

**MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES**

Saturday, January 9, 2010, 9:30 a.m.
LaSells Stewart Center
Oregon State University
875 SW 26th Street
Corvallis, OR 97331

ATTENDANCE

Members Present:

John R. Bachofner
Arwen Bird*
Michael Brian*
Brian S. Campf*
Brooks F. Cooper
Don Corson
Kristen David
Martin E. Hansen*
Hon. Robert D. Herndon*
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland
Hon. Rives Kistler*
Maureen Leonard*
Hon. Eve L. Miller*
Leslie W. O'Leary
Kathryn M. Pratt*
Mark R. Weaver*
Hon. Locke A. Williams
Hon. Charles M. Zennaché*

Members Absent:

Hon. Rex Armstrong
Eugene H. Buckle
Hon. Mary Mertens James
Hon. David F. Rees

Guests:

David Nebel, Oregon State Bar
Michael B. Hallinan, Bullivant Houser Bailey*

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
<ul style="list-style-type: none"> • ORCP 1B • ORCP 7C(3) • ORCP 13 • ORCP 13B • ORCP 14B • ORCP 18 • ORCP 21 • ORCP 21A • ORCP 22A • ORCP 38 • ORCP 43 • ORCP 47E • ORCP 54B(3) • ORCP 69 • ORCP 69A • ORCP 71 	<ul style="list-style-type: none"> • ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • Moving venue to ORCP 		

I. Call to Order (Mr. Cooper)

In the absence of Mr. Buckle, Vice Chair Mr. Cooper called the meeting to order at 9:35 a.m.

II. Introduction of Guests

The Council welcomed Michael Hallinan of Bullivant Houser Bailey, who appeared as a guest via teleconference. Mr. Hallinan explained that he was newly appointed to the Oregon State Bar's Procedure and Practice Committee, and that he will be that committee's liaison to the Council.

III. Approval of November 21, 2009, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft November 21, 2009, minutes (Appendix A) which had been previously circulated to the members. A motion was made and seconded, a voice vote was taken, and the minutes were approved with no amendments or corrections. Mr. Corson abstained from voting since he was not present at the meeting in question.

IV. Administrative Matters (Mr. Cooper)

A. Website Report (Ms. Nilsson)

Ms. Nilsson reviewed the website report (Appendix B) and stated that the number of visitors and page views are comparable to those of the past six months, indicating that the website is still being visited and proving to be a useful resource. She remarked that one visit resulting from a Google search produced a visit that lasted twenty minutes. Ms. Nilsson also discussed an e-mail inquiry from an assistant attorney general at the Oregon Department of Justice, Appellate Division. She stated that she referred him to the Council website and that, after visiting the website, he wrote back and thanked her, as he found everything that he was looking for on the site.

B. *Rules of Court* (Prof. Peterson)

Prof. Peterson asked whether any Council member had yet received a copy of Thomson/West *Rules of Court 2010*. No members had. Prof. Peterson asked Mr. Nebel whether the Bar can send an e-mail blast to Bar members noting the recent amendments to the ORCP and their effective date, and referring Oregon lawyers to the Council's website. Mr. Nebel asked Prof. Peterson to send him a draft e-mail on Monday, January 11, 2010. Mr. Nebel stated that the Bar has tried to highlight changes to all laws, not just the ORCP. He noted that a copy of the new Oregon Revised Statutes has just been published by Legislative Counsel, and that it includes the revised ORCP in Volume 1.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Cooper)

Mr. Cooper stated that the committee was not able to meet in December. He stated that he will set up a committee meeting as soon as possible, and that he has spoken to attorneys of both the plaintiffs' and defendants' bar and has information to share with the committee when they meet.

2. Uniform Interstate Depositions and Discovery Act (UIDDA) Committee (Mr. Corson)

Mr. Corson discussed the concern that Prof. Peterson raised at the last meeting regarding *pro se* litigants being able to use the rule, as drafted for inclusion in ORCP 38, to obtain subpoenas. He stated that the rule was intentionally drafted by the UIDDA committee so that anyone can use the rule. Mr. Cooper asked whether the committee has spoken with anyone in other states that have adopted the Act to see how it is working. Mr. Corson replied that a national level staff person from Chicago sat in on early meetings, but that no other information from other states was given to the work group. Judge Holland stated that many people on the UIDDA committee are not practicing lawyers and do not have the same frame of reference as a practicing attorney. Mr. Corson stated that he can check with the Oregon Law Commission staff and see if they can provide the Council with any information regarding other states.

Prof. Peterson noted that the ORCP 69A provision for 10 days' notice of intent to take a default was limited to attorneys at one point, and recalled reading something, possibly in the Council minutes, of a concern that treating *pro se* litigants differently than represented litigants might raise an equal protection issue. He stated that the Council is not an academic body, and is well-suited to deal with questions and problems which can arise in practice. Prof. Peterson stated that he has had experience with subpoenas being issued that cannot be enforced, or that required witnesses to travel to counties in which they did not reside or transact business.

Judge Miller stated that self-represented litigants frequently make errors without the benefit of having an attorney to review their materials. She stated that this makes a judge's job difficult, as the judge does not want to deny due process or access to justice. She noted the dilemma that judges face in deciding how to proceed (whether to allow the self-represented litigant to proceed, explain what they have done incorrectly, etc.). She stated that it may cause more problems if self-represented litigants are allowed to issue out-of-state subpoenas. Judge Holland stated that the judiciary has a directive from the legislature to embrace *pro se* litigants, but noted that it may be more effective to focus on ensuring

access to legal representation, as we are in effect asking such litigants to do things that have taken lawyers intensive study to learn about. Mr. Bachofner agreed that justice is not being served when self-represented litigants do something incorrectly and end up with a poor result.

Ms. David stated that the ORCP does segregate certain things that *pro se* litigants cannot do. She recalled that she had a case in which the issue of an ORCP 47E expert affidavit, which needs to come from an attorney, arose. She reviewed Council records, and read that the Council's minutes indicated that it had decided that only an attorney can do certain things. She observed that sometimes these differences are for the efficiency of judicial economy, and that case law supports that notion.

Mr. Corson stated that this is a mechanical matter, and that an Oregon court clerk would not necessarily know that a subpoena issued in another state was issued by a *pro se* litigant. Mr. Cooper asked, if a *pro se* litigant is required to go to a clerk of the court to get a subpoena issued, whether this procedure is any check on the issuance of improper subpoenas. He wondered whether clerks look at subpoenas and talk to a judge if they have questions, or whether they issue subpoenas as an administrative matter. Judge Holland stated that it is purely an administrative matter. Mr. Cooper noted that it would be a huge burden on court clerks if they were required to attempt to separate out subpoenas issued by *pro se* litigants. Prof. Peterson stated that, if there is a bar number on the subpoena, a lawyer is ultimately responsible for the subpoena. Mr. Cooper noted that the policy reason that *pro se* litigants are not allowed to issue subpoenas under the current ORCP appears to be that subpoenas are orders of the court, and that only officers of the court are allowed to issue such an order without involving the court itself.

Mr. Corson stated that he received a telephone call from an attorney regarding the Council's discussion of the UIDDA. The attorney assists attorneys from other states in issuing subpoenas, and he noted that courts are now charging subpoena fees for each defendant in an action, which can add up to thousands of dollars when an action has 50 defendants. The attorney wondered whether the Council could do anything about this issue. Council members agreed that this is outside of the Council's scope.

Mr. Corson agreed to communicate with staff of the OLC, get more information, and report back to the Council.

3. Rule 54 Issues Committee (Judge Rees)

Mr. Bachofner stated that the committee did not meet. He also stated that he had received a letter from attorney Danny Lang regarding ORCP 54 (Appendix C) which the committee will consider.

As a new matter, Mr. Corson noted that the last sentence of ORCP 21A, which refers to ORCP 54B(3), may include an incorrect reference. That sentence deals

with a granted motion to dismiss on the basis "that there is another action pending between the same parties for the same cause." The last part of the sentence gives the trial court, after granting such a motion, the option to "defer entry of judgment pursuant to subsection B(3) of Rule 54." He stated that ORCP 54B(3) does not seem to deal with deferring entry of a judgment at all. Mr. Corson stated that ORCP 21A may need to be amended.

Mr. Cooper stated that the court may grant a motion stating that it is not going to dismiss an action at the moment, but that it will let the attorney know pursuant to ORCP 54B(3) if it will do so. Judge Miller stated that the ORCP 21A reference does not relate to Rule 54B in any case, since that section pertains to involuntary dismissal. Ms. David noted that the last sentence of 54B(3) states: "nothing contained in this subsection...." She stated that this language had been changed and once allowed broad discretion to dismiss now or later.

Ms. Nilsson will send an e-mail to the ORCP 54 committee and ask its members to look into the matter.

4. Electronic Discovery & Filing Committee (Ms. David)

Ms. David reported that the committee has had some meetings, and that Mr. Campf has drafted a proposal which the committee is considering. She stated that there are two separate schools of thought among committee members on how to handle a rule change:

- 1) leaving as a blanket allowance that electronically stored information (ESI) is intended to be included in all requests for production; and
- 2) making a separate rule stating that, if one wants ESI, one needs to make a separate request and to confer with the opposing party before bringing the issue to court.

