**MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, February 6, 2010, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd
Tigard, OR 97224

## ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Arwen Bird*
Michael Brian*
Eugene H. Buckle
Brian S. Campf
Don Corson*
Kristen David
Martin E. Hansen
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

Members Absent:

Brooks F. Cooper
Hon. Robert D. Herndon
Hon. Mary Mertens James
Leslie W. O'Leary
Kathryn M. Pratt
Hon. David F. Rees
Mark R. Weaver

Guests:

David Nebel, Oregon State Bar

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 |
|---|---|---|---|
| • ORCP 36<br>• ORCP 38B<br>• ORCP 38C<br>• ORCP 39<br>• ORCP 43<br>• ORCP 46<br>• ORCP 55<br>• ORCP 69<br>• ORCP 71 | • ORCP 1E<br>• ORCP 7D(3)(a)(iv)<br>• ORCP 18A<br>• ORCP 19C<br>• ORCP 47<br>• ORCP 47E<br>• ORCP 55<br>• ORCP 68<br>• ORCP 68C(4)(a)<br>• ORCP 69A<br>• Federalizing ORCP<br>• Moving venue to ORCP | | |

I. Call to Order (Mr. Buckle)

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

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of January 9, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft January 9, 2010, 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.

IV. Administrative Matters (Mr. Buckle)

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the website report (Appendix B) and noted that the number of visitors and other statistics have remained consistent over the past year. She mentioned the "bounce rate," and stated that the website's bounce rate is not quite as low as might be desired. She stated that this may indicate a need for a closer look at the website to make sure that appropriate keywords are included on each page to help users better find what they are seeking. She stated that she and Prof. Peterson will be meeting soon to discuss improvements to the website, and asked Council members to look at the site and to offer their suggestions.

B. Council Funding (Mr. Nebel)

Mr. Nebel gave a brief report on Council funding and stated that funding is likely to be appropriated. He stated that a committee is reviewing all court filing fees and the use of them, and that this committee will recommend how such fees are to be expended. He noted that the Council was previously given authority to spend $51,000, but no funds were appropriated. He stated that the committee will likely recommend to the budget committee that it enact a bill that authorizes the Council to spend this money, and that this recommendation should happen during the month of February.

C. Council Timeline (Mr. Buckle)

Mr. Buckle noted that, due to the Council's timeline for publication of proposed amendments, the latest that a first draft of a committee report should be presented to the Council should be at the April meeting. He stated that final drafts of any rule changes need to be presented to the Council by the June meeting.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting. Mr. Bachofner indicated that the committee has not met since October. Mr. Buckle asked for a volunteer to be a meeting coordinator for this committee, and Mr. Bachofner volunteered.

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

Mr. Corson stated that the committee met by telephone after the last Council meeting regarding the issue of whether self-represented litigants should have access to the out-of-state subpoena process. Mr. Corson stated that he had contacted staff from the Oregon Law Commission (OLC), and the staff indicated that the inclusion of self-represented litigants was intentional. He noted that ORCP 55A allows self-represented litigants to have subpoenas issued by the clerk, and that the committee believes that it is reasonable to allow self-represented litigants to obtain subpoenas from the clerk in the amended ORCP 38.

Mr. Corson stated that the committee did make small formatting changes to the original draft of ORCP 38 (Appendix C). He stated that, until two days before the meeting, the intention was to ask the Council to discuss and move forward to adopt the revised draft in September; however, he received an e-mail from an attorney with concerns about the draft and did not have a chance to talk to the committee about this prior to the current meeting. Mr. Corson asked whether the Council would like to postpone discussion for one more month so that the committee has a chance for further discussion. Judge Holland stated that the new inquiry does warrant review, and Mr. Hansen agreed.

Mr. Buckle noted that the current language of ORCP 38 states that if a mandate, writ, or commission is issued from another court, one can take a deposition. He asked whether the draft rule reduces the ways in which an Oregon deposition in an out-of-state case can be taken, as it states that one can submit a foreign subpoena to the clerk of the court and does not mention a mandate, writ, or commission. Mr. Hansen stated that the revised draft does not eliminate the commission procedure if someone wants to use that procedure, but that the new draft eliminates the need to go before the court and allows one to simply send the subpoena to the clerk of the court in the other state. He stated that it is a new procedure in addition to the old, and is much simpler than the commission process. Prof. Peterson asked what would happen if a party were to use the commission process rather than issuing of a subpoena, as the rule now seems to eliminate the commission process. Mr. Buckle observed that the draft states that the clerk of the Oregon court issues the subpoena, which is different from a lawyer issuing the subpoena. Mr. Hansen stated that the out-of-state lawyer

would issue the subpoena, which would then go to the Oregon clerk, and that the point is to simplify the process by avoiding the need to involve an Oregon attorney or judge.

Mr. Bachofner and Mr. Buckle asked what the procedure would be if a state has not adopted the UIDDA and, therefore, issues a mandate. Mr. Corson noted that ORCP 38C is the only existing authority; therefore, the commission process is eliminated in Oregon. He stated that anyone coming to Oregon would use the new procedure and would no longer have to get a writ or use the commission process in their state. He stated that, when an Oregon lawyer needs to issue a subpoena in another state, he or she uses the other state's process, and that the same principle applies here. Mr. Bachofner observed that the rule, as amended, would mean that, if a party received a writ from another state, there would be no procedure for them to get a subpoena issued. Judge Armstrong stated that the party should not have proceeded in that manner. Mr. Corson noted that the party should have read the Oregon rule before proceeding. Mr. Bachofner questioned whether, if one wants to use the Oregon deposition in another state that says subpoenas must be issued through a commission, that state would accept the deposition. Judge Armstrong stated that, if one takes a deposition in Oregon based on Oregon's rules, an out-of-state court should not reject that deposition based on "improper procedure." Mr. Hansen noted that an attorney wishing to obtain a deposition in a foreign state should read the relevant state's rules to determine the procedure that is required.

Mr. Bachofner stated that the draft rule makes an assumption that other states are consistent with Oregon. Mr. Hansen again stated that an attorney needs to read the Oregon rules. Judge Miller observed that, if the witness is compliant, the procedure is a non-issue. Mr. Hansen stated one must always comply with the jurisdiction of the receiving state. Prof. Peterson asked what would happen if one did not read the Oregon rules and instead issued a commission. Mr. Hansen stated that the draft would repeal the commission process, so there is no need for one. Mr. Bachofner asked whether a procedure should be included in case another state has a requirement that, in order for a deposition to be admissible for trial, it must be duly attained through a commission. Mr. Buckle asked if there was any harm in adding back the mandate language. Prof. Peterson noted that, if time is of the essence, days could be lost if a party uses the commission process and then needs to go back and issue a subpoena. Mr. Hansen stated that, if language about the commission procedure is kept in the rule, confusion may ensue as to whether both a subpoena and a commission are needed. Mr. Bachofner suggested language such as, "nothing in this rule shall prohibit the court from issuing a commission…" Ms. David noted that such language regarding the need to promote uniformity is already contained in section C(6), so a judge might just issue a subpoena in this case anyway. Prof. Peterson asked what the effect would be in states that have not adopted the UIDDA. Mr. Hansen stated that Oregon would adopt the rule, not necessarily a foreign state, and that by adopting the rule Oregon would say "we recognize foreign subpoenas in this fashion." Judge Armstrong observed that the uniformity language is typical for all uniform acts.

Mr. Buckle suggested that the committee discuss these issues more and return to the Council next month with a final recommendation. Mr. Bachofner noted that, as a trial attorney in another state, if his court rules require something, he wants to be sure to comply with his state's rules so that no one can challenge him later. Mr. Corson noted that ORCP 38B gives an attorney different tools to work with, and that the draft does not change ORCP 38B. He stated that he is not familiar with any state that requires a commission or letter rogatory in that state to obtain a deposition in another state.

Prof. Peterson noted that, in the proposed draft language, a judge is not involved in any way. He envisioned a scenario in which an out-of-state attorney obtains a commission in his or her state and presents it to an Oregon clerk. He expressed concern that a clerk may note that the commission is not a subpoena and be unable to issue a subpoena, and that the judge will not be able to issue one either because the commission process has been repealed. Mr. Corson stated that the committee can ask for more input from the OLC regarding this concern and whether it was addressed before the recommended language was drafted.

