

**MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES**

Saturday, December 13, 2008, 9:30 a.m.

Oregon State Bar Center

16037 SW Upper Boones Ferry Rd

Tigard, OR 97224

ATTENDANCE

Members Present:

Eugene H. Buckle
 Brian S. Campf
 Brooks F. Cooper
 Don Corson
 Dr. John A. Enbom
 Martin E. Hansen*
 Hon. Daniel L. Harris
 Hon. Robert D. Herndon
 Hon. Jerry B. Hodson
 Hon. Lauren S. Holland*
 Hon. Rodger J. Isaacson
 Hon. Mary Mertens James*
 Hon. Rives Kistler
 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:

Kristen S. David
 Alexander D. Libmann

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 this Biennium	ORCP Amendments Promulgated this Biennium	ORCP to be Reexamined Next Biennium
ORCP 1 ORCP 7D(3)(b) ORCP 54A ORCP 54E ORCP 55 ORCP 59B ORCP 69A&B	ORCP 7 ORCP 7D(4) ORCP 7D(4)(a) ORCP 7F(2)(a) ORCP 9 ORCP 9F ORCP 18B ORCP 19B ORCP 21A ORCP 25 ORCP 27 ORCP 38B ORCP 38C ORCP 43B ORCP 44A ORCP 44B	ORCP 47C ORCP 51 ORCP 54 ORCP 54A ORCP 55H ORCP 57 ORCP 57D(2)-(4) ORCP 58B(5) ORCP 59H ORCP 61 ORCP 67C ORCP 68	ORCP 1 ORCP 7D(3)(b) ORCP 54A ORCP 55 ORCP 59B ORCP 69A&B

I. Call to order (Mr. Corson)

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

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of September 13, 2008, Minutes

Mr. Corson called for a motion to approve the September 13, 2008, minutes which had been previously circulated to the members. The motion was made and seconded and the minutes were approved by the membership with no amendments or corrections.

IV. Administrative Matters

A. Update: Timely Notification of ORCP Changes (Prof. Peterson)

Prof. Peterson stated that the Council will provide Thomson West with the rules that are promulgated today and will let them know that they will not become final until after the Legislature has had an opportunity to act on them. The Council will offer to provide the rules to Thomson West as soon as the legislative session ends, in any form that Thomson West would like, and see whether that helps to get the *Rules of Court* out any earlier. He stated that, now that the Council is a part of the Legislative Counsel, there may be a possibility for the Legislative Counsel to publish a handbook of the ORCP with the current changes earlier than Thomson West's *Rules of Court* is released. Prof. Peterson stated that Mr. Nebel will arrange for the Bar to send an e-mail to all members notifying them of the rule changes as well.

B. Update: Key Performance Measures and Council Survey (Prof. Peterson)

Prof. Peterson stated that the Council's Key Performance Measures are complete and in place with no adverse feedback. He stated that the survey results will need to be looked at in order to fill in the 2007-2009 figures. Mr. Buckle asked whether the target for 2009-2011 will also be filled in. Prof. Peterson replied that he needs to speak with the Council's contact at the Legislative Fiscal Office regarding those goals. Prof. Peterson stated that the KPM will be available in response to any questions by the Ways and Means Committee.

Prof. Peterson stated that the results of the Council survey – which was sent to the members of the Litigation, Business Litigation, Family, Products Liability, and Sole and Small Firm sections; the members of the Judicial Administration, Procedure and Practice, and Uniform Jury Instructions - Civil committees; and to all circuit court judges and all appellate judges – have been received and compiled. They are attached as Appendix A. Judge Miller asked whether the

percentage of people who responded is good. Prof. Peterson stated that there was a 20% response rate, which is good according to the person at the Bar who crafted the survey for the Council.

Mr. Corson asked whether the Council will publish survey results on its website. Mr. Nebel suggested placing a summary of results on the website. Mr. Corson stated that it would be a good idea in terms of transparency. Judge Herndon pointed out that survey takers usually appreciate the results being posted for their review. Mr. Corson suggested posting the first two summary pages on the website for the benefit of the public. Judge Miller asked whether an e-mail could be sent to survey respondents letting them know that the results are available on the website. Mr. Nebel said that he will check with his survey person to see if it is possible. Judge Holland asked whether there are any comments that the Council wants to address or to take into consideration. Prof. Peterson indicated that he and Ms. Nilsson had distilled a list of responses that asked for rule changes and will provide that for the Council's review next biennium. Mr. Corson stated that both the distilled list and the actual survey results will be considered by the Council next biennium.

C. Council Agency Budget (Prof. Peterson)

Prof. Peterson stated that historically the Council travel budget (Appendix B) of \$4000 per year is provided by the Oregon State Bar and is separate from the rest of the budget. He pointed out that the budget is running about one third short due to substantial increases in the price of travel. He stated that the remainder of the Bar funds will be available in January to pay the members who have not yet been reimbursed, and that he has received informal assurance from the Legislative Counsel's Office that they will follow the statute and pay to the extent that the \$8000 is inadequate. He stated that it appears that the entire Council (non-travel) budget (Appendix C, p. 1) will be short by approximately \$908, but that the Law School will make up that difference. Projecting to the 2009-2011 biennium, it appears that the budget (Appendix C, p. 2) will be short by nearly \$8000, \$4000 of which is due to travel and the rest for other costs. Prof. Peterson pointed out that there are no expenses listed for items such as equipment costs and paper, as those are subsidized by the Law School.

Prof. Peterson stated that he would like to ask for an increase in the Council's budget for next biennium. He stated that the request is not likely to be granted considering the current economic situation. Mr. Buckle asked whether there is any doubt that the Council will receive its budgeted \$50,000. Prof. Peterson stated that it is possible for the budget to be cut. Judge Miller stated that all state agencies are making cuts. Judge Herndon pointed out that historically there have been some who believe that the Council should not have a separate budget at all. Judge Williams stated that he feels it is important to request the increase even if there is a possibility that it will not be granted. Mr. Corson asked about the appropriate time for the Council to ask for an increase. Prof. Peterson stated that

it would be a request to Legislative Counsel since the Council is a line item in its budget.

Mr. Nebel explained that the governor has directed all agencies to find cuts of 5% for the remainder of the biennium. Justice Kistler asked whether the change in the composition of legislators on the Ways and Means Committee could mean more receptiveness than has been previously shown to the Council. Mr. Nebel stated that there will likely be hostility to any request for increased funds. Mr. Corson stated that, once the Council's Legislative Advisory Committee is elected, that committee will put the budget increase on its agenda.

D. Report: Website/Inquiries (Ms. Nilsson)

Ms. Nilsson discussed briefly the Website/Inquiries Update (Appendix D). She stated that the statistics show a large number of visitors, and the fact that there were a significant number of page views per visit indicates that people are actually staying and looking at web pages. She stated that it is apparent that a good number of people are looking at the published amendment page and staying for more than two minutes, which shows that they have been either reading or printing the published rule changes.

Mr. Cooper related a telephone call he had received from someone who wanted information regarding a problem with a judge. Mr. Corson and Judge Herndon stated that they had also spoken with this person. Mr. Cooper asked what the standard response should be to such an inquiry. Mr. Corson indicated that the best thing to do is to refer the person to the website and its inquiry form.

E. Confirm Council Members Whose Terms Expire August 31, 2009 (Mr. Corson)

A matrix of Council members and their term expiration information was circulated (Appendix E). Mr. Corson asked that members review the matrix and inform Ms. Nilsson of any errors, and that those members eligible for reappointment let her know whether they are willing to be reappointed.

V. Action items: Votes on whether to promulgate per ORS 1.735(1) (Mr. Corson)

Note: all published rules, as well as comments received and correspondence exchanged regarding those rules, are attached as Appendix F.

A. ORCP 1

Mr. Corson stated that no comments had been received to either proposed version of ORCP 1 (Appendix F-3 and F-5). He suggested adopting alternative one and making it clear in the minutes that it encompasses all documents enumerated listed in alternative two.

Mr. Cooper stated that alternative two was created because of the concern that the short form might leave something out, but he stated that he feels that it is unnecessary and cumbersome to list each document when the purpose of the change is to enable the UTCR to change when the Chief Justice's E-Filing Task Force is ready to begin.

A motion was made to promulgate alternative one of ORCP 1. The motion was seconded and it passed a roll call vote with 21 members voting in favor of the motion and with no votes in opposition or abstentions.

B. ORCP 7D(3)(b)

Prof. Peterson briefly explained the committee's work on changes to ORCP 7D(3)(b) (Appendix F-7). He stated that the goal of the changes was to make the rule more specific and clear regarding all recognized business entities that can be served. He stated that his communications with Deputy Tim Leader (Appendix F-18 through F-25) revealed that the Oregon State Sheriffs' Association believed that office service cannot be used to serve a corporate officer or director, and felt that the existing term "managing agent" allowed them to serve the person in charge. After a series of communications between Deputy Leader and Prof. Peterson, Deputy Leader stated that, if the Council minutes reflect that the rule contemplates that both substituted service and office service are allowed for corporate officers and directors, the Sheriffs' Association would not oppose removing the words "managing agent." Prof. Peterson confirmed that the Council clearly intends that office service is an acceptable method of service on officers and directors of corporations.

Judge Miller asked whether the correspondence between Prof. Peterson and Deputy Leader will be made part of the minutes. Ms. Nilsson confirmed that any comments and exchanges regarding proposed rule changes will become an appendix to the minutes.

Prof. Peterson stated that there had been a few changes made between the originally published version of ORCP 7D(3)(b) (Appendix G) and the version (Appendix F-7) on which the Council would be voting. This was due to an incorrect "base text" being used which resulted in small grammatical changes that had already been made in the previous biennium being made again. The base text was changed to reflect the current rule, which had no impact on the substantive changes proposed this biennium.

A motion was made to promulgate the changes to ORCP 7D(3)(b). The motion was seconded and it passed a roll call vote with 21 members voting in favor of the motion and with no votes in opposition or abstentions.

C. ORCP 54E

Mr. Buckle briefly explained the committee's work on changes to ORCP 54E (Appendix F-12). He stated that the basic idea is to not allow an offer to allow judgment to be filed with the court until after the case is adjudicated on its merits, in order to not allow the judge or arbitrator to know what settlement discussions have taken place. He stated that there have been a few cases in the last few weeks that reflect on ORCP 54, including *Wilmoth v. Ann Sacks Tile and Stone, Inc. and Kohler Co.*, a case where the judgment after trial did not exceed the offer of judgment. He stated that, in *Wilmoth*, the failure to file the offer of judgment pursuant to ORCP 9C precluded the offer from cutting off an entitlement to attorney fees which were incurred after the Rule 54E offer of judgment was rejected. He noted that the promulgated amendment should, contrary to *Wilmoth*, prevent Rule 9C from making an unfiled ORCP 54E offer ineffective. He discussed another case that involves the relationship between ORS 20.080 and ORCP 54 and how an offer to allow judgment under ORCP 54 which is not beaten at trial does not cut off attorney fees under ORS 20.080. He stated that those issues are a matter for next biennium, if at all.

Mr. Weaver stated that something else to consider for next biennium is the time allowed in the rule. He noted that attorney Danny Lang had made a proposal to the Council (Appendix H) regarding changing the time period from three to ten days, and stated that the Council should revisit this issue next biennium.

A motion was made to promulgate the changes to ORCP 54E. The motion was seconded and it passed a roll call vote with 21 members voting in favor of the motion and with no votes in opposition or abstentions.

D. ORCP 55D

Prof. Peterson explained that the change to ORCP 55D (Appendix F-13) is a technical change to reflect the numbering changes made in ORCP 7.

A motion was made to promulgate the changes to ORCP 55D. The motion was seconded and it passed a roll call vote with 21 members voting in favor of the motion and with no votes in opposition or abstentions.

E. ORCP 59B

Judge Harris briefly explained the history and the committee's work on changes to ORCP 59B (Appendix F-14). He stated that the current rule was approved in December, 2002. At that time, one third of judges in Oregon were using written jury instructions regularly. During the first three years after the 2002 rule change,

training for judges was provided at judicial conferences and in other arenas. Currently, about two thirds of Oregon judges are using written instructions regularly. States adjacent to Oregon have a rate of 90%. Judge Harris and the committee felt that changing the rule now would help raise Oregon's percentage.

The Council received a few comments from judges regarding this amendment (Appendix F-30, F31). Judge Harris stated that he met with Chief Justice De Muniz about the potential rule change and his concern about putting a burden on judges and court staff. Justice De Muniz enthusiastically supports the change and sees it as a natural part of rolling out eCourt and improving the court process in Oregon. With Justice De Muniz's support, Judge Harris formed a four judge committee to create a plan for implementing the change and educating judges and court staff. That committee's findings are outlined in a memorandum to the Council from Judge Harris (Appendix I).

Judge Harris stated that the goal is to get the rule of law in front of jurors who are to decide cases based on that law. He stated that training of judges, staff, and lawyers was a primary concern, as well as resolving potential problems for traveling judges. Judge Harris met again with Chief Justice De Muniz and the Judicial Department's educational coordinator the day before the Council meeting and stated that they are fully committed to implementing the rule change if the Council promulgates it. He pointed out that there will be one year before the rule change becomes effective and that should give time for adequate training. The plan is to do a statewide survey of the best way to reach staff and others who will need training.

Mr. Buckle asked whether trial judges routinely require attorneys on both sides to provide written instructions. Judge Holland said that her practice is to have both sides' attorneys submit instructions on paper and to provide them to each other. Judge James requires attorneys to give her both a hard copy and an electronic copy. Judge Miller stated that, in Clackamas County, it is simpler in criminal trials because the District Attorney is either in the same building or across the street. She stated that, by the time jury instructions are ready to be read, they are usually complete. Sometimes as she is instructing jurors she may come across small items that need to be changed and, in this case, she will send the jury to the jury room with coffee while those changes are being made. She indicated that this does not pose any problem.

A motion was made to promulgate the changes to ORCP 59B. The motion was seconded and it passed a roll call vote of 21 members voting in favor of the motion and with no votes in opposition or abstentions.

F. ORCP 69A & B

Prof. Peterson explained that the main goal of changes to ORCP 69A and B (Appendix F-15) was to make it clear that notice of intent to take default needs to be in the form of a pleading. He stated that the Council had received two comments regarding the changes (Appendix F-32, F-33), both of which indicated that this change would decrease the civility of practice in Oregon and could result in increased costs. Prof. Peterson stated that the practice of sending a “friendly letter” might result in the other party not taking it as a serious notice of intent to take default, and that letters are not usually recorded in Oregon Judicial Information Network, whereas a document in pleading form would be and would be easier to track. He pointed out that this change would also make default judgments more difficult to set aside when someone has been given proper notice about the other side’s intent to obtain an order of default.