Ms. David noted that the committee has been struggling with the issue of giving the court the direct knowledge and authority that it can deal with ESI, while looking at expense vs. necessity on a case-by-case basis. She stated that, if ESI is included in the existing rule, people may not realize that ESI is included in a request for production. Ms. David stated that the committee has looked at different states and on a national level to see how other jurisdictions have dealt with this issue. She stated that the committee does not want to provide a draft to the Council until its members have finished their discussion.

Ms. O'Leary pointed out that it is important to have a provision for conferral because ESI is so different from other kinds of information and that, if there is no conferral, the opposing party can come back and claim that it did not know what information was being requested. She stated that she feels that there should be a

separate section on ESI in order to define it completely. Judge Zennaché stated that the question is whether ESI information that is responsive to the request is automatically included in any request, or whether one must specify that one is seeking ESI and describe it. In other words, is it included by default or does it require a separate request and, in either case, what procedures are to be followed. Mr. Corson stated that, in his opinion, Rule 43 is intended to encompass electronic information. He stated that, when one asks for a photograph, it should not be discoverable because it is film and not discoverable because it is on a disk.

Judge Zennaché noted that a large number of cases involve *pro se* litigants and that, in those cases, people are not expecting electronic records to be requested. He stated that this is a gray area that requires parties to talk about it, but that his assumption is that lawyers will include ESI when making a request. Judge Miller stated that the rule should be more specific to include ESI and should be as broad and inclusive as possible, instead of requiring the requestor to perform additional steps. Mr. Cooper noted that, in the case of photographs, one could receive color prints of photographs and not be aware that the original digital photographs included geographical location data in the metadata, or that the photographs had been Photoshopped or cropped to exclude certain details. He noted that many attorneys are not well-versed enough to know what specific items to ask for, so they cast a broad net; and that responding parties can be obstructionist and interpret requests as narrowly as possible. In such a case, because the language of the rule is vague, both parties can state to the court in good faith that they followed the rule. Mr. Cooper stated that he is not sure that this problem requires a new rule.

Mr. Corson stated that ORCP 43 contemplated including ESI. He noted that the technology for storing information is always evolving and cannot be captured in a rule, but that the concept of receiving information is an enduring concept. Ms. O'Leary stated that she believes that a separate rule is not necessarily required but, rather, a section should be added to the current rule. She stated that the federal rule has a procedure so the court can see if people are complying or not, and that it would be helpful to have specifics rather than a broad reference. Ms. David stated that part of what the committee discussed is adding language into ORCP 43 about making specific what medium the requestor is seeking, and specifying the form in which ESI needs to be produced (printed, copy of hard drive, etc.) so that attorneys can discuss and narrow down the issues.

Judge Miller stated that there will always be abuses of requests for production and people hiding things, and that attorneys have an obligation to confer and judges have an obligation to compel, if needed. She noted that there is a statute in ORS, Chapter 107, that lays out specifically what domestic relations parties are obligated to exchange, and that this statute is all-encompassing in terms of discovery issues. Mr. Corson reiterated his preference that electronic discovery be incorporated with regular discovery, and observed that there is an obligation to confer in any case. Judge Zennaché asked whether the rule always includes ESI

or whether one needs to specify the format in which one wants the information. Mr. Corson stated that he does not want to have to make the same request for production twice, and that specifying the format is happening now under ORCP 43, as was the case under common law.

Judge Holland stated that she is not seeing issues right now of disputes over the format of discovery. Ms. O’Leary stated that she sees the issue a lot, especially disputes about issues such as format, native format, searchable features, and archives. She stated that attorneys often need the help of judges to settle disputes, and that the provision in the federal rules has made attorneys give thought as to how they want the information, and to confer when necessary. Judge Holland noted that judges deal with scope and cost, not format. Mr. Bachofner observed that some attorneys will produce the bare minimum, and that some will request the broadest possible, at a huge cost. He stated that there needs to be a limitation in a way that is fair to both sides, and would like guidance in the rule on how to deal with these issues before going to the court. Prof. Peterson asked whether anyone receives requests for production that do not include the stock language that includes a definition section. Ms. David stated that *pro se* litigants would not include such language, and that she has also defended some lawyers who failed to include that language.

Mr. Cooper asked Ms. David whether the next step is to have proposed rules available for the next meeting. Ms. David stated that the committee will draft a few versions for the Council’s perusal. Judge Holland asked whether the committee has had enough input from the plaintiffs’ and defense bar. Ms. David stated that, when a draft is decided upon, the committee will send it to OTLA and OADC for comment.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper stated that the committee was not able to meet in December. He stated that he will set up a committee meeting as soon as possible.

6. Counterclaims in Domestic Relations Motions Committee (Judge Miller)

Judge Miller stated that this is a fairly simple issue. She talked to attorney Russ Lipetzky (who proposed the amendment) to let him know of the Council’s biennial schedule and that it is still pursuing this issue. Judge Miller noted that the majority of counties in Oregon have no trouble allowing counterclaims to be raised in domestic relations motions, and that only a few counties do not. She stated that, to remedy this, the committee proposed adoption of a new subsection to ORCP 22A that would be designated as subsection (2), thereby causing the current subsection (2) to be renumbered to (3). The proposed language would be:

“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.”

Judge Miller stated that the change anticipates that one would not have to file a new order to show cause, but merely a response stating that “I am responding to the motion and I would also like to litigate something else while we are in court.” She stated that it removes the formality of requiring a new order to show cause, but that the issues still need to be raised in a pleading in a formal way and include an affidavit of the counterclaiming party.

Prof. Peterson stated that ORCP 13B addresses what pleadings are allowed and that ORCP 19C states that, if a responsive pleading to a counterclaim is not filed, all allegations in the counterclaim are deemed admitted. He asked whether it would be more appropriate, under the ORCP, to file a cross-motion in response to a motion. Judge Miller stated that it could be characterized that way, and agreed that “counterclaim” does have a meaning all to itself. She noted that, in family law cases, a lot of things get done without formalities, but she agreed that using the right terminology is important. The goal is to make sure that all issues get raised as long as there is sufficient time to do discovery and trial preparation. Mr. Corson also asked whether it is technically a counterclaim or a motion. Mr. Cooper stated that the committee can wordsmith to replace the word counterclaim with the correct terminology.

Mr. Bachofner recalled that, when judgments were changed legislatively, the word “claim” was replaced with “request for relief.” He wondered whether the term “counterclaim” is appropriate for that reason. Mr. Cooper noted that ORCP 13B still lists “counterclaims” among the pleadings that are allowed. Ms. David stated that, under the new legislation increasing filing fees, certain counterclaims have fees that are greater than those for motions and responses. She was concerned about the ramifications that may create for *pro se* litigants. Mr. Bachofner stated that such a “counterclaim” may get rejected by the clerk of the court for filing if it is not filed with the proper fee. Judge Miller stated that she will look at the potential fee impact, but noted that ORCP 18 addresses claims for relief, which encompass the original claim, counterclaim, cross-claim, or third party claim.

Justice Kistler asked whether the ORCP refer to show cause orders, because the first part of the proposed rule talks about certain items requiring show cause orders in domestic relations proceedings. Judge Miller stated that show cause orders are not addressed in the ORCP but are provided for in the ORS, and that the only time a trial is held is when the original petition is filed and one is proceeding to obtain a general judgment. She stated that any other pre- or post-judgment issues are taken up in show cause hearings. Justice Kistler stated that certain things may be done in practice but, for those who do not practice in the area, there is no reference to how a show cause order comes into play. He stated that this adds an additional layer of complexity. Judge Miller stated that she does not want to make it more complex but does not want to make it so unspoken that

the *pro se* litigant or non domestic-relations attorney would not know where to find the rule that tells them what to do. Justice Kistler mentioned a mandamus case in which the parties were using one set of terms involving show cause orders and the statute said nothing about show cause orders; it was a practice that was unwritten. He stated that it is important to make sure that the practice and the rules match up.

Judge Miller noted that self represented parties receive packets of forms that are put together in an easy-to-use way, so that they may not need to refer to the rules. Judge Zennaché stated that the UTCR address some of this process and that it may be a UTCR issue rather than an ORCP issue, since the ORCP generally do not address domestic relations practice. He stated that UTCR 8.050 directly addresses judgment modification proceedings in domestic relations cases, and sets forth procedures for using an order to show cause. Judge Miller stated that the committee will revisit this issue at its next meeting. She stated that ORCP 22 may need to be given clarity in addition to a change to the UTCR to ensure that the process is clear. Mr. Corson agreed that a change to the UTCR may be more appropriate. He stated that, if the committee decides this is the case, the committee could draft a proposed UTCR and share it with the UTCR Committee.

Judge Holland stated that the Council should be cautious about using terms that do not comport with the ORCP, and also agreed that the UTCR may be a better place to address this issue. She stated that it is important to make sure that anyone who comes to court follows the rules and procedures instead of making lax procedures or continuing the use of informal existing procedures just because a group of people has a problem with the rules. Judge Holland stated that she prefers to raise awareness of the correct procedure rather than to change the procedure, and noted that people in domestic relations cases tend to abuse the procedure by bringing up issues at the last minute. Judge Miller stated that the reason expressed for wanting to make a change in the ORCP is that domestic relations cases are subject to the ORCP, and that confusion was coming from ORCP 22, with some judges interpreting the rules to not allow “counterclaims” to be heard. She noted that the concern was that ORCP 22 may be too narrow.

