitors were new and the rest were returning. The average time spent at the site was 1 minute and 38 seconds, and the average number of pages viewed was 2.38. Most visitors were from Oregon. There were a few anomalies from countries such as Japan and Malaysia (these visitors did not spend any time on the site but left immediately). A few of the non-Oregon visitors who did actually spend time and visit different pages on the site were from Washington and California.

b. Referral sources

Visitors came to the website from 23 different sources. The majority were visits directly to the site's address. The site received 25 visits from Google searches; 19 from the Oregon State Bar; 7 from the Lane County Bar; and 5 from the Clackamas County Bar. Among the Google search terms that visitors typed in were: Oregon council on court procedures; council on court procedures; council on court procedures minutes; council on court procedures in Oregon; court procedure; legislative minutes; and Oregon rules of court.

2. E-mail and telephone inquiries

During the month of January, the Council received six e-mail inquiries from the website. One inquiry was from a member of the public seeking legal advice. Another inquiry was from a librarian looking for information on changes to ORCP 58 B(9). The other four inquiries were from attorneys looking for information on rule changes to ORCP 7A, ORCP 7D, ORCP 9F, and ORCP 18B. Mark Peterson received three telephone calls from attorneys seeking information on rule changes to ORCP 7, ORCP 18, and the use of limited judgments (ORS, Chapter 18). Gene Buckle received an e-mail from an attorney seeking information on application of ORCP 69.

3. Search Engine

The website now contains a site-specific search engine (via Google). All pages on the site, including minutes, are "searchable," although there is sometimes a brief lag between the time that the pages are uploaded and the time that Google indexes them. Once we have converted past minutes to PDF format and made them available on the site (an ongoing project), the search engine will become an even more useful research tool.

4. Domain Purchase

The Council purchased and registered for our use the following domain names: counciloncourtprocedures.org, counciloncourtprocedures.com, and counciloncourtprocedures.net. Visitors to these domain names are redirected automatically to the site that resides at Lewis and Clark. If you are giving out the website name to someone, please use counciloncourtprocedures.org.

As always, if you have any questions about the website or any issues surrounding it, please do not hesitate to contact Kristen David or Shari Nilsson.

To: The Council on Court Procedures

From: Committee on Service Rules

The committee is constituted of Brooks F. Cooper, Chair, Honorable Robert Herndon, and Martin Hansen.

The committee was charged by the Council as a whole with considering whether or not the Council should promulgate amendments to the Oregon Rules of Civil Procedure that conform the Oregon Rules of service of process to the rules currently employed in Federal courts.

In short summary, the Federal Courts contemplate a two-track method of service of defendants. The preferred track is that Plaintiff mails to the Defendant a notice that the action has been instituted and a form by which defendant can waive official service of process. Defendants are induced by the rules to execute the waiver because if they do, the rules provide them an extension of their normal 30-day time to answer the complaint. If the defendant does not return the waiver and has no good cause for having done so, the Federal Courts "shall" on Plaintiff's motion, impose upon defendant immediately the costs of service. In this way, defendants have both a carrot and a stick compelling them to allow Plaintiff to avoid the normal costs of hiring a process server.

Both Mr. Cooper and Mr. Hansen practice in Federal Court and have similar experience. In many circumstances, even though the rules provide for this ultimate method of service, practitioners are more comfortable with "normal" service and forego even attempting to use them.

Also, in many of the circumstances where the waiver method is used, defendants do not return the forms and there is thus delay in the action being actively prosecuted. Further, defendants (this is not surprising) generally are not willing to pay costs of service without motion and therefore motion practice is frequently required.

For the following reasons, the sub-committee recommends that the Council take no action to draft "federal-like" service rules for promulgation this session.

First, the time in which an action is "commenced" is different in federal and state courts.

In Federal court, the filing of the complaint with the Clerk, is commencement of the action for the purpose of statute of limitations - without regard to how long it takes to achieve service on a defendant.

As all of us are familiar, in Oregon an action is deemed commenced on the day it is filed if the matter is also properly served within sixty (60) days after filing - so-called "relation back." The "relation back" rule is found at ORS 12.020. This, of course, is not part of the rules of civil procedure and therefore, it is apparently outside the Council's authority to directly modify this statute.

Further, it is the opinion of the sub-committee that, because of the effect that this statute has on the rights of parties - specifically defendants - it is a substantive, rather than merely procedural rule.

Therefore, if the Council were to draft and promulgate “federal-like” service rules, these rules would have to be crafted to avoid altering the effect of the 60-day relation back rule, so as to avoid affecting the substantive rather than merely procedural rules of civil practice.

Also, the sub-committee worries that institution of such a rule would simply serve as an avenue for increased motion practice when defendants fail to return the “waiver” documents and plaintiffs come to court seeking their costs of service.

