MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 12, 2009, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd
Tigard, OR 97224

ATTENDANCE

Members Present:

John R. Bachofner
Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Don Corson
Kristen David
Hon. Jerry B. Hodson
Hon. Lauren S. Holland*
Hon. Mary Mertens James*
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Kathryn M. Pratt
Hon. David F. Rees
Mark R. Weaver*
Hon. Charles M. Zennaché

Members Absent:

Michael Brian
Martin E. Hansen
Hon. Robert D. Herndon
Hon. Locke A. Williams

Guests:

David Nebel, Oregon State Bar
John Borden, Legislative Fiscal Office

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 7 ORCP 7E ORCP 9C&D ORCP 9F ORCP 36B/43A ORCP 36B(2) ORCP 38B&C ORCP 39 ORCP 43 ORCP 43B(2)(a) ORCP 46 ORCP 46A(2) ORCP 54A ORCP 54A(1) ORCP 54E ORCP 54E(2) ORCP 69B(1) ORCP 71 ORCP 71B(1)(c)			

I. Call to Order (Mr. Corson)

Mr. Corson called the meeting to order at 9:33 a.m.

II. Introductions (all)

A. Guests

Mr. Corson welcomed John Borden of the Legislative Fiscal Office and David Nebel of the Oregon State Bar.

B. Welcome of new members

All members and staff introduced themselves. Mr. Corson welcomed new Council members John Bachofner, Maureen Leonard, Kathryn Pratt, and Judge Charles Zennaché. Judge David Rees, formerly an attorney member of the Council, has been appointed to a new term as a judge member of the Council. New member Michael Brian will be introduced at the next meeting.

C. Hand out current roster and note corrections

A draft member roster was distributed and Prof. Peterson requested that errors or updates be noted and returned to Ms. Nilsson for correction.

III. Approval of December 13, 2008, Minutes (Mr. Corson)

Mr. Corson called for a motion to approve the December 13, 2008, minutes (Appendix A) 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. Council Rules of Procedure per ORS 1.730(2)(b) (Mr. Corson)

A. Review

Mr. Corson noted that the Council's Rules of Procedure had not been reviewed or updated in quite some time. He stated that the proposed amendments (Appendix B) which had been distributed to the members for review were not radical revisions, just an update.

B. Vote on proposed amendments

Mr. Corson called for a motion to approve the suggested changes to the Rules of Procedure. The motion was made and seconded and the motion passed unanimously to amend the Rules of Procedure as specified in Appendix B.

C. Council Timeline

Mr. Corson stated that a timeline of the Council's biennial activities had been distributed to the members for their information. (Appendix C)

V. Annual election of officers per ORS 1.730(2)(b) (Mr. Corson)

A. Chair

Mr. Corson asked the members for nominations for chair. Mr. Buckle was nominated by Mr. Cooper. A motion was made to elect Mr. Buckle as chair. The motion was seconded and was passed in a voice vote with 17 members in favor and no votes in opposition or abstentions.

B. Vice-Chair

Former Chair Corson turned the meeting over to newly-elected Chair Buckle. After commending Mr. Corson for his years of service as chair, Mr. Buckle then asked the members for nominations for vice-chair. Mr. Cooper was nominated by Ms. David. A motion was made to elect Mr. Cooper as vice-chair. The motion was seconded and was passed in a voice vote with 17 members in favor and no votes in opposition or abstentions.

C. Treasurer

Mr. Buckle noted that, by tradition, the public member is usually elected as treasurer. He suggested that, since a public member had not yet been appointed, the election of treasurer be deferred. The membership agreed and the election will be carried over until the next meeting after which a public member has been appointed.

VI. Reports Regarding Last Biennium (Mr. Buckle)

A. Promulgated rules (Prof. Peterson)

Prof. Peterson reported that last biennium the Council made amendments to ORCP 1, 7, 54, 59, and 69, and that the Legislature had not amended, modified, or repealed any of those amendments. Those amendments will therefore go into effect on January 1, 2010.

B. 75th Legislative Assembly's ORCP amendments outside of Council amendments (Prof. Peterson)

Prof. Peterson explained that the Legislature retains the authority to enact its own Oregon Rules of Civil Procedure or to amend existing rules and that it had made a few of its own amendments this biennium. Those changes included:

- HB 2284: cleaning up the statutory citations in many statutes (one change to ORCP 7D(3)(a)(iv)).
- HB 2585: eliminating ORCP 32K which had made class actions not available for unlawful trade practices act.
    - The Legislature's House Judiciary Committee had previously asked the Council whether it believed the change was substantive or procedural; the Council's Legislative Advisory Committee offered the opinion that the change was substantive. Since the Council does not have the authority to make substantive changes, the Legislature did so, effective by emergency clause June 25, 2009.
- HB 2394: sponsored by Oregon State Sheriff's Association, amending ORCP 55D(1) and (2) regarding service on witnesses under 14 years of age; and requiring service on a law enforcement agency's subpoena coordinator 10 days before the party can expect an officer or sheriff to appear and give testimony.

Prof. Peterson reported on several bills relating to the ORCP this biennium which did not pass:

- SB 266: changing ORS 12.020 regarding commencement of actions (would have therefore affected ORCP 3). There was one public hearing on the bill but the bill did not make it out of judiciary committee.
- HB 2814: requiring clerks to accept fax filings and e-mail attachment filings and would have affected ORCP 9E. The bill did not make it out of committee.
- HB 2480: abolishing contributory negligence, which would have amended ORCP 19B. The bill did not make it out of committee.
- SB 361: changing ORCP 32 relating to class actions to require that class action members only be citizens of Oregon. The bill did not make it out of committee.
- HB 3397 and SB 680: making changes to health care claims; changing the practice completely regarding discovery of expert witnesses; and requiring a pre-filing sign-off by a medical review panel. The bill did not make it out of committee.

Mr. Buckle asked if there was any sense of why the changes that were passed by the Legislature were not brought before the Council. Prof. Peterson stated that one change was a statutory revision to correct errors and that the Council will try to be better about catching those in the future. He stated that the Rule 32 bill was a substantive change and not something that the Council would have entertained as part of its statutory charter. He stated that the Sheriff's Association was only in touch with the Council toward the end of last biennium regarding a change to ORCP 7, and that hopefully they will come to the Council first for any requested changes in the future.

Mr. Buckle emphasized the collegiality of the Council and that, despite affiliations and professional biases that members may have, everyone attempts to step back and be objective about what is best for the system of justice and the smooth operation of our courts. He re-emphasized that the Council is only allowed to make procedural changes to the ORCP and not substantive changes.

VII. Administrative Matters (Mr. Buckle)

A. Funding (Prof. Peterson/Mr. Nebel)

Mr. Nebel stated that he works in the Public Affairs department of the Oregon State Bar and that he is the Bar's liaison to the Council. Included in his duties is trying to keep an eye on the Council's budget. Historically, the Council had its own budget which was administered through the Judicial Department. The Council's budget is now is within the Office of Legislative Counsel and it is through this office that any funding flows. For this biennium, the Council asked for an appropriation of the same amount that it received last biennium, roughly $52,000. It received an expenditure limitation authorizing the Council to spend money it receives from the state up to $52,000, but not actually appropriating any funds. The Council's funding would be generated from increased court fees approved in HB 2287. The Legislature will meet in February, 2010, and hopefully pass a bill appropriating the $52,000 the Council has authority to spend. The funds are also contingent on whether the two tax measures the Legislature passed are referred to the ballot and repealed. The Council's funding future is somewhat unclear at this point.

Mr. Buckle pointed out that the bulk of the Council's budget is used to pay Council staff and that the staff puts in a large number of hours to keep the Council organized and running. He stated that he is committed to finding funding for the Council. He mentioned that Council member travel is also included in the budget, but asked that regular attorney members might consider not turning in an expense report for travel and funding that themselves if they are financially able. Prof. Peterson stated that the Oregon State Bar also provides $4,000 per year to the Council, and that those funds have been traditionally used for member travel expenses. Mr. Nebel stated that these funds are not in danger of being eliminated. Judge Miller asked whether, after the $4,000 is exhausted, the Council asks that any remaining travel expenses to be paid by the State. Prof. Peterson stated that the Council had done this last biennium and that the request is still pending. He stated that there is about $500 in Council funds from the Bar remaining for 2009, which will likely not be enough to pay all travel expenses through the end of the calendar year.

Mr. Bachofner asked whether members are able to donate any travel expenses received back to the Council if extra funds are needed. Mr. Cooper stated that there is currently no way for Council members to give money to the Council. He stated that it is important to show the Legislature that the travel funding is needed. Prof. Peterson stated that people should submit the forms and let the staff know if they do not absolutely need reimbursement so that the staff can put the form at the "bottom of the pile" for payment. He emphasized the importance of paying travel expenses for the public member and our judge members. Ms. Pratt asked whether the Council is able to provide educational programs to raise funds. Prof. Peterson stated that, by statute, the Council may accept donations but he does not believe it may charge for CLEs.

Ms. David stated that when she and Prof. Peterson testified before the Legislature to talk about funding, they emphasized how many volunteer hours Council members had put in and how many miles members had traveled because they feel it is such an important function. She stated that when Council members communicate with legislators throughout the year it would be good to emphasize that the Council travels to different districts throughout the state and puts in a great deal of time. Mr. Bachofner stated that a good way to frame the number of hours would be to include the billable hours equivalent.