Prof. Peterson stated that it is bad practice to respond to a motion with a pleading, and that perhaps a new section, using some of the ORCP 22A(2) concepts, could be added to ORCP 14 to make clear that a litigant may file a cross motion to a motion. He stated that any other problems relating to this issue could be taken care of with a change to the UTCR. With regard to the brand new filing fees vs. the fairly new motion fees, Prof. Peterson noted that Rule 1B charges the Council with considering costs to secure the just, speedy, and inexpensive resolution of all civil actions.

Judge Williams noted that this issue was raised by the family law bar, not as a modification of rules to make it easier for *pro se* litigants, but to meet the general practice of most practitioners in the state. He stated that a very small minority of

courts require filing a separate motion, and that it is more appropriately called a counter motion, not a counterclaim. As to the fee issue, Judge Williams noted that the vast majority of *pro se* litigants have their fees waived. Mr. Corson stated that the Council should be cautious about adding to ORCP 14, as one can always file a cross motion, and a separate rule is not required. Judge Miller stated that the committee will take another look at the issue, and get input from family law groups. She stated that Judge James may not stay on the committee and asked if there were volunteers to join. No members present at the meeting volunteered to join the committee. Judge Miller noted that the committee will report to the Council by the March meeting.

7. Default Judgment Committee (Ms. David)

Ms. David reported that the committee had not held a meeting since the last Council meeting, but that a re-draft of ORCP 69 is in process. She stated that the committee will meet again and bring the draft to the Council. The proposal is to break ORCP 69 into the following sections: a) general terms and definitions; b) notice of intent to take default; c) motion for order of judgment by default; and d) judgment by default. She stated that this is to clarify that there are separate motions, orders, and judgments, and that they are not all one in the same. Ms. David stated that the committee will suggest creating a new section which refers to special cases (e.g., contract and motor vehicle). She stated that the goal is to make a better roadmap for practitioners to follow and to make the process more efficient. To this end, the committee has also spoken with court clerks regarding their procedure for default judgments.

Ms. David stated that the committee will also be ready to present a draft amendment of ORCP 71 that deals with intrinsic vs. extrinsic fraud. She noted that the committee will also present a memo on its research on the fraud issue. Ms. David noted that she has been working with OJIN staff regarding the “appearance vs. pleading” issue and that it seems to be an issue of informing the bench, bar, and staff of the problem rather than making a rule change.

8. Time Issues (Ms. Pratt)

Ms. Pratt had nothing to report at this time.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Judge Herndon had no additional information to report since the last Council meeting. Prof. Peterson noted that Sen. Suzanne Bonamici is following this issue, but could not be at this Council meeting. The item will be continued on the agenda until Sen. Bonamici can join a Council meeting and participate in the discussion.

10. “Must” v “Shall” in the ORCP

This question arose during earlier Council discussions of the UIDDA. The Oregon Law Commission (OLC) suggested that there have been interpretations of “shall” which do not equate its use to a mandatory directive and that “must” is a superior term for indicating that a directive is mandatory. Mr. Hansen stated that he and Mr. Buckle have been working on the issue. Mr. Nebel stated that he spoke with David Heynderickx of the Legislative Counsel, who stated that “shall” usually directs a person or group to do something: “The Council shall adopt rules of procedure...”; and that “must” is used in passive voice sentences where a specific actor is not identified: “A notice of appeal must be filed not more than 30 days after...”. Mr. Heynderickx stated that “must” is used more often in procedural rules and statutes, since it is often difficult to list all of the possible persons or parties who might take some particular action. Mr. Heynderickx also told Mr. Nebel that the use of “shall” where “must” would be arguably better has generally not created problems, and suggested that the Council consider making such stylistic changes when it is otherwise amending a particular rule, not as a wholesale revision of the ORCP.

Mr. Cooper stated that, rather than making a wholesale revision, the Council might consider adopting a Council rule of practice when amending a rule to check whether the drafted rule meets certain stylistic standards. Ms. O’Leary noted that the Council should be sure to note in the minutes when a change is made for stylistic rather than definitional purposes that the amendment is not intended to change existing practice. Mr. Corson stated that there is an existing rule which deals with the construction of rules, ORCP 1B, and that it should perhaps be revised to include a definition of “shall.” Mr. Cooper suggested that Mr. Buckle and Mr. Hansen meet again and report back to the Council at the next meeting.

B. Communication with Legislators (Ms. David)

Ms. David stated that she sent out a second draft e-mail to send to legislators last month, and that she will prepare another draft which emphasizes all of the rules that the Council has discussed so far this biennium, regardless of whether a committee has been formed. She stated that the Council should also be keeping OADC and OTLA members informed of the issues the Council has addressed and continues to address.

VI. New Business (Mr. Cooper)

There was no new business raised.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:15 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, October 10, 2009, 9:30 a.m.
 Oregon State Bar Center
 16037 SW Upper Boones Ferry Rd
 Tigard, OR 97224

ATTENDANCE

Members Present:

John R. Bachofner
 Michael Brian*
 Eugene H. Buckle
 Brian S. Campf
 Don Corson
 Kristen David
 Martin E. Hansen
 Hon. Robert D. Herndon
 Hon. Lauren S. Holland*
 Hon. Rives Kistler
 Maureen Leonard
 Kathryn M. Pratt
 Mark R. Weaver*
 Hon. Locke A. Williams
 Hon. Charles M. Zennaché*

Members Absent:

Arwen Bird
 Brooks F. Cooper
 Hon. Jerry B. Hodson
 Hon. Mary Mertens James
 Hon. Eve L. Miller
 Leslie W. O'Leary
 Hon. David F. Rees

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

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I. Call to Order (Mr. Buckle)

Mr. Buckle called the meeting to order at 9:35 a.m.

II. Introduction of New Members (Mr. Buckle)

The Council welcomed new member Michael Brian, who appeared by telephone from Medford.

III. Approval of September 12, 2009, minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the September 12, 2009, 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. Annual election of officers per ORS 1.730(2)(b) (Mr. Buckle)

A. Treasurer

As the public member, Arwen Bird, was unable to attend this meeting, the election of the treasurer was postponed until the November 21, 2009, meeting.

V. Administrative Matters (Mr. Buckle)

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the Website Report (Appendix B) and noted that the Council's website continues to be visited regularly. She observed that since 67% of the visitors during the period were new visitors, it is evident that word is spreading about the website.

VI. Old Business (Mr. Buckle)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting and was, therefore, unable to report on the committee's progress. Mr. Bachofner stated that some of the committee members had a telephone meeting, but that no plaintiff's attorney was present during that meeting. He stated that the committee plans to e-mail the Oregon Trial Lawyers Association and Oregon Association of Defense Counsel and ask members to comment on the suggestions before the Council. The committee will then meet again and report back to the Council.

2. Uniform Interstate Depositions and Discovery Act Committee (Mr. Corson)

Mr. Corson reported that the Oregon Law Commission workgroup already had a proposed draft prepared and that Ms. Nilsson had put this draft into the Council's legislative format for the committee's review. The committee will meet and report back at the next Council meeting. Mr. Buckle asked whether there was any reason not to adopt the third Uniform Interstate Depositions and Discovery Act since Oregon had adopted the first, but not the second. Mr. Corson stated that the Act will make everything more uniform and streamlined and that there is no reason not to incorporate it into the ORCP's current Rule 38.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees was not present at the meeting and was unable to report. Mr. Bachofner stated that the committee has not yet met due to scheduling difficulties, but is attempting to schedule a meeting date in the next few weeks.

4. Electronic Discovery & Filing Committee (Ms. David)

Ms. David stated that the committee had a telephone conference and discussed ESI (Electronically Stored Information) and discussed how ESI is different from the documents and tangible items specifically referred to in ORCP 43A. She stated that Ms. Pratt did a good job of bringing the committee up to speed on what has occurred in other jurisdictions and in the federal courts. The committee will meet again in the upcoming months and report to the Council at a later time.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper and other members of said committee were not present and were unable to report, so no report was given.

6. Counterclaims in Domestic Relations Motions Committee (Judge Miller)

Judge Miller was not present at the meeting and was unable to report. Judge Zennaché reported that the committee has not yet been able to meet.

7. Default Judgment Committee (Ms. David)

Ms. David reported that the committee had a teleconference where she and Prof. Peterson updated on what the committee had done last biennium and where the rule may need to be reorganized. The committee also spoke about extrinsic vs. intrinsic fraud. Committee members were given research assignments and plan to meet again and report within a few

months.

B. Legislative Contacts (Ms. David and Ms. Nilsson)

Ms. David stated that she and Ms. Nilsson wanted to prepare the legislative contact list before having Council members send e-mails to legislators, so that the e-mails could all be sent around the same time. Some Council members and staff volunteered to contact legislators with whom they are acquainted. The Council agreed that Ms. Nilsson will randomly assign Council members to the remaining legislators, attempting to keep the number of contacts per Council member as equal as possible. Ms. David will prepare a draft letter that members can modify and send to their legislators. Ms. David explained that last biennium the process was to send e-mails to legislators after each Council meeting, telling them what the Council is working on, inviting them to Council meetings, and welcoming them to ask any questions they may have.