Prof. Peterson stated that he and Ms. Nilsson had done a survey of how many clerks are entering judgment as allowed in ORCP 69B(1) without the involvement of a judge. They received a good response which indicated that very few districts do so. He stated that this is something to think about for the next biennium.

Mr. Buckle questioned whether the impetus for the change was to make setting aside a default more difficult. Prof. Peterson corrected his earlier statement and stated that the intent was simply to make the record clear so that when a party is attempting to set aside a default there is a clear record as to what kind of notice was given and how it was given.

A motion was made to promulgate the changes to ORCP 69A and B. The motion was seconded and it passed a roll call vote with 21 members voting in favor of the motion and with no votes in opposition or abstentions.

VI. Annual election of officers per ORS 1.730(2)(b)

Judge Williams made a motion to elect for a new term a slate consisting of Mr. Corson for Chair, Mr. Buckle for Vice-Chair, and Dr. Enbom for Treasurer.

A. Chair

A motion was made to re-elect Mr. Corson as Chair. The motion was seconded and it passed a voice vote of 21 members with no votes in opposition or abstentions.

B. Vice Chair

A motion was made to re-elect Mr. Buckle as Vice Chair. The motion was seconded and it passed a voice vote of 21 members with no votes in opposition or abstentions.

C. Treasurer

A motion was made to re-elect Dr. Enbom as Treasurer. The motion was seconded and it passed a voice vote of 21 members with no votes in opposition or abstentions.

VII. Election of Legislative Advisory Committee per ORS 1.760

Prof. Peterson explained that the Legislative Advisory Committee is a body that is available to respond quickly to any inquiries by the Legislature. Historically the committee has dealt with budget and legislative matters.

A. Two judges

Motions were made to elect Justice Kistler and Judge Herndon as judge members of the Legislative Advisory Committee. The motions were seconded and passed a voice vote of 21 members with no votes in opposition or abstentions.

B. Two attorney members

Motions were made to elect Mr. Corson and Mr. Buckle as attorney members of the Legislative Advisory Committee. The motions were seconded and passed a voice vote of 21 members with no votes in opposition or abstentions.

C. One public member

A motion was made to elect Dr. Enbom as the public member of the Legislative Advisory Committee. The motion was seconded and passed a voice vote of 21 members with no votes in opposition or abstentions.

D. Election of chair by a vote of the Committee

The Committee chose to hold a brief meeting after the Council meeting for the purpose of electing a chair. That chair is Mr. Buckle.

VIII. New Business

No new business was raised.

IX. Next Meeting Date/Location

The next Council meeting will take place on Saturday, September 12, 2009. The meeting location will be announced at a later date.

X. Adjournment

Mr. Corson adjourned the meeting at approximately 11:00 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Rate your level of agreement with the following statement: The Oregon Rules of Civil Procedure promote the just, speedy and inexpensive determination of civil court actions.

Answer Options	Response Percent	Response Count
Agree Strongly	6.3%	28
Agree	42.4%	190
Agree Somewhat	39.3%	176
Disagree	7.4%	33
Disagree Strongly	2.2%	10
Don't Know	2.5%	11
<i>answered question</i>		448
<i>skipped question</i>		0

Please rate your familiarity with the composition and work of the Council on Court Procedures.

Answer Options	Response Percent	Response Count
Very Familiar	10.0%	45
Somewhat Familiar	35.7%	160
Vaguely Familiar	32.4%	145
Unfamiliar	21.9%	98
<i>answered question</i>		448
<i>skipped question</i>		0

You indicated you are very or somewhat familiar with the work of the Council on Court Procedures. How would you rate the quality of its work?

Answer Options	Response Percent	Response Count
Excellent	18.3%	37
Good	60.9%	123
Fair	13.9%	28
Poor	1.5%	3
Don't Know	5.4%	11
<i>answered question</i>		202
<i>skipped question</i>		246

How would you rate the Council on Court Procedures' responsiveness to the needs of litigants, lawyers and judges?

Answer Options	Response Percent	Response Count
Excellent	13.4%	27
Good	51.5%	104
Fair	22.3%	45
Poor	3.5%	7
Don't Know	9.4%	19
<i>answered question</i>		202
<i>skipped question</i>		246

Have you visited the Council on Court Procedures website?		
Answer Options	Response Percent	Response Count
Yes	15.3%	68
No	84.7%	376
<i>answered question</i>		444
<i>skipped question</i>		4

Please rate the usefulness of the Council on Court Procedures website:		
Answer Options	Response Percent	Response Count
Excellent	21.7%	15
Good	49.3%	34
Fair	18.8%	13
Poor	4.3%	3
Don't Know	5.8%	4
<i>answered question</i>		69
<i>skipped question</i>		379

Have you ever made a proposal to the Council on Court Procedures?		
Answer Options	Response Percent	Response Count
Yes	11.9%	53
No	88.1%	391
<i>answered question</i>		444
<i>skipped question</i>		4

The following best describes my practice:

Answer Options	Response Percent	Response Count
Trial Judge	4.1%	18
Appellate Judge	0.2%	1
Defense Lawyer	25.6%	113
Plaintiff's Lawyer	23.8%	105
Probate	2.0%	9
Family Law	21.3%	94
Other (please specify)	23.1%	102
<i>answered question</i>		
442		

Response Text:	Complex Ag and Business transactions and litigation related to those matters	government attorney
Commercial and construction litigation	General including Family & Probate Law	trying to decide if I still want to practice
General litigation -- plaintiff and defense	mediation and arbitration, only	Criminal Defense Lawyer
Deputy District Attorney	Commercial law and litigation	Both Plaintiffs and Defense lawyer
Business trial practice--both plaintiff and defendant	general practice of law	business litigation
Corporate in-house lawyer	general practice/pro tem judge	business litigation
General practice	criminal	Business trial lawyer
commercial litigation	Complex commercial litigator	civil defense lawyer
trial (defense and plaintiff) lawyer	former litigator, now non-profit litigator	general civil litigation and family law
Mediation, Collaborative Practice	mediator	Transactional (both Plaintiff and Defense equally)
Business Litigator/trial lawyer	professional liability	Business Litigation lawyer
Business litigator	business and real estate lawyer	Bankruptcy and creditor/debtor litigation
Government Relations	general practice; wills; contracts; some p.i.; misc	government/family law/criminal
commercial litigation representing both plaintiff and defendant	general business	In house counsel
General Practice	in house counsel	Estate and Trust Litigation
General Litigation	City Atty/ Civil	Business Litigator
Civil Litigation, state court	criminal defense lawyer	I work almost exclusively in federal court.
General Practice	General Civil Practice for 1 year; previously criminal prosecutor	General practice of law - both Pl. and Def. work
Civil Legal Services to Low-Income Persons	Defense and plaintiff's lawyer	Business and real estate litigation
plaintiff's AND defense lawyer	Government Lawyer	Legal Aid attorney
law professor	general practice	policy
business litigation	Registered Patent Attorney - Exclusive Federal Practice	County Counsel
commercial litigation, both sides	property and land use	land use and commercial litigation
Commercial Litigation (Plaintiff and Defendant)	generalist	general civil practice issues
Civil plaintiff's and defendant's lawyer	general practitioner	General Civil. Mostly construction lien law & family law
government lawyer - trial	In house counsel	Government Civil Litigation
Plaintiff's injury, family law and criminal defense	family law and plaintiff's work mostly, low income clients	Family, Criminal Defense and Plaintiff's Personal Injury
Arbitrator and mediator	general	criminal law
trial lawyer	part-time civil, part-time fed magistrate judge	Environmental, inc. litigation
Both plaintiff and defense lawyer	General civil/ Legal Services for the Poor	General practice
Commercial Litigator (Plaintiff/Defense)	Business Litigator	Government Civil Lawyer (not a prosecutor)
Business/Construction lawyer	Program Coordinator/ Child Custody Mediator	Commercial Lawyer (the plaintiff/defendant labels don't apply
Government attorney	Business / debt collection	Arbitrator/Mediator
General practice attorney; judge pro tem	government lawyer (appellate)	Appellate Lawyer
commercial litigator		
family, business bankruptcy		

Please add any comments you feel are appropriate about the Council on Court Procedures or its work:	
<i>answered question</i>	69
<i>skipped question</i>	379

Response Text

As a former law clerk, it becomes important to find out about work done by the council on court rules, which may affect the interpretation of the rule. It is EXTREMELY difficult to get easy access to that work. Mark, who is the main contact with CCP is extremely helpful, but there needs to be better access to the decisions of the council and reasoning, especially for judicial interpretation of rules.

Court procedures are getting ridiculously picky and, it appears, for no particular reason. Forms and procedure is rapidly overtaking substantive work.

I feel the rules are very plaintiff oriented.

The COCP is sometimes criticized for the relatively small number of changes that it actually promulgates. I believe it in fact works quite efficiently, and effectively, and that the vast majority of ideas suggested to it are not necessary or gainful improvements of the ORCP. We, and the legislature, are well served by the fact this thoughtful body of volunteers does the hard work of exploring ideas and their foreseeable consequences, and prevents weak ones from being thrust upon us without a clear idea of their benefits.

Promotion of electronic filing would be helpful and save costs for everyone.

The Rules sometimes seem biased in favor of small cases without recognizing the practices or customs in more significant cases. For example, the rule on motions to compel required a moving party to retype all of a set of a requests for production in the motion when a party refuses to produce any or more than a few documents. As a result, the "motion" section may be five pages long instead of five lines with an attached copy of a request. That rule made it easier for Judge Velure to rule on simple one or two issue motions without looking further, but imposes substantial extra work on us.

First, there is no means by which the bench and bar can provide direct input for a new rule, and for that matter, comment on a proposed rule. Where does a lawyer go if they have a suggestion? When the CCP proposed a new SJ rule a couple years ago, they set up a user friendly email monkey box to make comments. The problem was that no one knew it existed until the comment period was almost over. Thank goodness an OTLA member saw it and disseminated on the OTLA listserve. Otherwise, the Oregon courts would likely be stuck with the federal SJ rule, which is nothing less than awful.

Second, CCP OTLA members do go out of their way to informally seek input from fellow OTLA members, and it is good that they do. But there must be a formal process for insuring that all groups are given notice and the opportunity to provide input.

This type of monkey email input system should be put in place for all proposed rules and suggestions for new rules. Moreover, it should disseminated on a regular basis.

Expert discover is needed. Interrogatories would be a welcome addition to the rules

I think it is too cumbersome a system. If a person came up with a good idea now for the Council, it probably could not be enacted until 2.5 years from now. The Council and the legislature should consider how the Council might be more flexible and implement at least noncontroversial changes more quickly.

Change is not always necessary. Stability, practicality and predictability are more important.

If you can make a rule that forces the judges in Washington County to actually consider a reset, that would be great news.

I served two terms on the Council, and I think it serves an important function. It is efficient and certainly works better than having the legislature deal with the rules.

Keep up the good work

The rules need to be enforceable, i.e., default and discovery rules are not being followed because sanctions and setting aside a default are discretionary where those standards should be mandatory and non-discretionary. Fact pleading rules are not being enforced because the bench thinks notice is good enough; requiring claimings to plead ultimate facts narrows issues and disposes of litigation faster. Summary judgment is not being allowed where it should be allowed. Clarity in the procedural standards and a reduction of judicial discretion is needed to dispose of most cases prior to trial - the average person just cannot afford to litigate a civil claim anymore.

I don't know that much about the CCP, because I have practiced only in California for the last 30 years. The lawyers in Oregon say they make stuff up as they go. Seems like the trick with the Courts is not to let them do that, and apply what's there already. I know I will try to be a contributor in Oregon, as I am an expert in California civil procedure, having reinvented every wheel and cog on my own, and have a lifetime dedication to the work.

I find the ORCP on subpoenas (55, I think) to be confusing.

I feel the time period for action by the Council on proposals is far too long. I believe that it takes at least 18 months to process a proposal.

To me, the Council appears overly pro-plaintiff. The latest change requiring parties to sort through and produce documents responsive to each request is overly burdensome and unduly expensive - it does nothing more than give lazy plaintiff attorneys yet another excuse not to do their jobs.

I do have a suggestion for amendment of ORCP but am unsure as how to submit my suggestion.

I DON'T KNOW ENOUGH TO COMMENT. HOWEVER, IF THE USE OF A DECLARATION RATHER THAN NOTARIZING IS IN YOUR PURVIEW, I WOULD CERTAINLY LIKE MORE INFORMATION ABOUT IT. I WOULD LIKE TO USE DECLARATIONS, BUT I SO FAR HAVE BEEN ABLE TO DETERMINE WITH ANY CERTAINTY WHEN THEY CAN BE USED. WARREN DERAS WROTE INTERESTING COMMENTS IN THE ESTATE PLANNING AND ADMINISTRATION LISTSERV -- THAT'S HOW I LEARNED ABOUT THEM. AN EXPLANATION OF THEM WOULD BE WONDERFUL. ALSO, REGARDING THIS SURVEY, IT IS VERY DIFFICULT TO TYPE IN ALL CAPS AS THIS SURVEY IS REQUIRING ME TO DO. HABIT REGARDING CAPITALIZATION IS VERY HARD TO BREAK. MORE FLUIDITY WOULD RESULT IF ALL CAPS WERE NOT THE ONLY CHOICE.

Because of the legislative framework, the process for rule revision through the CCP is too slow. Also, the supermajority requirement unnecessarily impedes progress.

To my view, the Council has never been able to lift itself sufficiently above partisan perspectives and focus objectively on the just and efficient administration of the system.

I would like the ex parte rules strengthened. Mult Co requires at least 24 hours' notice before an ex parte order is to be submitted. i would also like the rules of personal service to be made more clear. i don't want there to be waffle room, that permits service by mail, without a court order for that.

The council should clarify the recent additions to ORCP 43 (e.g., how one should match production documents to the corresponding request).

I believe the time has come for Oregon to join the rest of the United States and adopt a set of procedures that are similar to the Federal Rules. Our system is arcane, inefficient, and impedes the imposition of justice in civil matters, rather than promoting it.

There needs to be more attention to the self-represented litigant who abuses and refuses to follow the rules. Trial judges don't seem to know how to deal with these persons, and unduly impose upon the lawyer who represents the other party and aggravates that party's fees and costs.

the super majority requirement makes changes nigh impossible

The rules need to more closely match the federal rules.

I find it inexplicable that cases involving millions of dollars can proceed to trial with no expert discovery or disclosure.

While I am not personally very familiar with the CCP, I know attorneys have have served on the Council and I applaud the Council's ability to hear all sides of an issue and suggest improvements for the practice of law. Keep up the good work!

Not responsive to public comment. Won't participate or give comments when other groups work to improve civil rules, then swoop in and act all offended and obstructionist when something is actually getting done by another group.