B. Website Report (Ms. Nilsson)

Ms. Nilsson stated that the website report (Appendix D) was very brief and consisted mostly of informational attachments. She explained that the Council's website has Google Analytics set up so that we can view and analyze how many visitors the site has, where they come from, how much time they spend on each page, etc. The website received more than 1,000 unique visitors from December through August, with more than 4,000 unique page views. Visitors looked mostly at the agendas and minutes page, the Council promulgations page, and the legislative history of individual rules. Mr. Bachofner asked whether there was a link to the Council's page on the OSB website. Ms. Nilsson replied that there is and that it is also on the MBA's website and various others. Ms. David stated that, if Council members know of any other pages which should include a link to the Council's, to let Ms. Nilsson know. Mr. Buckle stated that the website has only been active a few years and that the Council's legislative history is now online from its inception, and that the site is very active and dynamic. He stated that the word needs to get out to the Bar that it is a valuable resource. Ms. Nilsson stated that the latest addition to the website is a document showing the Council's promulgated amendments and the legislative amendments to the ORCP and, since the *Oregon Rules of Court* book has not been published until March (and the rules become effective in January), this is a valuable resource for attorneys. Prof. Peterson stated that he has worked with West/Thomson to try to get something

published in a more timely fashion than *Oregon Rules of Court* and is willing to continue to work with them on this.

VIII. Old Business (Mr. Buckle)

No old business remained from last biennium.

IX. New Business (Mr. Buckle)

Mr. Buckle stated that suggestions for changes to the ORCP come from various sources, including Council members, the Council survey (that was sent out last biennium to five Bar sections and all circuit court judges), and the website. Prof. Peterson stated that the ideas included in the agenda were not screened prior to being placed there. He pointed out that the original agenda order was according to the source of the suggestion. Mr. Buckle stated that the New Business portion of the agenda had been re-ordered by the Executive Committee to better categorize the suggested amendments for discussion and potential formation of committees. The reorganization is reflected below. Mr. Buckle stated that he did not anticipate getting through all 39 suggestions at this meeting. He stated that a committee will not be formed for every suggestion but that all suggestions will be discussed by the Council. The goal for committee composition is at least one plaintiff's attorney, one defense attorney, and one judge.

Mr. Cooper asked if documentation on suggestions could be provided to members. Ms. Nilsson stated that if a suggestion came from the survey, it was brief and would likely not have any documentation attached, but that for suggestions that came with documentation, this documentation was included in the member meeting packets and will be included in the minutes.

A. **Discovery**

- ORCP 36B(2): disclosure of documents affecting coverage
- ORCP 36B/43A: limit number of discovery requests (like federal)
- ORCP 39: limit number of depositions and the number of hours per deposition
- ORCP 43B(2)(a): clarify how to match documents produced to the corresponding request
- ORCP 46: make discovery sanctions mandatory, not discretionary
- ORCP 46A(2): eliminate requirement to set out at the beginning of a motion to compel the items that a party seeks to discover - complaint: the current language requires the party producing documents to retype of all of the ORCP 43 RPD request

After a brief review of the above suggestions, a committee was formed as follows:

Committee

Mr. Bachofner
Mr. Cooper*
Judge Miller
Ms. O'Leary
Mr. Weaver

*Committee contact person (chair to be selected later by committee members)

The committee will report on any progress at the next meeting. Mr. Buckle stated that the committees will be ongoing and that a final report does not have to be submitted immediately. Prof. Peterson emphasized that the Council staff is available as a resource for committees for such items as rules from other jurisdictions, legislative history of the ORCP, etc.

B. **Uniform Interstate Depositions & Discovery Act**

- ORCP 38B&C: Uniform Interstate Depositions & Discovery Act (Appendix E)

Mr. Corson stated that he and Judge Holland participated in the Oregon Law Commission's work group on this issue, and that the work group has sent the Council its draft and suggestions with the idea that the Council will take a final look. He stated that this is the third Uniform Act, that Oregon's ORCP 38 reflects the first Uniform Act, and that Oregon never adopted the second. Ms. Pratt stated that the UTCR were amended in 2008 to include some of the updated forms under the act, and she wondered how the Council would interface with the UTCR Committee. Mr. Corson stated that the Council would keep the UTCR Committee informed of the Council's work. A committee was formed consisting of the following:

Committee

Mr. Corson*
Mr. Hansen
Judge Holland

*Committee contact person (chair to be selected later by committee members)

C. **Offers of Judgment and Other Rule 54 Issues**

- ORCP 54A: confidentiality agreement at settlement
- ORCP 54E: make offer of judgment mutual, i.e. allow plaintiff to make offer on plaintiff's claim (Appendix F)
- ORCP 54E(2): liberalize 3 day period for offers of judgment (Appendix G)
- ORCP 54A(1): explicitly allow dismissal of fewer than all claims/parties - not just "an action"

After a brief review of the above suggestions, a committee was formed as follows:

Committee

Mr. Bachofner
Justice Kistler
Ms. Leonard
Judge Rees*

*Committee contact person (chair to be selected later by committee members)

D. **Electronic Discovery & Filing**

- the OSB Procedure & Practice Committee has asked the Council to amend the ORCP to address the issue of electronically stored information (Appendix H)
- ORCP 43: make Oregon's electronic discovery like federal, California, Washington
- ORCP 9: to allow electronic filing (*see* HB 2814, section 1, Appendix I)

Ms. Pratt stated that the federal courts in Oregon have not been having a great deal of electronic discovery issues so she is not certain how much need there is to make sweeping changes to the ORCP. However, there have been a few sanctions in Oregon for failure to produce electronic discovery so there is a move afoot to better define electronic discovery in the ORCP. She stated that about 24 state jurisdictions have added electronic discovery definitions or rules similar to the FRCP in their state rules.

Mr. Cooper stated that the Chief Justice has an E-Filing Task Force and is promulgating rules at the UTCR level, and that the Council should be sure to talk to the Task Force before promulgating any rules to make sure it is not duplicating their work.

Committee

Mr. Campf
Ms. David*
Judge Hodson
Ms. Pratt
Judge Zennaché

*Committee contact person (chair to be selected later by committee members)

E. **Service & Filing**

- ORCP 7E: allow self-represented parties to effect service of summons by mail under ORCP 7D(2)(d)(I) to the same extent that attorneys have this authority (Appendix J)
- ORCP 9F: eliminate the 3 day service period for facsimile service; faxes confirmed received after 5:00 p.m. treated as hand delivered the next business day (Appendix K)
- ORCP 9C & D: address the potential conflict between ORCP 9C & D and Council's 2008 amendment of ORCP 54E (Appendix L)
- ORCP 7: clarify rules for personal service and require a court order for service by mail

After a brief review of the above suggestions, a committee was formed as follows:

Committee

Mr. Cooper*
Judge James
Judge Miller
Prof. Peterson (liaison)

*Committee contact person (chair to be selected later by committee members)

F. **Counterclaims in Domestic Relations Motions**

- Allow counterclaims to be authorized in responses to domestic relations motions (Appendix M)

Judge Zennaché stated that in some counties, judges are not allowing counterclaims in divorce cases allowing relief beyond what is sought by the petitioner. Judge James stated that this issue comes up in a show cause order on a modification. Judge Miller stated that domestic relations practice is unique in that one may file a generic motion and order to show cause and the affidavit gives the

particulars as to the relief requested. She said that, to the extent the subject is changing (e.g., from parenting time to support), if it was not pleaded it should not be allowed. Judge James stated that some counties are allowing it and some are not, and there is a question as to whether the ORCP allow such changes in the relief sought to be allowed without filing a completely separate document. She stated that the issue is more about the economy of a court's time because, if a judge states that a party should have filed the issue as its own, a separate hearing will have to be held. Mr. Cooper observed that the suggestion submitted states a desire to change the UTCR; he questioned whether it is actually an ORCP issue. Judge James stated that the committee can look into this and refer to the UTCR if appropriate.

A committee was formed consisting of:

Committee

Judge James
Judge Miller*
Ms. Pratt
Judge Zennaché

*Committee contact person (chair to be selected later by committee members)

G. **Default Judgment**

- ORCP 69B(1): whether clerks enter default judgments; reorganize (Appendix N)
- ORCP 71B(1)(c): allow intrinsic as well as extrinsic fraud as basis for relief from judgment (Appendix O)
- ORCP 71: make the standard for setting aside defaults mandatory, not discretionary

Prof. Peterson stated that the Council staff surveyed the circuit court clerks throughout the state regarding whether they enter default judgments and got a better than 50% response rate. The result was that some of the clerks who responded are entering defaults (one FED court and one small claims court). He stated that ORCP 69B(1) is a cumbersome section which needs reorganization, but also that the default judgment process could be clarified. Judge Miller asked whether there would be a problem if the authority granted to clerks was removed, and wonders about the 50% that did not respond. Ms. Pratt stated that some clerks are still entering default judgments and when an attorney wants to move to set aside the default, he or she cannot be sure whether it was entered by the clerk or judge and may not know whether to go to presiding court or to handle it in a

different way. Mr. Corson suggested that the committee survey the 50% that did not respond.

Judge Zennaché stated that he had just read the original rules, which did not have that distinction. Ms. Pratt stated that a motion to set aside a default in federal court is significantly cheaper than in state court due to arguing the difference between extrinsic and intrinsic fraud.

