MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 10, 2010, 9:30 a.m.
Law Firm of Francis Hansen Martin, LLP
1148 NW Hill Street
Bend, OR 97701-1914

ATTENDANCE

Members Present:

Hon. Rex Armstrong*
John R. Bachofner
Eugene H. Buckle
Don Corson*
Kristen David
Martin E. Hansen
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Maureen Leonard*
Hon. Eve L. Miller*
Leslie W. O'Leary*
Kathryn M. Pratt*
Hon. David F. Rees*
Mark R. Weaver*
Hon. Charles M. Zennaché*

Members Absent:

Arwen Bird
Michael Brian
Brian S. Campf
Brooks F. Cooper
Hon. Robert D. Herndon
Hon. Mary Mertens James
Hon. Rives Kistler
Hon. Locke A. Williams

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 9 • ORCP 21A • ORCP 36 • ORCP 38 • ORCP 39 • ORCP 43 • ORCP 44 • ORCP 46 • ORCP 54A • ORCP 54B(3) • ORCP 55 • ORCP 64F • ORCP69	• ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 64F • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • 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 who required introduction.

III. Approval of March 13, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft March 13, 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). She noted that the only significant change made to the website during this period was to create a page which includes links to the e-discovery drafts that the Council is considering, and that this page received 437 views (55% of all page views for the reporting period). Ms. Nilsson stated that it is her hope that these new visitors will recognize the website as a valuable resource and become regular visitors.

Mr. Buckle asked if there is a sense of whether the website is being used as a legal research tool. Ms. Nilsson replied that the analytical reports show that visitors are indeed looking at "content" pages, such as legislative history and promulgated rules, not just at "informational" pages.

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

Prof. Peterson stated that he had received his copy of Thomson West's *Rules of Court* on April 6, 2010. He noted that this means that for 96 days of a 2 year cycle, practitioners did not have ready access to the amended ORCP. He also stated that the legislative history in *Rules of Court* did not get updated for all of the rules. Mr. Buckle asked where Thomson West obtains the rules and legislative history. Prof. Peterson replied that Thomson West obtains it from the Legislature's website, and noted that the Council has volunteered to send Thomson West our changes and the Legislature's changes when they become effective, but that Thomson West has not taken us up on this offer.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner reported that the committee had met by telephone that morning before the Council meeting. He stated that the consensus seems to be that the committee would like to come up with some language but temper it by protecting work product. Mr. Bachofner stated that he will draft language based on Washington's CR 26-2, as well as an alternative which would add new language to the current rule. He stated that Mr. Cooper will research the Washington rule, which permits discovery of insurance coverage information, and any case law interpreting that rule. Mr. Bachofner noted that the goal is to ensure that parties can receive information about a notice of a denial of coverage or a reservation of rights, but to protect work product associated with denials or reservations of rights.

Mr. Buckle asked whether the committee is considering any other issues. Mr. Bachofner replied that another issue came up this week due to a ruling in Multnomah County regarding Rule 44 medical examinations (MEs). He stated that there has been a consensus in Multnomah County that, rather than requiring expert witnesses to produce personal tax records, an affidavit could be produced which details how much income the witness has derived from these exams. Mr. Bachofner explained that the recent ruling required a physician witness to provide financial information such as personal tax returns, and that the witness refused to testify because he was required to produce such information.

Mr. Bachofner stated that this produced concern among the defense bar, and that some defense attorneys are stating that they may have to start subpoenaing the plaintiff's doctor's financial information as well in order to get leverage to get an agreement. Mr. Bachofner stated that his concern is that this may affect access to justice. He stated that the change may cause bullying of witnesses from either side, that having a witness produce all personal financial and tax information is irrelevant and invasive, and that this requirement may cause witnesses to refuse to testify. He also noted that it is an issue of professionalism and does not want to see the collegiality of the bar degraded over this issue.

Mr. Bachofner wondered whether it is appropriate for the Council to amend ORCP 44 or the discovery rules to give an indication of whether personal financial information should be discoverable for a witness or whether it can be handled with an affidavit. He stated that the committee generally feels that it is late in the biennium to begin work on such an amendment, but agreed that the issue was appropriate to raise for discussion. Mr. Buckle asked whether the committee has absolutely decided not to address the issue during this biennium.

Mr. Bachofner replied that, in the past, proposed amendments involving MEs have been divisive. He stated that his hope is for consensus from both sides of the bar that, generally speaking, not every witness should have to produce personal financial information just because they will testify in court. He emphasized that it is important to do something before both sides start wasting time and money on the issue.

Mr. Hansen noted that the issue seems substantive to him. Prof. Peterson stated that, if the Council were able to reach consensus this biennium and promulgate a rule, it would be January 1, 2012, before the rule became effective; but that, if the Council holds off on making changes until next biennium, a rule would not be effective until January 1, 2014. He stated that the issue would have a great deal of time to fester if the amendment is not made soon, but that he does not know if it is feasible to act that quickly. Mr. Hansen stated that the issue should perhaps be handled legislatively. Judge Miller expressed concern about waiting until next biennium, but stated that she did not have a sense of how quickly consensus could be reached and noted that any proposals would need to be crafted thoughtfully. Ms. Pratt asked whether the issue arose from an individual judge's ruling or a Multnomah County motion panel decision. Mr. Bachofner replied that there had been a prior Multnomah County motion panel consensus, but that a judge had issued a recent ruling inconsistent with that consensus. Ms. Pratt stated that action could be swift in Multnomah County if a motion panel considers the issue and issues a new ruling. Mr. Bachofner stated that the issue is what the fallout will be among the plaintiffs' and defense bars as a result of the ruling. He noted that, whether or not the Multnomah County motion panel continues to adhere to its consensus opinion, the issue will come up throughout the state. Judge Rees noted that consensus statements are advisory, not binding.

Mr. Buckle stated that he recalled that, about 10 to 15 years ago, the approach of subpoenaing a witness' tax records to trial arose, but that it seems to have died down. He stated that, if this is just one judge's ruling on one case and that other cases may be different, the Council might want to consider making a change if the practice becomes widespread. Ms. David noted that the Clackamas County motion panel consensus reached an opposite conclusion, and that it may be premature to deal with this issue. Ms. Pratt stated that the ruling needs to go to the Court of Appeals, and wondered why this would be considered a procedural issue as opposed to interpretation of discovery statutes. Mr. Weaver stated that, in Jackson county there are approximately three doctors who perform MEs and that, after last week's ruling, he received letters from the plaintiffs' bar asking for financial disclosures or they will subpoena the doctors. He stated that the doctors have said that they will not testify under those circumstances, and that there are four motions before the court next week to deal with these issues. Mr. Weaver emphasized that, in small counties where there are not a lot of doctors, this can cause major problems. He stated that, in Josephine County, the court looks at panel statements from other counties that

have considered the issue, and that there could be a ripple effect throughout the state from this ruling. Ms. Pratt noted that it would be faster for a party to take the issue to the Court of Appeals, because it would take a long time for the Council to effect change even if the Council decided it was a procedural issue. Mr. Bachofner stated that, in an ideal world, he would agree, but that if a defense attorney is faced with losing a witness as a result of this ruling, he or she has an obligation to protect the client and may feel obligated to settle. Mr. Weaver noted that ORCP 36 and 44 set discovery for MEs, and that the "statute" that the Court of Appeals would have to interpret would be our ORCP. Mr. Corson noted that he and Mr. Buckle are veterans of a prior Council effort to deal with ME issues, and that this is a very difficult issue. Mr. Corson also expressed concern about involving the legislature in ORCP matters, as the bench and bar have a long history of having good rules of civil procedure and dealing with rule changes through the Council process. Judge Armstrong agreed.

Mr. Buckle opined that subpoenaing tax records for trial is not a discovery issue but, rather, is a trial issue. He stated that, in his experience, when a ME doctor's tax records get subpoenaed for trial, that ME doctor will get his or her own lawyer who moves to quash, etc. Mr. Buckle stated that he believes the former practice of subpoenaing ME doctors' tax records to trial led to the current practice of using an affidavit. Mr. Bachofner stated that it is his understanding that Oregon's current consensus opinion is based on a Florida rule of civil procedure, and that examining this rule may also address the issue of whether such a change is substantive or procedural. Judge Miller noted that the reason that the subpoena of actual tax records was occurring in the past because the person who subpoenaed the records did not believe that the doctor was being honest in his or her testimony, so they were attempting to impeach credibility on the issue of truthfulness. She stated that, if a witness is willing to lie in court, that witness would likely not hesitate to lie on an affidavit. Mr. Bachofner stated that Judge Miller had brought up an interesting idea about using in camera review by a judge in such cases, which may be an agreeable compromise.

Mr. Buckle asked the discovery committee to continue to consider the issue and to propose an amendment if this is what the committee decides. He agreed that the issue will likely be contentious, and that there will be a timing issue as a practical matter. Mr. Bachofner asked whether the Council as a whole would like the committee to work on it or to table it until next biennium. Ms. David suggested that the committee take a look at practices in different counties and those counties' consensus statements, see how the issue plays out in the next 30 days, and report back to the Council.

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

Mr. Corson stated that he had received assistance from the Oregon Law Commission staff and the National Conference of Commissioners on Uniform State Laws to address the issues raised in the last Council meeting. He reported that neither body had reported any problems with those issues. He also noted that the committee had made one change since the last Council meeting; it added a sentence to the draft of ORCP 38C(2)(b) to address the issue of a party desiring to hire an Oregon attorney to help draft a subpoena (Appendix C). Mr. Corson stated that the committee is submitting this version for the Council's consideration on whether it should be added to the list of amendments to formally publish in September. Mr. Buckle suggested changing "which" to "whom" on page 2, line 22. Mr. Bachofner wondered whether any Council members had concerns about using the word "person" and suggested that "entity" might be more appropriate. Mr. Corson pointed out that the definition of subpoena in ORCP 55A is "a written order directed to a person." The Council agreed that a subpoena is always served on a person even if that person's name is not known (e.g., one serves a registered agent to serve a corporation) and agreed that the word "person" is proper. The Council agreed to add this amendment to the agenda for September's list of rules to publish, unless any other issues arise before that time.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees reported that the ORCP 54 changes are still in the "work in progress" stage. He noted that the committee had begun with changes to 54E and is now addressing issues with 54A. He stated that some committee members had a conference call the previous day and that they discussed some new issues as well. He stated that Judge Armstrong raised the topic of inconsistencies throughout ORCP 54, which in some places treats dismissal of an action as a whole and in others addresses the dismissal of claims, counterclaims, cross-claims, and third party claims. Judge Armstrong stated that there is a tension in the rule that he saw result in questions in a Court of Appeals case recently. Judge Rees stated that the committee agreed that the new issue is a larger piece of work than the Council can accomplish right now, and feels that it needs to be on the agenda for next biennium.

Judge Rees stated that the committee discussed some concerns about previously raised concerns as well. He stated that the language suggested in subsection A – "in its entirety or as to one or more defendants" by giving notice to "all defendants" – is a significant change. He also noted that the committee had a conference call with attorney Danny Lang regarding making the offer of judgment reciprocal and stated that Section 998 of the California Code of Civil

Procedure allows the inclusion of extra expert discovery fees, deposition costs, and prevailing party fees for the party that does not better the offer of judgment. Judge Rees pointed out that the Oregon rule does not provide for such fees and costs even if it were made reciprocal. Ms. Leonard stated that the committee is not prepared at this time to present the reciprocal attorney fees proposal.

Judge Rees stated that the committee had agreed that changing lines 14 and 15 to read that "a party" shall submit a judgment was a good change. He stated that the committee had proposed new timelines in subsection E (changing from 10 to 14 days the time for serving an offer to allow judgment, and from 3 to 5 days the time to accept such an offer. He noted that the general agreement is that both timelines need to be longer, but that these numbers are not definite. Mr. Bachofner noted that the committee is proposing the changes to ORCP 9 and ORCP 54 which were included in the last draft, with the exception of changing “the parties” on page 4, line 14 to “a party," and except for the language about reciprocity. Mr. Buckle suggested that the committee redraft its recommended changes to present at the next meeting.

Prof. Peterson stated that timing needs vary depending on the area of the state and type of law practice. He stated that the committee agreed that more than 3 days is appropriate but, as it gets close to trial time, the advantage of making the offer goes away because trial costs begin to be incurred. Mr. Buckle stated that it is a good idea to present the timing changes to Oregon Trial Lawyers Association (OTLA) and Oregon Association of Defense Counsel (OADC) for comment. Prof. Peterson agreed to produce a copy of the Rule with just the time changes for presentation to those organizations. He wondered whether the same should be done for the reciprocity issue, or whether the issue should be held over until next biennium. Mr. Buckle suggested not sending any proposed language regarding reciprocity but, rather, to just float it as an idea. Mr. Bachofner proposed just sending an e-mail stating that the Council is considering changing the times specified in ORCP 54E, rather than actual proposed language. Judge Rees noted that he is puzzled by the proposal for the reciprocity change, but that by soliciting input early, the Council might receive additional information that would help decide whether to go forward with it next biennium. Mr. Bachofner suggested two separate e-mails so that one is not overshadowed by the other.