Didn't know you had a website

ORCP 54 A(1) should be amended to allow explicitly the voluntary dismissal of all or fewer than all claims or parties, not just "an action."

We need to move Oregon toward procedures closer to the FRCP's.

We need to move away from trial by ambush practice in Oregon. Pre-trial disclosures (both initial and heading into trial) save money and promote fairness. Expert discovery does as well. There is no sound policy reason for Oregon not to have these procedures in place.

N/A

The Council should take up amending the current ORCPs to bring them more into line with Washington rules and the federal rules of civil procedure. The lack of expert discovery and interrogatories and other "trial by ambush" aspects of the current state rules do not serve the interests of justice or of the majority of litigants in business disputes who are often required to either settle a case with many things left unknown (and therefore incappable of accurate valuation) or proceed to trial.

Even if the rules are not amended in such a fundamental fashion the Council should take up amendments relating to electronic discovery along the lines of the proposed California and Washington rules (which generally follow the Uniform State Court rules on the subject).

I am a new judge and did not have a strong civil practice (other than family law) before taking the bench. So, I am appreciative of all training opportunities regarding civil procedure and related rules.

Thanks for your hard work.

The Council on Court Procedures needs to address electronic discovery and it needs to put limits on the number of hours per deposition, number of depositions, and number of discovery requests like the federal rules.

Now that I've taken this survey, I may figure out what CCP does. And make a suggestion or two.

Keep working to make the practice better.

I appreciate their commitment of volunteer time and effort to improving court procedures.

I had the privilege of working on the council for a number of years.

It's always hard to get info out and feedback in, but the CCP should send e-blasts to litigators from time to time (either to OSB as a whole or the Litigation Section).

I appreciate the work they do. I mostly appreciate not having a lot of changes in the rules to track.

I do appreciate all the hard work that goes into maintaining and updating civil procedures and believe the body of work is very well written. My only hesitation which generated the "somewhat" is the inclusion of "inexpensive" in your analysis. Perhaps, if I studied my concerns I would realize that it is the application of the rules by the courts, not the actual rules themselves, that leads to my concern.

I wish the council or someone would find a way to make the discovery tools in ORCP work in application. In our county, for example, at least in my practice area, it is very difficult to get reasonable discovery requests enforced. Judges tend to assume that a motion to compel is just an extension of a fight between divorcing spouses, at least that's the inference many of us draw from rulings or the lack of effective follow through. This isn't always the case, but too often reasonable discovery requests are ignored or "blown off" by the adverse party, and efforts to compel are to no avail. We have a set of rules that should work, but those of us who make a genuine effort to play by them are often frustrated.

Too slow to recognize changing realities of the modern legal profession. Many changes do not make any sense or are poorly explained (e.g. adding 3 days for faxed documents was simply absurd, and was generally met with rolled eyes and exasperation. I've certainly never met the person who could explain that or thought it was a good idea).

Merely seeking comment on proposed changes is inadequate without including an explanation as the "why."

Changes to ORCP need more publicity to lawyers. I recently learned of a huge change to the rule that class action awards which are not claimed by actual plaintiffs revert to the State. It was quite difficult to find the source and content of this change.

I don't know much about the composition of the Council, but would encourage inclusion of lawyers who practice law in our courts around the state

We should change our rules to be similar to the Federal Rules of Civil Procedure

please work on an agreement between the plaintiff's and defense bar for pre-trial disclosure of experts

The federal local rules were renumbered so that the local rule that pertains to a FRCP has the same number. For example, LR 56.1 is related to FRCP 56. I wish the UTCR (and if possible the Supplementary local rules) were similarly numbered. This change has been rather helpful.

I seem to me as a casual observer that changes to ORCP and others take quite some time to enact. Perhaps the procedure could be streamlined a bit.

ORCP may work well for civil cases but is a little unweilding for family law.

Pleading in general has become sloppy and ineffective and results in far too much need to force through procedural motions the definition of exactly what is being claimed. Code pleading forced the lawyer to know his case, the elements of the specific tort or action and then to plead it succinctly and correctly. With the advent of pleading which is more "notice" pleading than old fashion code pleading, we have become sloppy at our craft, file too many cases without a proper knowledge of the elements of proof to establish and waste far too much of the resources of clients in vain as well as tax the judicial system with garbage that should not have been put before the court in the first place.

We should adopt the Federal Rules, our current system may be in the best nterest of lawyers who can think fast on their feet, but it is not in the best interest of our clients. There must be a reason almost every other State, including our neighbors across the river, utilyze them.

You can change the rules, but until the judges enforce the rules, justice will not be served.

ORCP should follow FRCP like Washington state. Stop trial by ambush, implement interrogatories, put lawyers in charge of procedure not clerks like in Washington state, etc.

ORCP 55 is extremely convoluted and difficult to read.

FRCP 60(b) (Relief From Judgment or Order) allows for relief based on "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

ORCP 71 B(1) allows for relief based on "(c) fraud, misrepresentation, or other misconduct of an adverse party."

Under ORCP 71 B(1)(c), fraud provides grounds for allowing relief from a judgment BUT ONLY IF THE FRAUD IS "EXTRINSIC" to the proceeding rather than "intrinsic." Watson v. State of Oregon, 71 Or App 734, 737, 694 P2d 560 (1985) (mother's perjured deposition testimony about lack of sexual relations with men other than putative father during period of conception, relied on by putative father in stipulating to judgment establishing paternity, was intrinsic to proceeding; intrinsic fraud does not provide basis for setting aside judgment, even if judgment was entered in accordance with stipulation and without any trial on merits. "Surely, justice cannot be so blind. This is no way to create a father." 71 Or App at 739; dissenting opinion of Judge Rossman). See also McClain v. McClain, 155 Or App 258, 259, 958

It's high time for the CCP to reconsider this issue and bring ORCP into alignment with the Federal Rules by eliminating

NOTE: For full history of CCP's action (or lack of action) regarding this issue, see: Johnson v. Johnson, 302 Or 382, 72

Thank you.

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the rules no longer are designed to resolve matters for the litigants but only focus on ease for administrators

My cases are primarily construction cases. Exchange of expert reports is vital to try to hold down expenses. I understand the historical reasons for not exchanging expert reports in Oregon, but for my practice, this does not work well. I recommend the Council consider this, if only for certain specified types of cases.

The procedures only work for lawyers, when people are pro se against a lawyer it is virtually impossible for them to know what to do, getting discovery (even the required stuff) just doesn't happen, even when they request it. I think that there should be more sanctions for lawyers to don't play by the rules of discovery. Also for lawyer who file Orders the same day they serve them. Both of these tactics get abused with pro se clients frequently. Oh, on attorney fees the federal rules seem better.

some rules such as continuing discovery are fine for commercial clients but greatly add to difficulty and expense for unsophisticated clients.

I am on the motion panel in my county and I think our rules of Civil Procedure are pretty darn good. The problems I most often see arise out of attorneys not following the rules. I do not want to loose the flexibility our rules provide but I do think lawyers should make a good faith attempt to follow them.

I believe the allowance of interrogatories in discovery would expedite settlement or narrow trial issues at earlier stages in litigation and pre-trial.

Never even heard of the "council on court procedures" until receiving this survey.

Meeting	Expenses 2007-2009 Biennium	Estimate 2009-2011 Biennium
Previous Biennium	\$166.98	\$0.00
September	\$705.83	\$725.00
October	\$749.95	\$775.00
November	\$1,279.07	\$1,300.00
December	\$754.58	\$775.00
January	\$476.29	\$500.00
February	\$1,001.20	\$1,025.00
March	\$714.80	\$725.00
April	\$498.52	\$525.00
May	\$1,651.85	\$1,675.00
June	\$694.69	\$725.00
September	\$907.26	\$925.00
December (estimated)	\$1,765.00	\$1,775.00
	\$11,366.02	\$11,450.00

**Council on Court Procedures
Expenditures
2007-2009 Biennium**

Date	Administrative Salary & Benefits	Executive Director Salary & Benefits	Admin. Parking	Office Supplies	Postage	Software	Website Expenses	Council Member Travel	TOTALS
JULY 07	\$0.00	\$1,310.00							\$1,310.00
AUGUST 07	\$0.00	\$1,310.00							\$1,310.00
SEPTEMBER 07	\$169.00	\$1,310.00		\$12.99				\$705.83	\$2,197.82
OCTOBER 07	\$260.00	\$1,310.00						\$749.95	\$2,319.95
NOVEMBER 07	\$884.00	\$1,310.00				\$159.00	\$13.00	\$1,279.07	\$3,645.07
DECEMBER 07	\$0.00	\$1,310.00	\$66.00			\$79.00		\$754.58	\$2,209.58
JANUARY 08	\$754.00	\$1,310.00	\$48.75					\$476.29	\$2,589.04
FEBRUARY 08	\$903.50	\$1,310.00	\$76.75	\$165.68			\$45.48	\$1,001.20	\$3,502.61
MARCH 08	\$949.00	\$1,310.00	\$51.75					\$714.80	\$3,025.55
APRIL 08	\$884.00	\$1,310.00	\$48.00	\$88.40				\$498.52	\$2,828.92
MAY 08	\$1,053.00	\$1,310.00	\$67.50					\$1,651.85	\$4,082.35
JUNE 08	\$1,118.00	\$1,310.00	\$42.00					\$694.69	\$3,164.69
JULY 08	\$585.00	\$1,310.00	\$29.00						\$1,924.00
AUGUST 08	\$0.00	\$1,310.00							\$1,310.00
SEPTEMBER 08	\$307.50	\$1,310.00	\$26.00					\$907.26	\$2,550.76
OCTOBER 08	\$315.00	\$1,310.00	\$26.00				\$81.36		\$1,732.36
NOVEMBER 08	\$255.00	\$1,310.00	\$24.00						\$1,589.00
ALL POSTAGE					\$81.52				\$81.52
SUBTOTAL EXPENDED	\$8,437.00	\$22,270.00	\$505.75	\$267.07	\$81.52	\$238.00	\$139.84	\$9,434.04	\$41,373.22
ESTIMATES FOR REMAINDER OF BIENNIUM									
DECEMBER 08	\$850.00	\$1,310.00	\$50.00					\$1,765.00	\$3,975.00
JANUARY 09	\$850.00	\$1,310.00	\$50.00						\$2,210.00
FEBRUARY 09	\$850.00	\$1,310.00	\$50.00						\$2,210.00
MARCH 09	\$850.00	\$1,310.00	\$50.00						\$2,210.00
APRIL 09	\$850.00	\$1,310.00	\$50.00						\$2,210.00
MAY 09	\$1,000.00	\$1,310.00	\$50.00						\$2,360.00
JUNE 09	\$1,000.00	\$1,310.00	\$50.00						\$2,360.00
SUBTOTAL ESTIMATES	\$6,250.00	\$9,170.00	\$350.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,765.00	\$17,535.00
TOTALS	\$14,687.00	\$31,440.00	\$855.75	\$267.07	\$81.52	\$238.00	\$139.84	\$11,199.04	\$58,908.22

	Budgeted	Expended	Estimated for Remainder of Biennium	Difference
General Fund	\$50,000.00	\$31,939.18	\$15,770.00	\$2,290.82
Other Funds (OSB)	\$8,000.00	\$9,434.04	\$1,765.00	-\$3,199.04
TOTAL	\$58,000.00	\$41,373.22	\$17,535.00	-\$908.22

Council on Court Procedures
 Estimated Expenditures
 2009-2011 Biennium

Date	Administrative Salary & Benefits	Executive Director Salary & Benefits	Parking	Office Supplies	Postage	Software	Website Expenses	Council Member Travel	TOTALS
JULY 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
AUGUST 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
SEPTEMBER 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
OCTOBER 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
NOVEMBER 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
DECEMBER 09	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
JANUARY 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
FEBRUARY 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
MARCH 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
APRIL 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
MAY 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
JUNE 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
JULY 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
AUGUST 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
SEPTEMBER 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
OCTOBER 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
NOVEMBER 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
DECEMBER 10	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
JANUARY 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
FEBRUARY 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
MARCH 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
APRIL 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$477.00	\$2,747.00
MAY 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$478.00	\$2,748.00
JUNE 11	\$850.00	\$1,310.00	\$50.00	\$25.00	\$12.50	\$10.00	\$12.50	\$478.00	\$2,748.00
TOTALS	\$20,400.00	\$31,440.00	\$1,200.00	\$600.00	\$300.00	\$240.00	\$300.00	\$11,450.00	\$65,930.00

	Budgeted	Estimated Expenditures	Difference
General Fund	\$50,000.00	\$54,480.00	(\$4,480.00)
Other Funds (OSB)	\$8,000.00	\$11,450.00	-\$3,450.00
TOTAL	\$58,000.00	\$65,930.00	-\$7,930.00

**Council on Court Procedures
Website/Inquiries Update
Reporting Period: 8/25/08 - 12/1/08**

I. New Additions

A. Comment Form

As the Council is aware, a comment form was added to allow people to submit comments on proposed amendments. This form has indeed been used for this purpose.

II. Website Statistics

A. Visitors

From August 25 to December 1, the site received a total of 796 visits and 1,942 page views from 603 unique visitors. Visitors averaged 2.44 page views per visit. 69.85% of the total visits were from new visitors. 35% of the visits were direct, 23% came from referring sites, and 42% came from search engines.

B. Geographical Information

Most visitors (497) to the website came from various cities throughout Oregon, including:

Albany	Gresham	Portland
Astoria	Hood River	Redmond
Aurora	Independence	Roseburg
Bandon	Jacksonville	Salem
Beaverton	Jefferson	Springfield
Bend	Keizer	Talent
Clackamas	La Pine	Tillamook
Corvallis	La Grande	Troutdale
Eugene	Lake Oswego	Tualatin
Forest Grove	Medford	West Linn
Gervais	Mount Angel	Wheeler
Gladstone	Newberg	

The site also had visitors from other states including Washington, California, Arizona, Idaho, New York, Colorado, and Florida.

C. Keywords from Search Engines

Google Analytics keeps track of keywords (search phrases) that get entered into Google which bring up the Council's website. Attached is a report of all search phrases that were entered into search engines and resulted in a "hit" for the Council's website.