Committee

Ms. David*
Ms. Leonard
Prof. Peterson (liaison)
Ms. Pratt
Judge Zennaché

*Committee contact person (chair to be selected later by committee members)

H. **Time**

- Fast-tracking cases for the elderly/very sick
- Review time periods specified in ORCP and make most or all time periods divisible by 7, i.e. weeks
- ORCP 14: require at least 24 hours before ex parte motion presented

Discussion of this category was deferred to the October 10, 2009, meeting.

I. **Declaration in Place of Notarizing**

- ORCP 1E: allow declarations in place of notarized signatures

Discussion of this category was deferred to the October 10, 2009, meeting.

J. **Subpoenas**

- ORCP 55: procedures relating to subpoenas are confusing

Discussion of this category was deferred to the October 10, 2009, meeting.

K. **Service**

- ORCP 7D(4): question of why serving insurance carriers was moved to ORCP 69A(2)
- ORCP 7D(3)(a)(iv): correct the ORS reference [see HB 2284 - passed]
- Service via post office box

Discussion of this category was deferred to the October 10, 2009, meeting.

L. **Summary Judgment**

- ORCP 47: liberalize granting of summary judgments

Discussion of this category was deferred to the October 10, 2009, meeting.

M. **Attorney Fees**

- ORCP 68: attorney fees in certain actions such as probate & supplemental requests

Discussion of this category was deferred to the October 10, 2009, meeting.

N. **Federalizing ORCP**

- Pre-trial disclosures
- Making the ORCP more like the FRCP
- Adding expert discovery (*see* HB 3397, sections 21 & 22 and SB 680 sections, 21 & 22; see also ORCP 47E)
- Adding interrogatories

Discussion of this category was deferred to the October 10, 2009, meeting.

O. **Form/Fact Pleadings**

- ORCP 18A: allow Optional Form Pleadings for Personal Injury (and Other) Complaints
- ORCP 18A: enforce fact pleading

Discussion of this category was deferred to the October 10, 2009, meeting.

P. **Venue**

- Moving venue from ORS Chapter 14 to ORCP 11

Discussion of this category was deferred to the October 10, 2009, meeting.

Q. **Appearance but No Answer**

- ORCP 13B: how to handle a situation where there has been an "appearance" but no answer

Discussion of this category was deferred to the October 10, 2009, meeting.

R. Appointment of committees regarding any items listed in IX A-Q

S. Survey of Oregon attorneys from the Institute for the Advancement of the American Legal System at the University of Denver

Ms. Nilsson explained that the Institute had previously sent a draft of this survey to the Council to give to members for review and suggestions, and that the survey is now live at the following web address for attorneys to take:

http://gssw.qualtrics.com/SE?SID=SV_4JlEpLZciMRCsLO&SVID=Prod

T. Legislative Contacts (Ms. David)

Ms. David raised the issue of contacting legislators, which was not included on the agenda. She stated that last biennium each Council member contacted two or three legislators by e-mail with updates regarding Council actions. Since someone from the Council will be appearing before the Legislature again in February, it would be a good idea to continue with these updates. Since there are new Council members and new legislators, new contact persons need to be assigned. Ms. Nilsson will create a new matrix of legislators for the next meeting. Ms. David will prepare and distribute a sample e-mail to send to legislators.

X. Schedule Future Meeting Dates/Locations (Mr. Buckle)

A. Hand out calendar with potential schedule

Ms. Nilsson handed out a calendar for the biennium. After discussion, the Council chose dates for meetings through May of 2010. It was noted that the Council is required to strive to hold meetings in every congressional district. The next meeting will be held at 9:30 a.m. at the Oregon State Bar Center on October 10, 2009. Future meeting locations, as well as dates for the remainder of the

biennium, will be discussed at the October meeting when a full complement of members is present.

XI. Adjournment

Mr. Buckle adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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	ORCP 7D(4) ORCP 54A ORCP 54E ORCP 68 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 *e*Court 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 its 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

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at ~~such~~ the time and place fixed by the Chair after any appropriate consultation with the Executive Committee. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of such meeting shall be given personally by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of ~~the~~ special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, ~~SUB~~COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a period of one year at the first meeting of the Council following ~~October 1~~ September 1 of each year. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to ~~them~~ it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. ~~Sub~~Committees. The Chair may appoint such ~~sub~~committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. Such ~~sub~~committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee selected pursuant to ~~ORCP~~ ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a) ~~(last sentence)~~.

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. The Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. The LAC, after a request by a legislative committee, has presented

any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the Council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that such member speaks for the Council, but shall only identify himself or herself as ~~a member of the Council,~~ a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of required notice of meetings of the Council; preparation and disbursement of Council agenda; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the ~~State Court Administrator's office~~ Office of Legislative Counsel and/or the Oregon State Bar and shall be paid out only ~~by the State Court Administrator~~ as directed by the Council, the Executive

Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept in such office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgations, ~~modifications~~ amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar ~~and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the rules and amendments which have been proposed,~~ the exact language of the proposed promulgations, amendments, or repeals. ~~and notice that copies of any specific rules and amendments proposed may be secured upon request from the Administrative Office of the Council.~~

B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. ~~Thereafter,~~ Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the ~~tentative final action to be taken to amend or adopt rules of pleading, practice and procedure as directed by the Council~~ proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct. ~~and t~~

The Council shall meet and take final action to ~~modify~~ amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals ~~and rules~~ and any list of statutory sections affected thereby, together with explanatory comment, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this _____ day of _____, 2009.

Council on Court Procedures Timeline

Event Name	Start Date	Start Time	End Date	Place	Notes
Council Terms Expire; New Appointments Made	Aug 28 2009				
First Council Meeting of Biennium	Sep 12 2009	9:30 AM		Oregon State Bar	
Officers Elected	Sep 12 2009				
Regular Council Meetings	Oct 10 2009	9:30 AM	Jun 12 2010	Oregon State Bar or other county in Oregon	Usually 2nd Saturday of the month. Generally no meetings in July, August; or October, November in even numbered years
Council meets and votes to publish amendments to ORCP	Sep 11 2010				
Officers elected	Sep 11 2010				
Council publishes or distributes to the bar the exact language of all proposed promulgations	Nov 10 2010				At least 30 days prior to promulgation
Council publishes or distributes to the bar a notice and agenda for promulgation meeting	Nov 26 2010				At least 2 weeks prior to promulgation meeting

Council meets and votes to promulgate amendments to ORCP	Dec 11 2010	affirmative votes required
Legislative Advisory Committee elected	Dec 11 2010	
Council submits promulgations and statutory sections superceded thereby to legislature at beginning of regular session	Jan 07 2011	
Regular legislative session convenes	Jan 10 2011	Second Monday of January in odd-numbered years
Council publishes or distributes to bar notification of any changes to the language of any promulgation	Feb 07 2011	Within 60 days of promulgation meeting
Regular legislative session adjourns	Jun 30 2011	Approximate date (sessions typically last 6 months)
New ORCP effective	Jan 01 2012	

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 1/1/09 - 8/27/09

I. New Additions

A. Promulgated Amendments with Legislative Assembly Amendments

A document which includes both the Council's promulgated amendments and the Legislature's amendments can now be found on the website. It clearly outlines which changes were made by which agency and when those changes became or will become effective.

II. Website Statistics

A. Google Analytics

Attached are analytical reports detailing website visitors, geographical information, page views, keywords from search engines, and traffic sources. We received more than 1,000 unique visitors from throughout the state, and more than 4,000 page views in an 8-month period. Visitors spent the most time viewing the pages which include agendas and minutes; promulgated amendments; and legislative history of individual rules. The statistics seem to indicate that the website is being visited regularly and that visitors are actually reading the materials.

B. Inquiries

The Council received various inquiries during this 8-month period, most by e-mail. This included four inquiries asking for legal assistance (referred to appropriate legal resources); two inquiries from attorneys asking for interpretations of ORCP (referred to the website for legislative history); two administrative or procedural questions from state agencies (duly answered); and eight questions about ORCP legislative history (referred to the website or law library for documents).

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

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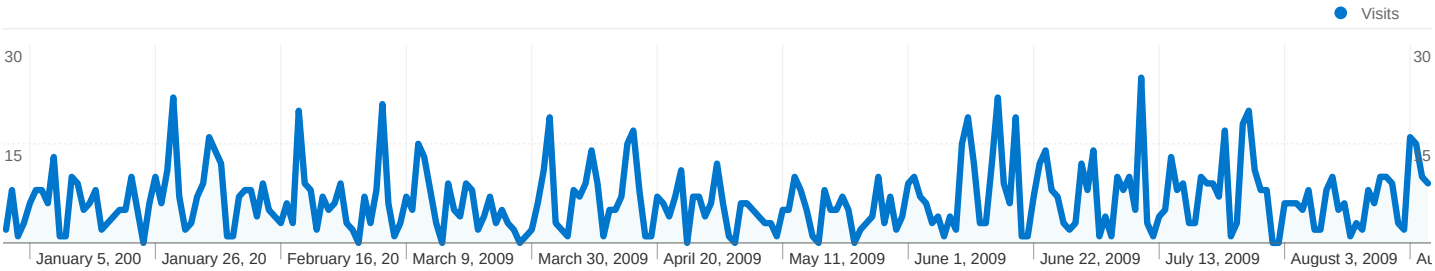
All Traffic Sources