Prof. Peterson raised the issue of the reference to ORCP 54B(3) in the final line of ORCP 21A. He stated that he and Ms. Nilsson had looked at Council history (Appendix D) and were unable to determine why the reference to ORCP 54 is there. He noted that the amendment to ORCP 21 that was made in 2000 was fairly clear except for the ORCP 54 reference. Prof. Peterson asked that Council members look at the history and give their input by the next meeting. He

proposed removing the reference to ORCP 54B(3) if no good reason could be found for keeping it there. Mr. Hansen stated that, the way he reads the rule, while you have another action pending which may or may not be pursued to a final judgment, the court could defer entry of judgment of dismissal and wait to see if the case should be dismissed later for want of prosecution. He stated that he has seen placeholder lawsuits filed that are used just to grab jurisdiction to prevent an action from being prosecuted in a more proper forum. Mr. Hansen recalled that this was the reason why the ORCP 54 reference to want of prosecution was inserted.

Mr. Buckle suggested that this is an ORCP 21 issue rather than an ORCP 54 issue. Prof. Peterson volunteered to head a committee on the issue and suggested that draft language may be able to be presented this biennium. Mr. Corson and Mr. Hansen agreed to join the committee.

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

Ms. David stated that an e-mail regarding the two alternate versions (Appendix E) of rule changes regarding e-discovery was sent to OTLA, OADC, all judges in the state, the Litigation Section, the Business Litigation Section, and the Computer and Internet law Section. She noted that the web page containing those drafts received 437 visits, and that she had received more than 50 e-mails, approximately 30 of which contained substantive comments. She stated that the positions on the issue can be summarized as follows:

- those that believe no rule change is necessary;
- those that absolutely agree that a rule change is necessary; and
- those who are split between version A and version B.

Ms. David stated that version A is longer and more comprehensive, while version B is shorter and includes electronically stored information (ESI) under the definition of documents. She noted that attorneys who deal with e-discovery appear to like version A better because it is more comprehensive and clear; while that attorneys who seldom deal with e-discovery appear to favor the short version. She stated that some attorneys feel that it is a Uniform Trial Court Rules (UTCR) issue rather than an ORCP issue. Ms. David stated that the committee needs to discuss this thoughtful feedback from the bench and bar, but that it feels that action needs to be taken this biennium so that it is not 2014 before a rule change is put into effect.

Mr. Buckle asked about the perceived advantages or disadvantages of the short version v. the long version. Ms. David stated that those who favor the short version believe that attorneys will confer on their own, that every case is different, and that it is sufficient to state that the parties need to confer and

leave it at that. She stated that these attorneys feel that the long version would be a hindrance and that Oregon attorneys are very civil and more prone to pick up the telephone and confer. Ms. David noted that a part of the committee's concern is for newer attorneys or attorneys who have not dealt with e-discovery in the past, because they may not know in which form to request the information.

Ms. David stated that she has received feedback suggesting that the Council include staff comments about case law and other rules on which it relied for any rule change. Prof. Peterson stated that the Council has discussed staff comments in the past and that, in light of the case law on interpreting statutes, voted to discontinue using staff comments. He noted that any feedback received by the committee should be a part of the minutes and, therefore, part of the Council's legislative history. Mr. Bachofner asked whether it would be a fair inference that those who want the short version typically have not had experience with e-discovery and do not realize that the longer form may be necessary. Judge Holland warned about being cautious about characterizing a group of people who are making comments. She noted that no other type of discovery is spelled out in such intricate detail. Ms. David agreed that the Council should not categorize who prefers which version. She stated that, once all e-mails have been complied, the committee can prepare a memorandum summarizing the content without divulging names. Ms. David stated that she anticipates further feedback in the coming weeks, and that the committee will report to the Council at the next meeting.

Mr. Corson stated that, at Judge Zennaché's suggestion, he had contacted the former chair of the Oregon State Bar's Procedures and Practice Committee, to discuss the original suggestion from the committee which prompted the Council to examine this issue in the first place. He stated the issue was that a small number of judges were declining to recognize electronic documents as documents under the current rules, and that the Procedures and Practice Committee wished to have this rectified. Ms. David stated that the Procedures and Practice Committee had also received her e-mail requesting comments, and that the Committee is grateful that the Council is addressing the issue. She stated that the fact that judges are unsure as to whether they have the authority to rule on e-discovery disputes was also mentioned in the feedback she received.

Mr. Buckle noted that the Council soon needs to determine what will be on the September docket for voting to publish. He stated that, as a general rule, it may be preferable to start out small, and that it is easier to add items later than to remove items that do not work.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting and no report was given.

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

Judge Miller reported that the committee had submitted a report to the Council (Appendix F). She stated that the committee had decided not to pursue the issue further since it appears to be a UTCR issue rather than an ORCP issue. Judge Miller stated that there is a great deal of support for this concept from the domestic relations bar and from the committee, but that biggest obstacle to getting a UTCR rule change is from UTCR members who do not agree. The committee's recommendation is to not take action this cycle, and to perhaps form a joint task force with the UTCR committee if there comes a point where there is no opposition from UTCR committee members.

7. Default Judgment Committee (Ms. David)

Ms. David reported that the committee is still working on draft amendments to ORCP 69 and that it should have more of a final version for the entire Council by the next meeting. She noted that the committee took into consideration the comments from the last Council meeting and input from court staff and practitioners. Ms. David stated that Ms. Leonard and Judge Zennaché are working on the intrinsic v. extrinsic issue and that they will draft a proposed change to eliminate the distinction. She stated that she, Prof. Peterson, and Ms. Pratt had also been working on the appearance v. pleading issue, and that they will produce a report stating that the committee believes that this is an education issue, not a rule change issue.

8. Time Issues (Ms. Pratt)

Ms. Pratt stated that she and Judge Miller had sent a letter to Chief Justice DeMuniz regarding this issue, and that Bruce Miller had contacted them in response stating that there are significant budgetary concerns with regard to changing something this significant. She pointed out that Mr. Miller stated that there are also doubts about whether the Oregon Judicial Information Network could be changed to reflect time changes. Ms. Pratt stated that she is expecting a reply from the Chief Justice which reflects these concerns. Ms. Pratt suggested leaving this item on the agenda until such response is received, and revisiting the issue next biennium if the economic situation improves.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Prof. Peterson stated that he will get in touch with Senator Suzanne Bonamici to see whether she is still interested in appearing at a Council meeting to give her input on this issue.

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

Mr. Hansen reported that he had found that there may be some merit to possibly making a few changes of “shall” to “must,” but that a universal change is neither warranted nor appropriate. He noted that approximately 50% of instances of the word “shall” could be changed to “must.” Mr. Hansen observed that the word “shall” seems to have crept into the ORCP in recent years, perhaps through sloppy drafting, and that there is a concern that one could interpret this as being an intentional change by the Council. Ms. Pratt stated that the federal court had cleaned up its language about four years ago by changing “shall” to “must” wherever appropriate. Mr. Buckle pointed out that this issue arose from another Council discussion and that no practitioner had presented this to the Council as a problem. Prof. Peterson stated that Mr. Nebel had previously pointed out that the Oregon Revised Statutes are not being re-drafted globally to fix this issue either. Mr. Corson suggested thinking about the use of “shall” and “must” as the Council drafts rule changes in the future, rather than tackling the issue retroactively. Mr. Nebel stated that Legislative Counsel is taking this approach as well. Ms. David suggested that Mr. Hansen draft a memorandum summarizing why the Council is not choosing to make specific rule changes and that the Council will try to develop a more uniform standard for future rule changes. Mr. Buckle inquired whether the report should state that the Council feels that “shall” means the same as “must” and is mandatory rather than advisory. Prof. Peterson noted that the Council cannot create legislative history without making a rule change, but that the report can capture this sentiment from the Council.

11. McCollum v Kmart, Case No S 057609: impact on ORCP 64F if order not "entered" within 55 days (Mr. Corson)

Mr. Corson stated that this decision (Appendix G) had been issued during the current biennium and that it is thought-provoking. He stated that in some counties, due to budget constraints and loss of staff, the time between the ruling on a motion for new trial and the entry of an order granting or denying a new trial can be substantial. Mr. Corson asked whether Council members feel that this issue is appropriate for the Council to address.

Judge Holland stated that Lane County has addressed the issue and has tried to ensure that this kind of motion is dealt with appropriately and in a timely

manner. She stated that she does not feel it is necessary for the Council to make any rule changes, but that it is more of an education issue for judges, attorneys, and staff. Mr. Bachofner asked whether this is something that is appropriate for the Council to address, or whether it is an issue of practitioners being on notice that they need to docket the 55 days and verify that the order has been entered. Prof. Peterson stated that an attorney can simply file a notice of appeal if he or she does not know whether the order has been entered. He noted that no harm would be done except for the possibility of losing a small filing fee, that rights are preserved, and that the appeal can be be dismissed or modified depending on whether the order has been entered. Mr. Hansen pointed out that monitoring deadlines is part of the practice of law, and that attorneys can fix this problem internally. Mr. Buckle agreed that this is an education issue and suggested that, unless a Council member thinks of a proposal that might be appropriate, we take the item off of the agenda.

B. Communication with Legislators (Ms. David)

Ms. David stated that she did not send a draft e-mail to Council members last month, but that she will do this shortly.

II. New Business (Mr. Buckle)

A. Civil Case Processing in Oregon Courts Survey (Mr. Buckle)

Mr. Buckle stated that he added this item (Appendix H) to the agenda for the Council's information. Ms. David encouraged all Council members to read the report because it has some amazing insight into some of the rules and feedback about where amendments could be helpful. She noted that these rule change suggestions could be helpful to the Council in future biennia. Judge Miller stated that the report contains useful information and that she was proud of Oregon's system after reading it. Mr. Bachofner pointed out that the report notes that parties rarely sought to extend or continue pre-trial deadlines. He stated that this is not because continuances are not needed but, rather, it is a function of Oregon lawyers' collegiality in that attorneys are allowing continuances without the need to file a formal request.

II. Adjournment

Mr. Buckle adjourned the meeting at 11:37 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
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Oregon State Bar Center
16037 SW Upper Boones Ferry Rd
Tigard, OR 97224

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Members Absent:

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I. Call to Order (Mr. Cooper)

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

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of February 6, 2010, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft February 6, 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. Cooper)

A. Website Report (Ms. Nilsson)

Ms. Nilsson reviewed the website report (Appendix B) and noted the organizational changes recently made to the website that will hopefully make the site easier to navigate and improve the site's bounce rate. She stated that she has added a history of Council drafts leading up to the final promulgated amendments for each rule for the last two biennia. She noted that this may not be feasible for prior biennia, but that it will be done in the future and should help those seeking legislative history by not requiring them to comb through the Council minutes to find the draft history. Ms. Nilsson also reviewed the inquiries received by the Council and stated that many of the inquirers were able to be referred to the website to find the information they were seeking.

Judge Miller commended Ms. Nilsson and Ms. David on the website. Ms. Pratt asked about the time frame for putting the remaining Council history (minutes and agendas prior to 1995) on the website. Ms. Nilsson stated that it is a fairly simple but somewhat time-consuming process, and that she and Prof. Peterson are the only Council staff. Ms. David stated that the website committee had previously discussed having a law student assist with the process, but that has not yet happened. Prof. Peterson stated that it is also important for there to be quality control and supervision of any outside work. Judge Miller asked about the process, to which Ms. Nilsson replied that the documents need to be scanned to PDF, converted to OCR form so that the content is visible to a search engine, and uploaded to the website, after which links need to be added to the website. Mr. Cooper stated that he will be hiring some attorneys to do legislative work on a project for him and that he will ask if they are willing to volunteer some of their time to the Council for scanning Council history.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner agreed to take over from Mr. Cooper as chair of this committee. Mr. Bachofner reported that the committee has met by telephone and discussed the issues with which it was charged. After much discussion, the committee is recommending against making amendments on the following issues:

- Limiting the length/number of depositions
- Limiting the number of requests for production
- Clarifying how to match documents produced to specific items requested within a request for production (the committee felt that the language in ORCP 43B(2)(a) is sufficient)
- Making sanctions mandatory
- Eliminating ORCP 46A(2)'s requirement of setting out items sought for discovery in a motion to compel (the committee felt it was good to keep this in for the benefit of the court)

Mr. Bachofner stated that this left one issue for the committee to consider: disclosure of documents affecting insurance coverage. Mr. Corson had previously provided the committee with a detailed description of the original suggestion, which read as follows:

> "ORCP 36 B(2) needs to be reworded to require defendants to disclose not just insurance policies but documents affecting coverage (e.g., policy produced, but documents, letters, reservation of rights letter, etc. provide that insurer is denying coverage). Also, if requested, a defendant shall admit or deny that its insurer has accepted coverage for plaintiff's claims subject only to policy limits."