Mr. Buckle noted that a request to issue a subpoena does not constitute an appearance in an Oregon court, but that a request to quash a subpoena is an appearance. He asked what the effect of the new rule would be on this issue. Mr. Corson stated that an attorney is not appearing on behalf of a party in an Oregon court simply by requesting the issuance of a subpoena here. He stated further that, if an out-of-state attorney asks for an Oregon subpoena and violates Oregon rules, the Oregon court does have jurisdiction to issue sanctions. Mr. Buckle said that, when he sees the word "appearance," he thinks of it as a party appearing rather than an attorney appearing. Mr. Hansen stated that the Oregon court merely has personal jurisdiction over the witness. Since there is no court appearance, an Oregon-licensed attorney is not necessary. He noted that, if another issue arises and an attorney wishes to attempt to quash the subpoena, an Oregon attorney then needs to be involved. Judge Miller asked whether the court would have jurisdiction over the foreign party seeking the subpoena. Mr. Hansen stated that the foreign party is not appearing in Oregon court for any reason, so jurisdiction is only over the witness. Justice Kistler asked whether the draft language would foreclose, in a case where seeking to subpoena an Oregon resident is an abuse of process, an Oregon court from holding accountable the person responsible for the abuse of process. Mr. Hansen stated that a request for a subpoena in Oregon does confer authority for sanctions from an Oregon court.

Mr. Bachofner asked whether, when a motion for a protective order is made, the response would constitute an appearance or would the party be able to respond without appearing *pro hoc vice*? Mr. Corson stated that the party would have to hire an Oregon lawyer to respond. Mr. Hansen reiterated that a motion to enforce from an out-of-state lawyer, or a motion for sanctions or contempt, would constitute an appearance. He noted that the only thing that is not an appearance is

the request to issue a subpoena. Mr. Bachofner suggested adding "or response thereto" to the second line of ORCP 38C(5) to make it clear that any response to a motion constitutes an appearance. Mr. Buckle stated that the committee can take that into consideration during its discussions.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees was not present at the meeting. Committee members noted that the committee has not met in quite some time. Mr. Buckle asked for a volunteer to be a meeting coordinator for this committee, and Ms. Leonard volunteered.

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

Ms. David stated that the committee has met and put together drafts of ORCP 36, 39, 43, 46, and 55 (Appendix D). She noted that the draft of ORCP 43B removed ORCP 43B(1), but that the committee had intended to keep that language in place. Ms. Nilsson stated that slating the section for removal was her mistake and that she will correct the draft of ORCP 43B to keep section B(1) intact.

Ms. David stated that the goal of the committee was to emphasize that, if one is going to request electronically stored information (ESI), there is a duty within 20 days to confer about the issues, including the scope of the request, costs, etc. She stated that this conferral period is not intended to be comprehensive but, rather, to start discussion and to get consensus as to the issues on which the parties do and do not agree. She noted that a new section, ORCP 46E, would add sanctions for failure to comply with the conferral requirement, and that ORCP 43B(1)(b) would state that no motion regarding ESI could be filed until the moving party complies with conferral under this section and under the Uniform Trial Court Rules (UTCR). Ms. David emphasized that, because every case will be different, and every case will have different types of ESI, conferral is needed. She stated that the committee has spent a lot of time on how to fashion a rule that gives parties direction, yet requires that they identify any problems before turning matters over to the court.

Judge Miller noted that UTCR 5.010 requires conferral, and wondered why another conferral component or requirement is needed. She asked whether it is the 20 day period that is particular to ESI and wondered why modifying the UTCR is not more appropriate. Mr. Bachofner stated that the UTCR addresses motions to compel. Ms. David stated that the committee felt there was a need to help point the parties in the right direction regarding ESI, even before they reach the point of seeking a motion to compel. Mr. Hansen stated that ESI is so unique that it becomes a rule issue rather than a dispute issue, even as to how to make the request. Judge Miller stated that she hoped the change would reduce the need to reach the dispute level.

Ms. David stated that the committee was not set on the 20 day period, but that they felt that 20 days gave a little more time and was still within 30 day window to respond. Mr. Hansen stated that the rule should make it clear that, even if the parties have spent the first 20 days on conferral, the total period still consists of 30 days (i.e., that the 30 day clock is still running). Mr. Bachofner suggested that a 15-day period might be better. Mr. Hansen asked whether the 30 day rule must stay fixed if the parties are conferring in good faith to determine the procedure for receiving ESI. Judge Miller asked if one could ask the opposing counsel to waive the 30 day period if one is making a good faith effort to comply. Mr. Hansen stated that, in a perfect world, that type of request would happen. He noted that we are recognizing the complexity of ESI by building in a 20 day time period, but that there is no other rule in discovery that says that the 30 day clock has a 20 day sub-period. Ms. David noted that the draft of ORCP 43B(2) states that, within 30 days of the service of the request, a party shall serve a response. She stated that the need to respond is still there and that no exception is created, but that one must commence conferring within 20 days. Mr. Hansen stated that the draft rule only states that one must *begin* conferring within 20 days, and feels that 20 days is too long. Mr. Bachofner concurred that, in an ideal world, the conferral would begin immediately when the request is received, but that it is not an ideal world.

Judge Miller asked whether, if one begins conferral within 10 days and still has time remaining in the 30 day period, one can respond by saying "I'm working on it?" Mr. Hansen noted that the response rule the Council amended last biennium states with certainty that a "response" means to provide the requesting party with the materials asked for. Prof. Peterson wondered whether the material is clearly within a party's custody or control if it is not in the desired format. Mr. Buckle stated that a 10 day period might be better than 20. Mr. Hansen noted that the intent of the draft rule is to make sure that parties reach an agreement through conferral, and asked whether the 30 day period can begin running for ESI (as opposed to other documents) at the point during which the parties reach an agreement on format, costs, etc. Mr. Buckle stated that, 90% of the time, the parties agree to extend the time, and in the other 10%, one party files a motion for a protective order and takes the issue to the court.

Prof. Peterson wondered whether a party could file an objection stating one's inability to produce the material within 30 days and stating that one needs more time. He stated that, if the requesting party were unhappy about the requested extension, he or she could confer as required by UTCR 5.010 and file a motion, and most judges would allow more time. Judge Miller stated that no judge will punish someone making a good faith effort, and the time it takes to docket and set the motion would give more time to produce in any case. Ms. David noted that the draft provides for filing an objection, and that the committee considered 10 days but was concerned that, by the time the request is received by an attorney, sent to the client, etc., the 10 days may have already passed. She noted that, since the Council might eventually consider moving to a "multiples of seven" rule model, 14 days might be an appropriate time period. Ms. David stated that the

committee would like to circulate the draft rules to OLTA and OADC for comment. Judge Miller also suggested sending them to the Oregon State Bar corporate counsel and other business attorneys. Ms. David suggested tabling the issue for 30 to 60 days to get feedback from the bench and bar.

Mr. Corson asked whether ORCP 43B(2)(e) is necessary, as ORCP 43B(2)(d) already provides for objections. He stated that he sees the draft changes as a dramatic change in Oregon law because electronic documents are currently assumed to be in the concept of documents, and under the draft language, ESI would be seen as something different. Mr. Corson noted that most of what he receives now when he requests "documents" are electronic documents. Judge Zennaché stated that the committee clarified the issue by listing ESI in the general discovery rule, because the OSB Procedure and Practice Committee wanted clarification that ESI was covered by the discovery rule (ORCP 36). He noted that the Sedona Conference and subsequently adopted *Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* put emphasis on the parties conferring early in the process. He stated that these suggested changes create a mechanism by which the parties can confer early in the process. Mr. Corson stated that he does not necessarily disagree with this concept but that, definitionally under ORCP 36A(1), documents include ESI. He suggested a language change to "documents, including ESI" rather than defining ESI separately. He stated that he has no quarrel with the conferral concept. Judge Hodson agreed and stated that he does not feel it hurts the intent of the rule change to state it in this way. He stated that he would like the legislative history to reflect that the Council believed that ESI is already included in the rules, but that this change was an attempt to clarify it.

Judge Miller noted that ORCP 43's title is "Production of Documents and Things," and can remain such as long as it is clear that ESI is included. Mr. Hansen noted that he had a client who was convinced that ESI was not included in "documents" and believed that "documents" only referred to printed material. Judge Miller asked whether the "documents" and "tangible things" referred to in ORCP 43's title clearly include ESI. She asked whether "documents" encompass ESI or whether "things" encompass ESI. Mr. Campf agreed that, looking at "documents" in the title, one may not see right away that it includes ESI. Judge Miller stated that, if the draft is adding a third category of ESI, the title should perhaps reflect this. Mr. Buckle stated that ORCP 43 always referred to production of documents, which used to refer to traditional documents. He noted that "documents" are now stored in different manners and that defining "documents" as including ESI may be sufficient. Judge Miller asked why the draft would give ESI a separate category instead of defining it. Ms. David noted that the draft of ORCP 43B(1)(a) states that, unless ESI is requested specifically, a request does not include it. She stated that the committee was attempting to protect the person who responds in good faith and believes they have provided all information, but the other side then says "I wanted ESI too." She noted that the purpose of clarifying the rule is to let practitioners know that, if they want

something specifically, they need to state clearly their request and to confer. Mr. Buckle observed that many attorneys will ask as broadly as possible for everything and then decide what is relevant; these attorneys will always request paper documents and ESI.