Jan 1, 2009 - Aug 27, 2009
Comparing to: Site



All traffic sources sent 1,562 visits via 49 sources and mediums

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
1,562	2.87	00:02:02	70.29%	43.34%
% of Site Total: 100.00%	Site Avg: 2.87 (0.00%)	Site Avg: 00:02:02 (0.00%)	Site Avg: 70.29% (0.00%)	Site Avg: 43.34% (0.00%)

Source/Medium	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
(direct) / (none)	748	3.45	00:02:27	75.67%	33.02%
google / organic	488	2.47	00:01:47	63.93%	50.00%
ojd.state.or.us / referral	47	1.89	00:00:51	80.85%	61.70%
councilоncourtprocedures.org / referral	44	1.89	00:02:14	70.45%	59.09%
osbar.org / referral	38	2.32	00:01:17	84.21%	42.11%
lawlib.lclark.edu / referral	25	3.28	00:02:34	68.00%	24.00%
google.com / referral	19	1.42	00:00:22	100.00%	63.16%
yahoo / organic	15	2.07	00:00:45	93.33%	73.33%
thebesthosting.org / referral	14	1.00	00:00:00	0.00%	100.00%
live / organic	13	1.77	00:00:33	61.54%	76.92%

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Council on Court Procedures
September 12, 2009, Meeting
Appendix D-2

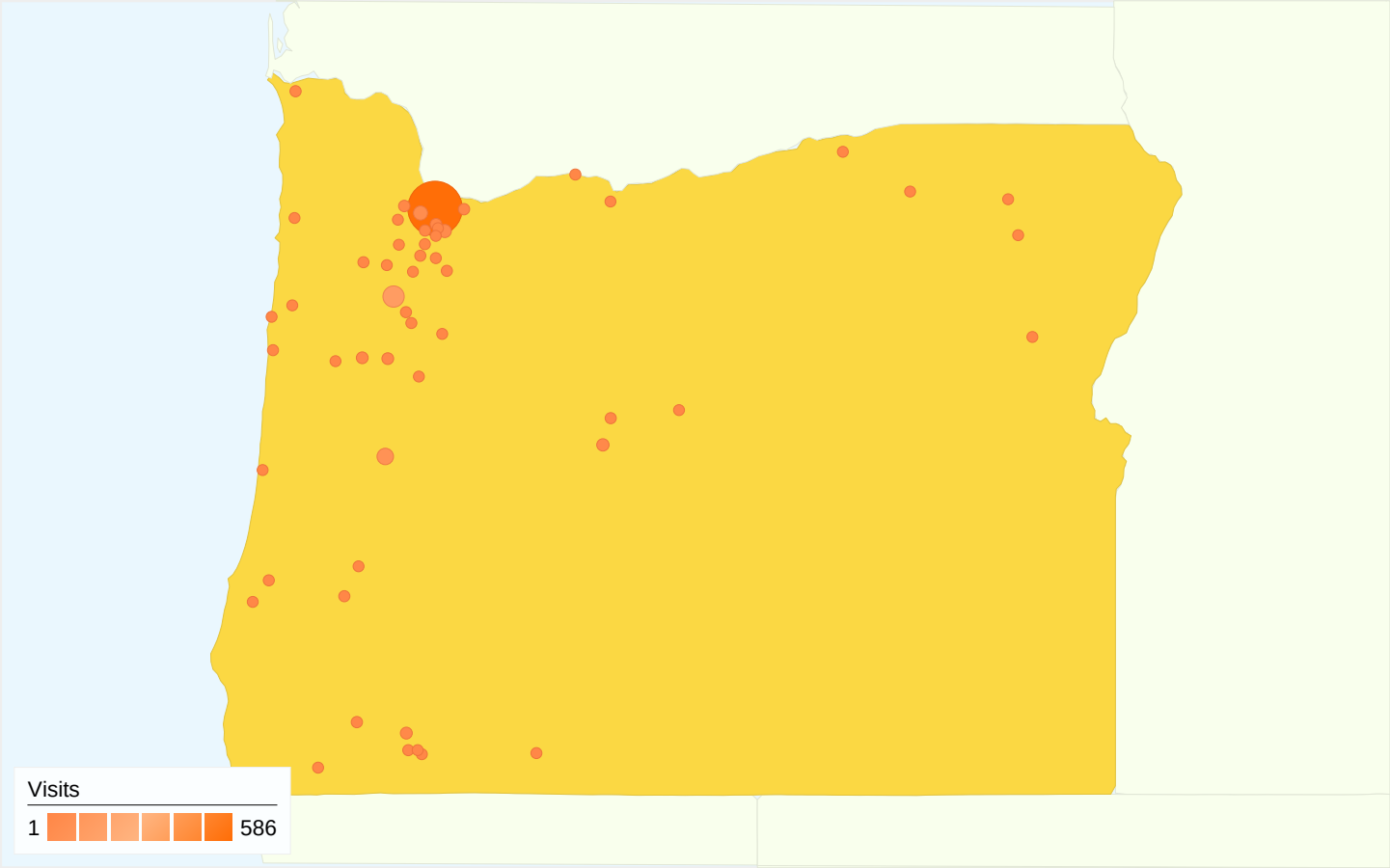
www.lclark.edu/~ccp

State Detail:

Oregon

Jan 1, 2009 - Aug 27, 2009

Comparing to: Site



This state sent 1,048 visits via 54 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
1,048	3.14	00:02:31	61.83%	36.64%
% of Site Total: 67.09%	Site Avg: 2.87 (9.41%)	Site Avg: 00:02:02 (24.06%)	Site Avg: 70.29% (-12.04%)	Site Avg: 43.34% (-15.46%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	586	3.08	00:02:30	52.73%	37.37%
Keizer	140	3.05	00:01:25	68.57%	30.71%
Eugene	76	3.34	00:02:27	76.32%	39.47%
Beaverton	44	2.36	00:02:50	72.73%	40.91%
Gladstone	31	7.06	00:12:45	29.03%	29.03%
Bend	20	3.70	00:02:13	80.00%	25.00%
Central Point	14	1.57	00:00:15	78.57%	64.29%
Corvallis	13	3.38	00:01:09	76.92%	38.46%
Lake Oswego	12	3.00	00:00:58	66.67%	33.33%

Albany	**12**	4.17	00:04:27	66.67%	33.33%
Washington County	**8**	2.62	00:03:39	75.00%	25.00%
Gresham	**7**	3.71	00:00:53	100.00%	42.86%
Tualatin	**6**	1.67	00:01:32	100.00%	50.00%
Grants Pass	**6**	3.00	00:00:36	83.33%	50.00%
Astoria	**5**	4.00	00:01:00	100.00%	60.00%
Redmond	**4**	1.50	00:00:51	50.00%	50.00%
Roseburg	**4**	2.50	00:05:19	100.00%	0.00%
Molalla	**4**	2.50	00:00:14	100.00%	0.00%
Coos Bay	**3**	2.33	00:00:29	100.00%	33.33%
Mcminnville	**3**	1.67	00:04:25	100.00%	33.33%
Medford	**3**	2.67	00:00:25	100.00%	33.33%
Salem	**3**	5.33	00:00:24	100.00%	0.00%
Hood River	**3**	3.00	00:01:02	100.00%	0.00%
Aurora	**3**	2.00	00:04:07	100.00%	33.33%
Newport	**3**	1.33	00:04:47	66.67%	66.67%

1 - 25 of 54

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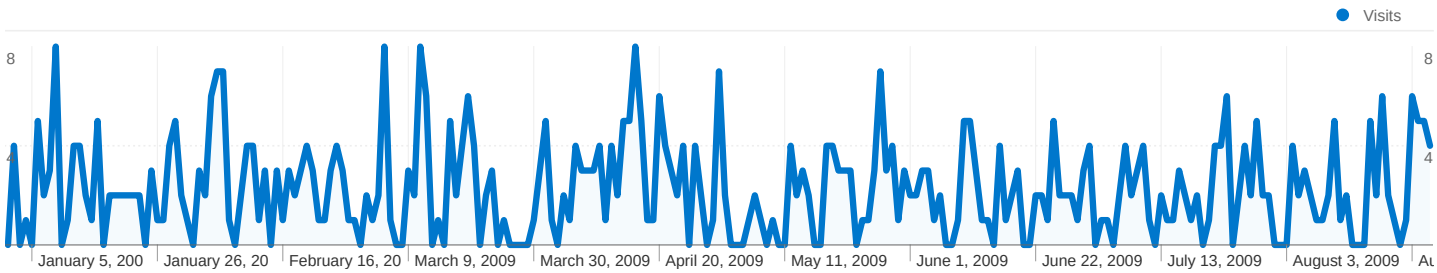
Keywords