Mr. Bachofner noted that the committee had looked at the Washington rule regarding disclosure of insurance documents. Judge Miller stated that she is in favor of the most broad interpretation, because it is useful for settlement. Mr. Bachofner stated that he liked how the Washington rule was crafted. Judge Miller noted that, conceptually, the committee is in favor of making a change, but that the new language needs to be crafted. Mr. Brian asked whether the Washington rule requires production of the full policy with all policy language. Mr. Bachofner replied that the rule states that, if there are documents relating to coverage, those documents need to be produced. Ms. Leonard asked what the current Oregon rule requires. Mr. Bachofner replied that it only requires production of a copy of the policy. Ms. Leonard asked whether it requires the entire policy, not just the declarations page. Prof. Peterson wondered whether most practitioners ask for the entire policy. Mr. Cooper indicated that most do

not. He stated that, under the current rule, the insurer and defendant can make the argument that a reservation of rights letter or a limitation of coverage decision are work product and need not be produced. He stated that, if documents that affect the actual duty of the insurer to pay if the plaintiff wins get produced, like the Washington rule requires, it allows the plaintiff to include an assignment of claims against the insurer as part of the settlement package.

Mr. Bachofner pointed out that the difficulty is how broad one makes the request for production, and reiterated that there is a work product issue as to some documents, such as a notice that there is a reservation of rights. Judge Miller stated that she does not want to know why there is a reservation of rights but, simply, that it is an issue that may affect whether the money comes from the insurance company or the defendant. She stated that the first thing she wants to know is whether or not there is insurance, so perhaps an insurance company could be required to produce a letter which merely states that there is a reservation of rights or a denial of coverage. Mr. Bachofner stated that the committee talked about whether, as a practical matter, one would want to let the other side know about a reservation of rights or denial during settlement negotiations because it has a huge effect on the settlement value. Ms. Pratt noted that, if a defendant were to produce the actual reservation of rights letter, that party would essentially be giving the plaintiff all of the information needed to re-plead the claim. Judge Miller stated that no analysis of the insurance issue would be disclosed. Judge Herndon noted that the other party would eventually receive that information anyway, but that it could be redacted in the meantime.

Mr. Brian stated that there are good reservations of rights with iron clad reasons, as well as weak ones that are paper thin. He observed that, as a plaintiff's lawyer, he would want to know how good the reservation is because, if it were weak, it would not reduce the value of the case. Mr. Brian stated that he believes that the reason for the reservation should be disclosed. Judge Miller agreed that it would be useful to plaintiffs' attorneys to have the reason, but stated that she believes it goes beyond what should be required because it gets into actual analysis/work product. Mr. Bachofner stated that, if both parties are getting a copy of the insurance policy and all of the documents associated with it, both parties have the opportunity to assess whether it is a good reservation or not. Mr. Cooper noted that he can read a policy as well as the analysis person in the insurance company can and is able to make his own determination.

Mr. Bachofner stated that the committee will meet one more time and have a proposal for the full Council at the next meeting.

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

Mr. Corson stated that the committee has met, and provided a draft for the Council's review. (Appendix C). He noted that the committee was also asked to address a few issues by Council members and Oregon practitioners. He stated that one such issue was whether the amended rule needs to include a procedure to accommodate a state that says an out-of-state subpoena must be issued through a commission or letter rogatory. Mr. Corson sent a query to the National Conference of Commissioners on Uniform State Laws, which replied that it is not aware of any state with such a restriction, and has noted no such problems in any state that has adopted the Uniform Act. Mr. Corson noted that, in the current draft of ORCP 38, he left out the language in ORCP 38B(5) to state that a response to an appearance is a motion. He stated that this will be included in the next draft.

Mr. Corson noted that another issue the committee was to address is whether a judge should be able to issue a subpoena. Judge Miller stated that, if an attorney came to her and asked her to issue a subpoena, she would likely sign it and wait for someone to move to quash. She noted that, as long as there was some understanding that there was due process, she would probably let it in. Judge Herndon asked if the question was whether language should be added to ORCP 38C(2)(a) stating that a subpoena can be submitted to a clerk of the court or to a judge in the county. Mr. Corson stated that this was what the committee was discussing. Judge Herndon stated that he is not sure that is a good idea, and thought that the rule should merely state that the procedure is to go to the clerk and not give any alternatives. He wondered whether there is any good reason someone should need to go to a judge. Prof. Peterson pointed out that the most clerks' offices close at 5:00 p.m. and that, if such language were adopted, one could attempt to find a judge at home after hours. Judge Herndon stated that he would not honor such a request unless it came from a police officer in a criminal case. Mr. Cooper stated that this type of emergency does not occur in a civil case. Ms. Pratt noted that some county clerk offices do have limited hours. Judge Herndon reiterated that issuing a subpoena is not an emergency and suggested not complicating the rule.

Mr. Corson stated that another issue the committee is dealing with is whether an attorney should be allowed to issue a subpoena after the clerk has authorized it. He stated that he was asked about this by a practitioner who was concerned about complex subpoenas, such as medical records subpoenas, that have procedures with which clerks are not familiar. Mr. Cooper asked whether the rule should allow attorneys in Oregon to issue a subpoena in the same way they can issue intra-state subpoenas. Judge Zennaché asked whether the UIDDA allows for this. Judge Holland stated that the UIDDA does not provide that an

attorney can issue a subpoena. She observed that, If someone in another state questions the subpoena, it becomes difficult because that person does not know the local rules. She stated that this leads to more questions and allows more controversy in other states as opposed to just having a clerk sign it. Mr. Cooper asked whether the committee was proposing that the Oregon rule deviate from the UIDDA in this way. Mr. Corson stated that the committee is just asking the Council for some guidance on the issue, not advocating it. The Council agreed that this language should not be added to the draft rule.

Mr. Corson stated that another issue which the committee had been asked to address is the issue of international subpoenas. Mr. Cooper asked whether this was within the scope of the UIDDA. Mr. Corson stated that it is not, and that Prof. Peterson had asked whether, by adopting the uniform language, we would inadvertently lose the procedure for issuing international subpoenas. Mr. Cooper stated that he had worked on a case in which he attempted to subpoena witnesses from China. He noted that China was only interested in the provisions of the Hague Convention, not state level issues. He suggested that the Council may not need to do anything with regard to international subpoenas. Mr. Corson also suggested not adding any language regarding international subpoenas.

Judge Holland stated that the committee is on track to have a finished product for the Council's review at the next meeting.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees was not present at the meeting. Ms. Leonard stated that the committee had met and had drafted changes to ORCP 9 and ORCP 54 (Appendix D). Judge Armstrong noted that he had asked to join the committee, and Ms. Leonard apologized that he had inadvertently been left out of the meeting. She assured him that the committee will meet again and include him.

Ms. Leonard discussed the committee's draft of ORCP 9. She stated that it removes the requirement to file a rejected offer of judgment, and that the committee had already agreed that this change is appropriate. She noted that this change is also reflected in the ORCP 54E change.

Ms. Leonard stated that the first change to ORCP 54 was meant to capture current practice, to dismiss any party. Prof. Peterson noted that the original suggestion to the Council asked for a change allowing dismissal of some, but fewer than all, claims. He stated that the committee had decided that there is no way to make that change, but decided that a limited judgment could be used to dismiss some, but not all, parties.

Ms. Leonard stated that the changes on page 1, lines 14-15, were intended to fix a hole in the process because, in practice, judgments were not being entered because no party knew it had the obligation to submit a form of judgment. Judge Miller stated that the practice in Clackamas county is to stamp an order of dismissal with a "judgment stamp" to make it a judgment. Mr. Bachofner noted that other counties actually require a judgment document, and that cases have been dismissed and are still listed on the Oregon Judicial Information Network.

Ms. Pratt asked why this would be an ORCP change rather than a Uniform Trial Court Rules change. Mr. Bachofner stated that the current rule reads that the court *shall* enter a judgment, but the parties cannot see on the face of the rule that a party needs to submit one. Mr. Corson suggested that it is the plaintiff's responsibility to submit a judgment, in a case where the parties are arguing about who will do it. Judge Armstrong stated that it is a plaintiff's issue in all cases. Mr. Bachofner observed that, when a plaintiff has already agreed to dismiss, the plaintiff may have no incentive to spend the time drafting a judgment. He noted that he had been in situations where a party signed a dismissal but then had no interest in drafting the judgment, so the case sat in limbo. He stated that he believes either party should be able to submit a judgment. Judge Armstrong stated that, if neither party submits a judgment, the requirement is not fulfilled. He suggested using the language "a party,"rather than "the party."

Mr. Cooper stated that there is nothing to prevent the defendant from submitting a judgment if the plaintiff does not do so. He noted that, if it is made clear that the plaintiff and the plaintiff alone has the burden of drafting the judgment, it will be clear who to go to if the judgment does not get drafted. Mr. Bachofner wondered whether someone could object if the rule says that the plaintiff must submit the judgment and, instead, the defendant submits it. Judge Miller noted that, if the parties have a trial date coming up and call the docketing clerk and state that the case is settled, the court can send out a Uniform Trial Court Rule (UTCR) 7 notice and let the case die of its own accord but, if the judgment is received from the defendant and the plaintiff has not approved it as to form, the court would want to know for sure whether there is an objection. She stated that, conversely, if the plaintiff submits the judgment, the court will want to know whether there is a counterclaim pending. Mr. Bachofner stated that this is a practical issue that could be solved through a stipulated notice of dismissal. Judge Miller stated that, in many instances, the case will just languish. Ms. O'Leary asked why the party that was dismissed would have the burden of submitting the judgment. Judge Miller noted that this party is more motivated. Prof. Peterson stated that the committee had also expressed concern about self-represented litigants being able to generate an acceptable document.

Mr. Cooper asked the committee to spend more time on this issue and present a

suggestion to the Council at the next meeting. He did note that he would like submitting the judgment to be a burden on a specific party. Judge Herndon asked whether the rule in its present form already does that, and noted that the clerk sends notice of dismissal to both parties. Mr. Cooper stated that not all counties send those notices. He noted that he has had cases go up on appeal where the appellate court had jurisdictional questions because the final general judgment does not mention the final adjudication of the claims against the dismissed party. Judge Miller stated that a Clackamas County judge would not enter a general judgment of dismissal unless it was clear that all issues were taken care of, except by inadvertence.

Judge Armstrong asked whether, once one adds a feature that changes a rule from whole action to claims within an action or parties within an action, there will always be a limited judgment that must be entered whenever a claim or a party is dismissed. Judge Miller stated that she believes that this should be the case. Judge Armstrong stated that there may be no real requirement to enter a judgment right away if the case is still going on, and that the limited judgment can be embodied in the final judgment when the case is over. Judge Miller stated that the rule seems to require entry of a limited judgment of dismissal, and she believes it should be done as a practical matter. Ms. Leonard agreed that Judge Armstrong raised a good point, and suggested that the committee reconsider the language at line 5 about dismissing particular defendants, as the rule has always been built to dismiss the action in its entirety, so the need for a limited judgment should not arise. Mr. Bachofner pointed out that, in a case where a party has been dismissed from a case because they were not involved in any way, that defendant would want the limited judgment of dismissal entered as soon as possible so that they do not remain a party to the case on the record. He stated that a defense attorney is obligated to show his or her client that they have been dismissed from such a case. Judge Armstrong noted that sub-paragraph C states that the rule applies to cross-claims, counterclaims, etc., but that it could not. He stated that the language does not make sense. He agreed that there is a need to figure out when the sub-parts of a case can be addressed through this rule by voluntary and involuntary dismissal, but that he is not certain that adding subparagraph A(1) fixes the underlying structural incongruity. He stated that one thinks of dismissing a party from an action, not dismissing an action as to a party, and the whole framework of the rule as written is addressed to dismissing an action. He stated that the language needs to be re-conceived entirely to avoid raising other problems.

Ms. Leonard stated that the Council had also received recommendations to amend ORCP 54E(1) to increase the time before trial when someone can serve the offer of judgment. The committee's draft changed it from 10 days to 14 days. The committee also changed, from three to five days, the length of time specified in ORCP 54E(2) during which the recipient of the offer has to accept it.

She noted that one proponent had even suggested that 10-14 days would be a better time period for acceptance. Ms. Leonard stated that the general agreement of the committee was to expand the three days to give more time for the attorney to contact the client, for the client to talk to family members, and to allow enough time to make a considered decision on the offer.