VII. New Business (Mr. Buckle)

A. Suggested Amendments to ORCP (carried over from the September 12, 2009, meeting)

1. 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

Prof. Peterson stated that the idea of standardizing the time periods in the ORCP came from Council members at a meeting last biennium. Ms. Pratt stated that, if the Council were to make changes to the time periods, the UTCR would also need to be amended to reflect this. She wondered about coordination with the UTCR, since the UTCR are amended in August of every year and the Council's amendments are made every other year. Mr. Buckle stated that the Council would coordinate with the UTCR committee.

Ms. Pratt noted that it took several years on the federal level to amend the time periods, and that it is a major renovation of the rules that could take a good deal of time. She stated that, when electronic filing was made mandatory in the federal rules, many of the old counting rules no longer made sense; this was the motivation behind the time changes. Mr. Bachofner stated that it would entail a lot of work and would cause problems for the ordinary practitioner if the time periods were changed just for the sake of changing them. Ms. Pratt stated that on December 1 she will have a chart available with the federal time changes. She stated

that her thought is that it would make more sense to implement these changes as Oregon moves nearer to e-filing.

Mr. Buckle asked Ms. Pratt if she would contact the UTCR committee to inquire about coordinating with them if the Council were to decide to make time period changes. Judge Herndon suggested talking to the E-Filing Task Force as well to see what their plans are in this regard.

Judge Williams asked whether litigants have had problems with a county not agreeing to set a proceeding quickly in the case of an elderly or very sick litigant who may not otherwise see their day in court. Mr. Corson stated that he has heard from other practitioners who have had this problem. Mr. Bachofner stated that a related issue is injured plaintiffs who are not yet medically stationary at the time of trial. He stated that some counties are good about abating cases in these instances, but that others will not hold the case in abatement, even if both parties stipulate.

On the third issue, Prof. Peterson stated that providing for a 24 hour notice prior to presenting an *ex parte* motion may not require an ORCP change since UTCR 5.100 requires notice to be given before presenting an order. Ms. Pratt stated that there are also supplementary local rules regarding notice in most counties.

Mr. Buckle suggested keeping time issues on the agenda, having Ms. Pratt report on her contacts with the UTCR Committee and E-Filing Task Force, and deciding at a later meeting whether to form a committee.

2. Declaration Instead of Notarizing

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

Prof. Peterson stated that this issue had previously come up three biennia ago from an attorney who wanted to be able to utilize declarations on marriage documents. He pointed out that Rule 1E provides that a declaration may be used in lieu of an affidavit for anything in the ORCP. He asked whether the Council has the authority to replace affidavits in other parts of the law and whether that would be procedural or substantive. Ms. David stated that she does not believe the Council can make this change for laws outside of the ORCP. The Council concurred and agreed not to form a committee.

3. Subpoenas

- ORCP 55: procedures relating to subpoenas are confusing

Mr. Buckle stated that the subpoena procedure, which can be confusing, could be streamlined. He stated, however, that there does not seem to be a specific problem at this time and suggested tabling the issue until next biennium. The Council agreed.

4. 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

Prof. Peterson noted that the legislature has already fixed the incorrect statutory reference in ORCP 7D(3)(a)(iv), as suggested by a survey respondent.

Prof. Peterson stated that he and Ms. Nilsson had found some Council history on the issue of why only a reference to ORCP 69 is included in ORCP 7, while provisions for serving a party's insurance carrier were moved to ORCP 69A(2). He stated that the language on serving an insurance company was previously located in ORCP 7, but that it apparently was believed that the language being in ORCP 7 made it sound like it was related to personal jurisdiction, so in 1988 it was moved to ORCP 69A(2) to make clear that service on an insurance carrier is not required to obtain personal jurisdiction over a defendant in a motor vehicle accident case and that such service only becomes applicable if one is asking for a default. Mr. Bachofner stated that a reference to ORCP 69 could be included in ORCP 7 to help alleviate any confusion. Mr. Buckle suggested adding this item to the ORCP 69 committee's task list.

Prof. Peterson suggested adding the issue of serving post office boxes to the service and filing committee's task list.

5. Summary Judgment

- ORCP 47: liberalize granting of summary judgments

Mr. Buckle stated that it is likely not feasible to amend the ORCP to require judges to grant more summary judgments. The Council agreed not to consider this issue.

6. Attorney Fees

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

Prof. Peterson stated that Mr. Cooper had brought this issue to the attention of the Council last biennium. He stated that in specialized actions, such as probate cases, ORCP 68 does not seem to work very well. He recalled hearing about probate legislation being passed in the most recent legislative session that may take care of the issue. Judge Holland stated that it appears that ORCP 68 now does apply to such cases. She stated that the statutes are silent about attorney fees in some areas such as small estates, but that the new legislation will hopefully resolve some of those issues.

Prof. Peterson stated that another issue may occur when an attorney files a statement for attorney fees and cost bill after the entry of a judgment, and then spends more time collecting the judgment than he or she did obtaining it. He stated that the UTCR have a provision (Form 5.080, paragraph 5) to ask a judge for the amount of money one reasonably anticipates that one will spend attempting to collect the judgment. He stated that he knows of no presiding judge in Multnomah County who has granted this request, and that Judge Miller told him that they usually do not grant it in Clackamas County either. Prof. Peterson pointed out that, per ORCP 68C(4)(a), once a judgment is entered, a statement needs to be filed within 14 days. He wondered what happens if, much later in the course of collecting the judgment, more fees and costs are incurred. Judge Herndon stated that a supplemental judgment can be sought. Prof. Peterson replied that the rule does not say that. Ms. Pratt stated that it does not, but perhaps it should. Judge Zennaché noted that he has granted a request for anticipated costs for collection of fees when someone made a very good case for it.

Judge Herndon stated that he has never seen a judge deny a request for a supplemental judgment because he or she had no authority to do so. Mr. Buckle suggested leaving the rule the way it is. The Council agreed.

Mr. Bachofner raised another attorney fee issue that he had experienced recently. He stated that his understanding is that there needs to be a contractual or statutory provision that substantively allows an award of fees. He stated that there is an old case, *Vancouver Furniture [v Industrial Indemnity]*, 74 Or App 642 (1985), which may have occurred prior to the inception of the ORCP, that states that, under ORS 743.114, there is a procedural right to attorney fees, not a substantive right. He noted that this is creating a problem with out-of-state claims based on contract or an out-of-state insurance policy. He stated that cases are being filed in Oregon

precisely so that attorney fees can be sought as a procedural matter. Justice Kistler asked whether it is a choice of law issue. Mr. Bachofner stated that the case he recently experienced was a Washington accident where the plaintiff filed their case in Oregon because ORS 743.114 might give them a right to attorney fees.

Ms. Pratt asked whether the Council would be making a change just to get around an existing case that is presenting some problems. Mr. Bachofner stated that he envisions some kind of clarification as to whether the right to attorney fees has to be a substantive right, by statute or by contract. Mr. Buckle asked whether that was inherent in that they are the rules of procedure and that you have to convince the judge. Judge Zennaché stated that he has never interpreted ORCP 68 as creating an independent right for attorney fees. Justice Kistler stated that a more recent case, *Mattiza [v Foster]*, 311 Or 1 (1990), made it a more substantive entitlement, but that it is more an issue for litigation. Mr. Buckle stated that if Mr. Bachofner sees the issue arise again he should bring it back to the Council for further review.

7. Federalizing the 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

Mr. Buckle suggested forming a committee to take a serious look and to consider the pros and cons of the issue. Justice Kistler stated that the legislature has considered and reconsidered this issue several times since the inception of the ORCP.

Mr. Corson stated that he feels that looking at specific issues (rather than looking at rewriting all the rules to “federalize” them) could be useful. He personally feels that interrogatories are a waste of time and that expert discovery is extraordinarily expensive and washes a lot of legitimate cases and attorneys out of the system. Mr. Bachofner stated that in certain types of cases it would make sense to have expert discovery, such as large commercial cases, and suggested some type of procedure where it could be allowed by discretion of a judge. Prof. Peterson stated that the survey specifically mentioned construction cases as being cases where expert discovery would be helpful. Mr. Hansen stated his experience in commercial cases is that, if attorneys are serious about the case, they will voluntarily exchange expert reports. Mr. Corson stated that the historical argument for expert discovery has been that it will encourage settlement, but that 90% of cases in Oregon settle anyway. Ms. Pratt stated that a

change of this type is inconsistent with the legislative mandate that the majority of cases be resolved within one year.

After a thorough discussion, the Council decided not to form a committee on this issue.

8. Form/Fact Pleadings

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

Prof. Peterson stated that attorney Danny Lang had again brought the issue of allowing form pleadings to the Council, and that a Council survey respondent had suggested enforcing fact pleading, so there are obviously two very different schools of thought on this subject. Mr. Corson mentioned that the Council had formed a committee and discussed this issue last biennium and Judge Holland, who was on that committee, confirmed that the committee looked carefully at forms that Mr. Lang had proposed. The committee decided that it would be such an overhaul of the ORCP system that it was not worth pursuing. No committee was formed.