Jan 1, 2009 - Aug 27, 2009

Comparing to: Site



Search sent 541 total visits via 208 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
541	2.42	00:01:41	64.88%	50.65%
% of Site Total: 34.64%	Site Avg: 2.87 (-15.68%)	Site Avg: 00:02:02 (-17.19%)	Site Avg: 70.29% (-7.70%)	Site Avg: 43.34% (16.85%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	85	3.54	00:02:53	51.76%	21.18%
council on court procedures	63	3.59	00:02:36	26.98%	11.11%
court procedures	44	1.18	00:00:02	100.00%	88.64%
court procedure	36	1.14	00:00:13	100.00%	91.67%
council on court procedures oregon	28	3.11	00:01:31	39.29%	14.29%
oregon rules of civil procedure	11	2.73	00:02:26	72.73%	36.36%
nilsson	10	3.20	00:06:47	0.00%	10.00%
oregon council on court procedure	9	2.89	00:01:23	11.11%	22.22%
oregon council court procedures	6	2.00	00:00:24	83.33%	33.33%
oregon court procedures	6	1.00	00:00:00	83.33%	100.00%
brooks cooper attorney	5	1.40	00:00:21	100.00%	80.00%
oregon rules of appellate procedure	4	1.25	00:00:23	100.00%	75.00%
civil court procedures	3	1.00	00:00:00	100.00%	100.00%
court prosedures	3	1.67	00:00:30	66.67%	66.67%
history of oregon rules of civil procedure	3	1.00	00:00:00	33.33%	100.00%
on court	3	1.00	00:00:00	100.00%	100.00%
orcp 67	3	1.00	00:00:00	66.67%	100.00%
oregon council on civil court procedure	3	3.67	00:05:25	33.33%	33.33%
oregon counsel on court procedures	3	6.67	00:16:24	66.67%	0.00%
"oregon council on court procedures"	2	2.00	00:00:16	100.00%	0.00%
alexander d libmann	2	1.00	00:00:00	100.00%	100.00%
alexander libmann portland	2	1.00	00:00:00	100.00%	100.00%

bb9d7f80243b991a475a341cc6501e7cff1440bc7ab51a8276e2d5fdabca5dd9	2	3.00	00:01:36	0.00%	0.00%
ccp oregon	2	4.50	00:06:01	100.00%	0.00%
civil court procedure	2	1.50	00:00:01	100.00%	50.00%
					1 - 25 of 208

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Country/Territory Detail:

United States

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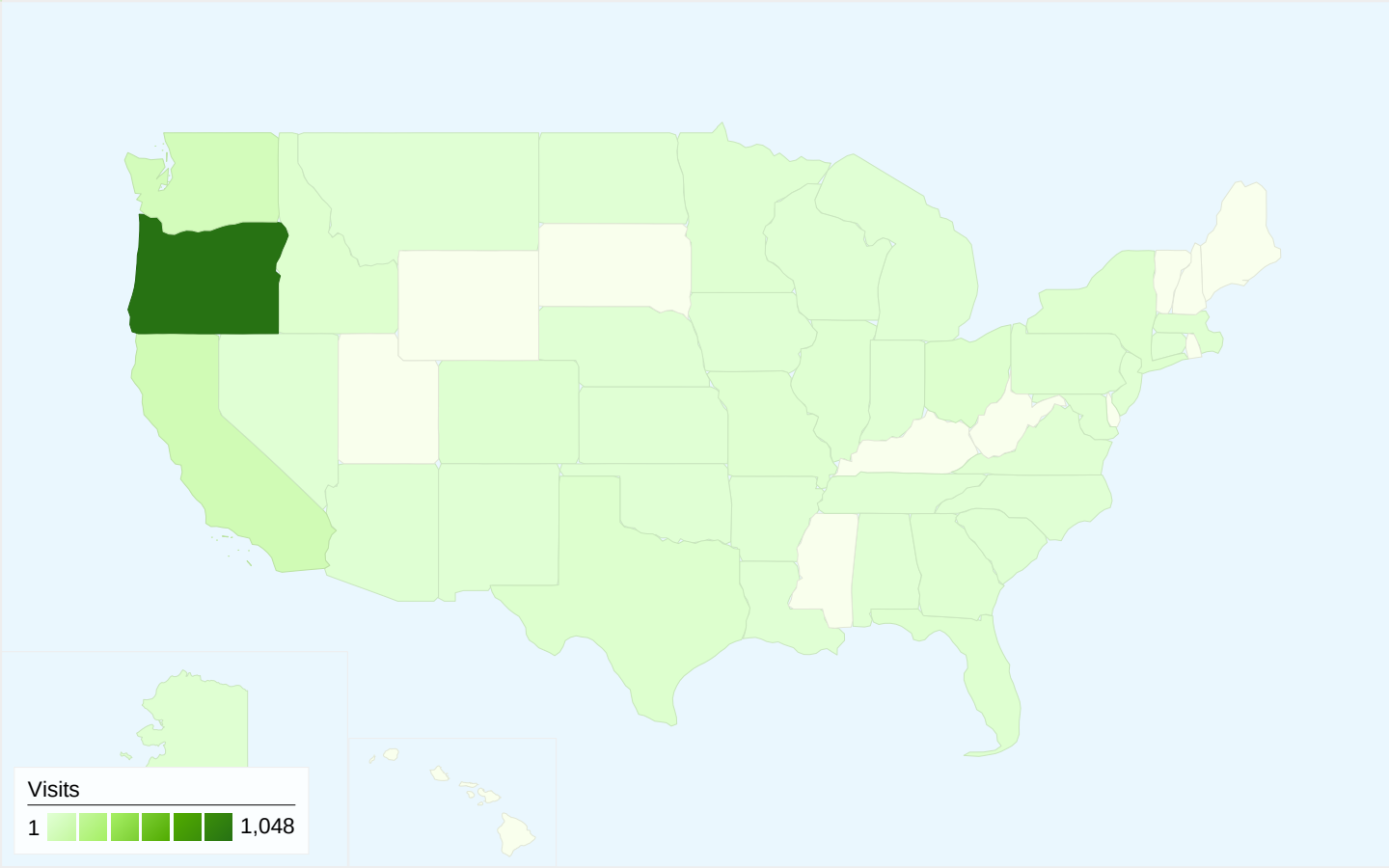

This country/territory sent 1,467 visits via 39 regions

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
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% of Site Total: 93.92%	Site Avg: 2.87 (3.39%)	Site Avg: 00:02:02 (5.29%)	Site Avg: 70.29% (-0.22%)	Site Avg: 43.34% (-5.95%)

Region	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Oregon	1,048	3.14	00:02:31	61.83%	36.64%
California	97	2.70	00:01:47	88.66%	49.48%
Washington	80	2.61	00:00:56	81.25%	40.00%
Ohio	20	2.25	00:00:46	80.00%	55.00%
Texas	20	2.95	00:01:14	95.00%	55.00%
New York	18	2.33	00:01:23	100.00%	61.11%
Idaho	18	2.94	00:02:11	94.44%	22.22%
Florida	15	2.13	00:01:04	100.00%	73.33%
Colorado	13	3.31	00:02:18	92.31%	30.77%

Missouri	**11**	1.55	00:00:05	100.00%	81.82%
Massachusetts	**11**	1.64	00:00:42	90.91%	72.73%
Alaska	**10**	3.50	00:00:20	100.00%	20.00%
Georgia	**10**	3.00	00:00:19	100.00%	50.00%
Minnesota	**8**	3.75	00:03:36	100.00%	25.00%
Illinois	**8**	2.12	00:00:35	87.50%	75.00%
Pennsylvania	**8**	2.00	00:00:34	87.50%	62.50%
South Carolina	**7**	1.00	00:00:00	100.00%	100.00%
Arizona	**7**	2.43	00:00:22	100.00%	28.57%
Virginia	**6**	3.67	00:01:12	100.00%	16.67%
Maryland	**5**	1.00	00:00:00	100.00%	100.00%
New Jersey	**5**	2.60	00:02:17	80.00%	40.00%
North Carolina	**4**	2.50	00:00:18	100.00%	25.00%
Oklahoma	**4**	1.75	00:00:03	100.00%	75.00%
District of Columbia	**4**	3.00	00:00:43	100.00%	50.00%
Kansas	**3**	1.00	00:00:00	100.00%	100.00%

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Content by Title

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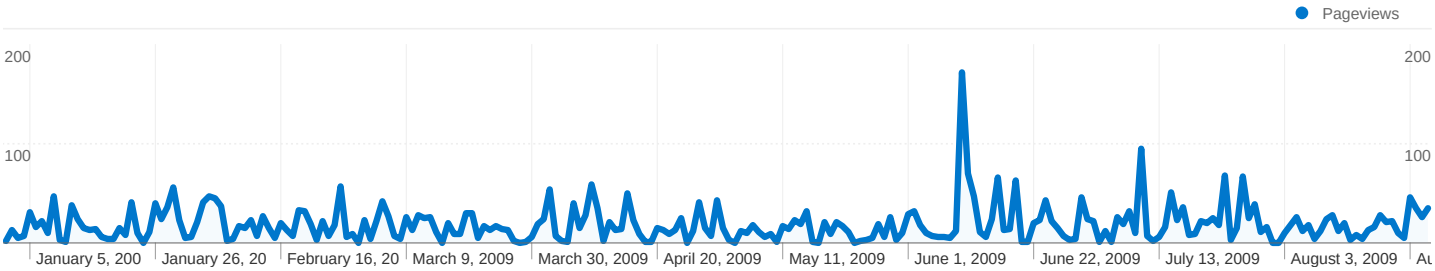

38 page titles were viewed a total of 4,482 times

Content Performance

Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
4,482	2,860	00:01:05	43.34%	34.85%	$0.00
% of Site Total: 100.00%	% of Site Total: 100.00%	Site Avg: 00:01:05 (0.00%)	Site Avg: 43.34% (0.00%)	Site Avg: 34.85% (0.00%)	Site Avg: $0.00 (0.00%)