Ms. Leonard stated that the committee had also drafted language to make the offer of judgment rule reciprocal, using Section 998 of the California Code of Civil Procedure as a reference point. She noted that the Oregon rule implicates attorney fees in an offer of judgment so that, if the offer of judgment is made, rejected, and not bettered, the attorney fees of the party that rejected the offer are cut off after that date. She stated that, in California, if an offer is rejected and is not bettered, the costs can be enhanced; the party that rejected the offer could be required pay either expert witness or deposition costs; or, perhaps, enhanced prevailing party costs could be assessed. Ms. Leonard pointed out that Rule 54 does not require payment of prevailing party fees. She noted that the committee had one concern about the possibility of a "gotcha" game where the plaintiff, who initially has all of the facts, can outwit the defendant with quick offer of judgment when the defense is not in a fair position to assess the value of the claim. She wondered whether an element of timing needs to be inserted into such a rule change, such as not authorizing an offer of judgment before a certain state of discovery in a case. She noted that the committee had identified this as issue of concern, but had not reached any conclusions about it yet.

Judge Miller suggested that, since making offers of judgment reciprocal would be such a large change, the Council might consider saving the issue for next biennium instead of trying to deal with it at this late date. Mr. Bachofner noted that the goal is to encourage settlement and to give parties a meaningful opportunity for settlement. He stated that, if not enough time for acceptance is given, the parties may not have had the chance to evaluate their case, and the offer loses some of its effect. On the other hand, Mr. Bachofner pointed out that, if too much time is given for acceptance, the time for trial preparation gets too close and the party making the offer loses the savings of the more substantial expenses that occur as the time for trial approaches. He stated that the committee had struggled with this issue. Judge Miller noted that her county tries to set judicial settlement conferences about a month before trial to give time for discovery to be completed. She stated that some people think earlier settlement conferences are better because they have not yet spent a great deal of money preparing for trial.

Judge Holland stated that, unless lawyers are experiencing a great deal of problems with this issue, perhaps a change should not be made. Mr. Cooper stated that, given the relatively toothless nature of the sanction that the rule imposes for rejecting an offer and failing to beat it in cases where there are no

attorney fees, which is most of them, the rule works fine in its present form because it is mostly useless. He stated that, if we are going to increase the teeth in the rule, we have to give the parties more time and the concerns about timing start to matter a lot. Ms. Leonard noted that, depending on the kind of practice, costs can matter a great deal, especially when attorney fees come into play. Judge Miller stated that more employment cases are now coming into state court and that they are oftentimes heavy on costs and attorney fees. Prof. Peterson suggested that work on the reciprocity issue should be continued this biennium, and that the committee's next draft should be made available to the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) for feedback. He noted that, if there is not a lot of controversy, the change could potentially be made this biennium. Ms. Leonard agreed to send the committee's next draft to OTLA, and Mr. Bachofner agreed to send it to OADC.

Mr. Corson asked that the committee also look at the last 3 lines of ORCP 21A that reference ORCP 54. Prof. Peterson stated that he will give the committee information from the 2003-2005 biennium when the Council made that change.

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

Ms. David reminded the Council that she and Mr. Cooper are liaisons to the Chief Justice's E-Filing Task Force. She stated that e-filing is now allowed in the Court of Appeals and Supreme Court and seems to be working well. Ms. David noted that there are no changes that the Council needs to make at this time to deal with e-filing or electronic case management, as changes being made to UTCR 22 are dealing with those issues. She stated that, when necessary, the Council can deal with any carry-over issues.

Ms. David stated that the committee is moving slowly with regard to e-discovery changes. She reminded the Council that the committee was waiting to submit draft ORCP changes (Appendix E) to the OTLA and the OADC until the committee received further feedback from Council members. She noted that Mr. Corson had submitted alternative draft changes to ORCP 43 and 55 (Appendix F).

Ms. David also stated that she and Mr. Campf had attended a CLE on e-discovery given by the Oregon State Bar technology group. She pointed out that the agenda for this CLE included five pages of topics about which it was suggested that parties should confer when dealing with e-discovery issues. She observed that there is no need to have that kind of detail in ORCP, since those are the practical matters about which there will be CLEs down the road, but that the list highlights the need to get the parties to confer on e-discovery issues. Ms. David stated that meaningful conferrals do not always happen, despite the desire for them, and that the committee feels there is a need to include a conferral

requirement in the rule; the question is how to define that concept. She stated that Mr. Corson had made the suggestion to add ESI to the definition of documents in ORCP 43 and had questioned whether it is necessary to include the need to confer in the rule. She stated that the committee had included an extensive procedure in their draft but that there was disagreement within the committee about adding a safe harbor provision (draft ORCP 46E). Ms. David noted that she suspects there will be some disagreement if that provision is put before the Bar as well.

Ms. David stated that the Council's goal is to create clear procedures (not substantive law) to help guide the lawyer. She noted that conferral in terms of ESI is crucial, because parties may not know what is out there. Ms. Pratt stated that the standard of care in cases where ESI is expected to be a crucial issue is to send out preservation letters, which are typically over-inclusive. She noted that this is one of the complications of the sanctions provision: even if some data is lost in "routine good faith operation," because there was a preservation letter, sanctions should be allowed. She stated that she has found that there are not many motions for protective orders except in complex business litigation cases. Mr. Bachofner stated that there have been recent cases in which a court found that, even without a preservation letter, companies should have known to preserve data because there were pending lawsuits against similar companies. He stated that there should be a clear notice and there should not be sanctions if no notice was given. Ms. Pratt noted that this may be substantive rather than procedural. Mr. Cooper opined that the idea of adding a "safe harbor" to ORCP 46 seems substantive to him, and that there is no current rule in the ORCP that addresses which items one needs to preserve. He stated that a new standard just for computerized information is highly likely to cross the line from procedural to substantive. Judge Hodson stated that the committee had included the language precisely for the purpose of having the Council have this discussion, and that there was no consensus from the committee on whether it should be adopted. He stated that he feels more comfortable leaving it to be decided in case law.

Ms. Leonard noted that there are also concerns about whether any changes need to be made at all. She stated that she has been pondering Mr. Corson's position and thoughts from the last meeting and wondering if setting out ESI will make it more difficult to successfully deal with all of the items that are routinely electronically stored. She wondered whether it is creating trouble with the practitioner not knowing whether he or she is in "traditional discovery" or "e-discovery." Ms. Leonard agreed with Mr. Corson that, most of the time, the rule as it exists works fine, and expressed concern over revising a rule that is working to meet the needs of a small proportion of cases. Mr. Campf stated that these issues are real, and that a practitioner often does not know a problem exists until he or she is far into the case. He stated that, in such cases, if the parties

had a substantive discussion earlier on, it would be useful to both sides.

Ms. Leonard asked whether the change would affect, for example, a typical medical malpractice case. Ms. David stated that the change means that, if a party is requesting e-discovery, this extra step will need to be taken. She noted that a party will only need to take the extra step if they really need to. She stated that she also believes that the rule has always provided for e-discovery, but that the committee feels it is important to further clarify it for the parties. Judge Miller stated that, when she was practicing, she would hire a nurse in medical malpractice cases to advise her. She noted that, in cases where e-discovery is involved, an attorney could hire an IT person for advice. She stated that she would not feel comfortable describing things she does not understand. She noted that the change would perhaps be going beyond the scope of what needs to be done, except to suggest that perhaps once a party has described what that party wants, the other party has to respond in a good faith way.

Ms. David pointed out that most hospitals and doctors keep electronic records, and that pushing the "print" button may print out a pre-defined set of chart information but that there may be additional information buried within the system that needs to be requested as well. She stated that the average person does not see this information and that this is where conferral can be helpful. Judge Miller wondered why there needs to be such a specific rule when an attorney would need to talk to the other party's IT person to get the rest of the information. Ms. David stated that, when one hears the term "discovery," one thinks of printable documents already in existence. She noted that ESI is not necessarily easily printable, and envisioned a scenario with a defense attorney spending an exorbitant amount providing ESI to a plaintiff who did not need all of that information and, therefore, refusing to pay. She stated that this is why conferral is so important.

Judge Armstrong stated that segregation of ESI and requiring a request for ESI at the outset of a case will alter the dynamic and has implications for every case. He wondered whether this approach is necessary. Ms. O'Leary noted that her firm has been dealing with ESI for quite some time under the existing rule. She stated that she often does not know what she needs to ask for, and the other side does not know what they need to produce. She suggested that taking a deposition of a corporation and asking how the information is stored and refining a request for production may work from a practical standpoint. She stated that better advocacy and better early discovery is needed. Mr. Bachofner opined that ESI needs to be separated because, in the majority of cases, parties do not want to spend the money for ESI. He pointed out that, in cases of smaller value, it may not be worth spending extra money for something that could have been answered another way after conferring on the issues. Ms. O'Leary stated that it is impractical to try to envision every type of conceivable scenario that

would come up in a separate rule or definition. She noted that she would like to try to address the issue in a simple way that does not require a dramatic change or addition to what we have already. Judge Zennaché stated that part of the reason the committee added the conferral obligation was because of the diversity of issues raised by ESI. He stated that there is no easy, one-size-fits-all answer, and that the best way to deal with the issue is to confer early on. Judge Zennaché reiterated Mr. Corson's concern that routine discovery may be typically stored electronically, and stated that the committee was not intending to burden that discovery with the conferral obligation. He suggested attempting a way to distinguish between electronically stored information and discovery of electronically formatted files.

Mr. Campf stated that electronic discovery is something that one needs to specifically ask for and that he cannot remember a case where someone *did not* ask for electronic discovery. He stated that he does not see the conferral requirement as an earth-shattering change and that, by conferring early on, parties will learn more about the case and reduce the number of motions that come later because the parties will have talked. Mr. Campf stated that he does not see the rule change as burdensome. Judge Herndon stated that he has been on the Council for some time, and is concerned about the tendency to spend a great deal of time and energy talking about solutions in search of a problem. He suggested that this may be one of those cases. He stated that he has dealt recently with complex cases with ESI issues, and that the existing rules seem to be adequate to deal with them.

Ms. David stated that the reason the committee was formed was that there appear to be some judges in Oregon that do not recognize that the current rules deal with ESI. She noted that the committee began with the definition of ESI, and discovered that one cannot really define it since it is constantly evolving. Ms. David stated that the committee will meet again, deal with the new issues raised by Council members, and send the drafts to OTLA and OADC members for comment. She noted that the issue may need to be tabled until next biennium, depending on the feedback, but that the Council needs to think about how these matters will be dealt with during the two years that it will take to process if the matter is deferred.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper stated that the committee has had one meeting and talked about the issues with which the committee was charged. He stated that ORCP 7D(2)(d)(I) allows attorneys to serve the summons and complaint by mail, but does not authorize *pro se* litigants to do so. He noted that, the more technical the rule, the higher the likelihood that self-represented litigants may misunderstand it. He stated that, under ORCP 7D(6)(a), self-represented parties

may make a motion to the trial court to serve by mail, and that the committee felt that making a blanket rule change to allow *pro se* litigants to serve by mail in all cases may not be a good idea.

Mr. Cooper stated that the committee also talked about removing the 3 day presumptive mailing time for service by fax from ORCP 9F. He noted that this is a holdover from the days of fax machines being novel technology, and that the committee recommends eliminating the 3 day service period and having a fax deemed hand delivered on the same day it is received if it is received prior to 5:00 p.m., and hand delivered the next day if it is received after 5:00 p.m. Ms. Pratt wondered whether faxes should be treated the same way as electronic delivery. Mr. Cooper replied that there is currently no rule allowing service by e-mail unless, under ORCP 9G, it is consensual, so the committee feels that faxes should be treated as hand delivery. Judge Miller stated that the difference with e-mail is that it requires an affirmative response from the recipient to say "I got it." She stated that, although a fax transmission is immediate, there is a possibility that the recipient does not have paper or ink in the fax machine. Mr. Cooper stated that the presumption is that the recipient will keep his or her fax machine in good working order.

Mr. Corson stated the Council discussed this issue a few cycles ago and that it might be worth going back and looking at those discussions. Mr. Bachofner asked about the harm that we are trying to avoid by changing the rule. Mr. Cooper noted that it may be a solution in search of a problem. He stated that there is not necessarily a problem, except if there is a time-sensitive reason to use a fax. Ms. Nilsson noted that Judge Janice Wilson had made the original suggestion to the Council. Prof. Peterson recalled Ben Bloom being the prime mover behind adding the 3 days to the rule originally. Ms. David stated that, if the Council decides to standardize time increments in the ORCP, it may wish to wait to make this change at that time. Judge Holland agreed, since eliminating the 3 days is not necessarily a problem at this time. Mr. Cooper suggested that the committee report at the next meeting whether they feel the change is a good idea, but that the Council table the issue until next biennium when time changes might be made.

Mr. Cooper raised an additional issue: whether service to a post office box is allowed under the rules. He noted that, under the current rule, if he mails to a person's residence by first class mail and the mail is not returned, he may presume that it was delivered. He noted that service to a PO box has less indicia of delivery than delivery to a physical address. Judge Herndon stated that his recollection is that the service by mail rule was expanded considerably by actual legislative action. Mr. Cooper asked whether any judges or practitioners have had problems with people complaining of not receiving mail at their PO box. Judge Miller stated that she has seen that happen, but that it happens at homes

and businesses too. She stated that her feeling is, if someone chooses to have a PO box, that person is saying that is his or her preferred method of receiving mail, and that he or she should be responsible for checking it regularly. Mr. Cooper noted that, if the Council agrees that the rule does not prohibit service to a PO box, his concern may be unnecessary.