D. Comments/Inquiries

The Council received the following comments and inquiries during this period:

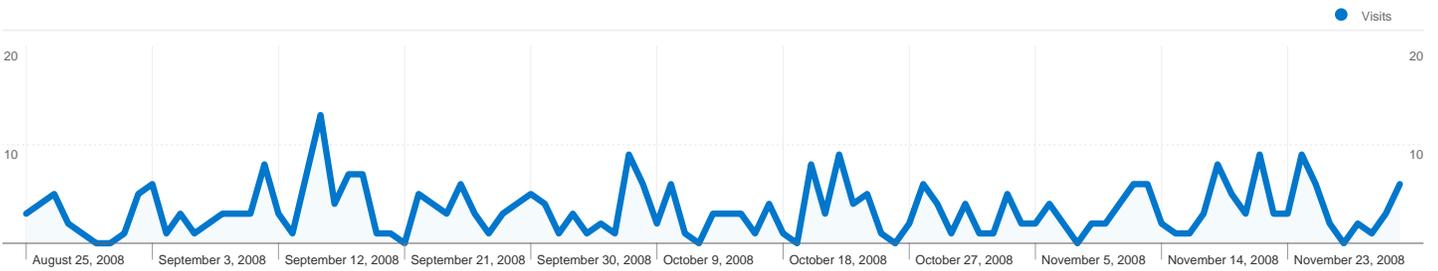
1. An inquiry from an attorney stating that opposing counsel had stated during a hearing in court that there were amendments to the ORCP effective January 1, 2008. The attorney did not believe this was the case. The inquirer was directed to the Council website for the latest ORCP and the promulgated amendments that indeed became effective on said date.
2. An inquiry from a law office consulting firm asking where to find the history of ORCP changes. The inquirer was directed to the Council website.
3. An inquiry from a person asking where the changes to ORCP for 2007/2008 can be found. The inquirer was directed to the Council website.
4. An inquiry from a litigant in a custody matter asking for assistance. The inquirer was sent the Council's standard reply with referral to the OSB lawyer referral service.
5. An inquiry from an out-of-state paralegal asking for assistance regarding a probate matter. The inquirer was referred to the OSB lawyer-to-lawyer assistance program.
6. An inquiry as to whether the Council has the ORCP available on a CD. The inquirer was referred to the Oregon State Legislature website.
7. An inquiry from a litigant in a municipal court who wished to complain about improper procedures in that court. The inquirer was sent the Council's standard reply with referral to the OSB lawyer referral service.
8. One comment regarding ORCP 7, two regarding ORCP 59, and two regarding ORCP 69.

III. Web Activity on Published Amendment Page

The published amendments were put on the website on October 16, 2008. Since that date, the page has received 276 visits, with an average visit time of 2 minutes and 17 seconds. Data indicates that there have been visits from throughout the entire state. As noted above, only 5 comments have been received regarding the Council's proposed changes.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant



Search sent 331 total visits via 134 keywords

Site Usage

Visits 331 % of Site Total: 41.58%	Pages/Visit 2.33 Site Avg: 2.44 (-4.52%)	Avg. Time on Site 00:01:18 Site Avg: 00:01:19 (-1.70%)	% New Visits 66.16% Site Avg: 69.85% (-5.28%)	Bounce Rate 57.40% Site Avg: 51.76% (10.90%)
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Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
court procedures	57	1.19	00:00:13	98.25%	94.74%
oregon council on court procedures	48	3.94	00:02:08	45.83%	16.67%
council on court procedures	37	2.35	00:00:58	16.22%	32.43%
court procedure	29	1.07	00:00:18	100.00%	93.10%
council on court procedures oregon	6	3.50	00:02:25	0.00%	16.67%
oregon rules of civil procedure	4	2.50	00:00:26	50.00%	25.00%
"council on court procedures" & oregon	3	2.67	00:04:36	33.33%	0.00%
lewis and clark law school	3	1.33	00:00:01	33.33%	66.67%
oregon council on court procedure	3	2.67	00:04:41	33.33%	33.33%
? lclark.edu~ccp	2	1.50	00:00:11	50.00%	50.00%
bb9d7f80243b991a475a341cc6501e7cff1440bc7ab51a8276e2d5fdabca5dd9	2	2.00	00:00:09	50.00%	0.00%
civil court procedures	2	1.00	00:00:00	100.00%	100.00%
council court procedure	2	11.00	00:05:46	50.00%	0.00%
council on court procedure	2	2.00	00:03:32	0.00%	50.00%
dr. john a enbom	2	1.00	00:00:00	100.00%	100.00%
history of court procedure	2	1.50	00:00:07	50.00%	50.00%
index for orcp	2	1.50	00:00:30	100.00%	50.00%
orcp	2	1.00	00:00:00	50.00%	100.00%
orcp 69	2	1.00	00:00:00	100.00%	100.00%
orcp 8	2	2.00	00:01:59	50.00%	50.00%
oregon council court procedures	2	6.50	00:02:19	100.00%	0.00%

oregon council of court procedures	2	2.00	00:00:22	0.00%	0.00%
oregon council on courts	2	2.00	00:00:11	100.00%	0.00%
oregon court procedure	2	3.00	00:00:00	50.00%	100.00%
oregon court procedures	2	2.00	00:00:19	50.00%	50.00%
www.lclark.edu/org/oli	2	2.50	00:02:31	0.00%	50.00%
"christine landers" clackamas	1	5.00	00:02:35	0.00%	0.00%
"council on court procedures"	1	11.00	00:02:52	100.00%	0.00%
"council on court procedures" & "oregon"	1	1.00	00:00:00	0.00%	100.00%
"orcp 4" applicability	1	1.00	00:00:00	100.00%	100.00%
"oregon rules of civil procedure"	1	4.00	00:00:52	100.00%	0.00%
+orcp +depositions	1	1.00	00:00:00	100.00%	100.00%
02c63fbd1d6e4508c84f50bd05336206ddf43b668e29cecc6631f592e9910eea96ae268264d6d9293e28cc4016781b62	1	4.00	00:05:01	0.00%	0.00%
brooks cooper attorney at law	1	1.00	00:00:00	100.00%	100.00%
brooks cooper attorney, oregon	1	3.00	00:00:26	100.00%	0.00%
brooks cooper portland lawyer	1	1.00	00:00:00	100.00%	100.00%
brooks cooper portland or	1	1.00	00:00:00	100.00%	100.00%
brooks cooper, oregon attorney	1	1.00	00:00:00	100.00%	100.00%
ccp rules	1	1.00	00:00:00	100.00%	100.00%
council on court procedures	1	2.00	00:00:04	100.00%	0.00%
council court procedures	1	2.00	00:00:36	0.00%	0.00%
council in court	1	1.00	00:00:00	100.00%	100.00%
council on court procedures & oregon	1	13.00	00:17:56	0.00%	0.00%
cour or council	1	1.00	00:00:00	100.00%	100.00%
court council	1	1.00	00:00:00	100.00%	100.00%
court procedure for the law of evidence	1	1.00	00:00:00	100.00%	100.00%
court procedure in oregon	1	1.00	00:00:00	100.00%	100.00%
court procedure order	1	1.00	00:00:00	100.00%	100.00%
court procedures for work carried out	1	1.00	00:00:00	100.00%	100.00%
court procedures, or	1	1.00	00:00:00	100.00%	100.00%
court prodecures	1	1.00	00:00:00	100.00%	100.00%
daniel harris judge circuit court oregon	1	1.00	00:00:00	100.00%	100.00%
david f rees attorney at law	1	3.00	00:01:23	100.00%	0.00%
definition of court procedure	1	1.00	00:00:00	100.00%	100.00%
dfae4d57de73dc58	1	1.00	00:00:00	100.00%	100.00%
district court judge mark weaver	1	1.00	00:00:00	100.00%	100.00%

donald corson attorney	1	1.00	00:00:00	100.00%	100.00%
e15a17896ed171c74c1db563ddbc3f1a19ad8dab98b8fe682612ac53c30af813	1	1.00	00:00:00	100.00%	100.00%
eugene buckle attorney at law	1	3.00	00:01:47	100.00%	0.00%
guidelines for court procedure	1	1.00	00:00:00	100.00%	100.00%
history court procedure	1	1.00	00:00:00	100.00%	100.00%
history of orcp 43	1	1.00	00:00:00	100.00%	100.00%
history on judge mary mertens james	1	4.00	00:00:32	100.00%	0.00%
how are members of the supreme court chosen	1	1.00	00:00:00	100.00%	100.00%
how does a court procedure?	1	1.00	00:00:00	100.00%	100.00%
how judges for circuit court are chosen for a court	1	1.00	00:00:00	100.00%	100.00%
is mark weaver a good attorney in oregon	1	1.00	00:00:00	100.00%	100.00%
jerry brian hodson oregon judge	1	1.00	00:00:00	100.00%	100.00%
john kroger	1	19.00	00:01:34	0.00%	0.00%
john l svoboda	1	1.00	00:00:00	0.00%	100.00%
joshua j. stellmon	1	2.00	00:00:14	0.00%	0.00%
kristen s. david+attorney	1	1.00	00:00:00	100.00%	100.00%
lauren s holland circuit court judge eugene or	1	1.00	00:00:00	100.00%	100.00%
lclark.edu oregon practice	1	3.00	00:01:52	100.00%	0.00%
legal procedure oregon	1	1.00	00:00:00	100.00%	100.00%
legislative history orcp 55	1	1.00	00:00:00	0.00%	100.00%
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lewis clark law school	1	3.00	00:00:27	0.00%	0.00%
mary mertens james circuit court judge	1	2.00	00:00:12	100.00%	0.00%
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officers members	1	1.00	00:00:00	100.00%	100.00%
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orcp 38	1	1.00	00:00:00	100.00%	100.00%
orcp 4	1	2.00	00:07:15	100.00%	0.00%
orcp 64	1	1.00	00:00:00	100.00%	100.00%
orcp 67 a	1	1.00	00:00:00	0.00%	100.00%
orcp 71	1	1.00	00:00:00	100.00%	100.00%
orcp 83	1	1.00	00:00:00	100.00%	100.00%
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oregon civil courts	1	1.00	00:00:00	100.00%	100.00%
oregon civil law steps and procedures	1	1.00	00:00:00	100.00%	100.00%
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oregon court rules of civil procedure	1	1.00	00:00:00	100.00%	100.00%
oregon federal rules of procedures	1	1.00	00:00:00	100.00%	100.00%
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oregon law school	1	1.00	00:00:00	0.00%	100.00%
oregon rule of court	1	4.00	00:02:35	0.00%	0.00%
oregon rules & procedures	1	7.00	00:25:32	100.00%	0.00%
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oregon rules of evidence	1	2.00	00:00:15	100.00%	0.00%
oregon rules of procedure	1	7.00	00:21:04	100.00%	0.00%
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procedures in court	1	1.00	00:00:00	100.00%	100.00%
professor bogdanski	1	5.00	00:00:33	0.00%	0.00%
proposed amendments to oregon rules appellate procedure	1	2.00	00:00:22	0.00%	0.00%
robert herndon attorney portland oregon	1	3.00	00:05:06	100.00%	0.00%
robert herndon, attorney, oregon	1	4.00	00:01:32	100.00%	0.00%

rule of legislative history	1	1.00	00:00:00	100.00%	100.00%
shelly russell attorney	1	1.00	00:00:00	100.00%	100.00%
weaver attorney medford	1	1.00	00:00:00	100.00%	100.00%
what council does in court	1	2.00	00:01:03	100.00%	0.00%
what's in a court procedure	1	3.00	00:00:25	100.00%	0.00%
who's who	1	2.00	00:04:20	0.00%	0.00%
work of court	1	1.00	00:00:00	100.00%	100.00%
www.lclark.edu/~ccp/amendmentspublishedforcomment.htm	1	1.00	00:00:00	0.00%	100.00%
lewis & clark legal clinic	0	0.00	00:00:00	0.00%	0.00%

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Oregon Council on Court Procedures
Roster

2007-2009 Biennium

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**PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE**

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail, by e-mail, or through the form available on the Council's website:

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

Council on Court Procedures
310 SW 4th Avenue, Suite 1018
Portland, OR 97204
ccp@lclark.edu
www.counciloncourtprocedures.org

or by mail to:

Don Corson
Chair, Council on Court Procedures
The Corson & Johnson Law Firm
101 E Broadway Ste 303
Eugene OR 97401

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 13, 2008	Oregon State Bar Center
	16037 SW Upper Boones Ferry Rd.
	Tigard, Oregon

The Council will take final action on the proposed amendments at its December 13, 2008, meeting.

**PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE**

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1 **SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION**

2 **RULE 1**

3 **ALTERNATIVE ONE**

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

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

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

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

25 **E Use of declaration under penalty of perjury in lieu of affidavit; “declaration” defined.**
26 A declaration under penalty of perjury may be used in lieu of any affidavit required or allowed

1 by these rules. A declaration under penalty of perjury may be made without notice to adverse
2 parties, must be signed by the declarant, and must include the following sentence in prominent
3 letters immediately above the signature of the declarant: “I hereby declare that the above
4 statement is true to the best of my knowledge and belief, and that I understand it is made for use
5 as evidence in court and is subject to penalty for perjury.” As used in these rules, “declaration”
6 means a declaration under penalty of perjury.

7 **F Electronic Filing. Any reference in these rules to any document, except a summons,**
8 **which is exchanged, served, entered, or filed during the course of civil litigation shall be**
9 **construed to include electronic images or other digital information in addition to printed**
10 **versions of such items, as may be permitted by rules of the court in which the action is**
11 **pending.**

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

1 **SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION**

2 **RULE 1**

3 **ALTERNATIVE TWO**

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

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

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

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

25 **E Use of declaration under penalty of perjury in lieu of affidavit; “declaration” defined.**
26 A declaration under penalty of perjury may be used in lieu of any affidavit required or allowed

1 by these rules. A declaration under penalty of perjury may be made without notice to adverse
2 parties, must be signed by the declarant, and must include the following sentence in prominent
3 letters immediately above the signature of the declarant: “I hereby declare that the above
4 statement is true to the best of my knowledge and belief, and that I understand it is made for use
5 as evidence in court and is subject to penalty for perjury.” As used in these rules, “declaration”
6 means a declaration under penalty of perjury.

7 **F Electronic Filing. Any reference in these rules to proofs of service, pleadings,**
8 **complaints, answers, third-party complaints, motions, memoranda, responses, replies,**
9 **orders, affidavits, declarations, responsive pleadings, amended pleadings, judgments,**
10 **limited judgments, general judgments, supplemental judgments, notices, requests for**
11 **production of documents or things or permission to enter upon land or other property,**
12 **subpoenas, commissions, letters rogatory, mandates, writs, requests for admissions,**
13 **proposed instructions to juries, special findings of fact, conclusions of law, proposed**
14 **findings of fact, objections, orders of reference, reports of referees, statements of attorney**
15 **fees and costs and disbursements, preliminary injunctions, permanent injunctions,**
16 **provisional process, or writs of attachment which are exchanged, served, entered, or filed**
17 **during the course of civil litigation shall be construed to include electronic images or other**
18 **digital information in addition to printed versions of such items, as may be permitted by**
19 **rules of the court in which the action is pending.**

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

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 a mailing made in accordance with
11 paragraph (2)(d) of this section provided the defendant signs a receipt for the certified,
12 registered, or express mailing, in which case service shall be complete on the date on which the
13 defendant 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
8 subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the
9 defendant signs a receipt for the mailing, in which case service is complete on the day the
10 defendant signs the receipt.