Judge Holland observed that it appears that some of the issues have to do with how to receive the information, as opposed to what is being requested. She stated that, most of the time, the person who has the stored information has more knowledge of what information is held and in what form than the person who is seeking that information. She stated that requesting ESI is different from a broad brush request because the person requesting does not know what the other side has, yet wants everything that may be relevant. She stated that putting the onus on the requesting party shifts what was done previously, and wondered whether this is the goal of the proposed rule change. Judge Holland stated that conferring about how to get information might be more properly addressed in the UTCR. She expressed concern that the proposed ORCP 46E may be getting into substantive issues by making a specific exception since, if a sanction is requested and a good faith effort has been made, it is already covered. Judge Zennaché stated that ESI comes in a variety of forms (a contract can be printed, in PDF format, or in a Word file where changes in metadata can be tracked). He stated that, since there is such a variety, the change is not trying to prohibit a party from asking, but is requiring that party to specify the format and to discuss the request. He noted that the committee wanted to create a safe harbor with ORCP 46E for those acting in good faith, but that the committee could go either way on keeping that section.

Mr. Bachofner stated that it is a reality of a practice that people will include "everything" in a stock request for production, and that there could be a huge expense if a broad request is made. He stated that the proposed rule attempts to get to the reality of the situation and require the parties to discuss and determine what is really needed. Mr. Buckle stated that a request for ESI may specify the form or forms in which ESI is to be produced, and wondered who pays to put the ESI into the requested form if the other side does not keep it in that form. Judge Zennaché noted that this is the reason for the conferral process. Mr. Campf agreed that a rule cannot address this question, but that the conferral process can. He stated that the conferral process is the most important part of the change, so that disputes can be headed off early. He noted that the committee chose not to define ESI because it will change over time. Prof. Peterson wondered why the committee had deleted "phono-records." Mr. Campf stated that the committee had interpreted it as "sound recordings" and therefore replaced it with that term.

Ms. David stated that the committee will meet again and discuss and redraft if necessary. She noted that there is benefit to getting the drafts to the bench and bar early because it would be such a large rule change. Mr. Hansen stated that he sees no disadvantage to circulating the drafts in their current form, and that he would like to hear what people think early. Prof. Peterson noted that the Council's

timeline is to have rules essentially approved in June to publish in September. Judge Zennaché suggested circulating for comment for 30 days and seeing what people think. Prof. Peterson asked whether the Council would like to change the time period to 14 days. Council members agreed. Mr. Corson stated that he would like to think about his position for a bit before deciding whether he would like to define ESI separately or change the draft language to "documents, including ESI." Judge Zennaché suggested giving Council members a chance to respond to the committee first before circulating a draft to the bench and bar. It was agreed that the committee will circulate the drafts for comment after giving Council members 14 days to comment to the committee.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting. Committee members noted that the committee has not met in quite some time. Mr. Buckle appointed himself as meeting coordinator for this committee.

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

Judge Miller discussed her committee's report to the Council (Appendix E). She stated that the committee believes that the requested change is a good idea but has not yet determined whether the best way to make such a change is through modifying the ORCP or the UTCR. She stated that, while subsection 1 of UTCR 8.050 states that modification proceedings must be initiated by an order to show cause, UTCR 8.040 does not state that an order to show cause is necessary. However, in practice, an order to show cause is necessary in order to get the matter heard. Judge Miller noted that Judge Williams recommended a joint UTCR-Council work group to look at the issue. Judge Miller stated that she has been in contact with Bruce Miller of the UTCR Committee, who will do further research and let the committee know whether the UTCR Committee has addressed this issue in the past. Unfortunately, the UTCR Committee's legislative history is not as accessible as is the Council's.

Judge Miller noted that the Council should be looking for economical and efficient ways to make modifications of family law judgments, and that making a change that would require a party to pay an additional filing fee to file a cross-motion may not be in the spirit of the Council's mission. She stated that, since the cross-motion does not put further burden on the court, the additional fee may not be necessary. Mr. Buckle noted that, in the domestic relations area, minimizing fees is a good thing. Judge Miller stated that she did some research and found that orders to show cause come up in a variety of other areas besides family law, but that the family law prejudgment relief and post judgment modification areas are the only two areas that the Council would want to impact, not orders to show cause in a wholesale fashion. She stated that Ms. Pratt will do more research to see whether there are any other contexts that the committee should look at, but that it seems that, if a modification can be drafted, only the ORCP and/or UTCR

would be impacted and that nothing would have to be changed in the statutes.

7. Default Judgment Committee (Ms. David)

Ms. David noted that the committee has met and is working on a draft of changes to ORCP 69 which should be presented at the next Council meeting. She stated that the committee is also working on a memo regarding its recommended changes to ORCP 71, which will include legislative history and why the committee recommends abolishing the extrinsic v. intrinsic distinction.

Ms. David stated that Ms. Nilsson is researching the occurrence of the word "appear" in the ORCP, and that the committee is looking at past Council legislative history regarding defining motions and appearances in the ORCP. She noted that, when she has spoken with members of the bar and bench regarding this issue, some see it as an Oregon Judicial Information Network problem but others say it is simply an education problem in the courts. The committee is still attempting to determine whether it is a rule change or education issue. Judge Miller stated that a related issue occurs when a self-represented party files some type of document (a letter, etc.) with the court as a response. The clerk accepts the document and a filing fee, but the plaintiff objects, stating that the document is not a motion or an appearance.

Ms. David reiterated that the main problem is arising, for example, when a UTCR 7.020 notice is issued stating that the case will be dismissed unless an appearance is filed, but the parties are currently arguing Rule 21 motions, which by that rule are required to be raised before an answer is filed. Judge Miller stated that, to her, it is clear that a Rule 21 motion or change of venue motion counts as an appearance, but Ms. David replied that this is not so clear to certain judges in the state. Ms. David noted that, if the committee attempts to define the term "appearance," this may help address the issue relating to self-represented litigants that Judge Miller identified. Judge Miller noted that the UTCR notice of dismissal was not designed to weed out the good cases from the bad, but merely to remind people that they have a lawsuit pending and need to take action. Ms. David observed that certain counties seem to believe that a defendant must file an answer to put the case at issue to set a trial date, but that UTCR 7.020(4) already provides that, if all defendants have made an appearance, the case will be deemed at issue 91 days after the filing of the complaint or when the pleadings are complete, whichever is earlier. She noted that the committee is attempting to fix a flaw in the system. Mr. Buckle suggested that any Council members who would like to provide input on the issue should contact the committee.

8. Time Issues (Ms. Pratt)

Ms. Pratt was not present at the meeting and, therefore, did not provide a report.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Prof. Peterson noted that the committee had decided that this is likely a substantive issue and an issue for the legislature to address, but that Sen. Suzanne Bonamici had wanted to appear before the Council and take part in the discussion. Prof. Peterson will contact Sen. Bonamici to see when she may be available to attend a Council meeting or to meet with the committee to discuss the matter.

10. "Must" v "Shall" in the ORCP (Mr. Buckle)

Mr. Hansen stated that the committee had spoken briefly on this issue. He stated that he is doing research and that the usage of these words in the ORCP is inconsistent (sometimes "shall" is the only grammatically correct choice, sometimes "must" is used when "shall" could be, and vice versa). He noted that no global change can be made. Mr. Buckle stated that Mr. Nebel had made a good point about "must" typically being used when there is no actor and the passive voice is used. Ms. David stated that she has been looking at statutory construction and case law, and found that sometimes the word "may" has been construed as "must." She stated that she is hesitant to make too many changes because case law has been based upon these distinctions in the rules. Mr. Buckle noted that the Council's mission is to repair problems and make things run efficiently, and that he is not aware of a particular problem with this issue at the moment. Mr. Corson reminded the Council that the issue was brought up by the Oregon Law Commission during discussion of the UIDDA, and that he is not sure that it is an urgent issue but, rather, merely an issue brought up for consideration. Mr. Buckle asked whether there was a sense of a problem that the OLC had identified. Mr. Corson replied that there was split of opinion and that the OLC staff person did not think it was an urgent issue but acknowledged that it had been brought up by others who were trying to make the usage of "shall" and "must" more uniform.

Mr. Buckle noted that the UIDDA committee had decided to use the word "shall" because it found more instances of the word "shall" than the word "must" in the rules. Prof. Peterson stated that it may be a good idea to change those rules that include both "must" and "shall" in the same rule to all "shall" to show that there was no distinction intended between the two terms. Mr. Hansen stated that the Council could purge all occurrences of the word "must" from the rules to eliminate the issue, but that not all instances of "shall" can be replaced with "must." Mr. Buckle stated that this is not an issue specific to any one rule, and wondered whether the Council can include in its legislative history that the Council intends that "shall" and "must" in the ORCP are synonymous. Mr. Corson noted that he does not believe the Council can create a legislative history

for rules after they have been adopted. Mr. Hansen stated that use of the word "must" (other than in passive voice instances) seems to have begun in recent years and that he is not certain why. Prof. Peterson asked whether having a discussion of, for example, why the Council decided not to change an instance of "must" to "shall" or vice versa, and having that discussion included in the Council's legislative history, would be helpful to show the Council's intent. Justice Kistler noted that courts typically say that a failure to change a statute or rule does not provide any insight into the original meaning of the rule. Mr. Buckle stated that the committee will continue to look into the issue and report back to the Council next month.