Page Title	Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
Council on Court Procedures	2,247	1,191	00:00:43	37.64%	35.47%	$0.00
Council on Court Procedures - Legislative History of Rules	339	272	00:02:23	65.96%	50.44%	$0.00
Council on Court Procedures - Officers, Members & Staff	261	200	00:01:07	70.00%	42.15%	$0.00
Council on Court Procedures - Resources	221	170	00:01:16	60.00%	39.37%	$0.00
Council on Court Procedures - Contact Us	181	122	00:00:35	75.00%	25.41%	$0.00
Council on Court Procedures - Agendas & Minutes	171	131	00:02:51	55.56%	35.67%	$0.00
promulgated_amendments	154	121	00:02:46	63.33%	42.21%	$0.00
Amendments Published for Comment	130	99	00:00:56	33.33%	27.69%	$0.00
Council on Court Procedures - Order Materials	89	63	00:00:31	56.25%	29.21%	$0.00
Council on Court Procedures - Meeting Schedule	87	68	00:01:06	100.00%	19.54%	$0.00

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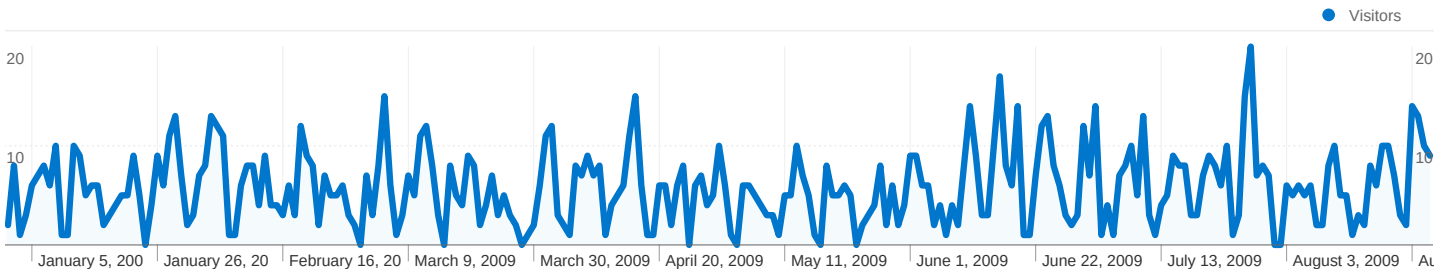
Visitors Overview

Jan 1, 2009 - Aug 27, 2009

Comparing to: Site



1,148 people visited this site

1,562 Visits

1,148 Absolute Unique Visitors

4,482 Pageviews

2.87 Average Pageviews

00:02:02 Time on Site

43.34% Bounce Rate

70.29% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	1,093	69.97%
Firefox	373	23.88%
Safari	53	3.39%
Chrome	26	1.66%
Opera	7	0.45%

Connection Speed	Visits	% visits
Unknown	429	27.46%
T1	368	23.56%
Cable	364	23.30%
DSL	322	20.61%
Dialup	64	4.10%

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA

July 27 – August 3, 2007

WITH PREFATORY NOTE AND COMMENTS

April 3, 2008

ABOUT NCCUSL

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL), also known as Uniform Law Commission (ULC), now in its 116th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

DRAFTING COMMITTEE ON UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

RICHARD B. LONG, P.O. Box 2039, 20 Hawley St., East Tower, Binghamton, NY 13902, *Chair*
FRANCISCO L. ACEVEDO, P.O. Box 9023905, San Juan, PR 00902-3905
GEORGE H. BUXTON, III, 31 E. Tennessee Ave., Oak Ridge, TN 37830
M. MICHAEL CRAMER, 4 Whisperwood Ct., Rockville, MD 20852
PATRICK DEBLASE, 8648 Wilshire Blvd., Beverly Hills, CA 90211-2910
TIMOTHY D. DEGIUSTI, 204 N. Robinson, Suite 1550, Oklahoma City, OK 73102
HARRY D. LEINENWEBER, U.S. District Court, 219 S. Dearborn St., Suite 1946, Chicago, IL 60604
HAROLD E. MEIER, Box 491, Dayton, WY 82836
FREDERICK D. NELSON, Hamilton County Courthouse, 1000 Main St., Rm. 320, Cincinnati, OH 45202
DAVID T. PROSSER, JR., P.O. Box 1688, Madison, WI 53701
KAREN ROBERTS WASHINGTON, 2929 Carlisle, Suite 250, Dallas, TX 75204
THOMAS A. MAUET, University of Arizona, James E. Rogers College of Law, P.O. Box 210176, Tucson, AZ 85721-0176, *Reporter*

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*
DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LIN HUGHES, 1300 Capitol Center, 919 Congress Ave., Austin, TX 78701, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

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UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

> *Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.*

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

> *[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.*

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

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In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter

rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

Comment

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This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

SECTION 3. ISSUANCE OF SUBPOENA.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

(A) incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistence to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial

state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

SECTION 4. SERVICE OF SUBPOENA. A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

SECTION 8. APPLICATION TO PENDING ACTIONS. This [act] applies to requests for discovery in cases pending on [the effective date of this [act]].

SECTION 9. EFFECTIVE DATE. This [act] takes effect ___.

Dear Mr. Peterson:

The following is the proposed changes requested in ORCP 54E (offers of compromise). The proposed language will make 54E mutual in its force and effect and give both Plaintiffs and defendants equal leverage to attempt to settle cases that should be settled. Currently, the statute only unfairly affords a defendant to give an offer of compromise and to benefit from plaintiff's rejection of a reasonable offer. There is no such opportunity for a plaintiff to do the same.

ORCP 54E (proposal):

(1) Except as provided in ORS 17.065 through 17.085, any party may, at any time up to 20 days before trial, serve an offer in writing upon any other party to allow judgment to be entered in accordance with the terms and conditions stated at that time. The offer shall not be filed with the court clerk or provided to any assigned judge, except as set forth in subsections E(2) and E(3) below.

(2) If the offer is accepted within 10 days after it is served, the offer with proof of acceptance shall be filed with the clerk and judgment shall be entered accordingly. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees, if applicable, shall be entered in addition, either as a part of the judgment or as a supplemental judgment as provided in Rule 68.

(3) If the offer is not accepted within 10 days after it is served and filed with proof of acceptance at least five days before trial, it shall be deemed withdrawn, and cannot be given in evidence at trial; notwithstanding ORCP 9C, such offer may be filed with the court only after the case has been adjudicated on the merits and only if the judgment is not more favorable to the party upon whom the offer was served.

(4) If an offer made by a party against whom a claim is asserted is not timely accepted and the party asserting that claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

(5) If an offer made by a party asserting a claim is not timely accepted and the party against whom a claim is asserted fails to obtain a more favorable judgment, the court shall require the party against whom a claim is asserted to pay a reasonable sum to cover charges for the services of expert witnesses for the party asserting a claim that were incurred from the time of the service of the offer, and in addition, the court may, in its discretion, award enhanced prevailing party fees and prejudgment interest at the legal rate of interest from the date of the offer. [End]

The proposed statute, if enacted, can be an effective tool that can put some teeth into all reasonable settlement offers, made by plaintiffs or defendants, and add a cold slice of reality into a case for unreasonable rejection of any good faith offer. Currently, as a plaintiff's lawyer, I have no such opportunity to make a bottom line offer and convey a serious desire to go to trial, if the offer is not accepted. Often, defense sees my bottom line offer as a ceiling and a sign of weakness, encouraging them not to settle. A typical response by defense to a reasonable and even an unreasonably low offer is, to counter by cutting down the offer in half or even more or to just treat the offer as a ceiling for the remainder of the litigation. As a result, Plaintiffs often learn to unreasonably inflate their bottom line, in hopes of getting a bottom line number which may deter the other side from wanting to negotiate any further. With the new proposed mutuality in the 54E, plaintiffs will be able to give their bottom line offers and at the same time send a clear signal that they are serious and getting ready for trial, if the offer is not accepted. Defense faced with a reasonable offer of settlement and an imminent threat of a trial with serious consequences, would and often does take the offer serious and settles.

The proposed language also extends the response time to 10 days, instead of the current 3 days. Three days is just not enough time for plaintiff's lawyer to receive the offer, get a hold of a client who may be unavailable for a day or two and to meet with that client to explain the offer and the consequences and get consent in time to respond to the offer. Additionally, having the offer sent 20 days prior to the trial date with a 10 day deadline, assures that the settlement would happen, if at all, prior to parties spending substantial amount of time and money preparing for trial. In my experience, 10 days prior to the trial is where parties spend substantial amount of time and resources preparing, filing and serving pre-trial documents, witness subpoenas, witness and expert travel arrangements, etc.

California, for decades now, has had a mutual statutory offer of compromise (C.C.P. § 998) which affords both plaintiffs and defendants the opportunity to make good faith and reasonable offers of compromise with consequences for rejection of a reasonable offer with a 30-day deadline. In addition to practicing law in Oregon, I have practiced employment law in California for over 15 years and have successfully used statutory offers of compromise to settle many plaintiffs' cases that would not have otherwise settled without protracted and expensive litigation. In 2002, when I first began practicing here, I tried giving defendants reasonable bottom line offers but time after time, it was either ignored, cut down to a nuisance amount, or later used as a ceiling in my cases. I have since stopped giving such offers and I know my experience is not unique.

Again, I urge you to consider making 54E mutual in its language and force so that it would afford

plaintiffs, much like defendants, an opportunity to try to resolve their cases early in the litigation process. I assure you that the outcome will lead to more settlements of cases that should settle but are currently clogging our court system.

Thank you for your consideration and please let me know if I can assist in providing more information regarding the proposed changes.