11 **D(3)(b) Corporations [and limited partnerships] including, but not limited to,**
12 **professional corporations and cooperatives.** Upon a domestic or foreign corporation [*or*
13 *limited partnership*]:

14 **D(3)(b)(i) Primary service method.** By personal service or office service upon a
15 registered agent, officer, **or** director[, *general partner, or managing agent*] of the corporation [*or*
16 *limited partnership*];¹ or by personal service upon any clerk on duty in the office of a registered
17 agent.

18 **D(3)(b)(ii) Alternatives.** If a registered agent, officer, **or** director[, *general partner, or*
19 *managing agent*] cannot be found in the county where the action is filed, true copies of the
20 summons and the complaint may be served:

21 **(A)** by substituted service upon such registered agent, officer, **or** director[, *general*
22 *partner, or managing agent*]; [*or*]

23 **(B)** by personal service on any clerk or agent of the corporation [*or limited partnership*]
24 who may be found in the county where the action is filed; [*or*]

25 **(C)** by mailing **in the manner specified in paragraph (2)(d) of this section** true copies
26 of the summons and the complaint to the office of the registered agent or to the last registered

1 office of the corporation [*or limited partnership*], if any, as shown by the records on file in the
2 office of the Secretary of State or, if the corporation [*or limited partnership*] is not authorized to
3 transact business in this state at the time of the transaction, event, or occurrence upon which the
4 action is based occurred, to the principal office or place of business of the corporation [*or*
5 *limited partnership*], and in any case to any address the use of which the plaintiff knows or[, *on*
6 *the basis of reasonable inquiry,*] has reason to believe is most likely to result in actual notice[.];

7 **or**

8 **(D) upon the Secretary of State in the manner provided in ORS 60.121 or ORS**
9 **60.731.**

10 **D(3)(c) Limited Liability Companies. Upon a limited liability company:**

11 **D(3)(c)(i) Primary service method. By personal service or office service upon a**
12 **registered agent, manager, or (for a member-managed limited liability company) member**
13 **of a limited liability company; or by personal service upon any clerk on duty in the office of**
14 **a registered agent.**

15 **D(3)(c)(ii) Alternatives. If a registered agent, manager, or (for a member-managed**
16 **limited liability company) member of a limited liability company cannot be found in the**
17 **county where the action is filed, true copies of the summons and the complaint may be**
18 **served:**

19 **(A) by substituted service upon such registered agent, manager, or (for a member-**
20 **managed limited liability company) member of a limited liability company;**

21 **(B) by personal service on any clerk or agent of the limited liability company who**
22 **may be found in the county where the action is filed;**

23 **(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies**
24 **of the summons and the complaint to the office of the registered agent or to the last**
25 **registered office of the limited liability company, as shown by the records on file in the**
26 **office of the Secretary of State or, if the limited liability company is not authorized to**

1 transact business in this state at the time of the transaction, event, or occurrence upon
2 which the action is based occurred, to the principal office or place of business of the limited
3 liability company, and in any case to any address the use of which the plaintiff knows or has
4 reason to believe is most likely to result in actual notice; or

5 (D) upon the Secretary of State in the manner provided in ORS 63.121.

6 D(3)(d) Limited Partnerships. Upon a domestic or foreign limited partnership:

7 D(3)(d)(i) Primary service method. By personal service or office service upon a
8 registered agent or a general partner of a limited partnership; or by personal service upon
9 any clerk on duty in the office of a registered agent.

10 D(3)(d)(ii) Alternatives. If a registered agent or a general partner of a limited
11 partnership cannot be found in the county where the action is filed, true copies of the
12 summons and the complaint may be served:

13 (A) by substituted service upon such registered agent or general partner of a limited
14 partnership;

15 (B) by personal service on any clerk or agent of the limited partnership who may be
16 found in the county where the action is filed;

17 (C) by mailing in the manner specified in paragraph (2)(d) of this section true copies
18 of the summons and the complaint to the office of the registered agent or to the last
19 registered office of the limited partnership, as shown by the records on file in the office of
20 the Secretary of State or, if the limited partnership is not authorized to transact business in
21 this state at the time of the transaction, event, or occurrence upon which the action is based
22 occurred, to the principal office or place of business of the limited partnership, and in any
23 case to any address the use of which the plaintiff knows or has reason to believe is most
24 likely to result in actual notice; or

25 (D) upon the Secretary of State in the manner provided in ORS 70.040 or ORS
26 70.045.

1 **or express** mail[,] **with** return receipt requested[, *or express mail*]; or that the identity of the
2 defendant's insurance carrier is unknown to the plaintiff.

3 **B Entry of [*default*] judgment by default.**

4 **B(1) By the court or the clerk.** The court or the clerk upon written application of the
5 party seeking judgment shall enter judgment when:

6 B(1)(a) The action arises upon contract;

7 B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for
8 a sum which can by computation be made certain;

9 B(1)(c) The party against whom judgment is sought has been defaulted for failure to
10 appear;

11 B(1)(d) The party seeking judgment submits an affidavit or a declaration stating that, to
12 the best knowledge and belief of the party seeking judgment, the party against whom judgment
13 is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined
14 in ORS 125.005, or a respondent as defined in ORS 125.005;

15 B(1)(e) The party seeking judgment submits an affidavit or a declaration of the amount
16 due;

17 B(1)(f) An affidavit or a declaration pursuant to subsection B[(3)] **(4)** of this rule has
18 been submitted; and

19 B(1)(g) Summons was personally served within the State of Oregon upon the party, or an
20 agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule
21 7 D(3)(a)(i), 7 D(3)(b)(i), **7 D(3)(c)(i), 7 D(3)(d)(i)**, 7 D(3)(e), or 7 D(3)(f).

22 **B(2) By the court.** In cases other than those cases described in subsection (1) of this
23 section, the party seeking judgment must apply to the court for judgment by default. The party
24 seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this
25 section if, to the best knowledge and belief of the party seeking judgment, the party against
26 whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected

1 person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party
2 seeking judgment cannot submit an affidavit or a declaration under this subsection, a default
3 judgment may be entered against the other party only if a guardian ad litem has been appointed
4 or the party is represented by another person as described in Rule 27. If, in order to enable the
5 court to enter judgment or to carry it into effect, it is necessary to take an account or to
6 determine the amount of damages or to establish the truth of any averment by evidence or to
7 make an investigation of any other matter, the court may conduct such hearing, or make an order
8 of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court
9 may determine the truth of any matter upon affidavits or declarations.

10 **B(3) Amount of judgment.** The judgment entered shall be for the amount due as shown
11 by the affidavit or declaration, and may include costs and disbursements and attorney fees
12 entered pursuant to Rule 68.

13 **B(4) Non-military affidavit or declaration required.** No judgment by default shall be
14 entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the
15 defendant is or is not a person in the military service, or stating that plaintiff is unable to
16 determine whether or not the defendant is in the military service as required by Section
17 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended, except
18 upon order of the court in accordance with that Act.

19 * * * * *



Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date 10/29/08

Name Tim Leader, Chief Civil Deputy

Firm (if applicable) Washington County Sheriff's Office

E-Mail Tim_Leader@co.washington.or.us

Phone (503) 846-2520

Proposed amendment(s) for which you are making comments

ORCP Rule 7 D3b - service upon Corporations

Please provide your comments in this space

Your proposed language appears to delete the title "managing agent" as a party to serve when making service upon a corporation. I know that serving a managing agent is utilized quite frequently by my deputies in serving a corporation when a corporate officer or the registered agent is not available. Losing the managing agent as a party to serve will have a significant negative impact on all sheriffs serving process, as well as the private process industry. If your desire is to modernize that term, and that is the purpose for trying to delete it, I would respectfully recommend that you at least leave in "manager" as a party to serve (like on LLCs) on a corporation. I expect that you will hear from other Sheriff's Civil Managers from across the state, as well as from the Oregon State Sheriff's Association, as the prospect of losing manager/managing-agent from a corporate service would result in sheriff's deputies having to make additional return trips to a corporation to find an officer or registered agent - when a manager is almost always to be found the first time out. Thank you for your consideration!

E-Mail Exchange with Deputy Tim Leader re: ORCP 7

To: Tim Leader

Subject: Re: Submit_Comment_Proposed_Changes - on ORCP 7

Deputy Leader:

Thank you again for submitting comments regarding proposed changes to ORCP 7. We have reviewed said comments. Despite the removal of the phrase "managing agent," there are provisions within ORCP 7D(3)(b) which allow for service on persons other than registered agents, officers, and directors. ORCP 7D(3)(b)(i) continues to allow for personal service on any clerk on duty in the office of a registered agent. ORCP 7D(3)(b)(ii)(A) continues to allow substituted service upon a registered agent, officer, or director. ORCP 7D(3)(b)(ii)(B) continues to allow personal service on any clerk or agent of the corporation who may be found in the county where the action is filed. The phrase "managing agent" was removed in part because service on partnerships was moved to a different subsection of the Rule, and in part because the phrase does not have a precise legal meaning with reference to corporations.

Given this explanation, do you continue to have concerns about the ability of your deputies to effect service on corporations if these changes were to take effect? Please feel free to provide further comments or concerns that you may have and we will forward them to the Council.

Mark A. Peterson
Executive Director

and

Shari C. Nilsson
Administrative Assistant
Council on Court Procedures

To: "Shari Nilsson"

Shari/Mark,

To expand on my previous comments....there are times when a corporate officer, director, registered agent, or clerk in the office of the registered agent can't be found (or are not available). In that case, historically my agency as well as many other agencies throughout the

state will default in finding and serving a "manager"...and listing them as the "managing agent". You are correct that the term "managing agent" is not clearly defined anywhere as it pertains to corporations. But serving a manager as a managing agent has worked very well, and has never been challenged to my knowledge (in the 18 years I've been in this field with the Washington County Sheriff's Office). I am also a senior instructor with the Oregon State Sheriff's Association (OSSA) Civil Training Conferences, and that is a service method/strategy that has been taught at our twice-a-year trainings ever since I've been a deputy.

Your suggestion about serving "any clerk or agent of the corporation" under the Alternatives section in ORCP 7D(3)(b)(ii) does not seem to be any clearer than the term managing agent. What is the definition of "agent" for a corporation? (any employee on duty? An employee at a certain level?) What is the definition of "clerk" for a corporation? (The secretary/receptionist at the front door?) Obviously, the "clerk in the office of the registered agent" is typically a specific person that is the personal clerk for the person designated as the registered agent. But the generic term of any "clerk" for a corporation is much less clear.

I have conferred with my colleagues on the Legislative Committee for the OSSA Civil Command Council, and we would suggest the following solution:

Simply replace the term "managing agent" - with "manager".

Managers are employees of a corporation at a level that are unique and differentiated from worker-employees or even supervisory employees. Managers are also a commonly consistent position that are used across the board at corporations. That would also be consistent with historical practice and service methods - at least for county sheriffs. I also noted that "manager" is utilized under service of LLCs, so there appears to be consistency there too.

I also noted that the term "managing agent" appears to have been left alone in D(3)(f) for "other unincorporated associations"...I didn't know if that was intentional, or an oversight.

Please advise what your thoughts are on this suggestion. Thank you so much for your consideration of our input and suggestion.

-Tim

To: Tim Leader
Subject: Re: Submit_Comment_Proposed_Changes - on ORCP 7

Deputy Leader,

Thank you for your follow-up with regard to service on corporations. We want to clarify your concerns. We understand that sometimes service under 7D(3)(b)(i) is not possible because the registered agent, officer, or director simply cannot be found, or the office of the registered agent is closed or the address is no longer effective, meaning that a clerk in that office cannot be served either.

If service under 7D(3)(b)(i) cannot be accomplished because those persons cannot be found, 7D(3)(b)(ii)(B) allows personal service on any clerk or agent of the corporation who may be found in the county where the action is filed (not always practicable if the corporation is not resident in the said county). This language is the language that has historically been in Rule 7, allowing service on any clerk or agent who can be found in that county. The other non-mail alternative is 7D(3)(b)(ii)(A), which allows for substituted service. That service is directed to any registered agent, officer, or director of the corporation but, because it is substituted service, service may be made upon any person age 14 or older who resides at the dwelling house or usual place of abode of the person to be served. (Of course, a copy of the summons and complaint would then be mailed to the person to be served to complete the substituted service.) Your suggestion of requiring that the person actually served be a "manager" appears to be a level of service higher than that required in the normal circumstances for substituted service.

Inserting the word "manager" into the Rule may create its own problems, as there is no clear definition of that word pertaining to corporations. It does occur to us that substituted service may be too restrictive. It may be appropriate to allow either substituted or office service. Office service would allow service on any person who is apparently in charge at an office maintained by the person to be served, regardless of whether that office is in the county where the action was filed. This would seem to address your concerns regarding a desire to serve a manager on duty at the corporate office.

We appreciate your taking the time to raise these concerns with us. Please let us know if we understand your concerns correctly, and whether

you believe that allowing office service would adequately address these concerns. The Council is able to make changes to any proposed amendment

immediately after discussion at the December 13, 2008, meeting.

Mark A. Peterson
Executive Director

and

Shari C. Nilsson
Administrative Assistant
Council on Court Procedures

Deputy Leader did not reply to previous mail

To: Tim Leader
Subject: Re: ORCP 7

Deputy Leader,

We have forwarded your e-mail and our responses regarding ORCP 7 to the committee that worked on the proposed amendment. One of the committee members astutely pointed out that the primary service method outlined in ORCP 7(3)(b)(i) already provides for service by office service upon a registered agent, officer, or director of a corporation. As you know, the definition of office service is as follows:

ORCPD(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

Therefore, if the corporation is a going concern and has an office,

service can be made with the person who is apparently in charge, which would include a manager. If the corporation is not a going concern and no longer has an office, ORCP 7(D)(3)(b)(ii)(A) allows for substituted service at the home of a registered agent, officer, or director.

Hopefully, the rule as amended covers instances of routine as well as difficult service on corporations.

Please let us know if this adequately addresses the concerns outlined in your previous e-mails. Thank you for your continued interest in the work of the Council.