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

Judge Miller reminded the Council that Bruce Miller of the UTCR Committee was going to talk to Russ Lipetsky and research whether this issue has been brought up at the UTCR Committee in the past. She stated that she did not hear back from either Mr. Miller or Mr. Lipetsky, but that she will try again to contact them before the next meeting. She stated that the committee feels this is a problem that could be addressed, but needs to resolve whether it is a UTCR issue first.

7. Default Judgment Committee (Ms. David)

Ms. David stated that the committee had re-drafted ORCP 69 (Appendix G), and that the intent was a complete rewrite and reorganization. The draft rule is broken into the following parts in order to create a clear procedure:

- In general
- Intent to appear; notice of intent to take default
- Motion for order of default
- Judgment by default
- Setting aside default judgment
- Special cases

Ms. David noted that this is still a very rough draft and that the committee welcomes feedback and comments. She stated that the former rule is convoluted and that the intent is to make the procedure more clear. She noted that, in speaking to court clerks, she discovered that parties are not filing a motion and affidavit for an order, but directly for a judgment. She stated that the attorney fee issue is also difficult, and encourages the Council to consider whether an amendment to ORCP 68 would be helpful since the rule in its current form is confusing and many struggle with it. Judge Miller stated that a change to ORCP 68 is not required, since there are no grounds to object if a party has been defaulted. Ms. David gave an example of a credit card company taking a default judgment because the defendant agrees that they owe $6,000, and then the credit card company submits an $18,000 bill for attorney fees. She asked whether, in a case like this, the defaulted party should be able to object. Judge Miller noted that, if a party asks for ridiculous attorney fees, a judge is not likely to grant them, even if there is no objection.

Ms. David noted that most of the language in the re-draft is identical to the language in the current rule, but that it has been re-ordered so that it flows better and makes more logical sense. She stated that the committee would like to receive input from Council members within next seven days, and then the committee will meet about fine-tuning the language. She suggested then sending the draft to court clerks for comment. Mr. Corson asked whether the intent was to take the authority to enter judgments by default away from clerks and to give it to judges. Ms. David stated that yes, all references to "clerk of court" had been removed. Mr. Corson noted that ORCP 69F(1) in the draft would no longer be longer necessary if only judges are entering judgments by default, as contract cases are no longer a special case. Mr. Corson stated that he would send his comments to Ms. David. Mr. Bachofner agreed with Judge Miller that, in the overwhelming majority of cases, the desire would be to have the plaintiff submit the motion/order in one document so that it is complete and can move on to the collection process. He stated that, if a party wants to be able to respond, they can do it in a motion to set aside. Judge Miller stated that the process does not move quickly, and that there is often a two week lag time between filing and entry. She stated that, if one has defaulted a party, there is no obligation to keep serving that party with documents, and wondered how the defaulted party would get notice of an ORCP 68 statement of attorney fees and costs in such an instance.

Ms. David suggested reiterating in ORCP 69 the process for receiving attorney fees, or changing ORCP 68 to state that the court shall wait a certain amount of time and, if there is no objection, shall enter the supplemental judgment. Judge Miller asked how there can be an objection if there is no notice. Judge Zennaché suggested merely cross- referencing rather than changing ORCP 68. He stated that many awards of attorney fees are discretionary, not mandatory, and that, under ORS 20.075(1) and (2), a judge must look at factors before awarding attorney fees, even if there is no objection. Judge Herndon stated that the cost can increase by requiring an additional proceeding and that, when a party has been defaulted, that party does not have a right to object to attorney fees. He stated that everything should be in handled in one proceeding, and suggested that this may be a controversial proposal. Judge Miller stated that she does not want to make findings on default cases. Mr. Bachofner pointed out that *McCarthy vs Oregon Freeze Dry, Inc.*, 327 OR 84 and 327 Or 185 (1998), appears to require ORS 20.075 findings. Judge Armstrong asked whether findings are always required. Judge Herndon replied that they are only required if requested.

Prof. Peterson noted that, once defaulted, a party would not get further notices. Ms. Pratt stated that, even when an order of default is obtained, the defaulted party can file an answer afterwards and the case would continue, and that moving against or answering the complaint is not foreclosed until a judgment is entered. Mr. Cooper stated that, after the order is entered, one does not need

to serve further motions. Ms. David stated that ORCP 9A states: "No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7." She wondered at what point a party is "in default," after the order or after the judgment. She stated that she would like to create a simple rule on how to get attorney fees in default judgments. The committee will continue to work on this issue and will report to the Council at the April meeting.

8. Time Issues (Ms. Pratt)

Ms. Pratt stated that she was waiting to find out if the ballot measures would pass which would allow the judicial department to have the resources to deal with revising the time periods in the ORCP. The measures did pass. Ms. Pratt asked whether the Council is interested in standardizing time increments throughout the ORCP and, if so, whether it should contact the judges and see if that would impose an administrative burden on them that would be untenable. Mr. Cooper stated that it is appropriate to decide whether the Council wants to address this issue now that the way is clear, but noted that it is late in the process to draft these changes. Ms. Pratt noted that one complication of this change would be that the UTCR and Supplemental Local Rule (SLR) committees are on different cycles from the Council, so they would have to enact interim rules to match any changes the Council made. Mr. Bachofner agreed that it is so late in the Council's process that he feels that the issue should be should tabled until next biennium. He noted that, if the Council decides to proceed, it should take the time to do it correctly. Judge Miller stated that there is no urgency, and that it would be useful to form a task force with the UTCR Committee and the Chief Justice's office to get the big picture plan in place. She suggested asking if those offices would want to make changes first, or if the Council should draft first and have them act later. Ms. Pratt stated that such changes may affect the e-filing process and electronic docketing systems, including OJIN.

Mr. Cooper stated that, assuming that the Council wants to change the time periods in the rules, there is a vast network of people whom the Council needs to contact, and the fiscal impact needs to be considered. He asked whether a committee should be appointed to join Ms. Pratt and start surveying these entities now. Judge Miller agreed, and suggested first contacting the Chief Justice's office because of budget issues. Judge Miller joined the committee, and she and Ms. Pratt will communicate with the Chief Justice's office about this issue and report to the Council at the next meeting.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Judge Herndon reminded the Council that Senator Suzanne Bonamici had raised this issue and wanted to attend a Council meeting to discuss it, but has been unable to attend a meeting thus far. Prof. Peterson stated that he had sent an e-mail to the committee regarding the substantive v. procedural issue. He wanted to address this issue before attempting to contact Sen. Bonamici again regarding attending a meeting. He stated that, if a document does exist and existing case law says a party must recite a synopsis in or attach the document to a pleading, he feels that it does not change the relief to require a party to plead it in a certain way. Mr. Cooper stated that, if the basis of a claim for relief is a written contract that has been signed, he would need to put get into evidence at trial the contents of the contract, not necessarily the written contract itself. He opined that, in the case of a lost contract, a requirement that relevant portions of the written contract must be recited in or attached to the pleading prevents relief that otherwise may have been received. Prof. Peterson asked whether a rule could be phrased to state that the document must be attached if available, or a synopsis if not. Judge Herndon stated that he had looked at the legislation in other jurisdictions to which Sen. Bonamici had referred, and that it was not as simple as just attaching a contract; that much of it laid ground rules about the definition of a contract. He noted that the issue may be more complicated than it looks at first blush. The Council agreed that Prof. Peterson will contact Sen. Bonamici again about attending a Council meeting.

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

Mr. Buckle was not present at the meeting and, therefore, was unable to report on the committee's progress. This issue will be held over until the next Council meeting.

B. Communication with Legislators (Ms. David)

Ms. David noted that she had sent another draft e-mail to the listserve, and stated that hopefully people had personalized and sent it to their legislative contacts. She stated that, now that the legislature has finished its February session, this is a good time to reach out to legislators. She noted that Council members should continue to contact those on the legislative matrix and that the matrix will be updated after the November election with the help of David Nebel.

II. New Business (Mr. Cooper)

A. *McCollum v Kmart*, Case No S 057609: impact on ORCP 64F if order not "entered" within 55 days (Mr. Corson)

Mr. Cooper noted that this new issue (Appendix H) was raised by Mr. Corson, who needed to leave the meeting early and was unable to report. Mr. Cooper recognized that there is a problem that can be created if clerks do not enter orders in a timely manner, and that it could have a substantial effect on a party's rights, but that it has always been that way. Prof. Peterson stated that attorneys are advised to monitor the 55 days to make sure the order is entered on time. Judge Herndon stated that this is not a new issue, and that there has been a case relating to this issue in the past. The Council agreed to hold this issue over until the next meeting when Mr. Corson can brief the Council.

III. Adjournment

Mr. Cooper adjourned the meeting at 12:12 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 3/12/10 - 4/8/10

I. Inquires

The Council received no inquiries during this reporting period.

II. Updates to Website

The only significant change made to the website during this period was to create a page which includes links to the e-discovery drafts that the Council is considering. OADC and OTLA members were referred to this page to view the drafts and provide comments to the e-discovery committee. As you can see from the attached analytical reports, the page received 437 views (55% of all page views for the reporting period), proving once again that, if you build it, they will come.

III. Website Statistics

Attached are analytical reports detailing website visitors and traffic sources. The website had 288 visits from 215 unique visitors, and 785 page views in this period. Almost 64% of the visits were from new visitors. It is my hope that the new visitors (likely OADC and OTLA members who were asked to provide feedback) will recognize the website as a valuable resource and become regular visitors.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

Council on Court Procedures
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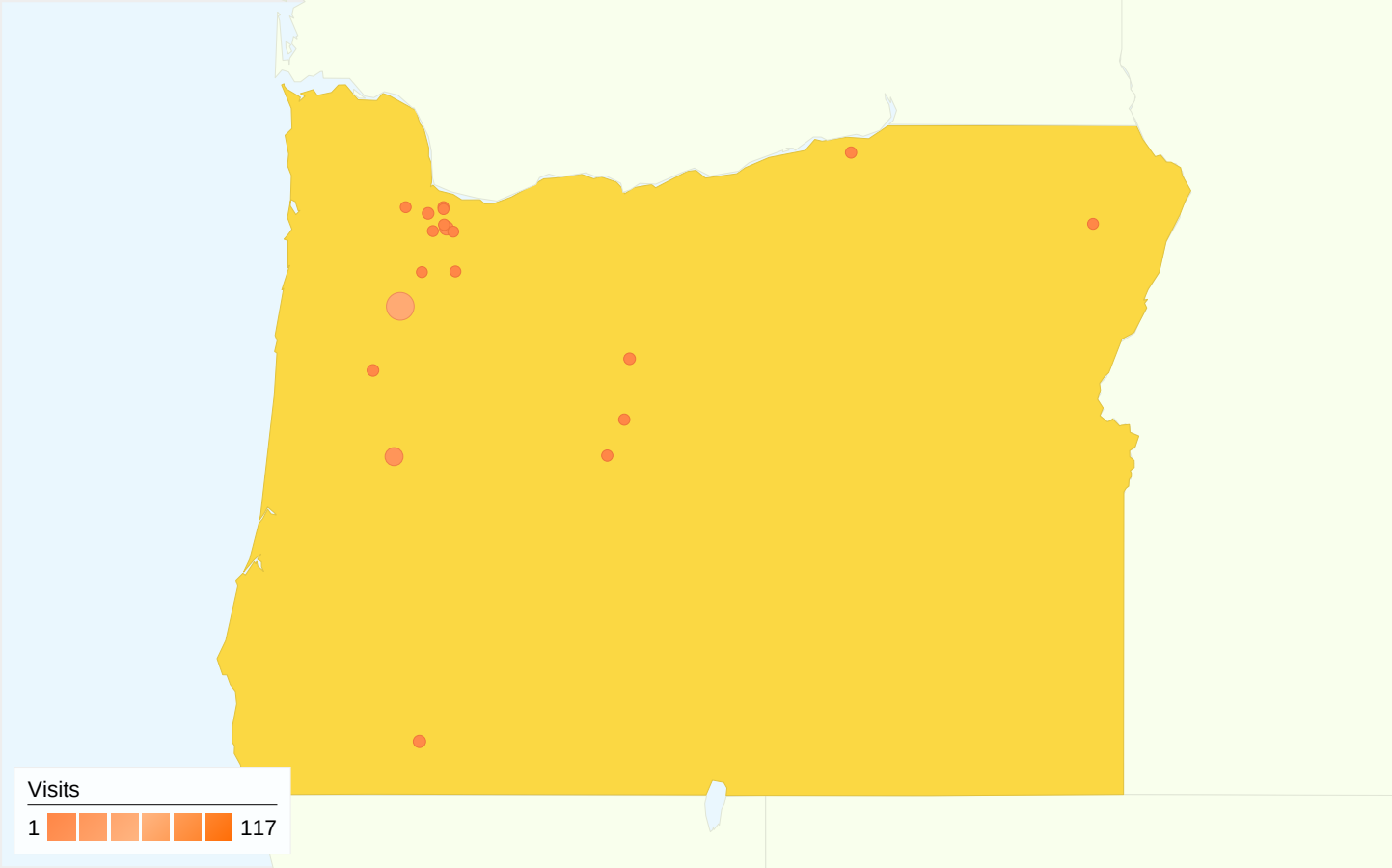
www.lclark.edu/~ccp