In summary, while the sub-committee is certainly of the opinion that Oregon rules, as drafted, are complicated and technical, a “federal-like” service method seems to be a more difficult solution than the problem that it attempts to solve.

1 | **CLAIMS FOR RELIEF**

2 | **RULE 18**

3 | \* \* \* \* \*

4 | A pleading which asserts a claim for relief, whether an original claim, counterclaim,  
5 | cross-claim, or third party claim, shall contain:

6 | **A** A plain and concise statement of the ultimate facts constituting a claim for relief  
7 | without unnecessary repetition.

8 | **B** A demand of the relief which the party claims; if recovery of money or damages is  
9 | demanded, the amount thereof [*shall*] **may** be stated; relief in the alternative or of several  
10 | different types may be demanded.

11 | **C If the amount of monetary damages is not stated in the demand, the party**  
12 | **must notify the opposing party or parties to the action in writing of the amount of**  
13 | **monetary damages sought within 7 days of service of the demand.**

14 | \* \* \* \* \*

1 **CLAIMS FOR RELIEF**

2 **RULE 18**

3 \* \* \* \* \*

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5 cross-claim, or third party claim, shall contain:

6 **A** A plain and concise statement of the ultimate facts constituting a claim for relief  
7 without unnecessary repetition.

8 **B** A demand of the relief which the party claims; if recovery of money or damages is  
9 demanded, the maximum amount thereof shall be stated either in that pleading or in an  
10 amended pleading filed within 14 days; relief in the alternative or of several different types  
11 may be demanded."

12 \* \* \* \* \*

## **Report from the Probate Sub-Committee**

The Counsel appointed a committee consisting of Judge Lauren Holland, Judge Robert Herndon, Brooks Cooper and Kristen David. The Committee considered a variety of amendments or proposed amendments to the rules. The following were considered and rejected as either not warranted or likely to cause as much trouble as any benefit conferred.

First, there was a proposal that ORCP 21 be amended to make it clear that it cannot be used to challenge the sufficiency of objections to probate and conservatorship accountings. The Committee felt that this was primarily a problem of rather limited occurrence and generally one created by issues with practitioners rather than problems with the rules.

Next, the Committee considered a proposal to amend ORCP 55 to make it explicitly clear that the Court Visitor appointed in guardianship and some conservatorship actions have the authority to access the proposed protected persons private and protected health information from physicians and other medical practitioners. The Committee felt that this was, first, a very substantive change to the law, and second, not warranted in that the probate courts retain the discretion to issue orders in cases where it is appropriate to effectuate such a result. Creating such a blanket authority would limit the probate court's ability to handle matters pending before it.

Next, the Committee considered amendments of ORCP 27. First, with respect to whether or not guardians ad litem have the authority to settle litigation in which they have been appointed. After much discussion, the Committee determined that no change to the rule would be recommended.

Next, the Committee considered whether or not ORCP 27 should be amended to establish different procedures for guardians ad litem for adults as opposed to minors. It was the Committee's feeling that while they could be merit to some such changes, the authority of a guardian ad litem is limited enough, and litigation pends for long enough that there are opportunities for hearings with respect to the propriety of the guardian ad litem's conduct or propriety of their appointment and thus, no change to the appointment procedure was necessary.

Next, the committee considered whether ORCP 27 should be amended to require notice of the Motion to Appoint Guardian ad Litem prior to the appointment. The Committee was of the opinion that no such requirement should be imposed because it is possible for such a notice requirement to prevent the filing of an action before the running of the statute of limitations and because of the limited nature of the guardian ad litem's appointment, issues of the propriety of any particular guardian ad litem could be worked out after the action was commenced and the statute of limitations preserved.

Next, the committee considered whether revisions to ORCP 44 should be made to clarify whether it can or cannot be used as a tool to compel a medical examination of a proposed protective person in a guardianship or conservatorship proceeding.

The Committee felt that no amendment was necessary because the Court has the

discretion under the existing rule to allow or deny such a medical examination. The Committee could see situations where one could be proper and other situations where it could be improper and the Committee felt it best to retain broad discretion for the individual trial judge making such decisions.

ORCP 57D(2)-(4): Peremptory Challenges for Third Parties  
Committee Report

Committee Members: Martin E. Hansen, John Svoboda, Judge Herndon

The question that was raised was whether there needs to be a more specific rule on how 3rd party defendants are allocated additional peremptory challenges. The current rule allows all plaintiffs together 3 challenges and all defendants together 3 challenges unless the court in its discretion expands the number of challenges between multiple parties.

The committee agreed to poll trial judges to see 1) what the typical practice is among judges on this issue, and 2) whether any judges felt a more specific rule is required.