9. Venue

- Moving venue from ORS Chapter 14 to ORCP 11

Prof. Peterson stated that it was odd that venue was not included in the ORCP but was left in the statutes when the ORCP were created. He stated that there is not a problem that needs to be fixed but that it might be good to put everything in one place. Mr. Buckle asked whether there was any indication of the legislature's intent in leaving venue in the statutes. Mr. Bachofner stated that while seeking a change of venue is a procedural issue, the propriety of a change of venue is a substantive issue which is outside of the Council's purview. Mr. Hansen stated that putting the substance and procedure in two different places may not be a good idea. No committee was formed.

10. Appearance Filed but no Answer

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

Prof. Peterson stated that this issue arose from the Council survey. He observed that, in general, if someone files an entry of appearance and will not file an answer, a party can move for default judgment; however, a family law statute, ORS 107.055, allows response to a petition for

dissolution of marriage by filing an appearance which does not admit or deny any of the allegations in the petition.

Ms. David stated that she has been frustrated in dealing with several PLF cases in the last few years where an attorney filed a Rule 21 motion and paid a first appearance fee, but the court did not record the Rule 21 motion as an answer or a true appearance and sent default and dismissal documents. She stated that, in one case, the plaintiff and defendant showed up to argue the Rule 21 motion only to find that the clerk had dismissed the case. She stated that part of the problem may be an OJIN entry issue and that it is a county-by-county issue and not necessarily something that the Council can deal with. Ms. Pratt stated that the Council may want to look at the default rule to the extent that it is unclear in the ORCP that a Rule 21 motion qualifies as an appearance for the purposes of default. Ms. David suggested adding this issue to the ORCP 69 committee's task list.

Mr. Corson stated that part of the genesis of the suggestion is when the plaintiff's side files a complaint and cannot get the defendant to file an answer. He noted that ORCP 69 states "plead or otherwise defend," so the fact that the defendant has filed an appearance may qualify for the "otherwise defend" language and not allow a default. Mr. Hansen stated that a notice of appearance only gives one the right to 10 day notice under ORCP 69A, and that a Rule 21 motion is treated as an appearance because it is a defense while a summary judgment motion is not. Ms. David stated ORCP 21F and G require filing ORCP 21 issues before filing an answer, so procedurally attorneys are attempting to get the Rule 21 issues dealt with before filing the answer. Ms. Pratt stated that, in two of her PLF cases, the court has ruled that a Rule 21 motion is not technically an answer and has allowed the default.

The ORCP 69 committee will discuss this issue and report back at a later meeting.

B. Suggested Amendments to ORCP (received since September 12, 2009, meeting)

1. Require incorporating the underlying agreement in the complaint in actions filed on consumer debt (Prof. Peterson)

Prof. Peterson stated that Senator Suzanne Bonamici had made a suggestion to the Council to require that debt collection companies who purchase debts attach to the complaint a copy of the original contract on which the claim is based. Judge Zennaché asked how much this occurs outside of small claims cases, since the ORCP do not apply to small claims. Judge Herndon stated that he has seen many cases in which the plaintiff asks for attorney fees and when the judge asks for the contract on

which they are relying for attorney fees, the plaintiff cannot produce it. Mr. Bachofner stated that the issue should be looked at more broadly to include any time a case is based on a contract. He noted that case law states that the substantive basis for the contract claim needs to be either pleaded or a copy must be attached to the pleading. He observed that, in many insurance cases and consumer cases, the insurance policy or contract being relied upon is not attached by the plaintiff. Justice Kistler raised the issue of transferred mortgages which have been bought so many times that cases are being dismissed because the company seeking default on the mortgage has no idea where the underlying mortgage contract is. He stated that adopting such a rule could have broader ramifications beyond small claims. The Council agreed to form a committee consisting of the following:

Committee

Mr. Brian
Mr. Hansen
Judge Herndon
Judge Williams

VIII. Continue Scheduling of Future Meeting Dates/Locations (Mr. Buckle)

Meeting dates were set for the remainder of the biennium. The meeting schedule will be as follows:

- November 21, 2009, 9:30 AM, Oregon State Bar
- December 12, 2009, 9:30 AM, Oregon State Bar
- January 9, 2010, 9:30 AM, Corvallis (location to be determined)
- February 6, 2010, 9:30 AM, Oregon State Bar
- March 13, 2010, 9:30 AM, Oregon State Bar
- April 10, 2010, 9:30 AM, Francis Hansen & Martin LLP, Bend
- May 8, 2010, 9:30 AM, Oregon State Bar
- September 11, 2010, 9:30 AM, Oregon State Bar
- December 11, 2010, 9:30 AM, Oregon State Bar

IX. Adjournment

Mr. Buckle adjourned the meeting at 11:15 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

**Council on Court Procedures
Website/Inquiries Update
Reporting Period: 11/14/09 - 1/6/10**

I. Website Statistics

A. Google Analytics

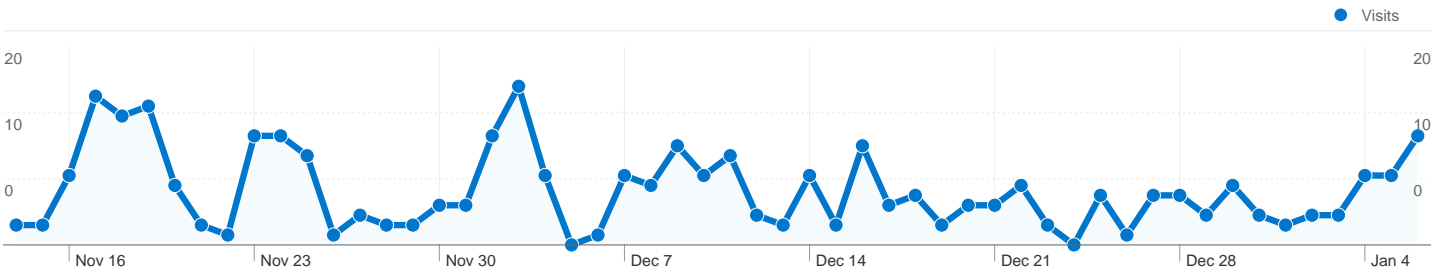
Attached are analytical reports detailing website visitors, geographical information, pages visited, keywords from search engines, and traffic sources. The website had 295 visits from 238 unique visitors, and 781 page views in this period. The average number of pages viewed was 2.65 and the average time spent on the site was 2 minutes, 9 seconds. 74.58% of the visits came from new visitors. These numbers are comparable to those of the past six months, indicating that the website is still being visited and proving to be a useful resource. The most visited pages included the legislative history of rules page and the minutes page. It is also interesting to note that a keyword search of “year of passing Oregon Rules of Civil Procedure” resulted in 2 visits that lasted a total of almost 20 minutes.

II. Inquiries

In late November, the Council received an e-mail inquiry from an assistant attorney general at the Oregon Department of Justice, appellate division. He was attempting to obtain commentary or legislative history pertaining to the 2004 amendments of ORCP 59H. He was directed to the Council website, its page of past meeting minutes, and its search function. Later that same day, he replied: “Thanks for the help! I just found everything I need in the minutes posted on your website.”

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant



Site Usage

295 Visits

43.39% Bounce Rate

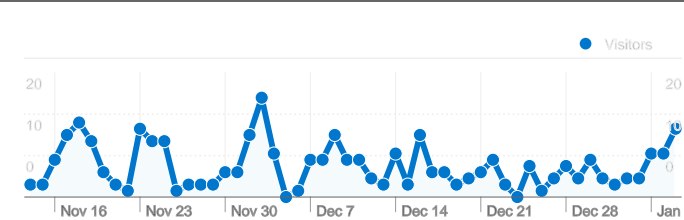
781 Pageviews

00:02:09 Avg. Time on Site

2.65 Pages/Visit

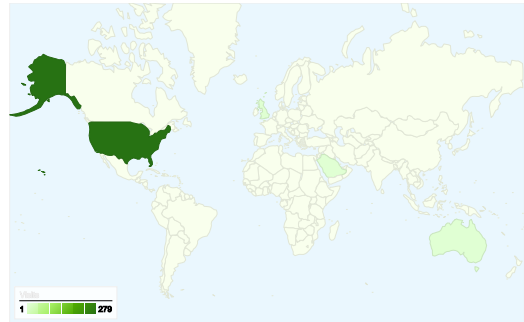
74.58% % New Visits

Visitors Overview

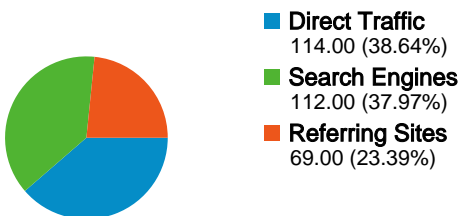


Visitors
238

Map Overlay world

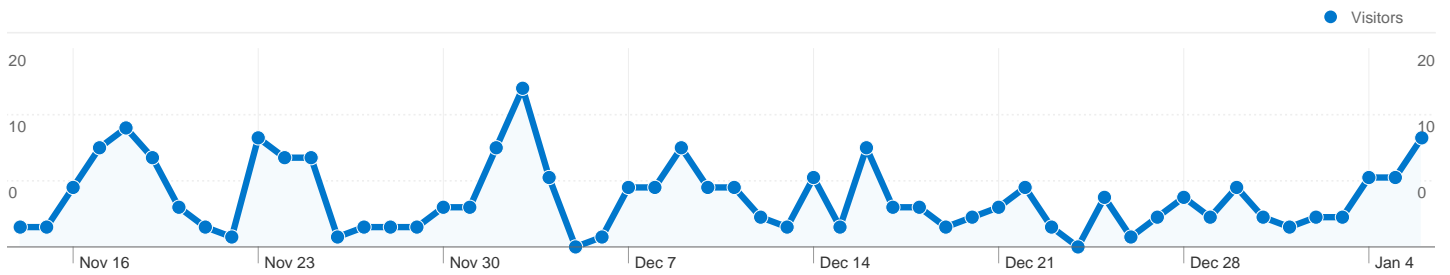


Traffic Sources Overview



Content Overview

Pages	Pageviews	% Pageviews
/~ccp/index.htm	388	49.68%
/~ccp/LegislativeHistoryofRules	72	9.22%
/~ccp/resources.htm	61	7.81%
/~ccp/Council_Membership.htm	50	6.40%
/~ccp/minutes.htm	40	5.12%