State Detail:

Oregon

Mar 12, 2010 - Apr 8, 2010

Comparing to: Site



This state sent 221 visits via 19 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
221	2.86	00:01:53	58.82%	45.25%
% of Site Total: 76.74%	Site Avg: 2.73 (4.92%)	Site Avg: 00:02:06 (-10.04%)	Site Avg: 63.89% (-7.93%)	Site Avg: 49.65% (-8.87%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	117	3.09	00:02:12	53.85%	44.44%
Salem	46	2.61	00:01:41	63.04%	50.00%
Eugene	20	3.20	00:02:34	70.00%	25.00%
Marylhurst	9	2.67	00:01:33	33.33%	33.33%
Medford	5	2.60	00:01:01	80.00%	80.00%
Madras	3	1.67	00:00:42	33.33%	33.33%
Corvallis	3	2.33	00:00:12	33.33%	66.67%
Beaverton	3	1.33	00:00:18	66.67%	66.67%
Lake Oswego	2	4.00	00:01:25	100.00%	50.00%

Redmond	2	1.50	00:00:01	0.00%	50.00%
Bend	2	5.00	00:01:25	100.00%	50.00%
Hermiston	2	1.50	00:00:03	100.00%	50.00%
Tualatin	1	2.00	00:00:47	100.00%	0.00%
Woodburn	1	2.00	00:00:05	100.00%	0.00%
Enterprise	1	2.00	00:00:21	100.00%	0.00%
Molalla	1	1.00	00:00:00	100.00%	100.00%
Gladstone	1	1.00	00:00:00	100.00%	100.00%
Portland	1	1.00	00:00:00	100.00%	100.00%
Hillsboro	1	1.00	00:00:00	100.00%	100.00%
					1 - 19 of 19

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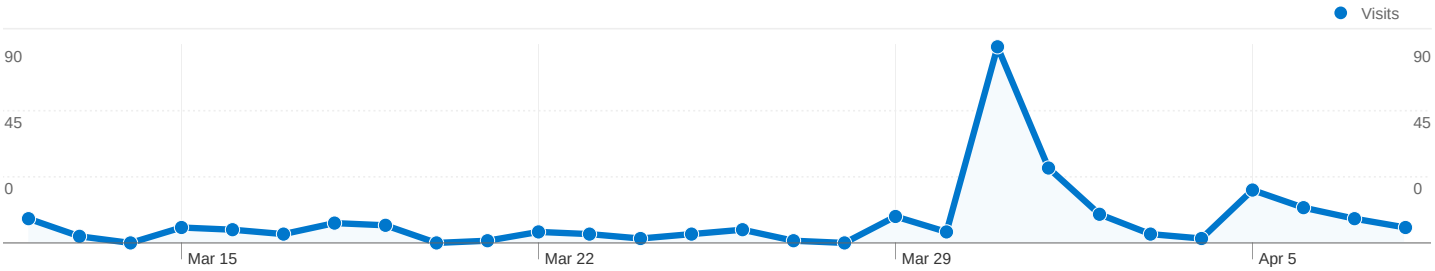
Dashboard

Mar 12, 2010 - Apr 8, 2010

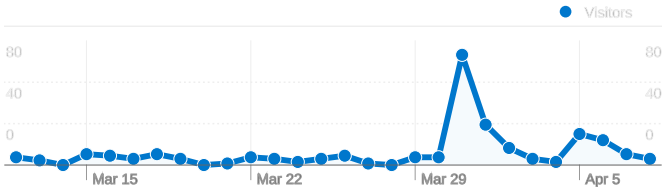
Comparing to: Site



Site Usage

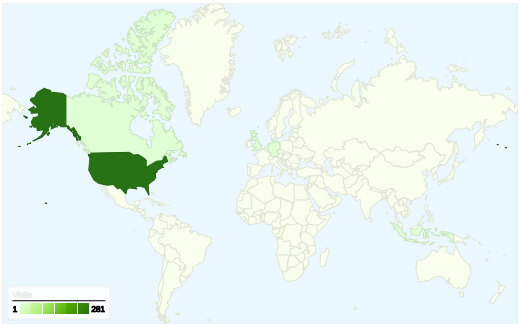
288 Visits	49.65% Bounce Rate
785 Pageviews	00:02:06 Avg. Time on Site
2.73 Pages/Visit	63.89% % New Visits

Visitors Overview

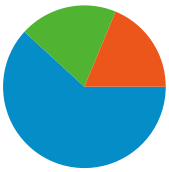


Visitors
215

Map Overlay



Traffic Sources Overview



- Direct Traffic
  178.00 (61.81%)
- Search Engines
  56.00 (19.44%)
- Referring Sites
  54.00 (18.75%)

Content Overview

Pages	Pageviews	% Pageviews
/~ccp/e-discoverydrafts.htm	437	55.67%
/~ccp/index.htm	84	10.70%
/~ccp/LegislativeHistoryofRules	54	6.88%
/~ccp/Past_Biennia.htm	50	6.37%
/~ccp/	31	3.95%

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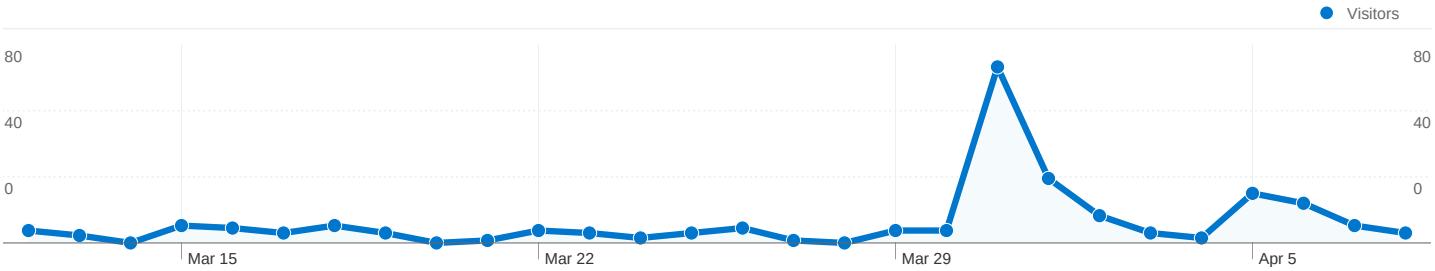
www.lclark.edu/~ccp

Visitors Overview

Mar 12, 2010 - Apr 8, 2010

Comparing to: Site



215 people visited this site

288 Visits

215 Absolute Unique Visitors

785 Pageviews

2.73 Average Pageviews

00:02:06 Time on Site

49.65% Bounce Rate

63.89% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	205	71.18%
Firefox	71	24.65%
Chrome	7	2.43%
Safari	5	1.74%

Connection Speed	Visits	% visits
T1	82	28.47%
Cable	75	26.04%
Unknown	74	25.69%
DSL	37	12.85%
Dialup	18	6.25%

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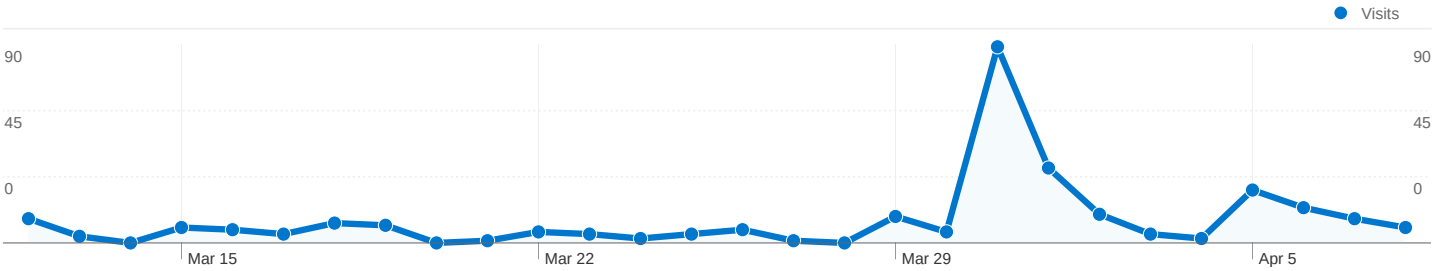
Traffic Sources Overview

Mar 12, 2010 - Apr 8, 2010
Comparing to: Site



All traffic sources sent a total of 288 visits

61.81% Direct Traffic

18.75% Referring Sites

19.44% Search Engines

Direct Traffic
178.00 (61.81%)
Search Engines
56.00 (19.44%)
Referring Sites
54.00 (18.75%)

Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	178	61.81%
google (organic)	50	17.36%
councilonccourtprocedures.org	19	6.60%
courts.oregon.gov (referral)	15	5.21%
bing (organic)	6	2.08%

Keywords	Visits	% visits
oregon council on court	14	25.00%
council on court procedures	4	7.14%
oregon council on court	3	5.36%
oregon rules of civil procedure	3	5.36%
court procedures	2	3.57%

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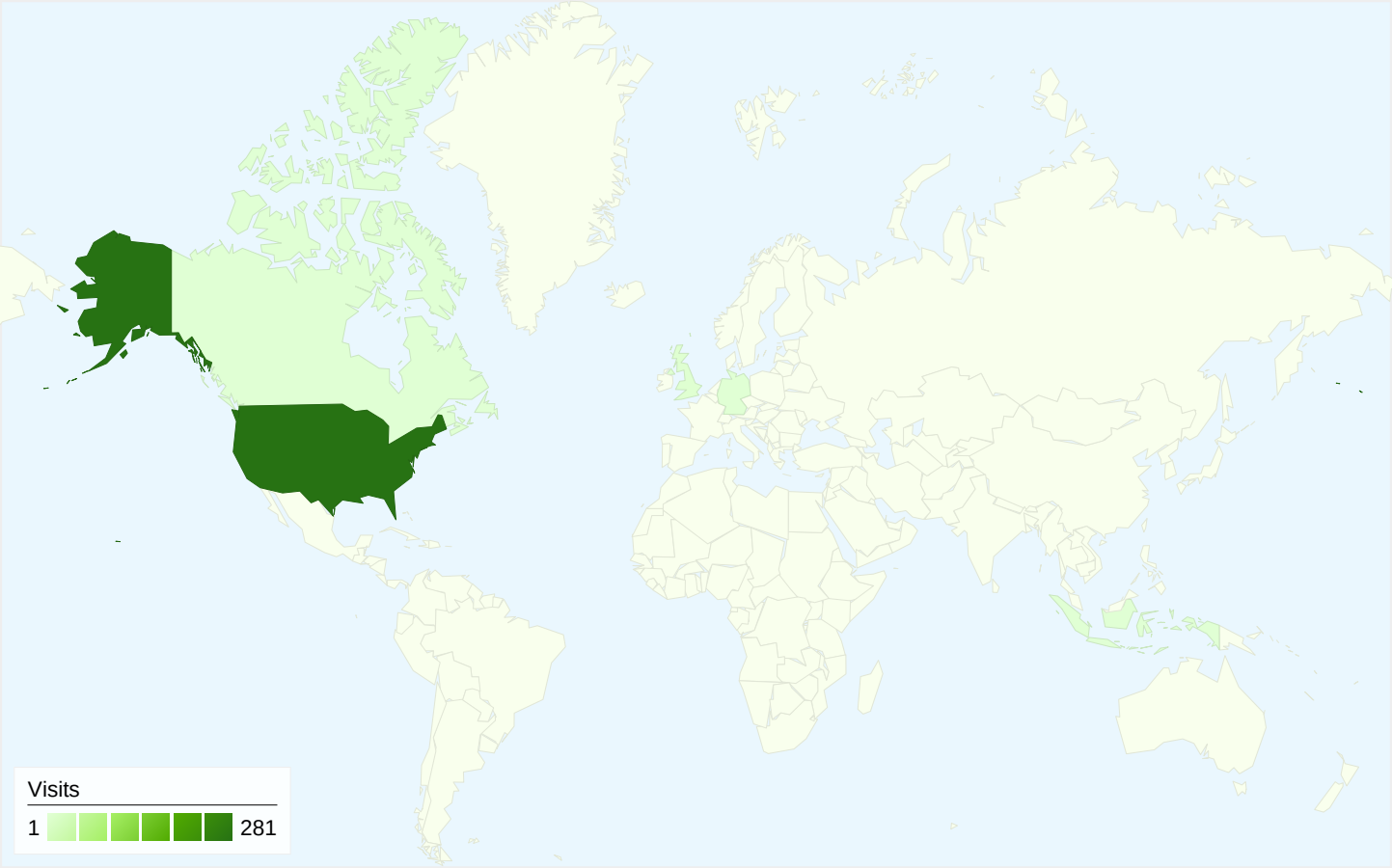
Map Overlay