Mitra Shahri

MITRA LAW GROUP

Employment Law, Exclusively Representing Employees

350 Riviera Plaza

1618 SW First Avenue

Portland, OR 97201

Tel (503) 243-4545

Fax (503) 222-7288

www.unlawfultermination.com

DANNY LANG,
OSB #79007 & CSB #78838

GLINDA SIFERS,
Litigation Manager

Law Offices of
DANNY LANG
Attorney at Law

140 S. STATE STREET
SUTHERLIN, OREGON 97479
TELEPHONE (541) 459-9898
FAX (541) 459-1230
attorneylang@paccomm.net
Taxpayer I.D. #1005536

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***.

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

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

MUSTAFA T. KASUBHAI
CIRCUIT COURT JUDGE

Phone (541) 682-4256
Fax (541) 682-3172

August 28, 2009

VIA FIRST CLASS MAIL

Mr. Mark A. Peterson
Oregon State Bar Council on Court Procedures
Lewis & Clark Legal Clinic
310 SW 4th Avenue, Suite 1018
Portland, OR 97204

RE: Council on Court Procedures' Consideration of ORCP Amendments Regarding Electronically Stored Information

Dear Mr. Peterson,

This letter is sent on behalf of the Oregon State Bar Procedure and Practice Committee (the "P&P Committee"). Our Committee is charged with, among other things, addressing current issues that affect civil practitioners. In the last year, the P&P Committee has discussed the need for the Oregon Rules of Civil Procedure to adopt rules governing the preservation, retention, and production of electronically stored information ("ESI"). We understand that the Council on Court Procedures has previously considered such changes to the Oregon rules, but has ultimately concluded to take no action. The P&P Committee urges the Council to reconsider its position.

The Federal Rules of Civil Procedure adopted rules that became effective December 1, 2006, almost three years ago, that address the discovery of ESI. Thereafter, the majority of states enacted ESI rules. As of the date of this letter, thirty-one states have specifically addressed ESI in their procedural rules: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Tennessee, Texas, Utah, Virginia, and Wyoming. This is clearly the trend across the country and the time has come for Oregon to take similar action.

The lack of any rules governing the discovery of ESI in state court actions has proven problematic for practitioners, clients, and judges. For example, a committee member in an accounting malpractice case where information was altered electronically, moved to compel the production of ESI. Without any rules, the judge believed his hands were tied and did not have any authority to order the production of the information. Without any direction in the rules,

parties are confused about their obligations regarding the preservation, retention, and production of ESI and the courts are also without guidance to resolve ESI disputes among parties.

To address this problem, the P&P Committee recommends that the Oregon Rules of Civil Procedure be amended to incorporate and address ESI to clearly delineate the obligations of all parties regarding the discoverability and production of ESI, and give courts a framework to resolve all ESI related disputes. Such amendments could be modeled, in part, on the language and approaches adopted in other states. The P&P Committee would be happy to collaboratively work on appropriate legislation to make these changes to the Oregon Rules of Civil Procedure.

Thank you for your consideration of this proposal. Please do not hesitate to contact the P&P Committee with any questions or concerns.

Sincerely,

Mustafa T. Kasubhai
Chair, OSB Procedure and Practice Committee

House Bill 2814

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Requires that clerk of court accept for filing document that is faxed to court by attorney, or that is otherwise scanned and sent to court in electronic form by attorney, if attorney files statement that certifies that scanned version is true copy of original and that attorney will retain original for period of at least _____ years, or for such shorter time as court may provide for.

A BILL FOR AN ACT

Relating to court filings; amending ORS 1.006 and ORCP 9 E.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 9 E is amended to read:

E Filing with the court defined. **(1)** The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or document the time of day, the day of the month, the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless the name of the court, the title of the cause and the document, the names of the parties, and the attorney for the party requesting filing, if there be one, are legibly endorsed on the front of the document, nor unless the contents thereof are legible.

(2) The clerk of the court or other person exercising the duties of that office shall receive for filing any document that is sent by telephonic facsimile communication device to the court by an attorney, or that is otherwise scanned and sent to the court in electronic form by an attorney, if the attorney files with the document a statement that certifies that the scanned version is a true copy of the original and that the attorney will retain the original for a period of at least _____ years, or for such shorter time as the court may provide by rule or order. The statement may be sent by telephonic facsimile or otherwise scanned and sent to the court in electronic form.

SECTION 2. ORS 1.006 is amended to read:

1.006. (1) The Supreme Court may prescribe by rule the form of written process, notices, motions and pleadings used or submitted in civil proceedings and criminal proceedings in the courts of this state. The rules shall be designed to prescribe standardized forms of those writings for use throughout the state. The forms so prescribed shall be consistent with applicable provisions of law and the Oregon Rules of Civil Procedure. The form of written process, notices, motions and pleadings submitted to or used in the courts of this state shall comply with rules made under this section.

(2) The Supreme Court may prescribe by rule the manner of filing of pleadings and other papers submitted in civil proceedings with the courts of this state by means of a telephonic facsimile com-

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

LC 3069

munication device. The manner so prescribed shall be consistent with applicable provisions of law and the Oregon Rules of Civil Procedure.

(3) The Supreme Court shall prescribe by rule the manner of filing of documents by attorneys under ORCP 9 E(2).

Proposal for Amendment to Oregon Rules of Civil Procedure

July 20, 2009
Hon. Maureen McKnight
Multnomah County Circuit Courts
1021 SW Fourth Avenue
Portland, OR 97204
maureen.mcknight@ojd.state.or.us
503/988-3986

I am requesting that the Council consider an amendment to ORCP 7E to allow self-represented parties to effect service of summons by mail under 7D(2)(d)(i) to the same extent that attorneys have this authority.ORCP 7E currently restricts any party to an action from serving summons. The rule provides a limited exception for attorneys for parties, allowing such attorneys to effect service pursuant to ORCP 7D(2)(d)(i). This latter rule provides that when allowed by statute or rule, service of summons may be done by first class mail with return receipt. Case law clarifies that a receipt actually confirmed (signed) by the Respondent is needed. Someone must then sign a Proof of Service to document these actions for the court and probably to identify the signed receipt (attached as an exhibit or otherwise). The rule appears to disallow a self-represented party from taking this action. Give the rates of self-representation -- where in family law they exceed 80% -- applicability of the rule rule seems to warrant re-examination.If concerns exist regarding the veracity or formality of the self-represented litigant's statement regarding mail service, an ORCP 1E declaration could be required on the Proof of Service in this circumstance. The opportunity for fraud seems unlikely, however: mailed service of summons involves submission of the postal receipt bearing the respondent's signature.ORCP 7F(2)(a)(i), prescribing the content of the Certificate of Service, does not currently address the attorney-doing-mail exception in ORCP 7D(2)(d)(i), so it would appear that no amendment would be needed in section F merely to address an expansion to self-represented litigants.Thank you for considering my request.

Proposal for Amendment to Oregon Rules of Civil Procedure

Oct 28, 2008
Hon Janice Wilson
Multnomah County Circuit Courts

ORCP 9F provides, among other things, that if service is made by fax, such service is considered the equivalent of service by mail, triggering the extra 3 days for response provided by ORCP 10C. An explanation of the reason for this rule is that before there was a rule dealing expressly with faxes, most lawyers and judges treated service by fax the same as hand-delivery, but some lawyers abused this and sent faxes after 5:00 p.m. -- on Fridays, no less. This prompted the adoption of the rule. An extra three whole days seems excessive to Judge Wilson. She runs into this issue when calculating the time that responses and replies to a motion are due. If both motion and response are faxed, it adds 6 days to the whole process Fax machines can confirm receipt. She suggests modifying the rule to say that faxes confirmed as received before 5:00 p.m. on a business day are the same as hand delivery that day and others are treated as hand delivered the next business day. Lawyers would then have to be more specific in the certificate of service.

-----Original Message-----
From: owner-cocp-list@lclark.edu [mailto:owner-cocp-list@lclark.edu] On Behalf Of Eugene Buckle
Sent: Thursday, December 04, 2008 11:26 AM
To: Mark Peterson; Martin E. Hansen
Cc: cocp-list@lclark.edu
Subject: RE: conflict between Rule 9C and our proposed Rule 54 E(3) ?

Mark and All

The only reason I caught this issue is because it is my partner's case and because she gets her atty fees (which of course makes her, and me indirectly, happy), I decided to read the opinion hot off of the presses.

Mark--You raise a good point about making any amendment, however slight, to another Rule now without publishing. I don't think we can.

I also think that the concern I expressed is only that--a concern about a perceived inconsistency btw 9B and our proposed 54E. Who knows, maybe it will never come up. I'm inclined to go forward with promulgating 54E, as published, and then we can address Rule 9 next go-around. Also by then we may have heard (or not) of a problem.

Gene Buckle
Admitted in Oregon and Washington
Cosgrave Vergeer Kester LLP
805 S.W. Broadway, 8th Floor
Portland, Oregon 97205
Direct dial: 503/219-3807
Receptionist: 503/323-9000
Fax: 503/323-9019
E-mail; ebuckle@cvk-law.com.