B. Communication with Legislators (Ms. David)

Ms. David stated that she has not yet sent a draft e-mail to the listserve but will do so shortly.

VI. New Business (Mr. Buckle)

No new business was raised for discussion.

VII. Adjournment

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

Respectfully submitted,

Mark A. Peterson
Executive Director

**DRAFT 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*
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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 |
|---|---|---|---|
| • ORCP 1B<br>• ORCP 7C(3)<br>• ORCP 13<br>• ORCP 13B<br>• ORCP 14B<br>• ORCP 18<br>• ORCP 21<br>• ORCP 21A<br>• ORCP 22A<br>• ORCP 38<br>• ORCP 43<br>• ORCP 47E<br>• ORCP 54B(3)<br>• ORCP 69<br>• ORCP 69A<br>• ORCP 71 | • ORCP 1E<br>• ORCP 7D(3)(a)(iv)<br>• ORCP 18A<br>• ORCP 19C<br>• ORCP 47<br>• ORCP 47E<br>• ORCP 55<br>• ORCP 68<br>• ORCP 68C(4)(a)<br>• ORCP 69A<br>• Federalizing ORCP<br>• Moving venue to ORCP | | |



Council on Court Procedures
February 6, 2010, Meeting
Appendix A-1

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 minium, 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

**Council on Court Procedures**
**Website/Inquiries Update**
**Reporting Period: 1/6/10 - 2/5/10**

Attached are analytical reports detailing website visitors, geographical information, pages visited, keywords from search engines, and traffic sources. The website had 258 visits from 214 unique visitors, and 640 page views in this period. The average number of pages viewed was 2.48 and the average time spent on the site was 1 minute, 49 seconds. 74.42% of the visits came from new visitors. These numbers continue to follow the trends of the last year.

One interesting statistic is the "bounce rate," defined as "the percentage of single-page visits or visits in which the person left your site from the page on which they entered." The lower the bounce rate, the more successful the website is considered to be. The Council's average bounce rate over the last year is 43.64. This number may indicate that we need to take a closer look at the website and make sure to include keywords on each page to help users better find what they are seeking. However, in my opinion, the bounce rate can be misleading. For example, single page visits are not necessarily a bad thing, as the visitor may be able to find the information sought on only one page (e.g., Council membership, a specific set of minutes that they find in a Google search, etc.).

In any case, we are always striving to improve the site and will continue in this effort. Mark has some ideas that he will be discussing with me soon, and we encourage all Council members to take a closer look at the website and make suggestions.

Respectfully submitted,

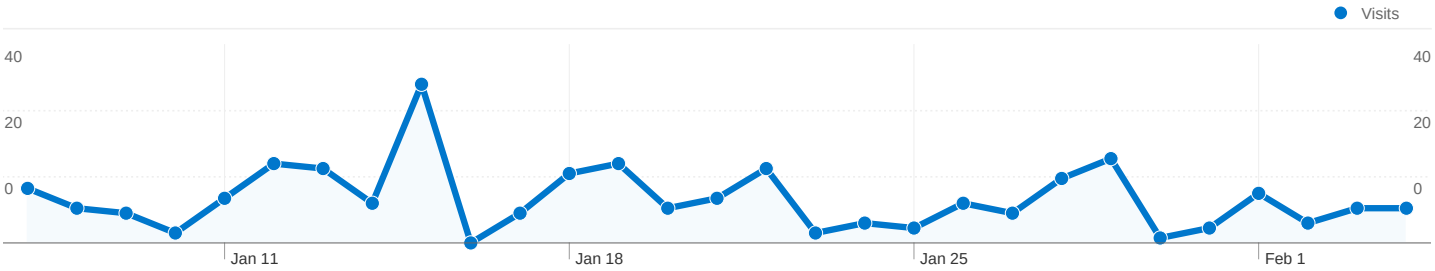
Shari Nilsson
Council Administrative Assistant

www.lclark.edu/~ccp

# Dashboard

Jan 7, 2010 - Feb 4, 2010

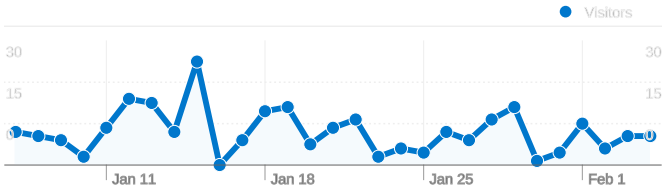
Comparing to: Site




## Site Usage

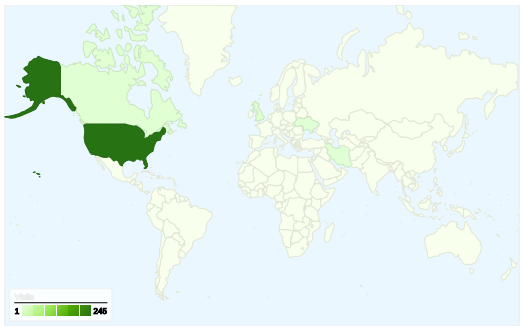
| | |
|---|---|
| 258 Visits | 44.96% Bounce Rate |
| 640 Pageviews | 00:01:49 Avg. Time on Site |
| 2.48 Pages/Visit | 74.42% % New Visits |

## Visitors Overview

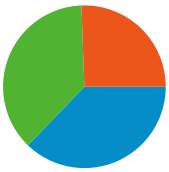



Visitors
214

## Map Overlay



## Traffic Sources Overview



- Search Engines
  96.00 (37.21%)
- Direct Traffic
  96.00 (37.21%)
- Referring Sites
  66.00 (25.58%)

## Content Overview

| Pages | Pageviews | % Pageviews |
|---|---|---|
| /~ccp/index.htm | 308 | 48.12% |
| /~ccp/LegislativeHistoryofRules | 61 | 9.53% |
| /~ccp/resources.htm | 57 | 8.91% |
| /~ccp/minutes.htm | 52 | 8.12% |
| /~ccp/Council_Membership.htm | 51 | 7.97% |



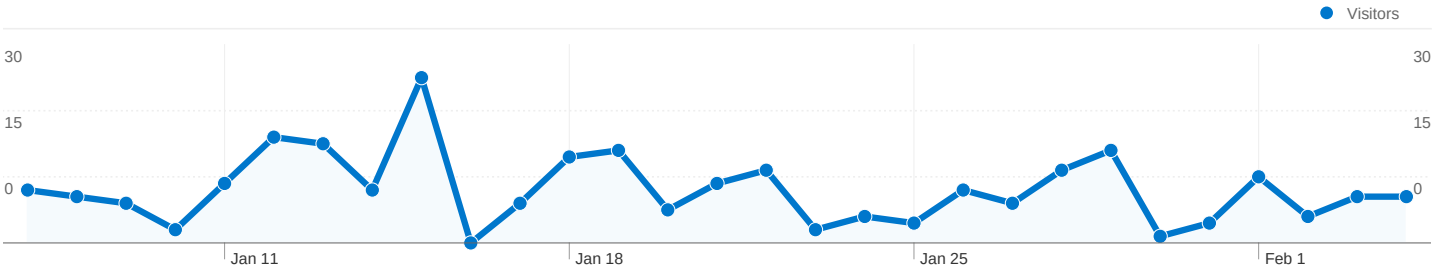
Council on Court Procedures
February 6, 2010, Meeting
Appendix B-2

www.lclark.edu/~ccp

# Visitors Overview

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## 214 people visited this site

**258** Visits

**214** Absolute Unique Visitors

**640** Pageviews

**2.48** Average Pageviews

**00:01:49** Time on Site

**44.96%** Bounce Rate

**74.42%** New Visits

## Technical Profile

| Browser | Visits | % visits |
|---|---|---|
| Internet Explorer | 178 | 68.99% |
| Firefox | 63 | 24.42% |
| Safari | 11 | 4.26% |
| Chrome | 5 | 1.94% |
| Opera | 1 | 0.39% |

| Connection Speed | Visits | % visits |
|---|---|---|
| T1 | 86 | 33.33% |
| Unknown | 70 | 27.13% |
| Cable | 58 | 22.48% |
| DSL | 33 | 12.79% |
| Dialup | 9 | 3.49% |