The committee findings show that courts generally listen to the requests for additional peremptory challenges made by 3rd party defendants and allocate additional challenges from 1 to 3 depending on how diverse the 3rd party interests are from the other parties. While no uniform rule seems to be followed by courts no judges interviewed appeared to have any real difficulty dealing with this process.

Judges uniformly did NOT want a change in this rule. Given the case-by-case differences the courts feel that the "discretionary exception" allowed in the present rule 57 works adequately.

Based on these findings, the committee recommends that no change be made in ORCP 57 D (2) at this time.

----- Original Message -----

Subject: RE: ORCP 7 issues  
Date: Thu, 31 Jan 2008 14:26:29 -0800  
From: Barbara Fishleder <BarbaraF@oaap.org>  
To: Mark Peterson <mpeterso@lclark.edu>

Okay, that sounds great. I'll do what I can to find out as soon as possible.

I did try you by phone during your no phone timeframe, that is why I ended up emailing you! I hope that doesn't happen to us...or maybe, I should hope it does!!

Take care,  
Barbara

-----Original Message-----

From: Mark Peterson [mailto:mpeterso@lclark.edu]  
Sent: Thursday, January 31, 2008 11:39 AM  
To: Barbara Fishleder  
Subject: Re: ORCP 7 issues

Barbara,

Hectic? We had no telephone service for most of the week. Good luck with the move. I don't envy you.

We will prepare the meeting packet on Friday, February 1, for our next meeting which is February 9, 2008. If I have information on these issues by either of those dates, that would be great. Since that is likely not possible, ASAP in February so I can prepare a proposal, if one is needed, for the March meeting.

Mark

Barbara Fishleder wrote:

> Mark,  
> Thanks for the email. I will check it out both questions with the claims  
> attorneys and our defense panel. Can you give me a timeline so I know  
> when you need to know. It is pretty hectic right now around here, since  
> the PLF is moving in about 10 days.  
>

> Barbara  
>  
> -----Original Message-----  
> From: Mark Peterson [mailto:mpeterso@lclark.edu]  
> Sent: Tuesday, January 29, 2008 6:33 PM  
> To: Barbara Fishleder  
> Subject: Re: ORCP 7 issues  
>  
> Barbara,  
>  
> Thanks. My ORCP 7 issues have now expanded to two. The first was whether  
>  
> the due diligence requirement to find other possible addresses for the  
  
> defendant in a motor vehicle case prior to serving the defendant with  
> a  
> summons and complaint via ORCP 7D(4)(a) was still causing problems.  
> There was some concern that plaintiffs' attorneys may have their  
> complaints dismissed if they did not conduct a thorough inquiry under  
> Rule 7D(4)(a)(i)(C). There are a number of cases; see Mitchem v. Rice,  
  
> 142 OrApp214, 219, reconsidered 143 OrApp546, 550 (1996); which seem  
> to  
> require a due diligence search including public utility records and  
> other inquiries that are no longer feasible in an age of identity  
> theft  
> and privacy concerns. There was a significant amendment to that  
> section  
> in 1997 and, perhaps, that solved the problem. However, the Council  
> was  
> asked to examine the rule for ongoing problems. As you no doubt know,  
> the Council is composed of plaintiff and defense attorneys and seeks  
> to  
> make amendments to the ORCP where the rules are unclear or outmoded or  
  
> where a court decision has created doubt as to how a rule is to be  
> applied. The intent is not to create an advantage for either side but,  
  
> rather, to have rules that are clear and provide for the just, speedy,  
  
> and inexpensive determination of every civil action.  
>  
> The other Rule 7 issue that has arisen relates to service on  
> corporations under ORCP 7D(3)(b). Rule 7D(3)(b)(i) sets out a

"primary"

> service method. Have issues arisen as to whether the "alternative"  
> methods of service outlined in Rule 7D(3)(b)(ii) may be employed, such

> as whether the plaintiff looked hard enough, or at all, for the  
> registered agent (or other persons listed) in the county where the  
> action is filed before relying on the alternative methods?  
> It seems prudent to ask the PLF if these paragraphs of Rule 7, or any  
> other rules, could be amended to make the job of litigation more  
> predictable, fair, and efficient.

>

> Mark

>

> Barbara Fishleder wrote:

>

>> Hi Mark,

>>

>> I just wanted to let you know that I got your voice mail message and  
I

>> have circulated your question to our claims attorneys and the defense

>> panel members you are involved in these claims. I'll be back to you

>> soon with an answer.

>>

>> Thanks for checking with us.