238 people visited this site

295 Visits

238 Absolute Unique Visitors

781 Pageviews

2.65 Average Pageviews

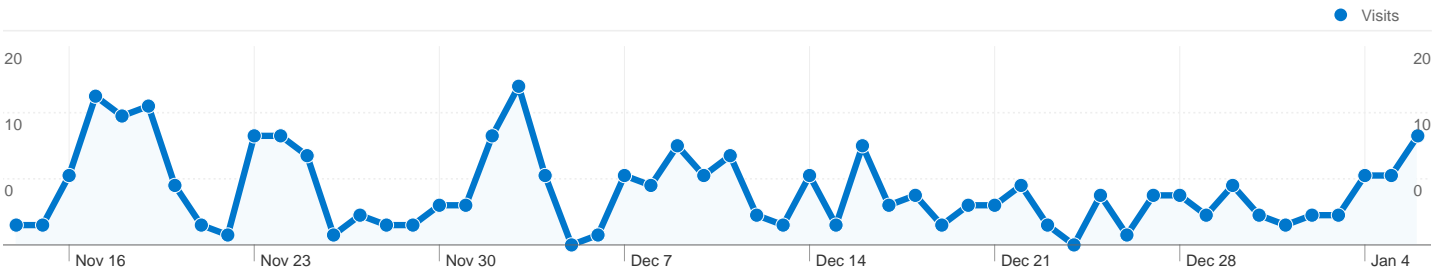
00:02:09 Time on Site

43.39% Bounce Rate

74.58% New Visits

Technical Profile


Browser	Visits	% visits	Connection Speed	Visits	% visits
Internet Explorer	208	70.51%	Cable	80	27.12%
Firefox	63	21.36%	Unknown	79	26.78%
Safari	13	4.41%	T1	68	23.05%
Chrome	7	2.37%	DSL	46	15.59%
NetFront	1	0.34%	Dialup	17	5.76%

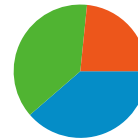


All traffic sources sent a total of 295 visits

 38.64% Direct Traffic

 23.39% Referring Sites

 37.97% Search Engines

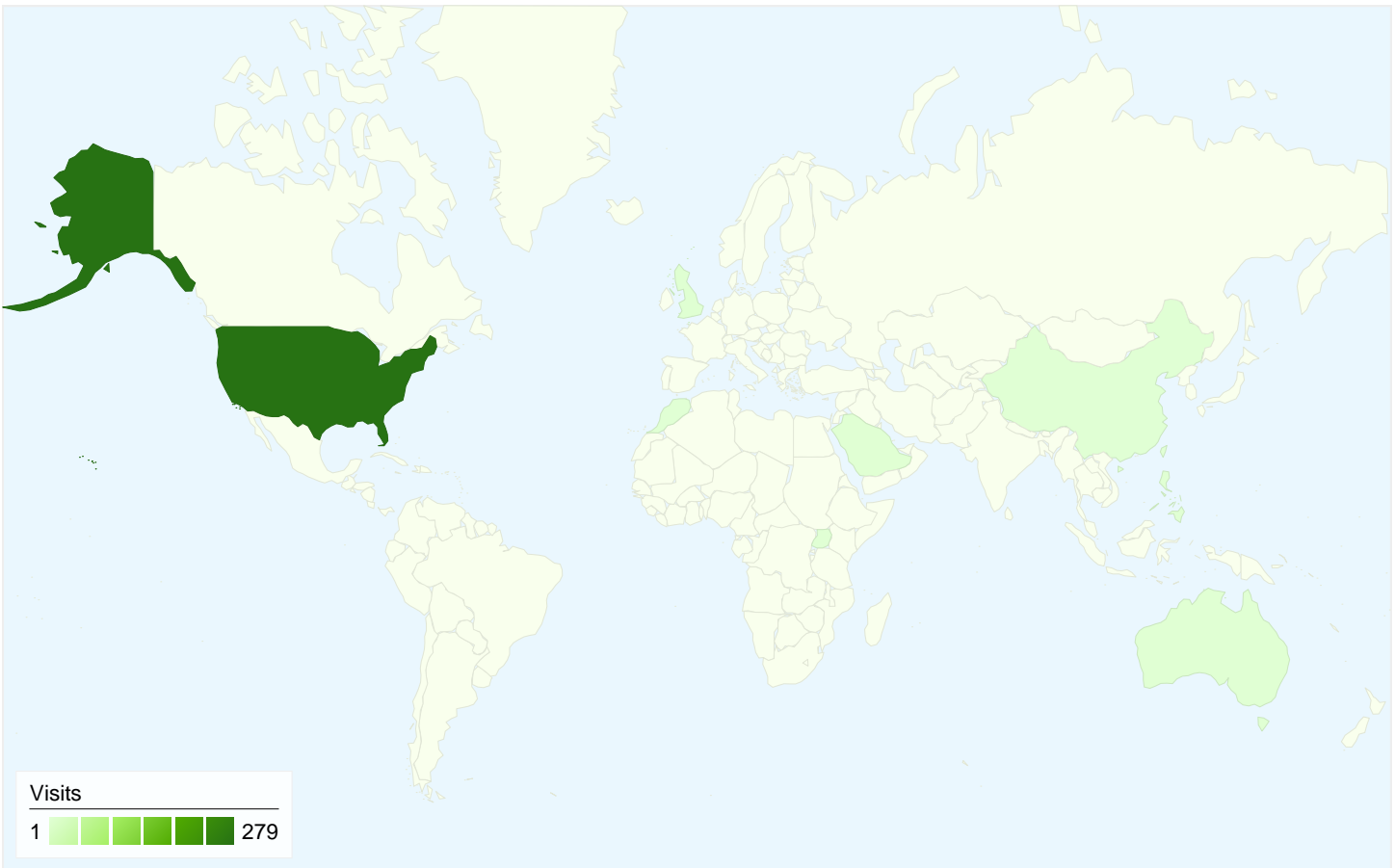


- Direct Traffic
114.00 (38.64%)
- Search Engines
112.00 (37.97%)
- Referring Sites
69.00 (23.39%)

Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	114	38.64%
google (organic)	93	31.53%
courts.oregon.gov (referral)	35	11.86%
counciloncourtprocedures.org	15	5.08%
bing (organic)	8	2.71%

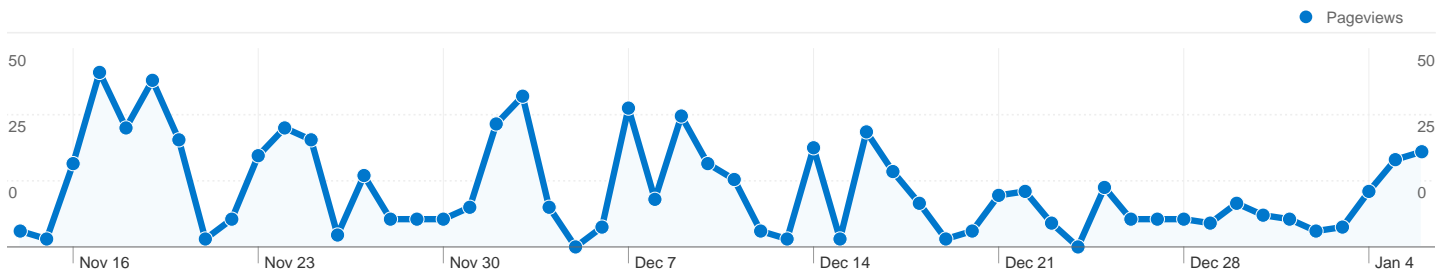
Keywords	Visits	% visits
oregon council on court	25	22.32%
court procedures	10	8.93%
oregon ccp	8	7.14%
council on court procedures	5	4.46%
council on court procedures	5	4.46%