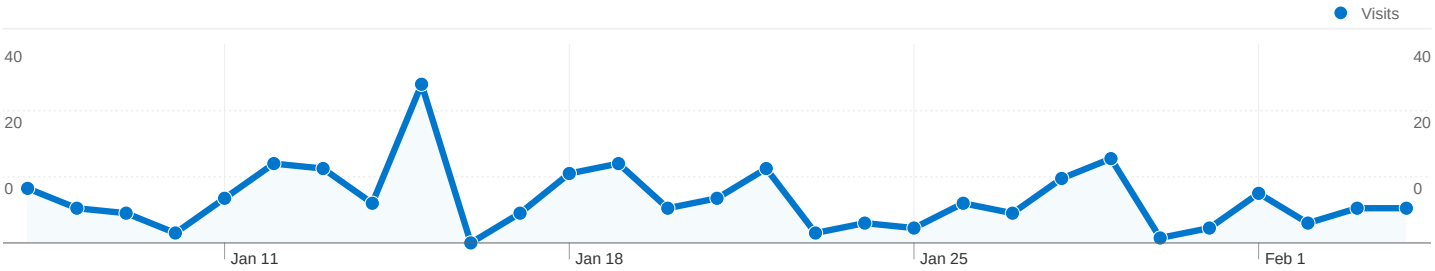
Council on Court Procedures
February 6, 2010, Meeting
Appendix B-3

www.lclark.edu/~ccp

# Traffic Sources Overview

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## All traffic sources sent a total of 258 visits

37.21% Direct Traffic

25.58% Referring Sites

37.21% Search Engines

Search Engines
96.00 (37.21%)

Direct Traffic
96.00 (37.21%)

Referring Sites
66.00 (25.58%)

## Top Traffic Sources

| Sources | Visits | % visits |
|---|---|---|
| (direct) ((none)) | 96 | 37.21% |
| google (organic) | 85 | 32.95% |
| councilonccourtprocedures.org | 25 | 9.69% |
| courts.oregon.gov (referral) | 22 | 8.53% |
| bing (organic) | 7 | 2.71% |

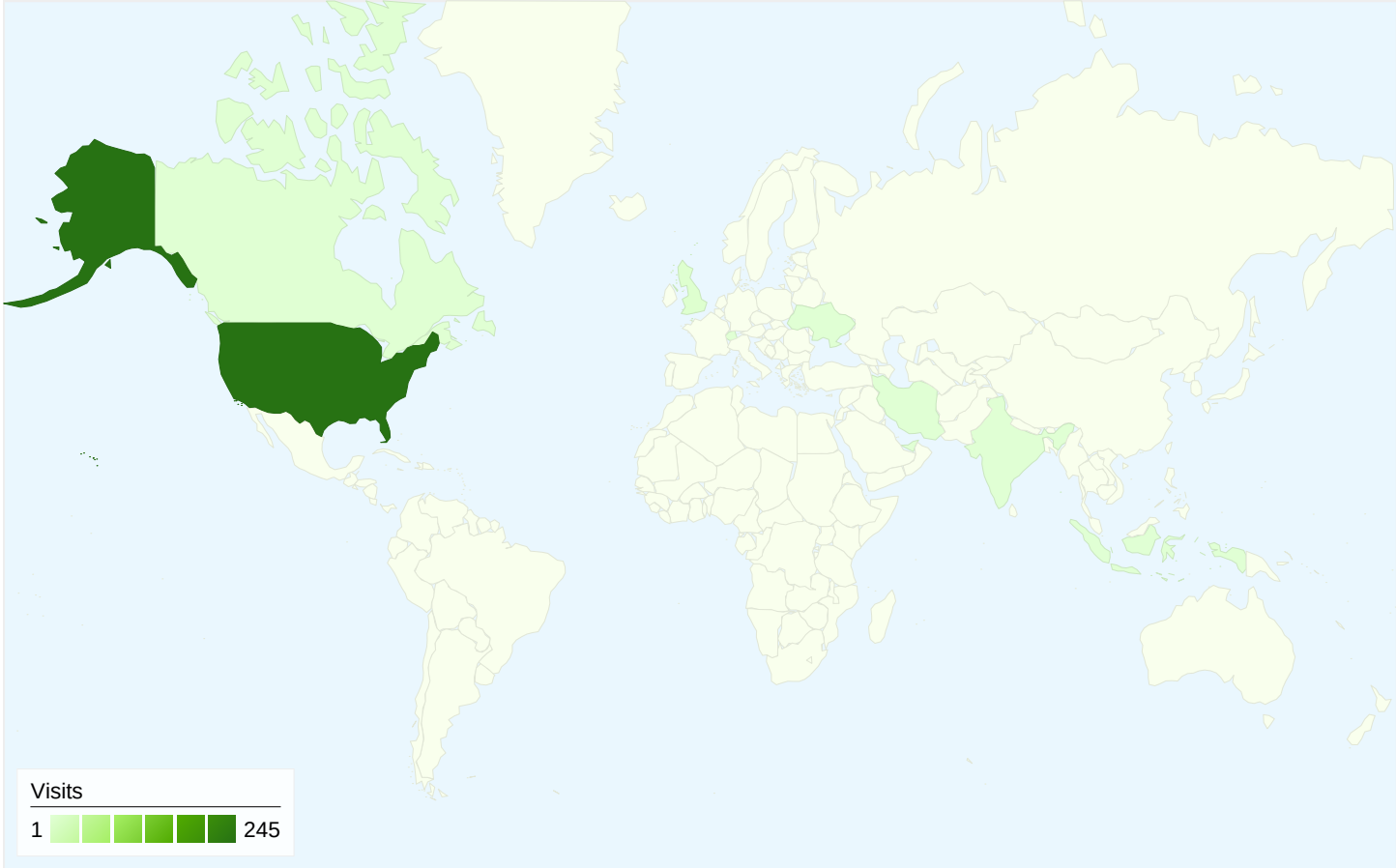
| Keywords | Visits | % visits |
|---|---|---|
| oregon council on court | 21 | 21.88% |
| council on court procedures | 9 | 9.38% |
| court procedures | 9 | 9.38% |
| council on court procedures | 6 | 6.25% |
| council on court procedure | 5 | 5.21% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-4

# Map Overlay

Jan 7, 2010 - Feb 4, 2010
Comparing to: Site




## 258 visits came from 9 countries/territories

Site Usage

| Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|
| 258<br>% of Site Total: 100.00% | 2.48<br>Site Avg: 2.48 (0.00%) | 00:01:49<br>Site Avg: 00:01:49 (0.00%) | 74.42%<br>Site Avg: 74.42% (0.00%) | 44.96%<br>Site Avg: 44.96% (0.00%) |

| Country/Territory | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|---|
| United States | 245 | 2.53 | 00:01:52 | 73.06% | 43.67% |
| United Kingdom | 5 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Canada | 2 | 3.00 | 00:03:50 | 100.00% | 0.00% |
| Iran | 1 | 2.00 | 00:00:01 | 100.00% | 0.00% |
| Ukraine | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Switzerland | 1 | 2.00 | 00:03:35 | 100.00% | 0.00% |
| United Arab Emirates | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Indonesia | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| India | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-5

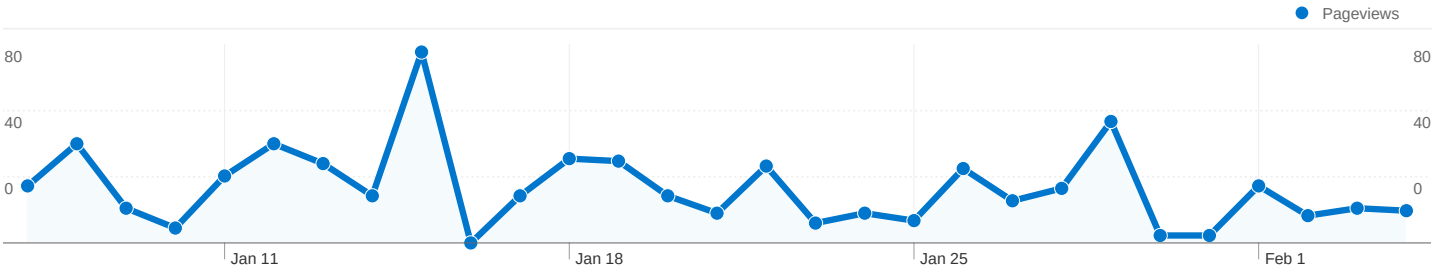
Google Analytics

www.lclark.edu/~ccp

# Content Overview

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## Pages on this site were viewed a total of 640 times

**640** Pageviews

**446** Unique Views

**44.96%** Bounce Rate

## Top Content

| Pages | Pageviews | % Pageviews |
|---|---|---|
| /~ccp/index.htm | 308 | 48.12% |
| /~ccp/LegislativeHistoryofRules.htm | 61 | 9.53% |
| /~ccp/resources.htm | 57 | 8.91% |
| /~ccp/minutes.htm | 52 | 8.12% |
| /~ccp/Council_Membership.htm | 51 | 7.97% |