Mark A. Peterson
Executive Director

and

Shari C. Nilsson
Administrative Assistant
Council on Court Procedures

Date: Thu, 04 Dec 2008 18:25:53 -0800

From: Mark Peterson

To: Tim_Leader, Shari Nilsson, Mark Weaver, David Rees, Don Corson

Subject: ORCP 7 service on corporations published amendment update

Deputy Leader,

Again, thank you for the time that you have expended in raising concerns regarding the published amendments to the Oregon Rules of Civil Procedure, specifically ORCP 7 D(3)(b) relating to service of the summons on corporations. The Council's current published amendment is intended to provide more complete direction concerning service on various business entities. The existing rule lumps corporations and limited partnerships together; omits most of the other recognized business entities that may be formed under Oregon law; and provides incomplete information on how to obtain service if the registered agent or the officers, directors, and other persons who may be served by statute or by practice cannot be found. That is the reason that the phrase "managing agent" was removed from the amended subsection covering corporations. You advised me in a telephone conversation that you and your legal counsel believed that office service is available only for service on individuals who maintain an office (which would include sole proprietorships also, I assume). You wanted to leave "managing agent" in the corporation subsection to indicate that service should be made on someone who appears to have some authority, if an officer or director of the corporation cannot be found. Since "managing agent" is not a phrase defined with any certainty as a matter of the law of corporations, the committee that drafted the published amendment is reluctant to retain that phrase. In our subsequent telephone conversation you indicated that, if the Council would amend Rule 7 D(2)(c) defining office service by replacing the word "person" with the word "party", such a change would remove your concerns regarding the propriety of using office service for service on corporations. The Committee believes that the word "person" in Rule 7 D(2)(c) refers to natural persons and also to a person who is an officer or a director of a corporation. See, subsection 7 D(3)(b)(i) of the current text of the rule which authorizes "personal or office service upon a ...,officer, director,...of the corporation..." You will note that Rule 7 D(3)(b)(ii) in its current form also allows, as an alternative service method, for substituted service on a corporation's officers or directors and that alternative is retained in the amendment. If the amendment to Rule 7 is approved and promulgated at the December 13, 2008, Council meeting, the discussion (and the minutes, which are the legislative history) will reflect your concern and the Council's intent that service on a corporation can be effected by personal or office service on its officers and directors.

If you have continuing concerns regarding this proposed amendment, please contact me or have your counsel contact me.

Mark

--

Mark A. Peterson

Clinical Professor

Lewis and Clark Legal Clinic

Executive Director

Council on Court Procedures

Subject: RE: ORCP 7 servoce on corporations published amendment update
Date: Fri, 5 Dec 2008 14:23:27 -0800
From: Tim Leader
To: Mark Peterson

Mark,

I discussed this with our counsel, and forwarded this e-mail to him. He said that if you guys will put that in the commentary (so we can have the legislative intent on the record) then we'd at least be able to proceed forward in good faith and perform office services on corporations.

So, if that is part of the legislative history, it sounds like that'll work for the sheriffs.

My thanks to you, and the other council members, for being willing to listen to our concerns and help find a solution.

-Tim

Tim Leader, Civil Unit Manager
Washington County Sheriff's Office

E-mail string between Mark Peterson, David Rees, and Mark Weaver re: ORCP 7

Fr: Mark Peterson
To: David Rees
Cc: Mark Weaver , Shari Nilsson , Don Corson
Subject: Re: ORCP 7 - Service on Corporations (the manager issue)

David and Mark,

As I understand the good deputy, he believes and he is advised that office service is limited to service on individuals, ie. natural persons who maintain an office. It seems to me that the "person " to be served is any individual to be served and would include officers, directors, and registered agents of corporations, all of whom are persons. We could clarify the definition of office service in 7D(2)(c) as David suggests but what of 7D(2)(b) relating to substituted service which would have the same problem under this restrictive reading? We could also change the word "person" to "party" in 7D(c), and in 7D(2)(b) but is it necessary? Since the portion of the rule that applies to corporations specifically authorizes (at what is presently 7D(3)(b)(i)) office service on the officer, director, or registered agent, can we simply discuss the issue in our deliberation before we vote and create the "legislative" history in the minutes that office service is an approved method for serving a corporation's officers, directors, or the registered agent? (The registered agent is in fact a little different because service on "any clerk on duty in the office of a registered agent" is specifically spelled out and seems to specify that service on a registered agent allows for a more liberal standard in that "any clerk on duty" will do while office service requires service on "the person who is apparently in charge"--evidence that office service on officers and directors of corporations is anticipated and explicitly authorized.

I am happy to call the deputy to ask him Mark's question about an example of service that he is concerned about but I think it is the restrictive view that office service is limited to service on natural persons and sole proprietorships. I would like to let the deputy know this week, tomorrow if possible, whether we are going to drop our amendment (which he did not ask us to do) or amend the rule further to satisfy him.

Thanks for responding. We need to take some position. I think that it is interesting that he is happy with the phrase "managing agent", which is hardly a term of art in corporate law, but doesn't feel comfortable with "the person who is apparently in charge" which would seem to be a more objective determination to be made at the time of service. Let me know your thoughts. Maybe I should ask to speak with the attorney who is advising the sheriffs; I probably should have done that in the first

place.

Mark

David Rees wrote:

- > I agree with Mark and Mark that the Deputy's counsel's interpretation of
- > person is overly restrictive. The ORCP use the term "natural person"
- > when referring to an individual only. See ORCP 4A. But maybe to
- > clarify Rule 7D(2)(c) with a minimal of hassle we could say:
- >
- > Office Service. If the person (including a natural person or legal
- > entity) to be served maintains an office for the conduct of business . .
- > .
- >
- > The clarifying text in parenthesis would be new.
- >
- >
- >
- > -----Original Message-----
- > From: Mark Weaver
- > Sent: Wednesday, December 03, 2008 12:27 PM
- > To: Shari Nilsson
- > Cc: Don Corson; David Rees; Mark Peterson
- > Subject: Re: ORCP 7 - Service on Corporations (the manager issue)
- >
- > Shari, I am still having a hard time understanding who Deputy Leader
- > believes that he cannot serve - even under the interpretation of
- > sheriffs' counsel.
- >
- > The rules regarding service on Corporations D(3)(b)(i) specify that a
- > corporation may be served by personal or office service on certain
- > individuals. It seems as though the definition of "office service" in
- > D(2) is appropriately focused on individuals.
- >
- > Could you give an example of the type of service that is of concern to
- > Deputy Leader?
- >
- > Mark

> ----- Original Message -----
> From: "Shari Nilsson"
> To: "Mark R. Weaver"; "David F. Rees"; "Don Corson"
> Cc: "Mark A. Peterson"
> Sent: Thursday, November 20, 2008 11:50 AM
> Subject: ORCP 7 - Service on Corporations (the manager issue)
>

>> All,

>

>> Mark has spoken with Deputy Leader and finally fleshed out the true
> nature of his concern and his proposed resolution. The deputy believes, on
>> advice of the sheriffs' counsel, that the word "person" in ORCP 7D(2)(c) (office service) must
> refer to an individual and, therefore, office service would only be available for the service of a
>> sole proprietorship, not a corporation. There was some discussion that, if the word
> "person" in 7D(2)(c) were changed to the word "party," the sheriffs' collective
>> concerns would be resolved. Mark told the deputy that there is a case
>> that seems to allow office service for corporations, but that he would run
>> the concern past the committee.

>>

>> You will note that the word "person" is used in 7D(2)(a) (personal
>> service), 7D(2)(b) (substituted service), and 7D(2)(c) (office
> service). Mark believes that the word "person" refers to the person to be
> served, whether it is an individual; a sole proprietor; or an officer,
> director, or registered agent of a corporation. The section that Deputy Leader
> is concerned about, 7D(3)(b)(i), indicates that personal or office service
>> upon a registered agent, officer, or director is the primary service
>> method. Those three people would appear to be the "persons" to be served

>> The fact that 7D(3)(b)(i) uses the phrase "office service" seems to make
>> it clear that office service is appropriate for corporations. Mark found
>> one case on point, /Abbots v. Bacon/, 133 Or App 315 (1995), involving
>> office service of a corporate defendant. This is the "bartender as the
>> clerk-in-charge" case. You will notice the high caliber of the attorneys
>> arguing the case, and no one suggested that office service of a
>> corporation was flawed because service had to be on a "person."
>> Should we change "person" to "party" in 7D(2)(c) to make the sheriffs
>> happy? Logically then would we change "person" to "party" in 7D(2)(a) and
>> 7D(2)(b) as well, or should we leave it as is (suggesting that the rule
>> allows for office service on corporations in the form of a registered
>> agent, officer, or director) and make our legislative history clear in the
>> discussion at the meeting? Your thoughts, please.

>>

>> Mark and Shari

>>

>> --
>> Shari C. Nilsson
>> Administrative Assistant
>> Council on Court Procedures



Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

November 4, 2008

Date _____

Michael Adler

Name _____

Deschutes County Circuit Court Judge

Firm (if applicable) _____

michael.adler@ojd.state.or.us

E-Mail _____

541-388-5300 Ext 2490

Phone _____

Proposed amendment(s) for which you are making comments

ORCP 59B, requiring written jury instructions

Please provide your comments in this space

The proposed change to ORCP 59 requiring that the court submit written jury instructions to the jury will not be feasible in most jury trials. In some long trials, the court may have time to discuss jury instructions with the trial lawyers a day or so before the case is submitted to the jury so that the lawyers will have the time to prepare written jury instructions. But in the average (2 to 4 day) jury trial this is not going to be possible. Even if the lawyers submit proposed jury instructions at the beginning of the trial, as they are required to do, there is almost always a need to modify and add instructions as a result of the variety of issues that arise during the trial. It is not feasible to have a detailed discussion and analysis of proposed jury instructions before all the evidence is presented due to the variety of legal and factual issues. When the court is able to discuss jury instructions at the end of the case, and make the necessary changes and additions to the jury instructions, there is no time for the lawyers to somehow magically create a set of revised written instructions in the courtroom. Normally the jury is in the jury room at that time waiting to come back in to the courtroom for closing arguments and instructions. The problem is even more impossible to solve when the lawyers are from another city and do not have a local law office which might possibly be able to prepare written instructions on a moment's notice in a rare cases. The court staff does not have the ability to prepare the written instructions for the lawyers.

The proposed change is a nice idea if it was possible. Unfortunately, in the real world of trials the proposed change is impossible to implement.



Comment on Proposed Amendment to ORCP

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Date Oct. 28, 2008

Name Charles D. Carlson

Firm (if applicable) Position 2, 2nd Judicial District, Oregon Judicial Dept.

E-Mail _____

Phone 541-682-4257

Proposed amendment(s) for which you are making comments
ORCP 59

Please provide your comments in this space

I would first like to thank the members for their work on the Council as I support all of the proposed changes save one. Please note my opposition to the proposed amendment to ORCP 59. I am a strong advocate for written jury instructions but many civil cases just don't need written jury instructions and if the parties are in agreement I would like to keep the discretion to forgo them. In other cases we are discussing jury instructions and modifications right up to final argument. We don't always have staff available here in Lane Co. with the skills necessary to pull together UCJI's and special instructions from 2 or 3 parties using different word processing programs and the attorneys, especially if they are from out of town, may not have the capability either. If preparation of written instructions could lead to inordinate delay waiving written instructions may make sense and I would like to keep that option on the table. I think this proposed change will be problematic particularly in eastern Oregon Judicial Districts with very small staffs and judges that are truly riding the circuit. A one size fits all approach simply won't work without a safety valve the court and parties can use to address unique circumstance of the case or venue. Thank you for your consideration of these issues.



Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date October 11, 2008

Name William A. Drew

Firm (if applicable) Elliott, Ostrander & Preston, PC

E-Mail billd@eoplaw.com

Phone 503.224.7112

Proposed amendment(s) for which you are making comments

69 Default Judgments

Please provide your comments in this space

I disagree with the notion that notice of intent to seek default should be made in the form of a pleading, and filed and served as a pleading. One of the nice things about Oregon practice is that it retains a custom of civility, and that includes letters informing parties to file their answers or face, and providing the reasons why (such as a UTCR notice of intent to dismiss). That will be lost if it becomes a faceless form filed by the plaintiff. Also, the current system allows parties to work out extensions, without having to file supplemental or amended notices of intent to seek default. I want to be able to continue that practice. On a motion for default, a plaintiff ought to have to attach a copy of the notice provided, and any subsequent extensions granted. The ethical rules should prevent sharp practices with respect to obtaining default. See *In re Porter*. If we make everything a rule, then what is left of ordinary civility and professional courtesies?



Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date October 10, 2008

Name Sonia A. Montalbano

Firm (if applicable) Elliott, Ostrander & Preston, PC

E-Mail sonia@eoplw.com

Phone 503-224-9867

Proposed amendment(s) for which you are making comments

Default Judgments

Please provide your comments in this space

I do not believe we should be required to prepare, serve and file a pleading with the court re: intent to seek an Order of Default. While there is some confusion in the bar as to what is required, this requirement makes the simple practice of sending a letter more complicated and more expensive. It takes more time to set up and send a pleading vs. a one sentence letter. And then to send it to the court. That will mean more expense, not mention the additional paper waste. The letter works. An alternative is to clarify within the rule that it may be done by letter or formal pleading, or, that it be done by letter but when applying for the d/f judgment you must attach the letter to your motion.



Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date 12/2/08

Name Brian Posewitz

Firm (if applicable) _____

E-Mail brianposewitz@comcast.net

Phone 503-432-8249

Proposed amendment(s) for which you are making comments

Rule 69

Please provide your comments in this space

I suggest you clarify whether a notice of intent to take a default can be served before the expiration of time to appear. Most attorneys serve a notice of intent to take a default only after the time for appearing has expired. However, some attorneys, in response to a notice of intent to appear, immediately serve a notice that they will take a default as soon as the time to appear expires. My view has always been that you can't serve a notice of intent to take a default until you have a right to take a default (i.e., after the time to appear has expired), but I've never been willing to risk a default based on that interpretation.

My suggestion is to clarify that the 10-day notice can only be served after the time to appear has expired (i.e., after the plaintiff has otherwise acquired a right to take a default).

Thanks for considering my comments.

Sorry if I'm overlooking some existing authority that resolves this issue.

From: Bruno Jagelski
Sent: Wednesday, December 03, 2008 12:39 PM
To: Kristen David
Subject: RE: ORCP 69 - Proposed Change Coming

Kristen,

I support the ammendment as it provides needed clarity. Thanks for your efforts.

Bruno J. Jagelski
Attorney at Law
Yturri Rose LLP

From: Kristen David
Sent: Wednesday, December 03, 2008 11:23 AM
To: PLF Defense Panel List Serve Members
Subject: RE: ORCP 69 - Proposed Change Coming

Folks - I saw this issue regarding ORCP 69 "letter" versus "notice" come up on the OADC listserv last Spring and I raised it to the Council on Court Procedures which resulted in a proposed amendment. The Judges were supportive of a change since if the notice gets filed it would be listed on OJIN versus a letter which would not get entered into OJIN.