>>

>> /Barbara/

>>

>> Barbara S. Fishleder

>>

>> PLF Director of Personal and Practice Management Assistance/

>>

>> Oregon Attorney Assistance Program Executive Director

>>

>> P.O. Box 1600

>>

>> Lake Oswego, Oregon 97035

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>> Phone: 503-684-7425

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>> Facsimile: 503-684-7250

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>> barbaraf@oaap.org

1 **SUMMONS**

2 **RULE 7**

3 \* \* \* \* \*

4 **D(3) Particular defendants.** Service may be made upon specified defendants as follows:

5 **D(3)(a) Individuals.**

6 **D(3)(a)(i) Generally.** Upon an individual defendant, by personal delivery of a true copy  
7 of the summons and the complaint to such defendant or other person authorized by appointment  
8 or law to receive service of summons on behalf of such defendant, by substituted service or by  
9 office service. Service may also be made upon an individual defendant to whom neither  
10 subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with  
11 paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered  
12 or express mailing, in which case service shall be complete on the date on which the defendant  
13 signs a receipt for the mailing.

14 **D(3)(a)(ii) Minors.** Upon a minor under the age of 14 years, by service in the manner  
15 specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's  
16 father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any  
17 person having the care or control of the minor or with whom such minor resides, or in whose  
18 service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A(2).

19 **D(3)(a)(iii) Incapacitated persons.** Upon a person who is incapacitated or financially  
20 incapable, as defined by ORS 125.005, by service in the manner specified in subparagraph (i) of  
21 this paragraph upon such person, and also upon the conservator of such person's estate or  
22 guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

23 **D(3)(a)(iv) Tenant of a mail agent.** Upon an individual defendant who is a "tenant" of a  
24 "mail agent" within the meaning of ORS 646.221 by delivering a true copy of the summons and  
25 the complaint to any person apparently in charge of the place where the mail agent receives mail  
26 for the tenant, provided that:

1 (A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

2 (B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the  
3 summons and the complaint to be mailed by first class mail to the defendant at the address at  
4 which the mail agent receives mail for the defendant and to any other mailing address of the  
5 defendant then known to the plaintiff, together with a statement of the date, time, and place at  
6 which the plaintiff delivered the copy of the summons and the complaint.

7 Service shall be complete on the latest date resulting from the application of subparagraph  
8 D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a  
9 receipt for the mailing, in which case service is complete on the day the defendant signs the  
10 receipt.

11 **D(3)(b) Corporations and limited partnerships.** Upon a domestic or foreign  
12 corporation or limited partnership:

13 **D(3)(b)(i) Primary service method.** By personal service or office service upon a  
14 registered agent, officer, director, general partner, or managing agent of the corporation or  
15 limited partnership, or by personal service upon any clerk on duty in the office of a registered  
16 agent.

17 **D(3)(b)(ii) Alternatives.** If a registered agent, officer, director, general partner, or  
18 managing agent cannot be found in the county where the action is filed, the summons may be  
19 served: by substituted service upon such registered agent, officer, director, general partner, or  
20 managing agent; or by personal service on any clerk or agent of the corporation or limited  
21 partnership who may be found in the county where the action is filed; or by mailing **in the**  
22 **manner specified in paragraph (2)(d) of this section** a copy of the summons and complaint to  
23 the office of the registered agent or to the last registered office of the corporation or limited  
24 partnership, if any, as shown by the records on file in the office of the Secretary of State or, if the  
25 corporation or limited partnership is not authorized to transact business in this state at the time of  
26 the transaction, event, or occurrence upon which the action is based occurred, to the principal

1 office or place of business of the corporation or limited partnership, and in any case to any  
2 address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to  
3 believe is most likely to result in actual notice.

4 **D(3)(c) State.** Upon the state, by personal service upon the Attorney General or by  
5 leaving a copy of the summons and complaint at the Attorney General’s office with a deputy,  
6 assistant, or clerk.

7 **D(3)(d) Public bodies.** Upon any county, incorporated city, school district, or other  
8 public corporation, commission, board or agency, by personal service or office service upon an  
9 officer, director, managing agent, or attorney thereof.

10 **D(3)(e) General partnerships.** Upon any general partnerships by personal service upon a  
11 partner or any agent authorized by appointment or law to receive service of summons for the  
12 partnership.

13 **D(3)(f) Other unincorporated association subject to suit under a common name.**  
14 Upon any other unincorporated association subject to suit under a common name by personal  
15 service upon an officer, managing agent, or agent authorized by appointment or law to receive  
16 service of summons for the unincorporated association.

17 **D(3)(g) Vessel owners and charterers.** Upon any foreign steamship owner or steamship  
18 charterer by personal service upon a vessel master in such owner’s or charterer’s employment or  
19 any agent authorized by such owner or charterer to provide services to a vessel calling at a port in  
20 the State of Oregon, or a port in the State of Washington on that portion of the Columbia River  
21 forming a common boundary with Oregon.

22 \* \* \* \* \*