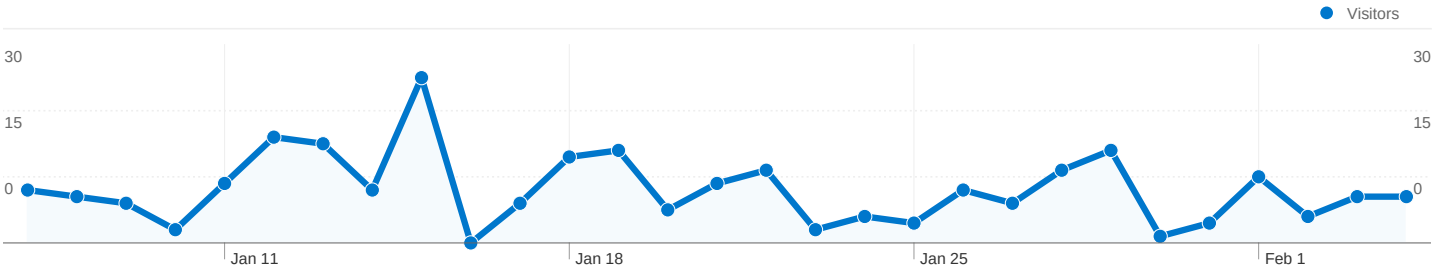
Council on Court Procedures
February 6, 2010, Meeting
Appendix B-7

www.lclark.edu/~ccp

# Visitors Overview

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## 214 people visited this site

**258** Visits

**214** Absolute Unique Visitors

**640** Pageviews

**2.48** Average Pageviews

**00:01:49** Time on Site

**44.96%** Bounce Rate

**74.42%** New Visits

## Technical Profile

| Browser | Visits | % visits |
|---|---|---|
| Internet Explorer | 178 | 68.99% |
| Firefox | 63 | 24.42% |
| Safari | 11 | 4.26% |
| Chrome | 5 | 1.94% |
| Opera | 1 | 0.39% |

| Connection Speed | Visits | % visits |
|---|---|---|
| T1 | 86 | 33.33% |
| Unknown | 70 | 27.13% |
| Cable | 58 | 22.48% |
| DSL | 33 | 12.79% |
| Dialup | 9 | 3.49% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-8

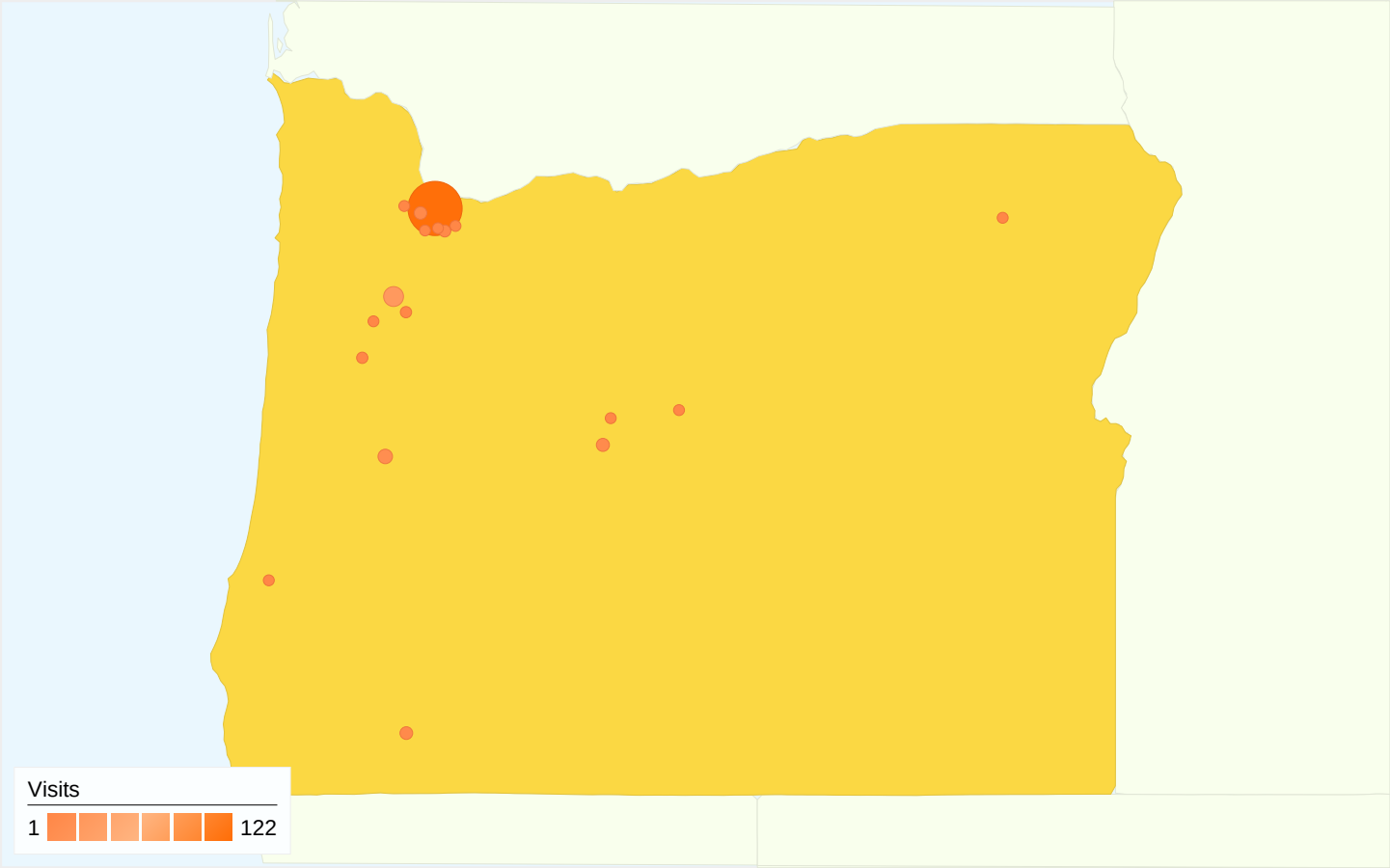
www.lclark.edu/~ccp

# State Detail:

Oregon

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## This state sent 195 visits via 18 cities

Site Usage

| Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|
| 195<br>% of Site Total:<br>75.58% | 2.50<br>Site Avg:<br>2.48 (0.68%) | 00:02:01<br>Site Avg:<br>00:01:49 (11.06%) | 69.23%<br>Site Avg:<br>74.42% (-6.97%) | 44.10%<br>Site Avg:<br>44.96% (-1.91%) |

| City | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|---|
| Portland | 122 | 2.52 | 00:02:17 | 62.30% | 44.26% |
| Keizer | 26 | 2.88 | 00:02:27 | 84.62% | 30.77% |
| Eugene | 11 | 2.18 | 00:00:52 | 90.91% | 36.36% |
| Bend | 7 | 2.29 | 00:00:14 | 71.43% | 71.43% |
| Central Point | 6 | 1.67 | 00:04:20 | 66.67% | 66.67% |
| Beaverton | 6 | 1.50 | 00:00:15 | 83.33% | 66.67% |
| Gladstone | 4 | 2.75 | 00:00:40 | 0.00% | 25.00% |
| Corvallis | 2 | 1.50 | 00:01:27 | 100.00% | 50.00% |
| Salem | 2 | 1.00 | 00:00:00 | 100.00% | 100.00% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-9

| | | | | | |
|---|---|---|---|---|---|
| Prineville | 1 | 2.00 | 00:01:06 | 100.00% | 0.00% |
| Clackamas | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Washington County | 1 | 3.00 | 00:00:22 | 100.00% | 0.00% |
| Imbler | 1 | 6.00 | 00:01:10 | 100.00% | 0.00% |
| Redmond | 1 | 3.00 | 00:00:07 | 100.00% | 0.00% |
| Independence | 1 | 9.00 | 00:02:25 | 100.00% | 0.00% |
| Marylhurst | 1 | 3.00 | 00:01:49 | 100.00% | 0.00% |
| Tualatin | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Coos Bay | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| | | | | | 1 - 18 of 18 |