There is still some unclarity within ORCP 69 and therefore the Council intends to address further changes next biennium. For now however, the proposed change clarifies that the notice must be filed and served. We would appreciate any input on the proposed change. The key text is below:

"If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, [then] notice, in the form prescribed by Uniform Trial Court Rule 2.010, of the intent to apply for an order of default must be filed and served upon the party against whom an order of default is sought [shall be served with written notice of the application for an order of default] at least 10 days, unless shortened by the court, prior to entry of the order of default."

A Complete list of the amendments published for comment (and a comments form) can be found on the Council's webpage:
<http://www.lclark.edu/~ccp/AmendmentsPublishedforComment.htm>

Kristen S. David
Bowerman & David, PC

From: Jonathan M. Radmacher
Sent: Wednesday, December 03, 2008 10:02 AM
To: PLF Defense Panel List Serve Members
Subject: ORCP 9 and ORCP 69

Those who have been involved in setting aside defaults may have dealt with the obvious tension (I'd say conflict) between *Denkers v. Durham Leasing Co., Inc.*, 299 Or 544, 704 P2d 114 (1985) and several recent Court of Appeals cases, with regard to whether a "Notice" of intent to make application for an order of default must be filed in the court, i.e. whether it must be a form of pleading, instead of just a letter. *Denkers* said a letter wasn't good enough, but the Court of Appeals has now, on several occasions (and without citing *Denkers*) said that a letter is enough. Yes, the Supreme Court decision controls, but I think some trial judges might have some hesitation going there, and you will certainly draw from plaintiff's counsel insistence that the more recent CtApp cases apply. So -- this morning's decision in *Wilmoth v. Ann Sacks Tile and Stone, Inc.* (congrats, Tom and Susan, on what sounds like an amazing trial), supports the *Denkers* view, albeit in the context of an offer of judgment -- it has to be filed, because it has to be served. By the same token, every "notice" has to be served under ORCP 9 (including the "notice" required under ORCP 69), and so a notice under ORCP 69 must be filed. (Query whether a plaintiff could send a letter, then file it with an affidavit submitted with the motion for order of default; I don't think so, but that's a different analysis.) Another analogy on ORCP 9 that might help.

Jonathan

Jonathan M. Radmacher
McEwen Gisvold LLP

E-mail string between Mark Peterson, Martin Hansen, and Gene Buckle re: ORCP 69

From: Mark Peterson
To: "Martin E. Hansen"
Cc: Eugene Buckle
Subject: Re: conflict between Rule 9C and our proposed Rule 54 E(3) ?

Gene, Martin, and all,

Wilmoth v. Ann Sachs Tile and Stone, Inc. is a really interesting case and quite a tour through the ORCP including rules 2, 54B(2), 60, 63. and 64 (and UTCR 5.100 and ORAP 5.45) not to mention the issue of how rules 9 and 54 E fit together. Gene's Rule 54 E committee must have seen this coming and resolved the problem created by this opinion which was fortuitously filed ten days before our meeting. I was not surprised that no one on the Council thought that it was appropriate to file unaccepted Rule 54 E offers prior to the entry of judgment, or at least a determination on the merits if the entry of the judgment is held up. However, the court ruled that Rule 9 A's inclusion of offers of judgment as documents to be served means that such offers must be filed within a reasonable time after service, as required by section C, or the offer is invalidated.. (It is a little odd that the court did not apply Rule 12 B, as was done in Heiner v. Porter, 164 Or App 508, 515 (1999)--plaintiff's contention that response to ORCP 43 requests for admission served but not timely filed should be deemed admitted was disregarded as not affecting a substantial right of the plaintiff.)

Be that as it may, my recollection was that all Council members who expressed an opinion on the issue believed that it was inappropriate to litter the court's file with unaccepted offers of compromise which might be seen by and influence the judge. UTCR 13.130 supports that same policy in mediations. The policy of favoring the confidentiality of settlement discussions was raised by the defendants and is mentioned in the second to the last paragraph of the opinion but did not succeed against the court's examination of the text of rules 9 and 54, current version, in context.. An examination of the text in context of the published Rule 54 E would indicate that unaccepted offers are not to be filed until after the case has been adjudicated on the merits. It is late but a little Latin phrase that a specific provision in a statute (or rule) will override a contrary general provision in a related rule seems to apply. See, ORS 174.020(b)(2).

Nonetheless, if one rule contradicts or modifies another rule, it seems desirable to give at least a hint in the latter of the contradiction or modification. I would suggest that the hint come in Rule 9 D which contains the exceptions to section C's requirement that papers which are served must be timely filed. If we choose to revise Rule 9 C, as

suggested by the person who raised the issue, I would suggest slightly different language--"except an offer of judgment made pursuant to Rule 54 E". I agree with Martin that section D is the better place for an amendment. We could explicitly exclude offers of judgment as Martin suggests or add a sentence following the two sentence coverage of notices of depositions and requests for production of documents such as, "Offers of judgment shall only be filed as provided in Rule 54 E."

Gene, thank the person who caught the issue and sensed its relevance to next Saturday's meeting. What do other members think is the proper approach? Note that ORS 1.735(2) may not allow us to amend Rule 9 in this biennium since we did not publish any amendment to that rule and we would not be changing the language of a proposed promulgation after consideration at the December meeting. If we cannot amend Rule 9, at this time, should we decide not to promulgate the published Rule 54 E amendment? For what it is worth, I think that the policy of keeping offers of judgment out of the court's file until after a determination on the merits is worthwhile and the Wilmoth Court would not have reached the same conclusion requiring the filing of unaccepted offers of judgment if the published amendment to Rule 54 E was the text and context before the court.

I have one more thing for you all to think about. Does the Wilmoth Court's handling of Rule 9 A's listing of documents bear on our discussion as to whether we prefer the long (list every document) or the short version of Brooks' Rule 1 published amendments? No comments have been received in support of or in opposition to either version.

Mark

Martin E. Hansen wrote:

- > Gene,
- > This was an interesting case. I would rather see us amend ORCP 9D to
- > add offers of judgment as documents you need not file with the court
- > but they can be used as exhibits in motions... such as attorney fee
- > motions. Since we do not want to poison the trier of fact (often a
- > judge) I feel we should still not expose the Judge to settlement
- > attempts until the case is over with.
- > Martin
- > *Martin E. Hansen
- > Francis Hansen & Martin LLP*

- >

> -----

> *From:* Eugene Buckle

> *Sent:* Wednesday, December 03, 2008 11:15 AM

> *To:* Council on Court Procedures

> *Subject:* conflict between Rule 9C and our proposed Rule 54 E(3) ?

>

> Dear Counsel

>

> FYI--see below excerpt from Wilmoth v Kohler, decided today

> <http://www.publications.ojd.state.or.us/A127861.htm>.

>

> My concern is Rule 9C, which says that all papers required to be

> served on a party (which includes an offer of judgment via ORCP 9A)

> shall be filed with the court "within a reasonable time / _after_

> /service."

>

> What if an offer to allow is served, rejected, it then takes 2 or 3

> years to adjudicate the case on the merits, the offer is not beaten

> (i.e., atty fees are cut off as of the date of the offer), and only

> then can the rejected offer be filed (via proposed ORCP 54E(3))? I can

> see the argument that filing the (rejected) offer some 2 years after

> service is not "within a / _reasonable _/time after service", and thus

> a la Wilmoth may be deemed "invalid".

>

> I'm wondering if Rule 9C should be amended to say:

>

> "Except as provided by section D of this rule, all papers required to

> be served upon a party

>

> by section A of this rule*__, except an offer to allow judgment,_*

> shall be filed with the court

>

> within a reasonable time after service. ***

>

> *_ _*

>

> Finally, we turn to defendants' challenges to the award of attorney

> fees to plaintiff. In their fourth assignment of error, defendants

> contend that the trial court erred by awarding attorney fees that were

> incurred after defendants had served an ORCP 54 E offer of judgment,

> which plaintiff rejected. The trial court ruled that defendants' offer

> was invalid because it was not filed as required by ORCP 9. We agree.

>

> Addressing defendants' argument requires construction of ORCP 9 and

> ORCP 54 E. We construe such rules by first examining their text in

> context and considering rules of construction "that bear on the
 > interpretation of the statutory provision in context, such as the
 > directive, * * * found in ORS 174.010, to interpret statutes with
 > multiple particulars or provisions, to the extent possible, so as to
 > give effect to all." /For Counsel, Inc. v. Northwest Web Co.
 > <<http://www.publications.ojd.state.or.us/S45616.htm>>/, 329 Or 246,
 > 252, 985 P2d 1277 (1999) (citing /PGE v. Bureau of Labor and
 > Industries/, 317 Or 606, 611, 859 P2d 1143 (1993)). If the legislative
 > intent is clear at the conclusion of that analysis, we proceed no
 > further. /Id/. Here, based on the text of the rules in context, we
 > conclude that the trial court correctly construed the two rules at issue.
 >
 > We begin with the text of the rules. ORCP 54 E(1) authorizes a party
 > against whom a claim is asserted to "serve upon the party asserting
 > the claim an offer to allow judgment to be given against the party
 > making the offer * * *." If the offer is accepted, then "the party
 > asserting the claim or such party's attorney shall endorse such
 > acceptance thereon, and file the same with the clerk before trial."
 > ORCP 54 E(2). On the other hand, "[i]f 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 * * *." ORCP 54 E(3).
 >
 > In addition to the requirement of ORCP 54 E(2) that a party who has
 > accepted an offer of judgment must endorse and file it, ORCP 9
 > establishes requirements for filing all offers of judgment. That rule
 > provides, in part:
 >
 > "A. Except as otherwise provided in these rules, * * * every * * *
 > offer of judgment * * * shall be served upon each of the parties. * * *
 >
 > "* * * * *
 >
 > "C. Except as provided by section D of this rule, all papers required
 > to be served upon a party by section A of this rule shall be filed
 > with the court within a reasonable time after service. * * *
 >
 > "D. Notices of deposition, requests made pursuant to Rule 43, and
 > answers and responses thereto shall not be filed with the court. This
 > rule shall not preclude their use as exhibits or as evidence on a
 > motion or at trial."
 >
 > Neither ORCP 54 E nor ORCP 9 D creates an exception to the filing
 > requirement imposed by ORCP 9 A and C for "every" offer of judgment.
 > Therefore, a party who makes and serves an offer of judgment also must
 > file it within a reasonable time.

- >
- > Contrary to the plain meaning of the rules, defendants contend that
- > unaccepted offers of judgment need not be filed. Noting that the offer
- > of judgment in /For Counsel, Inc./ was not filed and was nevertheless
- > found to be valid, defendants conclude that the case holds that an
- > offer need not be filed to be effective. The issue in that case,
- > however, was "whether the rule permits pretrial offers to be made
- > inclusive of costs, disbursements, and attorney fees without the
- > opposing party's prior agreement." 329 Or at 249. Because the filing
- > issue apparently was not raised, the court there did not decide the
- > issue now before this court. /For Counsel, Inc./ therefore does not
- > assist defendants.
- >
- > Defendants next contend that ORCP 54 E requires only that a party
- > accepting an offer of judgment file the endorsed offer. In defendants'
- > view, filing an unaccepted offer would be illogical, because ORCP 54
- > E(3) provides that an unaccepted offer is deemed withdrawn and "shall
- > not be given in evidence on the trial." Defendants rely on federal
- > case law and policies favoring confidentiality of settlement
- > discussions. This court cannot, however, impose its own view of logic
- > or policy to ignore the plain requirement of ORCP 9. Although ORCP 54
- > E(3) provides that an unaccepted offer is deemed withdrawn and is
- > inadmissible as evidence at trial, it does not create an exception to
- > the ORCP 9 requirement that an offer of judgment be served and filed.
- > Accordingly, the trial court did not err by deciding that the unfiled
- > offer of judgment did not cut off any entitlement to attorney fees and
- > costs.
- >
- > Gene Buckle
- >
- > Admitted in Oregon and Washington
- >
- > Cosgrave Vergeer Kester LLP

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 a 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*] including, but not limited to,**
12 **professional corporations and cooperatives.** Upon a domestic or foreign corporation [*or*
13 *limited partnership*]:

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

18 **D(3)(b)(ii) Alternatives.** If a registered agent, officer, **or** director[, *general partner, or*
19 *managing agent*] cannot be found in the county where the action is filed, the summons **and the**
20 **complaint** may be served:

21 **(A)** by substituted service upon such registered agent, officer, **or** director[, *general*
22 *partner, or managing agent*]; [*or*]

23 **(B)** by personal service on any clerk or agent of the corporation [*or limited partnership*]
24 who may be found in the county where the action is filed; [*or*]

25 **(C)** by mailing **in the manner specified in paragraph (2)(d) of this section** a copy of
26 the summons and complaint to the office of the registered agent or to the last registered office of

1 the corporation [*or limited partnership*], if any, as shown by the records on file in the office of
2 the Secretary of State or, if the corporation [*or limited partnership*] is not authorized to transact
3 business in this state at the time of the transaction, event, or occurrence upon which the action is
4 based occurred, to the principal office or place of business of the corporation [*or limited*
5 *partnership*], and in any case to any address the use of which the plaintiff knows or[, *on the basis*
6 *of reasonable inquiry,*] has reason to believe is most likely to result in actual notice[.]; or

7 **(D) upon the Secretary of State in the manner provided in ORS 60.121 or ORS**
8 **60.731.**

9 **D(3)(c) Limited Liability Companies. Upon a limited liability company:**

10 **D(3)(c)(i) Primary service method. By personal service or office service upon a**
11 **registered agent, manager, or (for a member-managed limited liability company) member**
12 **of a limited liability company; or by personal service upon any clerk on duty in the office of**
13 **a registered agent.**

14 **D(3)(c)(ii) Alternatives. If a registered agent, manager, or (for a member-managed**
15 **limited liability company) member of a limited liability company cannot be found in the**
16 **county where the action is filed, the summons and the complaint may be served:**

17 **(A) by substituted service upon such registered agent, manager, or (for a member-**
18 **managed limited liability company) member of a limited liability company;**

19 **(B) by personal service on any clerk or agent of the limited liability company who**
20 **may be found in the county where the action is filed;**

21 **(C) by mailing in the manner specified in paragraph (2)(d) of this section a copy of**
22 **the summons and complaint to the office of the registered agent or to the last registered**
23 **office of the limited liability company, as shown by the records on file in the office of the**
24 **Secretary of State or, if the limited liability company is not authorized to transact business**
25 **in this state at the time of the transaction, event, or occurrence upon which the action is**
26 **based occurred, to the principal office or place of business of the limited liability company,**

1 and in any case to any address the use of which the plaintiff knows or has reason to believe
2 is most likely to result in actual notice; or

3 (D) upon the Secretary of State in the manner provided in ORS 63.121.