Mar 12, 2010 - Apr 8, 2010
Comparing to: Site



288 visits came from 5 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
288 % of Site Total: 100.00%	2.73 Site Avg: 2.73 (0.00%)	00:02:06 Site Avg: 00:02:06 (0.00%)	63.89% Site Avg: 63.89% (0.00%)	49.65% Site Avg: 49.65% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	281	2.77	00:02:09	62.99%	48.75%
United Kingdom	4	1.00	00:00:00	100.00%	100.00%
Canada	1	1.00	00:00:00	100.00%	100.00%
Germany	1	2.00	00:00:12	100.00%	0.00%
Indonesia	1	1.00	00:00:00	100.00%	100.00%

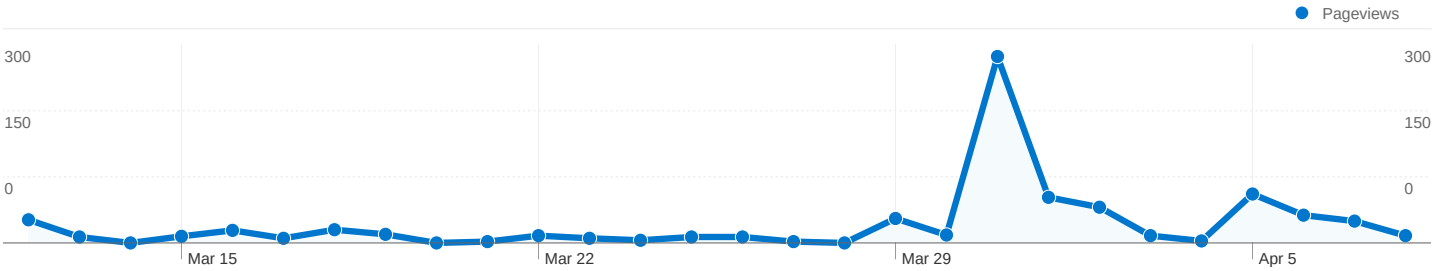
1 - 5 of 5

www.lclark.edu/~ccp

Content Overview

Mar 12, 2010 - Apr 8, 2010

Comparing to: Site



Pages on this site were viewed a total of 785 times

785 Pageviews

411 Unique Views

49.65% Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/e-discoverydrafts.htm	437	55.67%
/~ccp/index.htm	84	10.70%
/~ccp/LegislativeHistoryofRules.htm	54	6.88%
/~ccp/Past_Biennia.htm	50	6.37%
/~ccp/	31	3.95%

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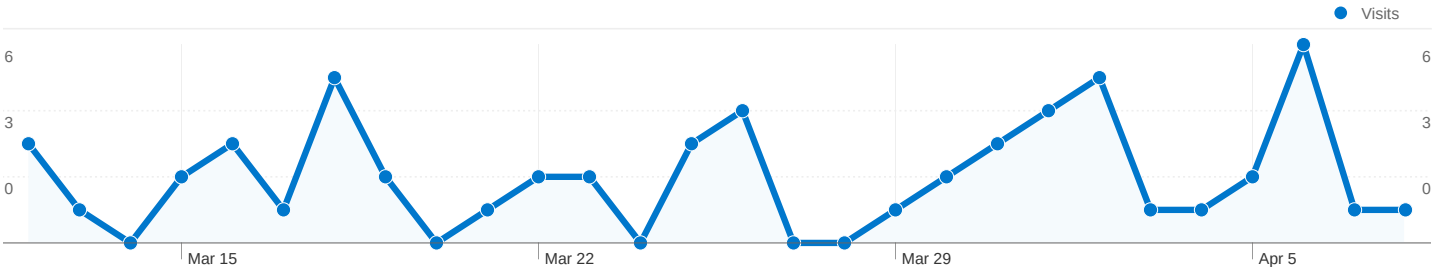
Keywords

Mar 12, 2010 - Apr 8, 2010

Comparing to: Site



Search sent 56 total visits via 33 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
56	2.61	00:01:31	62.50%	42.86%
% of Site Total: 19.44%	Site Avg: 2.73 (-4.35%)	Site Avg: 00:02:06 (-28.00%)	Site Avg: 63.89% (-2.17%)	Site Avg: 49.65% (-13.69%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	14	3.93	00:02:39	42.86%	0.00%
council on court procedures	4	1.75	00:00:10	25.00%	50.00%
oregon council on court procedure	3	3.67	00:03:50	0.00%	33.33%
oregon rules of civil procedure	3	8.33	00:06:02	66.67%	33.33%
court procedures	2	1.50	00:00:51	100.00%	50.00%
orcp 44	2	1.00	00:00:00	100.00%	100.00%
orcp 59	2	1.00	00:00:00	100.00%	100.00%
+31 holland council members @	1	2.00	00:00:12	100.00%	0.00%
arwen bird	1	1.00	00:00:00	100.00%	100.00%
comments to orcp 80 council on court procedures	1	2.00	00:03:49	100.00%	0.00%
council court procedures	1	1.00	00:00:00	100.00%	100.00%
council court proceedings	1	1.00	00:00:00	100.00%	100.00%
council in court	1	1.00	00:00:00	100.00%	100.00%
council on court procedure	1	2.00	00:00:04	0.00%	0.00%
council on court procedure oregon	1	2.00	00:00:25	0.00%	0.00%
counsel within the court process	1	1.00	00:00:00	100.00%	100.00%
court hearing procedure for council	1	1.00	00:00:00	100.00%	100.00%
history of oregon rules of civil procedure	1	4.00	00:00:53	100.00%	0.00%
is there a judicial council of oregon?	1	2.00	00:00:25	100.00%	0.00%
orcp 27	1	1.00	00:00:00	100.00%	100.00%
orcp 39	1	1.00	00:00:00	100.00%	100.00%

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orcp 68 summary	**1**	1.00	00:00:00	100.00%	100.00%
orcp rule 71 oregon	**1**	2.00	00:03:32	100.00%	0.00%
oregon council court procedures	**1**	4.00	00:05:37	0.00%	0.00%
oregon council on court proceedings	**1**	2.00	00:00:06	100.00%	0.00%
oregon rules civil procedure history	**1**	2.00	00:00:29	0.00%	0.00%
oregon rules of appellate procedure proposals	**1**	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure amendments	**1**	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure summons	**1**	1.00	00:00:00	100.00%	100.00%
oreogn council on court procedures	**1**	2.00	00:00:02	0.00%	0.00%
portland baroque orchestra lewis and clark	**1**	1.00	00:00:00	0.00%	100.00%
rule 32 rules of civil procedure legislative history	**1**	1.00	00:00:00	100.00%	100.00%
what a court procedure do	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 33 of 33

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

Council on Court Procedures
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States under 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, 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. If a party to an out-of-state proceeding retains an attorney licensed to practice in this state, that attorney may assist the clerk in drafting the subpoena.

/////

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 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, or a response thereto, 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.

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April 10, 2010, Meeting
Appendix C-3

Council History on Change to Rule 21 Referencing Rule 54B(3)

July 15, 2000
Council Minutes

3C. ORCP 21 A (see Attachment 3C to agenda of this meeting) (Judge Linder/Mr. Johnson). Judge Linder explained that the problem with which this subcommittee had been dealing was when an action is dismissed in an Oregon court because of the prior pendency of essentially the same action elsewhere, there exists the possibility that if the other action were terminated on some ground not resolving the merits of the dismissed proceeding in Oregon, reinstitution of the latter might be futile for such reason as the expiration of a statute of limitations or loss of subject-matter jurisdiction on the part of the Oregon court as occurred in Weller v. Weller, 164 Or App 25, 988 P2d 921 (1999).

She added that the subcommittee's preferred solution was set forth as Alternative A in Attachment 3C, which would authorize the Oregon court to defer dismissal of the action pursuant to ORCP 54 B(3), which she said would be the functional equivalent of a stay. Ms. Clarke commented that, although she agreed that Alternative A would accomplish what the subcommittee intends, she nevertheless thought that Alternative B would make clearer to judges and lawyers that a stay was essentially what was being sought and the reason for it. Judge Linder responded that the subcommittee thought that Alternative B risked creating the impression that some dramatic change from current practice was contemplated, but that nothing dramatically new was actually needed. Judge Marcus expressed agreement with Alternative A, though he also said that he would like to see the amendment call explicitly for a stay of the action. Discussion of this item concluded by Judge Linder stating that she and Mr. Johnson would give further thought about whether Alternative B's provision for a stay could be somehow combined with the essential features of Alternative A.

August 12, 2000
Council Minutes

Report 3B ORCP 21 A (see Attachment 3B to agenda of this meeting) (Judge Linder and Mr. Johnson). Judge Linder referred members to a revised draft of this proposed amendment which she said was based on suggestions by Judge Marcus. (A copy of this revision is filed with the original of these minutes:) Mr. Brothers commented that he thought the draft language was confusing because it linked the granting of a stay with leave to amend the complaint, which could lead to the inference that any time a court granted leave to amend it was also thereby entering a stay. He also observed that the phrase "in its discretion" was redundant in light of the words "the court may," with which observation Judge Marcus agreed. Mr. Gaylord stated that the problem might be trying to accomplish too much in a single sentence, and that it might be solved by having one sentence address the issue of a stay when defense (3) is successfully raised, and another sentence dealing with orders of dismissal pursuant to the other defenses enumerated in section 21 A.

Prof. Holland stated that stays on the basis of prior, duplicative actions pending are quite different things than are routine, brief delays following dismissal orders to allow an amended complaint before entry of judgment of dismissal. Among other differences stays can last for months, even years, while the action is, in effect, placed on hold.

A number of friendly amendments were then suggested and agreed to. As a result of these amendments, the proposed amendment to section 21 A read as follows:

"When the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If dismissal is based on defense (3) the court may enter judgment in favor of the moving party, stay the proceedings, or defer entry of judgment pursuant to subsection B(3) of Rule 54."

It was generally agreed that the two sentences shown above would be substituted for the final sentence of existing section 21 A. On motion of Mr. Gaylord, seconded by Judge Barron, this amendment was tentatively adopted subject to any final revisions which might be made at the Sept. 9 Council meeting.

MEMORANDUM

To: Council on Court Procedures
From: The Subcommittee (Johnson, Linder) on ORCP 21 A(3)
Re: Recommended Amendment to the Rule
Date: May 12, 2000

A. *Background: the problem.*

Under ORCP 21 A(3), a defendant may move to dismiss an action based on the fact that there is "another action pending between the same parties for the same cause ." The rule further provides that "[w]hen the motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25." The potential problem is that the prior action may have an outcome that does not resolve the issues, at which point the plaintiff should be free to refile. By that time, however, the court may have lost jurisdiction. As Maury Holland hypothesized:

> "21 A(3) contains the admittedly remote, yet real, potential for causing serious injustice. Suppose, for example, that A sues B in an Oregon circuit court. B then moves for dismissal of that action on the ground that A is a member of the plaintiff class in a class action pending in some other court in the United States. The judge, pursuant to A(3), grants B's motion to dismiss. Some time later the class in the other action is decertified, or the other action is disposed on some procedural ground not going to the merits. A then re-commences his action against B. While the previous dismissal in the Oregon court pursuant to A(3) would have been without prejudice, the pertinent statute of limitations might well have run and A's claim against B thus become time-barred."

Weller v. Weller, 164 Or App 25, 988 P2d 921 (1999), provides the only reported instance of the problem coming to pass. There, wife filed a dissolution action in Oregon. Husband, in a race to the courthouse, had previously filed for dissolution in Idaho. The Oregon court dismissed without prejudice. The Idaho judgment was then entered. Idaho did not have personal jurisdiction over wife, so it could not adjudicate property and support issues. Wife refiled in Oregon, seeking (as relevant to our concern here) a division of personal property based on husband's enhanced earning capacity. The Court of Appeals agreed with husband that Oregon lacked subject matter jurisdiction to make that property division because, under the pertinent statutes, the court must do so as relief ancillary to a judgment of dissolution. By the time of the refiling in Oregon, the parties were no longer married and the action was not one for dissolution.

A. Possible solutions

1. *Do Nothing.*

As written, the rule makes entry of a judgment in favor of the moving party mandatory "unless the court gives leave to file an amended pleading * * *." At least

arguably, the harsh result in *Weller* would be avoided by that course. The case would simply remain pending and would be reactived by the filing of the amended petition. In effect, that action serves to stay the case.