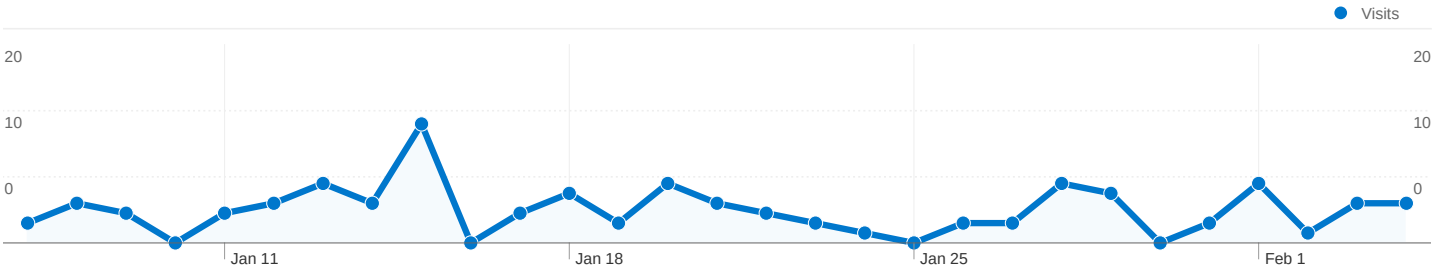
Council on Court Procedures
February 6, 2010, Meeting
Appendix B-10

www.lclark.edu/~ccp

# Keywords

Jan 7, 2010 - Feb 4, 2010

Comparing to: Site




## Search sent 96 total visits via 47 keywords

Site Usage

| Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|
| 96 | 2.54 | 00:01:54 | 67.71% | 46.88% |
| % of Site Total: 37.21% | Site Avg: 2.48 (2.46%) | Site Avg: 00:01:49 (4.41%) | Site Avg: 74.42% (-9.02%) | Site Avg: 44.96% (4.26%) |

| Keyword | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
|---|---|---|---|---|---|
| oregon council on court procedures | 21 | 2.67 | 00:02:03 | 57.14% | 38.10% |
| council on court procedures | 9 | 3.33 | 00:00:54 | 44.44% | 33.33% |
| court procedures | 9 | 1.56 | 00:00:42 | 100.00% | 77.78% |
| council on court procedures oregon | 6 | 3.50 | 00:00:38 | 33.33% | 16.67% |
| council on court procedure | 5 | 2.00 | 00:03:33 | 20.00% | 60.00% |
| how to find history of orcp | 4 | 5.00 | 00:01:12 | 25.00% | 25.00% |
| council of court procedure | 2 | 3.00 | 00:00:22 | 50.00% | 0.00% |
| oregon council on court procedures history | 2 | 1.00 | 00:00:00 | 50.00% | 100.00% |
| "orcp 38" | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| "oregon crime victims law center" | 1 | 2.00 | 00:00:27 | 0.00% | 0.00% |
| brooks cooper or attorney | 1 | 3.00 | 00:00:17 | 100.00% | 0.00% |
| brooks f cooper | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| ccp oregon | 1 | 2.00 | 00:00:07 | 100.00% | 0.00% |
| coucil on court procedures oregon | 1 | 4.00 | 00:02:26 | 0.00% | 0.00% |
| council court procedures | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| council on court proceedures oregon | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| council procedures on breaking a court undertaking | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| counciler in court | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| counsel court procedures oregon | 1 | 11.00 | 00:23:26 | 100.00% | 0.00% |
| court procedure | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| history of court procedure | 1 | 2.00 | 00:03:35 | 100.00% | 0.00% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-11

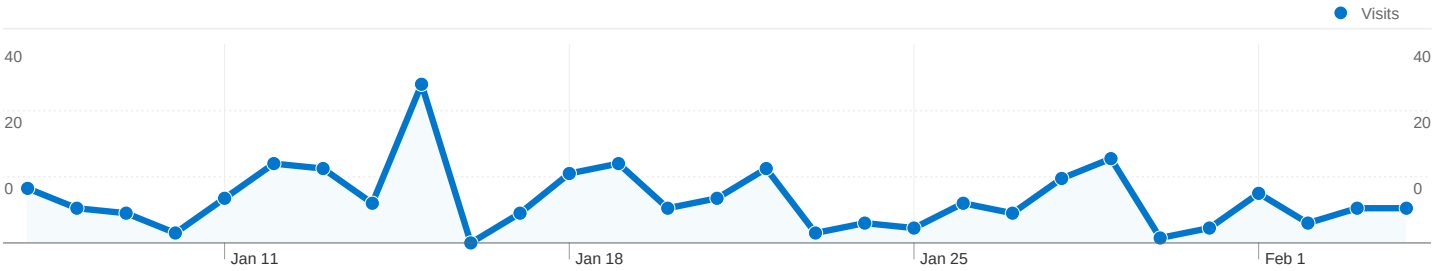
| | | | | | |
|---|---|---|---|---|---|
| history of oregon rules of civil procedure | 1 | 7.00 | 00:12:47 | 100.00% | 0.00% |
| how do i get the council to court | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| judge jerry b. hodson portland | 1 | 2.00 | 00:00:08 | 100.00% | 0.00% |
| judge lauren holland eugene oregon | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| lauren holland circuit court | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| legislative history of oregon court rules | 1 | 4.00 | 00:00:15 | 0.00% | 0.00% |
| legislative history oregon court rules | 1 | 2.00 | 00:00:04 | 100.00% | 0.00% |
| maureen leonard, attorney | 1 | 5.00 | 00:01:13 | 100.00% | 0.00% |
| members of staff at a court | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp 40 | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp 63 | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp 69 legislative change | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp history in oregon | 1 | 4.00 | 00:06:33 | 100.00% | 0.00% |
| orcp rules of court | 1 | 2.00 | 00:23:34 | 100.00% | 0.00% |
| orcp67a | 1 | 2.00 | 00:03:19 | 100.00% | 0.00% |
| oregon council on court procedure | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| oregon court procedure council | 1 | 3.00 | 00:04:33 | 100.00% | 0.00% |
| oregon court rules legislative history | 1 | 4.00 | 00:02:45 | 100.00% | 0.00% |
| oregon courtroom procedures for pro se | 1 | 3.00 | 00:09:01 | 100.00% | 0.00% |
| oregon law institute | 1 | 1.00 | 00:00:00 | 0.00% | 100.00% |
| oregon rules of civil procedure 1e | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| oregon,ccp | 1 | 2.00 | 00:02:54 | 100.00% | 0.00% |
| what is a council in court? | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| www.courtprocedures | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| oregon rules of civil procedure | 0 | 0.00 | 00:00:00 | 0.00% | 0.00% |

1 - 47 of 47

www.lclark.edu/~ccp

# Traffic Sources Overview

Jan 7, 2010 - Feb 4, 2010
Comparing to: Site




## All traffic sources sent a total of 258 visits

**37.21%** Direct Traffic

**25.58%** Referring Sites

**37.21%** Search Engines

- **Search Engines** 96.00 (37.21%)
- **Direct Traffic** 96.00 (37.21%)
- **Referring Sites** 66.00 (25.58%)

## Top Traffic Sources

| Sources | Visits | % visits |
|---|---|---|
| (direct) ((none)) | 96 | 37.21% |
| google (organic) | 85 | 32.95% |
| councilonccourtprocedures.org | 25 | 9.69% |
| courts.oregon.gov (referral) | 22 | 8.53% |
| bing (organic) | 7 | 2.71% |

| Keywords | Visits | % visits |
|---|---|---|
| oregon council on court | 21 | 21.88% |
| council on court procedures | 9 | 9.38% |
| court procedures | 9 | 9.38% |
| council on court procedures | 6 | 6.25% |
| council on court procedure | 5 | 5.21% |



Council on Court Procedures
February 6, 2010, Meeting
Appendix B-13

# ORCP 38

## PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

**A Within Oregon.**

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

**B Outside the state.** Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under



Council on Court Procedures
February 6, 2010, Meeting
Appendix C-1

these rules.

**C Foreign depositions.**

*[C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses 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.*

*C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.]*

**C(1) Definitions. For the purpose of this rule:**

**C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.**

**C(1)(b) "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.**

**C(2) Issuance of Subpoena.**

**C(2)(a) To request issuance of a subpoena under this rule, a party or attorney shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.**

**C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this state and pays the appropriate filing fee, the clerk, in accordance with that court's procedure and requirements, shall assign a case number and promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.**

**C(2)(c) A subpoena under subsection (2) shall:**

**(i) conform to the requirements of the Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55A but may otherwise**



Council on Court Procedures
February 6, 2010, Meeting
Appendix C-2

**incorporate the terms used in the foreign subpoena as long as they conform to the Oregon Rules of Civil Procedure; and**

**(ii) 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.**

**C(3) Service of Subpoena. A subpoena issued by a clerk of court under subsection (2) of this rule shall be served in compliance with ORCP 55.**

**C(4) Effects of Request for Subpoena. A request for issuance of a subpoena under this rule does not constitute an appearance in the court. A request does confer jurisdiction on the court to impose sanctions for any action in connection with the subpoena that is a violation of the Oregon Rules of Civil Procedure.**

**C(5) Motion to Court. A motion to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this rule is an appearance before the court and shall comply with the rules and statutes of this state. The motion shall be submitted to the court in the county in which discovery is to be conducted.**

**C(6) Uniformity of Application and Construction. In applying and construing this rule, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it.**



Council on Court Procedures
February 6, 2010, Meeting
Appendix C-3

## ORCP 36

## GENERAL PROVISIONS GOVERNING DISCOVERY

**A Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

**B Scope of discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, **electronically stored information,** or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B(2) Insurance agreements or policies. B(2)(a) A party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

B(2)(b) The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

B(2)(c) Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-1

insurance shall not be treated as part of an insurance agreement or policy.