295 visits came from 9 countries/territories


Site Usage

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	279	2.70	00:02:12	74.91%	41.94%
(not set)	4	3.00	00:00:21	50.00%	25.00%
United Kingdom	3	1.00	00:00:00	66.67%	100.00%
Australia	2	1.00	00:00:00	100.00%	100.00%
Saudi Arabia	2	2.00	00:00:15	50.00%	50.00%
Philippines	2	1.00	00:00:00	50.00%	100.00%
China	1	1.00	00:00:00	100.00%	100.00%
Uganda	1	1.00	00:00:00	100.00%	100.00%
Morocco	1	2.00	00:15:07	100.00%	0.00%



Pages on this site were viewed a total of 781 times

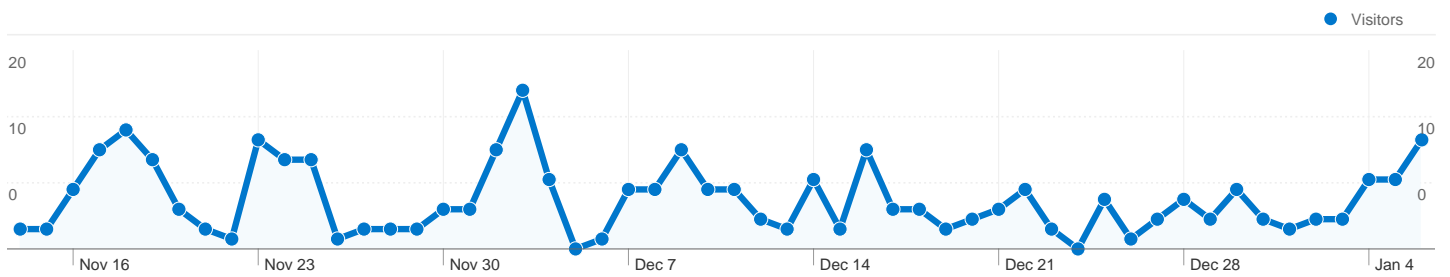
 **781** Pageviews

 **529** Unique Views

 **43.39%** Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	388	49.68%
/~ccp/LegislativeHistoryofRules.htm	72	9.22%
/~ccp/resources.htm	61	7.81%
/~ccp/Council_Membership.htm	50	6.40%
/~ccp/minutes.htm	40	5.12%




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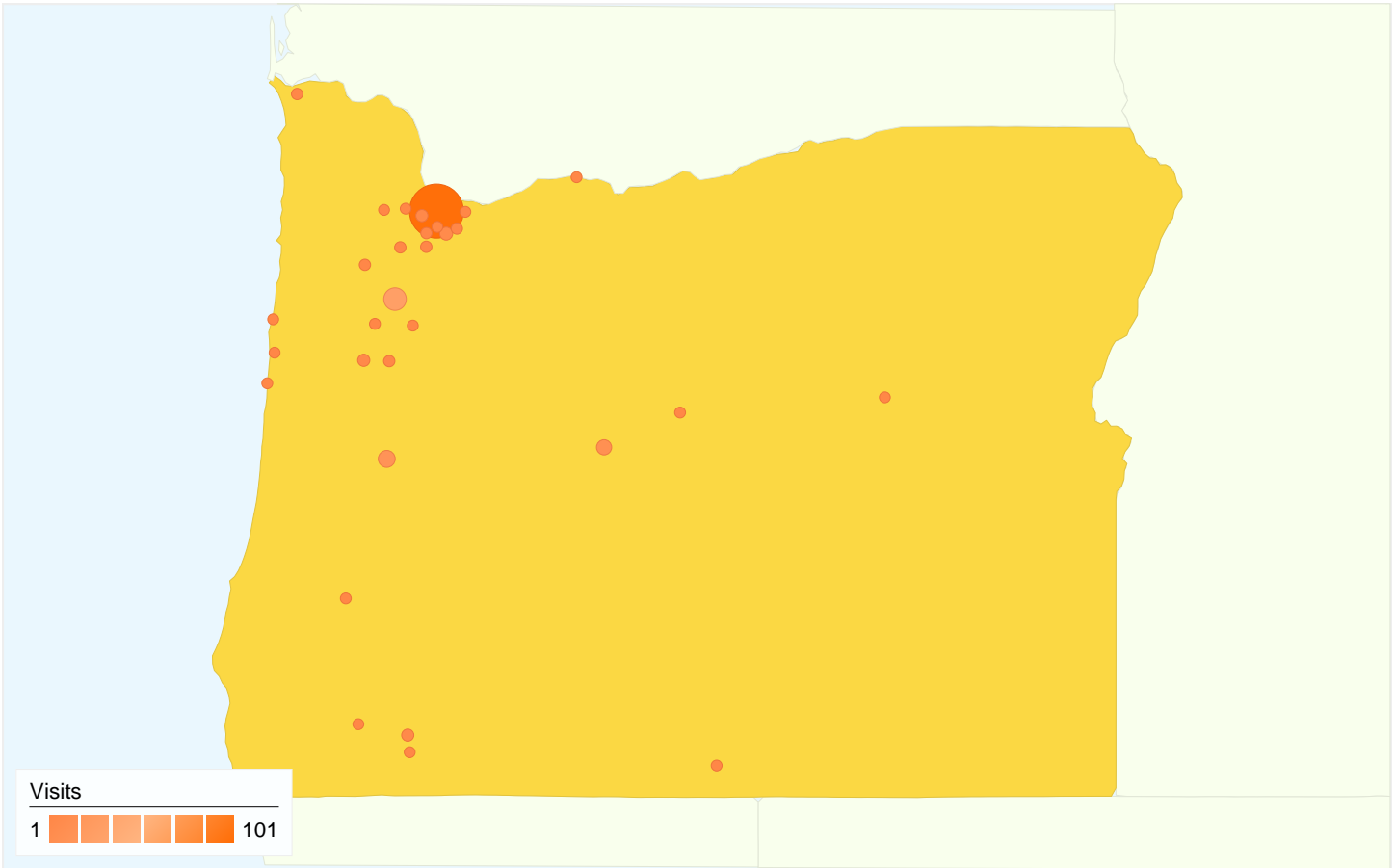
 **00:02:09** Time on Site

 **43.39%** Bounce Rate

 **74.58%** New Visits

Technical Profile

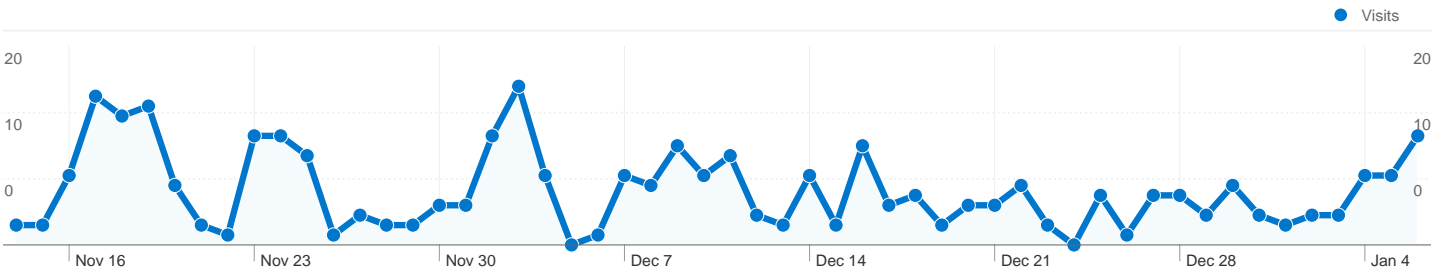
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Chrome	7	2.37%	DSL	46	15.59%
NetFront	1	0.34%	Dialup	17	5.76%



This state sent 203 visits via 31 cities


Site Usage						
Visits	Pages/Visit	Avg. Time on Site		% New Visits	Bounce Rate	
203 % of Site Total: 68.81%	2.69 Site Avg: 2.65 (1.59%)	00:02:36 Site Avg: 00:02:09 (21.20%)		71.92% Site Avg: 74.58% (-3.56%)	38.92% Site Avg: 43.39% (-10.31%)	
City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate	
Portland	101	2.85	00:03:50	64.36%	38.61%	
Keizer	28	2.89	00:01:18	64.29%	17.86%	
Eugene	15	3.00	00:00:48	86.67%	40.00%	
Bend	11	2.45	00:03:12	100.00%	36.36%	
Gladstone	6	2.33	00:02:57	50.00%	33.33%	
Central Point	4	3.25	00:00:33	100.00%	75.00%	
Beaverton	4	1.25	00:00:07	50.00%	75.00%	
Corvallis	4	1.50	00:00:07	75.00%	75.00%	
Astoria	2	2.50	00:00:19	100.00%	0.00%	