-----Original Message-----
From: Mark Peterson [mailto:mpeterso@lclark.edu]
Sent: Wednesday, December 03, 2008 10:49 PM
To: Martin E. Hansen
Cc: Eugene Buckle; cocp-list@lclark.edu
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*
> > *1148 N.W. Hill St. *
> > *Bend, OR 97701*
> > *Phone 541-389-5010*

> > *Fax 541-382-7068*
> > *meh@francishansen.com* <mailto:meh@francishansen.com>
> >
> >

> > *From:* owner-cocp-list@lclark.edu [mailto:owner-cocp-list@lclark.edu]

> > *On Behalf Of *Eugene Buckle
> > *Sent:* Wednesday, December 03, 2008 11:15 AM
> > *To:* cocp-list@lclark.edu
> > *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
> >
> > 805 S.W. Broadway, 8th Floor
> >
> > Portland, Oregon 97205
> >
> > Direct dial: 503/219-3807
> >
> > Receptionist: 503/323-9000
> >
> > Fax: 503/323-9019
> >
> > E-mail; ebuckle@cvk-law.com <mailto:ebuckle@cvk-law.com>.
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-- Mark A. Peterson Clinical Professor Lewis and Clark Legal Clinic Executive Director Council on Court Procedures 503-768-6500

Proposal for Amendment to Oregon Rules of Civil Procedure

February 3, 2009
Russell Lipetzky
Russell Lipetzky, Attorney at Law
495 State St. Suite 410
Salem, OR 07301
rlipetzky@qwestoffice.net
(503) 362-1372

Greetings - I write as a family law practitioner of 20+ years and a former chair of both the OSB Family Law Section and the UTCR Committee. In a domestic relations proceeding there are prejudgment motions (such a motion for temporary relief under ORS 107.095) and postjudgment motions (such as for a modification under ORS 107.135) that are initiated with a motion, supporting affidavit and order to appear and show cause. More often than not such a motion is responded to with an objection and -- and here is the rub -- one or more counterclaims.In some judicial districts (such as Marion) it is common and accepted practice to include counterclaims in the same pleading that responds to the motion. There is not any requirement or expectation that the responding party, in order to assert a counterclaim, obtain their own separate show cause order. In fact, doing so would be viewed as odd and not an efficient use of client or court resources. In other judicial districts (such as Washington) the court does not recognize a counterclaim that is not brought with a separate motion, affidavit and show cause order. As I understand the rationale, the court believes the lack of any specific authorization in the ORCP's for the inclusion of a counterclaim in a response to a motion precludes the inclusion of such a counterclaim and that "dueling show cause orders" are required.I thought a UTCR change might solve the problem, but as noted above it appears the lack of authorization in the ORCP's is the sticking point for the courts. Many practitioners have given me feedback confirming that the lack of judicial consistency is a problem. Universally, those practitioners have urged an amendment or clarification that inclusion of a counterclaim be allowed with a response without the need to obtain a separate show cause order. For what it is worth, here is proposed language:"A response to a domestic relations pre-judgment or post-judgment motion requiring a show cause order may include a counterclaim. A show cause order is not required to place the counterclaim at issue."If helpful, I can provide additional correspondence and comments on this topic that were generated via the Family Law Section's list serve.Thank youRussell Lipetzky

Hello Shari -

I recently submitted a proposal to amend the ORCP. The issue is the filing of counterclaims to motions in family law cases. In response to a posting on the OSB Family Law list serve and the comments to that posting I proposed to amend the UTCR's. That proposal is now one to amend the ORCP. At Don Corson's request, here are the comments I received in response to the proposal. Because the comments were sent to me privately and I haven't asked anyone about rebroadcasting them, I have reprinted them here without attribution to the authors. I am also providing the original list serve posting.

Here is the list serve posting that first raised the issue:

Ex-wife was served with a Show Cause Motion, Order and Affidavit by former husband's attorney asking for additional parenting time. Wife's lawyer filed the required responsive pleading and added as a "Cross claim" a prayer for a change from Joint Custody to Sole Custody and for fees and costs. In (what amounted to a Judicial Settlement Conference) the Judge agreed it was proper to limit the husband's claims to those made in his Show Cause Order but also denied wife's cross claim stating that there is no statutory authority for a cross claim in a post-decree Show Cause.

He suggested that the served party should do their own "dueling" Show Cause Order for the same time and place if additional issues are to be contested. I have used this procedure in other cases, but a cross claim seemed a better method. My questions are:

A. Do you all agree that there is not way to cross claim?

B. If so, can we amend some statute or court rule to allow?

The above posting generated a slough of comments from people who had the same problem, as well as postings from others who indicated that in their judicial district there would not have been a problem. I then posted the following:

As others have noted, Emily intends, I believe, to refer to a counterclaim, not a cross-claim. Given the apparent lack of judicial consistency in the treatment of counterclaims, I am interested in hearing from anyone who thinks an amendment to the UTCR's something like as stated below

would be helpful (or unnecessary, improper or otherwise just a bad idea). Reply off list is just fine.

"A response to a domestic relations pre-judgment or post-judgment motion requiring a show cause order may include a counterclaim. A show cause order is not required to place the counterclaim at issue."

My request for feedback on the proposal generated the following comments, which I have not edited:

"I like your proposal."

"Russ: My two cents worth (for now at least) is that such an amendment would be a good idea."

"In the 7th Judicial District (Wasco, Sherman, Hood River and Gillaim counties) my experience is that any issue raised as a counter-claim in a pendente lite proceeding or modification proceeding is considered by the court - and sometimes matters not raised by any pleadings. No objection to the procedure has been raised by adverse parties or noted by the court. So, it hasn't been an issue here. My only concern about raising this as a legislative matter is if it raises awareness that it might be a way to demand more filing fees from domestic relations cases."

"In that the language of the UTCRs seem to be causing the issue clarification would be a good idea."

"I like it!"

"Russ - In Washington County the judges have refused to hear counterclaims filed in response to show cause motions, citing not the UTCRs but the ORCPs which allow for a response to a motion, but not a counterclaim. I have seen people include counter-motions (novel but not part of the UTCRs or the ORCPs). I think we would all appreciate a way to simplify the response and "counterclaim" process when it comes to show cause motions, but it would require a change to the ORCPs as well as the UTCRs."

"I would vote for that amendment. This office regularly and routinely asserts counterclaims in S/C matters and so far (knock on wood) has not had a problem with that. However, there are at least two attorneys we reguarly deal with whose position is that a separate S/C must be filed in response to assert the counterclaims. I've looked through the ORS and UTCRs without any definitive conclusion, so clarification in the statute or rules would be helpful."

"I think your amendment is common sense."

"I think it would be a good idea to make a modification like the one you suggest. It should have some additional language to make clear that whether an affidavit is required in order to bring the relief sought by the counerclaiming party. UTCR 8.050(1) requires the moving party has to provide an affidavit witht the factual basis for the claim. The responding party asserting a counterclaim ought to have the same responsibility to provide an affidavit with the factual basis for whatever relief is being sought via counterclaim."

"Russ: Excellent idea. Let's go for it!"

"Having also had a WA Judge conclude counterclaims were not permitted in show causes I agree an amendment clarifying would resolve the problem. I think we all agree allowing counterclaims is the sensible way of handling these issues as neatly as possible without excess fees and litigation."

"Given the amount of variation in judicial treatment, and wide swing in outcomes, I think it would be very helpful to have a UTCR along the lines you have drafted."

"Works for me. Of course we all do it."

"I think amending the UTCR as you have suggested is a good idea."

"I think it is a helpful idea and very worth consideration."

Thanks Shari, please let me know if you need anyting else from me.

Russ

_____

Russ Lipetzky, Attorney at Law

Russ,

I just saw the e-mail from Shari, and agree that this will get the ball rolling. If the Commission has additional concerns, I hope I can re-contact you for any clarification they may seek. Additionally, I will volunteer to be on the committee that reviews the request.

Warm regards,

Mary M. James

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A Entry of order of default.

A(1) In general. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. 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*] **written notice, in the form prescribed by UTCR 2.010, of the application 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. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, declaration, or otherwise[,] and, upon such a showing, the clerk or the court shall enter the order of default.

A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to [*subparagraph*] **Rule 7**D(4)(a)(i) [*of Rule 7*] unless the plaintiff submits an affidavit or a declaration showing:

A(2)(a) that the plaintiff has complied with [*subparagraph*] **Rule 7**D(4)(a)(i) [*of Rule 7*]; and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, [*or*] registered,

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

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

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

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

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

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

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

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

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

B(1)[*(g)*]**(d)** Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 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)[.]**; and**

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

B(2) By the court. In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. [*The party seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this*

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

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

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

B(5) Affidavit or declaration of competency required. The party seeking judgment must submit the affidavit or declaration required by this subsection if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit or a declaration under this subsection, a default

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judgment may be entered against the other party only by the court and only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27.

Proposal for Amendment to Oregon Rules of Civil Procedure

Lawrence Gorin
Law Offices of L.D. Gorin
521 S.W. Clay St., Suite 205
Portland, OR 97201
LDGorin@pcez.com
503-224-8884

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 P2d 909 (1998) (perjury wife committed in course of marital dissolution proceeding regarding husband's paternity of wife's child was intrinsic fraud and therefore insufficient to set aside paternity provisions of dissolution judgment). It's high time for the CCP to reconsider this issue and bring ORCP into alignment with the Federal Rules by eliminating the archaic and unreasonable distinction between intrinsic and extrinsic fraud as a basis for seeking relief from a judgment. If it's good enough for the federal courts, it ought to be good enough for the state courts of Oregon. NOTE: For full history of CCP's action (or lack of action) regarding this issue, see: Johnson v. Johnson, 302 Or 382, 720 P2d 1221 (1986).