4 D(3)(d) Limited Partnerships. Upon a domestic or foreign limited partnership:

5 D(3)(d)(i) Primary service method. By personal service or office service upon a
6 registered agent or a general partner of a limited partnership; or by personal service upon
7 any clerk on duty in the office of a registered agent.

8 D(3)(d)(ii) Alternatives. If a registered agent or a general partner of a limited
9 partnership cannot be found in the county where the action is filed, the summons and the
10 complaint may be served:

11 (A) by substituted service upon such registered agent or general partner of a limited
12 partnership;

13 (B) by personal service on any clerk or agent of the limited partnership who may be
14 found in the county where the action is filed;

15 (C) by mailing in the manner specified in paragraph (2)(d) of this section a copy of
16 the summons and complaint to the office of the registered agent or to the last registered
17 office of the limited partnership, as shown by the records on file in the office of the
18 Secretary of State or, if the limited partnership is not authorized to transact business in this
19 state at the time of the transaction, event, or occurrence upon which the action is based
20 occurred, to the principal office or place of business of the limited partnership, and in any
21 case to any address the use of which the plaintiff knows or has reason to believe is most
22 likely to result in actual notice; or

23 (D) upon the Secretary of State in the manner provided in ORS 70.040 or ORS
24 70.045.

25 D(3)(e) General partnerships and limited liability partnerships. Upon any general
26 partnership[s] or limited liability partnership by personal service upon a partner or any agent

1 authorized by appointment or law to receive service of summons for the partnership **or limited**
2 **liability partnership.**

3 **D(3)(f) Other unincorporated association subject to suit under a common name.**

4 Upon any other unincorporated association subject to suit under a common name by personal
5 service upon an officer, managing agent, or agent authorized by appointment or law to receive
6 service of summons for the unincorporated association.

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

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

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

18 * * * * *

DANNY LANG,
OSB #79007 & CSB #78838

GLINDA SIFERS,
Litigation Manager

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October 10 2008

Mark A. Peterson, Executive Director
Council on Court Procedures
1018 Board of Trade Building
310 SW Fourth Avenue
Salem, OR 97204-2387
Phone: 503-768-6500
Fax: 503-768-6540
Mpeterso@lclark.edu

RE: ORCP 54E – UNREASONABLE THREE DAY TIME PERIOD

Dear Director Peterson:

Please present the contents of this letter and the attached **FURTHER COMMENTS** to the Council on Court Procedures regarding both bad prior experiences and the rather obvious need to liberalize the unduly restrictive three day period for acceptance of an offer to allow Judgment [**ORCP 54E(2)**].

Specifically, two separate issues have arisen, and are set forth in the attached further **Comments** being submitted with this letter.

1. The **three day acceptance period** is unreasonable in that it results in an unworkable burden upon Counsel and a fundamental unfairness to the Party Claimant by failing to allow sufficient time for consideration or timely processing.
2. Bias against Party Claimants is also demonstrated by **ORCP 54E** being a one-sided mechanism which operates to only put pressure upon a Party Claimant to settle, as the attached **Comments** explain.

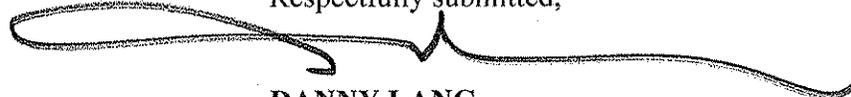
In my extensive personal experience as a Member of the California State Bar & a California Superior Court Settlement Conference Judge Pro Tem, far more cases are settled when both sides are given an equal opportunity and incentive to settle via a two-sided 10 day protocol. Rest assured, that the model found at **California Code of Civil Procedures Section 998** has proven to be favored by both Counsel for Plaintiffs and for Defendants and recognized by California Superior Courts as a valid and valuable incentive to promote settlement. Of course, if the goal is to promote settlements and reduce Trial Court Dockets, then in that event the best mechanism is a neutral two-sided procedure with a sufficient time for acceptance to accommodate the recognized needs of Counsel for both Plaintiffs and Defendants.

Accordingly, I formally propose that the Council on Court Procedures consider a new Oregon procedure for encouraging settlement by a procedural **Offer to Compromise** [available to either Plaintiffs or Defendants] based on the model of **California Code of Civil Procedure Section 998**.

Mark Peterson
RE: ORCP 54E
October 10, 2008
Page 2

Naturally I am offering to participate in meetings of the *Council on Court Procedures* to assist in providing additional information and answer any questions or concerns.

Respectfully submitted,



DANNY LANG
Region 3 Elected HOD Delegate - 2008-2011

cc: UTCR Committee
OTLA
Chief Justice Paul DeMuniz
Chief Judge David Brewer
Rick Yugler - OSB President
Gerry Gaydos - OSB President Elect
Douglas County Bar Association Board

Attachments

Memorandum

To: Members of the Council on Court Procedures

From: Dan Harris

Re: Proposed amendments to ORCP 59

Date: December 2008

Greetings to Council members:

At the September meeting of the council, the proposed amendments to ORCP 59 were approved for publication. A few days after the council meeting, I reviewed the proposed amendments with Chief Justice De Muniz. After discussing with him the changes and the challenges of implementing the amended rule, the Chief indicated that he fully supported the amended rule and authorized me to form a committee for the purpose of developing a plan for implementing the new rule.

At the October, 2008 judicial conference I formed a committee which includes the following members:

Judge Jean Maurer (Multnomah County)
Judge Burdette Pratt (Malheur County)
Judge John Collins (Yamhill County)
Judge Doug Mitchell (Lane County)

We started the process with an assessment of present practices and a review of the challenges that each courthouse would face if the rule were to be implemented. The initial responses of the committee members are set forth below:

From Judge Burdette Pratt – Malheur County

Dan: My answers are similar to the others:

1. What is your experience with the requirement to supply written jury instructions to the jury? I have been a judge for 18 years and have nearly always used written jury instructions. In some complicated cases I have provided copies for each juror. This was the practice in our county when I came on the bench. We have several staff members who are trained to draft instructions. They do the initial draft, I edit them and then they produce the final draft. Often my staff has a first draft on the file when I get it to start trial, particularly in simple criminal cases. If there are changes after the attorneys go over them they can be done in minutes. I don't know how attorneys would have a fair opportunity to object to proposed instructions if they don't get a written copy. Also, our attorneys want a copy before starting argument so that they can refer to them and sometimes read short portions of them to the jury during argument. I have been in other

jurisdictions on a few occasions where they do not prepare written jury instructions and I had to use the tape recording process. I found it to be very unsatisfactory.

In our county the attorneys seldom provide proposed instructions in criminal cases because they have come to rely on the quality of the instructions prepared by the court in advance. I have to remind them at times that if the court doesn't give an instruction that they want, it hasn't been preserved for appeal if they don't make a formal request for the instruction.

2. What issues and challenges do judges face in the effort to reduce instructions to written form? It is just a matter of changing old habits and having training for judges, staff and attorneys. Some judges are capable of preparing their own instructions and some need staff assistance. It is also important to insist that the attorneys prepare both a written and electronic copy of their proposed instructions. The written copy for the file and the electronic copy for editing. We don't require a disk. Often we get them by e-mail. With the advent of e-court they will all be submitted electronically.

I agree that one of the big challenges is civil cases. It takes a lot of work to draft a summary of the pleadings, however, that can be reduced by requiring the attorneys to submit a proposed statement of the pleadings then the judge just needs to resolve any conflicts.

3. What can the OJD do to remove these issues and challenges?

We need training for judges and staff and training that can be provided to attorneys although most attorneys are used to written instructions if the practice in multiple counties. We also need to develop jury instruction software similar to that available for criminal cases.

J. BURDETTE PRATT
CIRCUIT COURT JUDGE
MALHEUR COUNTY CIRCUIT COURT
NINTH JUDICIAL DISTRICT

From Judge Doug Mitchell – Lane County and

Judge John Collins – Yamhill County

I agree with much of what Doug said, so rather than write from scratch, I'll build on his response [in red]

John L. Collins
Presiding Judge
25th Judicial District
Yamhill County
503-434-7497

From: Douglas S MITCHELL/LAN/OJD
To: Dan HARRIS/JAC/OJD

Cc: J Burdette Pratt/MAL/OJD@ojd, Jean Kerr MAURER/MUL/OJD@ojd, John L Collins/YAM/OJD@ojd, Mollie A CROISAN/SCA/OJD@ojd
Date: 10/27/2008 06:00 PM
Subject: Re: Proposal to require written jury instructions

Hi All,

Here are my answers to Dan's questions

1. What is your experience with the requirement to supply written jury instructions to the jury? I cannot imagine not instructing the jury in writing. I always ask after the verdict if the instructions were helpful. The answer is always yes. Many jurors are amazed that I ask the question at all because to them, the answer is so obvious. I usually tell juries that some judges just read the instructions out loud and provide a tape recording for the jury to use if they need to hear them again. No juror has ever thought that was a better idea. Most are astonished to learn of the practice.

My experience also. I don't think there is any question but what they are VERY valuable -- and for the right reasons. We want juries to follow our instructions and, equally important, THEY want to follow the instructions. We could improve the impact not by dwelling on the question of whether written instructions are valuable, but rather on how can we make them MORE valuable by improving some of the wording to be less stiff, providing guidelines on what to give at the beginning of the trial, what to give during the trial (such as definitions central to certain testimony), before closing argument and then after closing argument.

I think it comes back to the fact that as judges we are also teachers, and that is especially true when it comes to "teaching" the jurors the legal standards to apply.

2. What issues and challenges do judges face in the effort to reduce instructions to written form? Criminal cases: Except in complex cases, these should not present much of a challenge where the judge or judicial assistant uses the OJD UJIC program. Some of the uniform instructions require additional narrative information, but I assume most judges write that out anyway before they read the instructions to the jury. I think once a judge walks through the UJIC program, he or she will see that this is not that challenging.

I agree. It might, though, be helpful if we communicated better what we want from the attorneys. Do we want the proposed instructions the day before? Do we want them email or on a disc (in addition to written until we are fully Ecourt implemented, as their written request makes their record of what they requested)? Do we want detailed instructions, simple list of OSB uniform instructions + any special instructions? And what about proposed verdict forms?

Civil case: Without an instruction generating program, this is more challenging. Even with a program, the instructions require much more input of information than the criminal instructions. Requiring the parties to provide instructions on blank documents as well as providing the instructions on a diskette would allow the judge (or staff) either to provide a set of one-instruction-per-page instructions or prepare a set from the diskette. Generally, preparing civil jury instructions will be much more labor intensive. Fortunately, civil jury trials are not nearly as frequent as criminal trials.

Again, I agree. There are, though, some boilerplate forms for non-complex trials. I have an

automated system for civil jury instructions with "standard packages" for negligence, construction, condemnation. Getting instructions via email attachment, disk or other is also very helpful -- in a writeable form, though.

Just today, even though I don't have a civil trial on my immediate docket, I downloaded Karsten Rasmussen's Preliminary Instruction for a civil case (on our flash drives from the judicial conference) and loaded it into my jury instruction forms so I will have it when I DO have a civil jury trial

3. What can the OJD do to remove these issues and challenges?

1. Provide designated clerical staff willing to assist judges from courts with limited staff resources. A judge's staff would fax or otherwise transmit the parties' requested instructions to the remote staff person with some basic guidance. The remote staff person would prepare a draft set of instructions and email the set back to the judge or judge's staff. If the requesting judge's staff or the judge was unable to do the final editing, the judge would return the draft to the remote staff person with instructions for editing.

2. Provide training (including the opportunity for 1:1 training) on the UJIC program to judges who want to prepare their own jury instructions or the staff of those who don't.

3. Develop a civil counterpart to the UJIC program.

4. Develop a protocol (UTCR?) for lawyers on preparing civil jury instructions for use by the court.

Ditto, though #1 may prove too awkward (alternative would be "Just send 'em to Doug, he'll do 'em for us")

Key will be making it as simple and user-friendly as possible.

Doug Mitchell

John Collins

Just one other thought. I have a set of "boilerplate" instructions for the most common criminal charges. Examples would be DUII w/ intoxilyzer, DUII with refusal, DV assault - harassment - menacing. Saves time -- just change names, dates.

John Collins

From Judge Jean Maurer – Multnomah County

Hi Dan,

1. What is your experience with the requirement to supply written jury instructions to the jury? I always provide at least one set of written jury instructions to the jury. I sometimes provide individual copies to the jurors--particularly if the case is complicated factually and legally.

2. What issues and challenges do judges face in the effort to reduce instructions to written form?

I would categorize the problems as follows:

- a. The simple, short trials which require the judge to finish quickly so as to start the next one. Instructions in these cases tend to be readily available on-line. However, even they become challenging when the lawyers have failed to provide "clean" instructions with appropriate wording tailored to the particular case. Example: DUII, with element sheet incompletely filled out. Or a damages instruction with blanks left in all of the spaces. Printing the instructions becomes a much lengthier process than it should be when the judge is scrambling to fill in the blanks that the lawyers should have completed themselves.
- b. The lengthy complex trials (civil or criminal) which require the judge to decide between competing proposed instructions.

Problems tend to arise when judges are nearing the end of the trial. Even with a great deal of pre-trial discussion of jury instruction issues, it is often the case that the lawyers are adamantly opposed to the instructions proposed by the other side. I have felt considerable pressure to decide the legal issues and then to wordsmith the instructions to prevent unnecessary delay for the jurors. Written instructions take considerably longer to produce even after all of the wordsmithing is complete, and I would venture to say that judges who rely on taped instructions do so because they want to move forward quickly. Written instructions must be finalized and printed and copied if each juror is to receive a personal set. All of that is time-consuming. I tend to rely on my clerks to assemble them as I have tweaked the instructions provided by the lawyers.

3. What can the OJD do to remove these issues and challenges?

Train judges, staff, (and lawyers if possible) to become proficient in using on-line uniform instructions and/or disks provided by the lawyers containing requested instructions. A disk makes it so much easier to edit the proposed instructions. It streamlines the printing of the final set. There also need to be a sufficient number of high speed copiers in the courthouse for copies to be made quickly for assembling into sets of instructions for the jurors.

Jean K. Maurer
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Multnomah County Courthouse
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Draft Plan for Implementation of

Amended ORCP Rule 59

If the proposed amended rule is adopted by the Council on Court Procedures, the Written Jury

Instruction Committee, with the assistance of OJD staff, would conduct a survey of each jurisdiction to determine following:

1. What is the local practice for using written jury instructions?
2. What training would be needed of Judges and staff to ensure proper implementation of the amended rule?
3. What equipment would be needed to ensure proper implementation of the amended rule?

The OJD education department is prepared to begin a statewide training program with the goal of addressing training needs by the end of 2009.