Newberg	2	1.50	00:00:30	50.00%	50.00%
Tualatin	2	3.00	00:00:17	100.00%	50.00%
Mcminnville	2	1.00	00:00:00	100.00%	100.00%
Clackamas	2	3.00	00:00:39	50.00%	0.00%
Wilsonville	2	3.50	00:00:39	50.00%	50.00%
Albany	2	2.00	00:11:56	100.00%	50.00%
John Day	1	2.00	00:00:16	100.00%	0.00%
Lake Oswego	1	1.00	00:00:00	100.00%	100.00%
Washington County	1	2.00	00:01:37	100.00%	0.00%
Aumsville	1	1.00	00:00:00	100.00%	100.00%
Independence	1	5.00	00:00:36	100.00%	0.00%
Seal Rock	1	1.00	00:00:00	100.00%	100.00%
Grants Pass	1	2.00	00:00:27	100.00%	0.00%
Gleneden Beach	1	1.00	00:00:00	100.00%	100.00%
Roseburg	1	1.00	00:00:00	100.00%	100.00%
Forest Grove	1	4.00	00:01:56	100.00%	0.00%
Lakeview	1	7.00	00:01:36	100.00%	0.00%
Hood River	1	1.00	00:00:00	100.00%	100.00%
Gresham	1	2.00	00:01:09	100.00%	0.00%
Newport	1	1.00	00:00:00	100.00%	100.00%
Prineville	1	2.00	00:00:22	100.00%	0.00%
Medford	1	1.00	00:00:00	100.00%	100.00%
					1 - 31 of 31

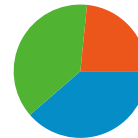


All traffic sources sent a total of 295 visits

 38.64% Direct Traffic

 23.39% Referring Sites

 37.97% Search Engines

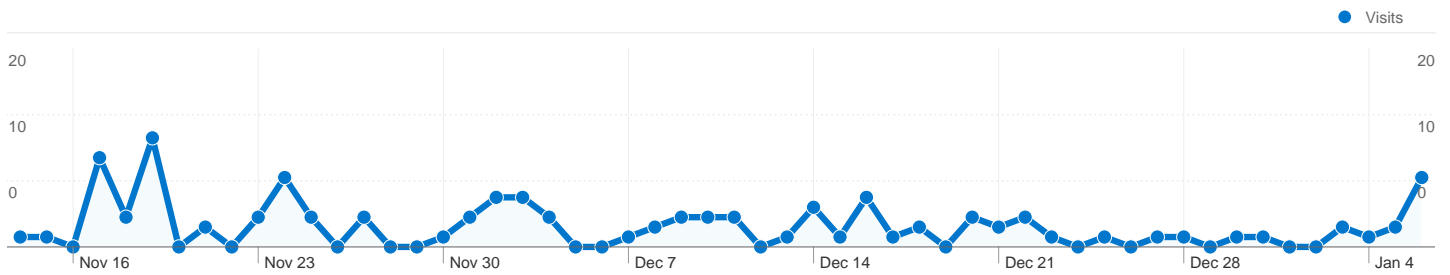


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Keywords	Visits	% visits
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court procedures	10	8.93%
oregon ccp	8	7.14%
council on court procedures	5	4.46%
council on court procedures	5	4.46%



Search sent 112 total visits via 56 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate	
112 % of Site Total: 37.97%	2.35 Site Avg: 2.65 (-11.30%)	00:02:21 Site Avg: 00:02:09 (9.83%)	66.07% Site Avg: 74.58% (-11.40%)	46.43% Site Avg: 43.39% (7.00%)	
Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	25	3.44	00:04:41	52.00%	12.00%
court procedures	10	1.40	00:00:29	80.00%	80.00%
oregon ccp	8	4.12	00:08:42	0.00%	0.00%
council on court procedures	5	2.60	00:00:13	20.00%	20.00%
council on court procedures oregon	5	4.00	00:00:57	80.00%	20.00%
oregon "council on court procedures"	5	3.80	00:00:48	60.00%	0.00%
council in court	3	1.00	00:00:00	100.00%	100.00%
orcp legislative	2	2.00	00:03:44	0.00%	0.00%
oregon small claims procedures	2	1.00	00:00:00	50.00%	100.00%
"rex armstrong judge"	1	1.00	00:00:00	100.00%	100.00%
ammedments to minutes	1	1.00	00:00:00	100.00%	100.00%
brian s. campf attorney leslie o'leary	1	1.00	00:00:00	100.00%	100.00%
brooks cooper council on court	1	1.00	00:00:00	100.00%	100.00%
brooks f. cooper	1	4.00	00:00:38	100.00%	0.00%
council on court procedure	1	3.00	00:03:02	0.00%	0.00%
court procedure	1	1.00	00:00:00	100.00%	100.00%
court procedures how does it work	1	1.00	00:00:00	100.00%	100.00%
court procedures how does it works	1	1.00	00:00:00	100.00%	100.00%
court procedures in practice	1	1.00	00:00:00	100.00%	100.00%
discipline for civil court judges oregon	1	1.00	00:00:00	100.00%	100.00%
first year oregon rules civil procedure	1	2.00	00:00:38	100.00%	0.00%
hon. robert d. herndon	1	1.00	00:00:00	0.00%	100.00%

judge lauren s holland eugene	1	1.00	00:00:00	100.00%	100.00%
judge mertens james marion	1	1.00	00:00:00	100.00%	100.00%
kathryn m pratt	1	1.00	00:00:00	0.00%	100.00%
legislative history of orcp 68	1	1.00	00:00:00	100.00%	100.00%
legislative history orcp 69	1	2.00	00:01:31	100.00%	0.00%
orcp	1	1.00	00:00:00	100.00%	100.00%
orcp 15	1	1.00	00:00:00	100.00%	100.00%
orcp 18	1	1.00	00:00:00	100.00%	100.00%
orcp 52	1	1.00	00:00:00	100.00%	100.00%
orcp 54(a) form	1	1.00	00:00:00	100.00%	100.00%
orcp 62.	1	1.00	00:00:00	100.00%	100.00%
orcp 63	1	1.00	00:00:00	0.00%	100.00%
orcp 64	1	1.00	00:00:00	100.00%	100.00%
orcp 67	1	1.00	00:00:00	100.00%	100.00%
orcp 68	1	1.00	00:00:00	100.00%	100.00%
orcp 8	1	1.00	00:00:00	100.00%	100.00%
oregon ccp civil procedure	1	4.00	00:01:24	100.00%	0.00%
oregon civil procedure appellate	1	2.00	00:07:27	100.00%	0.00%
oregon council court procedure	1	2.00	00:00:05	100.00%	0.00%
oregon council court procedures	1	4.00	00:19:33	100.00%	0.00%
oregon council members rules	1	1.00	00:00:00	100.00%	100.00%
oregon council of court procedure	1	2.00	00:00:09	100.00%	0.00%
oregon council on court procedure	1	3.00	00:00:22	0.00%	0.00%
oregon district court judges association	1	1.00	00:00:00	100.00%	100.00%
oregon orcp 15	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil proceedings for practicing	1	1.00	00:00:00	100.00%	100.00%
oregon rules of evidence	1	2.00	00:00:06	100.00%	0.00%
oregon state council on court procedures	1	1.00	00:00:00	100.00%	100.00%
procedure of filing a complaint in a local council court	1	1.00	00:00:00	100.00%	100.00%
robert herndon judge portland, or	1	1.00	00:00:00	100.00%	100.00%
when is judge lauren holland's term up	1	1.00	00:00:00	100.00%	100.00%
why was 8 of the supreme court chosen	1	1.00	00:00:00	100.00%	100.00%
www.oregonlawhelp.org	1	3.00	00:00:34	100.00%	0.00%
year of passing oregon rules of civil procedure	1	2.00	00:19:29	0.00%	0.00%

RECEIVED

NOV 30 2009

DANNY LANG,
OSB #79007 & CSB #78838

GLINDA SIFERS,
Litigation Manager

Law Offices of
DANNY LANG
Attorney at Law

November 23 2009

Via Fax & US Mail

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john.bachofner@bullivant.com

RE: AMENDMENTS NEEDED TO ORCP 54E

Dear John:

Thank you for your invitation, following the 2009 Annual Meeting of the House of Delegates, to submit additional input for the benefit of the Council on Court Procedures in studying how to promote settlements by amendments to ORCP 54E.

Upon such invitation, please find enclosed/attached a copy of the corresponding California Procedure, found in the California Code of Civil Procedure [CCP] Section 998.

Please recall that there was considerable interest expressed by HOD Members along with a considerable number of votes in favor of amendments to 1) make ORCP 54E mutually available to Plaintiffs & Defendants and 2) to extend the time for acceptance beyond the present unreasonably short time limit.

Please inform me of the dates when the Council on Court Procedures will be considering these matters as I wish to at least attend via telephone conference call/speaker phone so as to also be available to volunteer any additional helpful prior experiences.

May I suggest you contact another Member of the Oregon State Bar, Dan McKinney [541-673-4451] to confirm his vast experience as a California litigator with regard to the Merits of CCP Section 998 in practice.

Respectfully submitted,



DANNY LANG
OSB Member #79007
HOD Elected Delegate - 2008-2011

cc: Dan McKinney

Enclosure: Copy of CCP Section 998

Council on Court Procedures
January 9, 2010, Meeting
Appendix C-1

CODE OF CIVIL PROCEDURE

SECTION 998

998. (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.

(1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

(2) If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.

(3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

(c) (1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(2) (A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.

(B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in Encinitas Plaza Real v. Knight, 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a

reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

(e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

(f) Police officers shall be deemed to be expert witnesses for the purposes of this section. For purposes of this section, "plaintiff" includes a cross-complainant and "defendant" includes a cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.

(g) This chapter does not apply to either of the following:

(1) An offer that is made by a plaintiff in an eminent domain action.

(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

(h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

(i) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).