B(2)(d) As used in this subsection, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B(3) Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain discovery of documents**, electronically stored information,** and tangible things otherwise discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

**C Court order limiting extent of disclosure.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance,



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-2

embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-3

# ORCP 39

## DEPOSITIONS UPON ORAL EXAMINATION

**A When deposition may be taken.** After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

**B Order for deposition or production of prisoner.** The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

**C Notice of examination.**

**C(1) General requirements.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

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Council on Court Procedures
February 6, 2010, Meeting
Appendix D-4

**C(2) Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

**C(3) Shorter or longer time.** The court may for cause shown enlarge or shorten the time for taking the deposition.

**C(4) Non-stenographic recording.** The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

**C(5) Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents, **electronically stored information,** and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

**C(6) Deposition of organization.** A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-5

agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

**C(7) Deposition by telephone.** Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

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Council on Court Procedures
February 6, 2010, Meeting
Appendix D-6

## ORCP 43

## PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

**A Scope.** Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents **or electronically stored information** (including writings, drawings, graphs, charts, photographs, *[phono-records],* **sound recordings, images,** and other **data or** data compilations from which information can be obtained, and translated, if necessary, by the respondent through detection devices into reasonably usable form), **stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form,** or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

**B Procedure.**

*[B(1) A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property upon which entry is requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and related acts.]*

**B(1)(a) Unless discovery in the action requests electronically stored information, a request for production of documents pursuant to this rule does not encompass, and the**



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-7

**response is not required to include, electronically stored information. The request may specify the form or forms in which electronically stored information is to be produced. If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A party need not produce the same electronically stored information in more than one form.**

**B(1)(b) Within 20 days of service of a request for production that requests electronically stored information ("ESI"), the requesting and producing parties shall in good faith begin conferring about the request for ESI with respect to the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; and any other issue a requesting or producing party deems relevant to the request for ESI. No motion regarding ESI can be filed unless the moving party, before filing such motion, complies with this section and any other duty to confer required by the Uniform Trial Court Rules.**

B(2) A request shall not require a defendant to produce or allow inspection, copying, entry, or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or the parties may agree upon in writing, a party shall serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, which items shall be organized and labeled to correspond with the categories in the request;

B(2)(b) as to any requested item not in the party's possession or custody, a statement that reasonable effort has been made to obtain it, unless specifically objected to, or that no such item



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-8

is within the party's control;

B(2)(c) as to any land or other property, a statement that entry will be permitted as requested unless specifically objected to; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

**B(2)(e) The response may state an objection to a request for producing electronically stored information.**

B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control.

B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so within a reasonable time.

**C Writing called for need not be offered.** Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

**D Persons not parties.** A person not a party to the action may be compelled to produce books, papers, documents, **electronically stored information,** or tangible things and to submit to an inspection thereof as provided in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter upon land.



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-9

**ORCP 46**

**FAILURE TO MAKE DISCOVERY; SANCTIONS**

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**E Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.**



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-10

**ORCP 55**

**SUBPOENA**

**A Defined; form.** A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, **electronically stored information,** or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

**B(1) For production of books, papers, documents, electronically stored information, or tangible things and to permit inspection.** A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, **electronically stored information,** or tangible things in the possession, custody or control of that person at the time and place specified therein. **Unless discovery in the action specifically requests electronically stored information, a request for production of documents pursuant to this rule does not encompass, and the response is not required to include, electronically stored information.** A command to produce books, papers, documents, **electronically stored information,** or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents**, electronically stored information,** or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-11

service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents**, electronically stored information,** or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, **electronically stored information,** or tangible things.

**B(2) Electronically stored information; form of production. The subpoena may specify the form or forms in which electronically stored information is to be produced. The responding party may serve a written objection to a requested form pursuant to subsection B(1) of this rule. If such an objection is made, the parties shall confer as required by Rule 43E. If a subpoena does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A responding party need not produce the same electronically stored information in more than one form.**

**C Issuance.**

**C(1) By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents**, electronically stored information,** or tangible things and to permit inspection thereof: (I) it may be issued in blank by the clerk of the court in which the action is



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-12

pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

**C(2) By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

**D Service; service on law enforcement agency; service by mail; proof of service.**

**D(1) Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. If the witness is under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent, guardian or guardian ad litem. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(I), D(3)(c)(I), D(3)(d)(I), D(3)(e), D(3)(f), or D(3)(h). Copies of each subpoena commanding production of books, papers, documents**,** **electronically stored information,** or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-13

served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

**D(2) Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer. A subpoena may be served by delivery to one of the individuals designated by the agency that employs the officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is required, the officer is currently employed as a peace officer by the agency, and the officer is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

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Council on Court Procedures
February 6, 2010, Meeting
Appendix D-14

**D(3) Service by mail.**

Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

**D(4) Service by mail; exception.** Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, **electronically stored information,** or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

**D(5) Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action, an attorney for a party in the action or an officer, director or employee of a party in the action.

**E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-15

**F Subpoena for taking depositions or requiring production of books, papers, documents, electronically stored information, or tangible things; place of production and examination.**

**F(1) Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers, documents, **electronically stored information,** or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

**F(2) Place of examination.** A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, **electronically stored information,** or tangible things only in the county wherein such person resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, **electronically stored information,** or tangible things only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

**F(3) Production without examination or deposition.** A party who issues a subpoena may command the person to whom it is issued to produce books, papers, documents, **electronically stored information,** or tangible things, other than individually identifiable health information as described in section H, by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

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Council on Court Procedures
February 6, 2010, Meeting
Appendix D-16

**G Disobedience of subpoena; refusal to be sworn or answer as a witness.** Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

**H Individually identifiable health information.**

**H(1) Definitions.** As used in this rule, the terms "individually identifiable health information" and "qualified protective order" are defined as follows:

H(1)(a) "Individually identifiable health information" means information which identifies an individual or which could be used to identify an individual; which has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and which relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually identifiable health information for any purpose other than the litigation for which such information was requested and which requires the return to the original custodian of such information or destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

**H(2) Mode of Compliance.** Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

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Council on Court Procedures
February 6, 2010, Meeting
Appendix D-17

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of such information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that: (I) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to object; (iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with such resolution. The party issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

H(2)(b) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of individually identifiable health information in an action in which the entity or person is not a party, and the subpoena requires the production of all or part of the records of the entity or person relating to the care or treatment of an individual, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection (3) of this section.

H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (I) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-18

taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.

H(2)(d) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(e) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D.

**H(3) Affidavit or declaration of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit or declaration of a custodian of the records, stating in substance each of the following: (I) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the entity or person acting



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-19

under the control of either, in the ordinary course of the entity's or person's business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the entity or person has none of the records described in the subpoena, or only a part thereof, the affiant or declarant shall so state in the affidavit or declaration and shall send only those records of which the affiant or declarant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit or declaration, more than one affidavit or declaration may be used.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of records and the production of original records is required if the subpoena duces tecum contains the following statement:

> The personal attendance of a custodian of records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

**H(5) Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

**H(6) Scope of discovery.** Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

**I Within a 20 days of service of a subpoena that requests electronically stored information ("ESI"), the party issuing the subpoena and the person to whom it is issues shall in good faith begin conferring about the request for ESI with respect to the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of**



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-20

**ESI; issues of privilege pertaining to ESI; and any other issue a requesting or producing party deems relevant to the request for ESI. No motion regarding ESI can be filed unless the moving party, before filing the motion, complies with this section.**



Council on Court Procedures
February 6, 2010, Meeting
Appendix D-21

**Counterclaims in Domestic Relations Motions**

To: Council Members

From: Eve Miller

Date: February 3, 2010

On January 28, Charles Zenache, Locke Williams, Kary Pratt & I met by telephone to again discuss attorney Russ Lipetzky's proposal for a rule that would allow counterclaims to be brought in response to prejudgment and post-judgment motions without the need to file and docket a separate show cause order.

It was decided that although we favor the liberal allowance of cross motions, Mr. Lipetzky's suggestion may be better addressed by the UTCR Committee. With that in mind, I contacted Bruce Miller to see if the UTCR Committee has discussed this in the past.

Bruce advised me that he did not think the issue had been discussed by the Committee but he would do some additional research. He also said that he sees Russ Lipetzky on a regular basis and would talk with him directly. As an aside, Bruce said that Russ was the Chair of the UTCR Committee for several years.

The committee looked at possible places for an ORCP Rule and did not find the perfect place for such an amendment.

It was also noted that the statutes authorizing motions in domestic relations cases, in particular, do not provide that an order to show cause shall accompany the motion, however, UTCR 8.050 does, but not 8.040. This may mean that a cross motion will always require the show cause order to get the matter before the court.

I recommend that we table this issue for a month or so until I hear back from Bruce Miller.