The downside of that is that the rule's current language makes that solution obscure, both to courts and to the parties. Also, requiring an "amended pleading" is artificial because the problem is not in the contents of a plaintiff's pleading, but in the timing of the proceeding.

2. *Amend ORCP 21 (A) to give the court discretion to defer entry of judgment when the dismissal is on this ground.*

The rule could be amended as follows:

"When a motion to dismiss has been granted, ~~judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25~~ **the court may enter judgment in favor of the moving party or, if the dismissal is for defense (3) or the court has given leave to file an amended pleading under Rule 25, may defer entry of judgment pursuant to Rule 54B(3).**

The amendment provides that the court "may" enter judgment (rather than "shall" do so) after granting the motion to dismiss, thus emphasizing and making express that the court has discretion at that point. By cross-referencing Rule 54 B(3), the amendment permits the court to defer entry of the judgment on the same terms ("for good cause shown") as would justify deferring entry of judgment for inactivity in the case. The net effect would be to stay the case.

3. *Amend the rule as per Maury Holland's proposal in the February 12, 2000 agenda.*

Maury suggested deleting all references in section A to the defensive assertion of the fact of a prior action pending, and creating a new section H, which would provide:

H. Notwithstanding any other provision of this rule, should it appear to the court at any point in the proceedings, by motion or otherwise, that a prior action is pending between the same parties for the same cause, the court may in its discretion order that proceedings be stayed pending disposition of the prior action.

The subcommittee sees a couple of problems with that proposed amendment. First, it may be a bigger break from current practice (raising the matter as a defense, pursuant to the pleading practices and procedures described in A) than is necessary. The rule provides no guidance on when or how to raise the prior action issue, nor how to establish the existence of the prior action. Also, although staying the action is purely discretionary, no other options are identified. Can the court still dismiss the action on this basis? Or does the elimination of that ground from section A suggest a dismissal would no longer be among the appropriate dispositions? It would seem that, in nine

cases out of ten, a dismissal remains sound, given the rarity of the problem. If that is so, it may be better to fix the problem by broadening the options available under current section A, rather than giving the impression that the usual case should be stayed.

A. The Subcommittee's Bottom Line

We favor the second proposed solution, which would be to amend section A itself. The particular amendment that we have proposed may require some refinement. But we think it--or something close to it--will provide a solution without changing current practice more than necessary.

Subject: FW: ORCP Proposed Rules Changes re: E-Discovery - Feedback Wanted!
From: Kristen David <kristen@bowermandavid.com>
Date: Thu, 08 Apr 2010 08:25:14 -0700
To: Shari Nilsson <nilsson@lclark.edu>

Dear Bench and Bar:

The E-Discovery Committee of the Council on Court Procedures would like your feedback regarding some proposed changes to the discovery rules to encompass greater specificity regarding E-Discovery. Our Committee has spent the last several months researching rules related to preservation, retention and production of electronically stored information ("ESI") and has had extensive discussions regarding the scope and challenges of E-discovery to the many different types of litigation.

At this time there are two versions of the proposed changes to the ORCPs regarding E-Discovery which can be found at http://legacy.lclark.edu/~ccp/e-discoverydrafts.htm In essence, both versions reiterate that ESI is and always has been discoverable and requires the parties to confer regarding the form of production of the ESI.

The Long Version (Version A - ORCP 36, 39, 43, 46 & 55) requires production of electronic discovery only if specifically requested, requires
parties to commence conferral within 14 days of service of an E-Discovery Request for Production and provides a detailed list of issues for conferral under ORCP 43 B(1). The Long Version also contemplates a "safe harbor" provision for sanctions under ORCP 46. The Short Version (Version B - ORCP 43 & 55) is a more conservative change. It reiterates that information in electronic form is within the definition of discoverable "documents" and requires conferral only if a request seeks information to be produced in electronic form.

The E-Discovery Committee would like
feedback from the Bench and Bar regarding the following issues: need for discovery rules relating to ESI; the advisability of specific conferral requirements; the advisability of early deadlines to push parties to confer; safe harbor provisions; etc.

Please provide your written feedback by 5:00 p.m. on Thursday, April 8, 2010 to E-Discovery Committee Chair Kristen David via email (kristen@bowermandavid.com) or fax (503-650-0053). For more information on the work of the Council on Court Procedures please visit our website at:
www.councilonourtprocedures.org

Kristen S. David
Bowerman & David, PC
P.O. Box 100
1001 Molalla Ave., Ste 208
Oregon City, OR 97045
503-650-0700
503-650-0053 (fax)

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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

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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,

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.

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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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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

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.

* * * * *

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

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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 fourteen (14) 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

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.

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 (including **electronically stored information,** 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), 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. **If documents consisting of electronically stored information are requested to be produced in electronic form, the request may specify the form or forms in which such documents are to be produced.**

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

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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 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(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. **If documents consisting of electronically stored information are requested to be produced in electronic form, before the response is due the parties must begin conferring in good faith about such request. The conferral may address the scope, data sources, cost, search strategies, and other matters concerning such production. A party must make a good faith effort to confer before bringing a motion concerning the discovery of electronically stored information pursuant to ORCP 36C or 46A.**

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, 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.

ORCP 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

* * * * *

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.

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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

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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

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 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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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.

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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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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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 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 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 fourteen (14) 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 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.

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, or tangible things and permit inspection thereof at a particular time and place. **A subpoena may specify that documents consisting of electronically stored information are to be produced in electronic form; in such case, the subpoena must specify the form or forms in which such documents are to be produced**. 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, 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, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, 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, 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 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

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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, 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, or tangible things.

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, 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 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, 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 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. /////

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, 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.

F Subpoena for taking depositions or requiring production of books, papers, documents, 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, 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, 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, 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, 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.

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.

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 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 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.

Counterclaims in Domestic Relations Motions

To: Council Members

From: Eve Miller

Date: April 2, 2010

After the March meeting I contacted attorney Russ Lipetzky to further discuss his 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. I asked Mr. Lipetzky if he had heard from Bruce Miller to consider whether the rule change should be addressed by the UTCR Committee. Mr. Lipetzky said he had not but he would bring the suggestion to the UTCR Committee.

Following my conversation with Mr. Lipetzky, I received a series of emails between Mr. Lipetzky and Richard Weill, a UTCR Committee member, and emails between Mr. Lipetzky and Judges Raines and Thompson, Washington County Circuit Court.

The emails are available to any Council member if you want to review them. In summary, Mr. Lipetzky found that Judges Raines and Thompson opposed a rule allowing counterclaims. I am providing an excerpt of the last email I received from Mr. Lipetzky to Richard Weill:

> The problem is one of judicial inconsistency. Most counties allow the combined pleading, while some – notably Washington County – require the latter approach. After polling (via the list serve) practitioners on the issue and receiving a strong and unanimous response, I drafted a proposal to specifically authorize allow the combined approach. The proposal received conceptual support along the way until it got to Washington County. Judge Thompson, who sits on your committee, and Judge Raines, who serves with me on the SFLAC, are throwing up some objections that are valid but do not appear to be insurmountable.
>
> I frankly do not have the motivation (it is not an issue in my county) to pursue this through the UTCR Committee over the opposition of a sitting committee member unless someone else on the committee feels it is an issue worth supporting. Let me know if you are such a person and I will provide you with requisite background material and bring you up to speed. I would continue to work on the issue rather than simply dumping it in your lap, but as noted above I am realistic enough to recognize that the concept needs to have an ally on the UTCR committee. If that doesn't happen I will probably let the issue die. I do think one of the primary purposes of the UTCR Committee is to promote uniformity in court procedures, and this seems to be a prime example of a situation where such uniformity is absent.

I recommend that we take no action on this during this cycle but leave open the possibility for further work on this in the future.

McCollum v. Kmart Corporation
Case No.: S057609
http://www.publications.ojd.state.or.us/S057609.htm

AREA OF LAW: CIVIL PROCEDURE

HOLDING: (Opinion by Linder, J.) * A trial court opinion letter that refers to an attached order granting a motion for a new trial and which is entered into the court register 54 days after the original judgment, is not timely filed and is deemed denied by operation of law when the order itself is not formally entered into the register of the court until 59 days after the original judgment.

The circuit court entered a judgment for defendant Kmart Corporation. Plaintiff McCollum moved for a new trial which the circuit court granted by issuing an opinion letter and attached order 52 days later. The order was not entered into the registry until 59 days after the original judgment. The Court of Appeals held the order timely because the opinion letter, which was entered into the registry 54 days after the judgment, incorporated the order by reference. The Supreme Court reversed, holding that ORCP 64 F(1) requires that an order for a new trial be formally entered into the register of the court within 55 days after the original judgment. Additionally, the court held the opinion letter was not an order and did not incorporate the order by reference because it referred to the order as a distinct and separate document. Because the order was not formally entered into the register of the court until 59 days after original judgment, the order was deemed denied by operation of law. Order for new trial vacated and original judgment reinstated.

[Summarized by Kathleen Thomas]

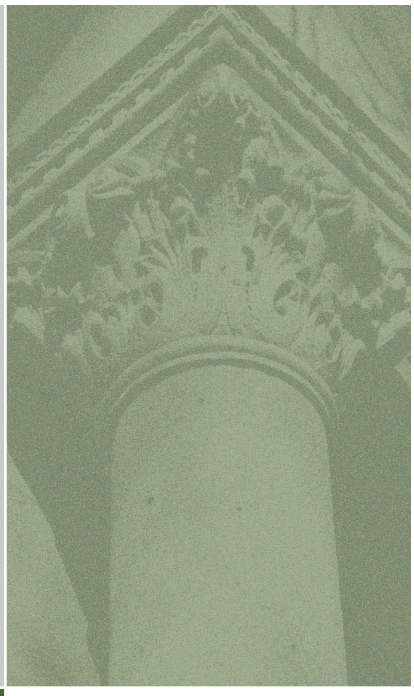
(3 Liberty Northwest Insurance v. Watkins
Case No.: S057190
http://www.publications.ojd.state.or.us/S057190.htm

AREA OF LAW: WORKERS' COMPENSATION

HOLDING: (Opinion by DE MUNIZ, C. J.) A claimant cannot release the right to derivative attorney fees from a successful medical services dispute, even if claimant unambiguously releases rights to all attorney fees potentially arising out of a claim in a contractual Claim Disposition Agreement entered in conformity with ORS 656.236.

The Department of Consumer and Business Services (Department) awarded attorney fees for resolving a medical services dispute. The Court of Appeals reversed because a Claim Disposition Agreement (CDA) released all rights pertaining to claimant's right to attorney fees, including potential attorney fees arising out of a medical services dispute. The Supreme Court held that claimant could not have released the right to derivative attorney fees from a successful medical services dispute even where claimant unambiguously released rights to all attorney fees potentially arising out of the claim in a contractual CDA entered in conformity with ORS 656.236. Using statutory interpretation, the Supreme Court reasoned that; the phrase "except medical services" in ORS 656.236(1), modifies all of the preceding phrases. Therefore, per 656.236, the CDA did not resolve derivative rights to attorney fees stemming from the claim for medical services. The decision of the Court of Appeals is reversed. The order of the Director of the Department of Consumer and Business Services is affirmed.

[Summarized by Manuel Bravo]



Civil Case Processing in the Oregon Courts

An Analysis of Multnomah County

Institute *for the* Advancement *of the* American Legal System

University of Denver

Council on Court Procedures
April 10, 2010, Meeting
Appendix H-1

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

IAALS is part of the University of Denver, and it benefits from gifts donated to the University for its use. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility. All IAALS research and products are supported by pooled grants from individuals, businesses and private foundations.

Institute for the Advancement of the American Legal System
University of Denver
2044 E. Evans Avenue; HRTM Bldg., #307
Denver, CO 80208-2101
Phone: 303.871.6600; Fax: 303.871.6610
www.du.edu/legalinstitute

STAFF

Rebecca Love Kourlis, Executive Director

Pamela Gagel, Assistant Director

Jordan Singer, Director of Research

Corina Gerety, Research Analyst

Natalie Knowlton, Research Analyst

Dallas Jamison, Director of Marketing & Communications

Theresa Spahn, Director - O'Connor Judicial Selection Initiative

Jennifer Moe, Legal Assistant

Abigail McLane, Executive Assistant

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EXECUTIVE SUMMARY

This report represents the third stage of an extended study of civil litigation in the State of Oregon by the Institute for the Advancement of the American Legal System at the University of Denver (IAALS). The first two stages examined, respectively, civil case processing in the United States District Court for the District of Oregon (as well as other federal district courts), and perceptions of the Oregon bench and bar about the civil justice system in that state.

The workings of the civil justice system in Oregon should be of interest to anyone concerned about access to civil justice in the United States. Civil practice in Oregon is widely believed to be among the most collegial and efficient in the nation. Anecdotes about the civility of the litigation process, the relative cost-effectiveness of the system, and attorney satisfaction with the system abound. The three IAALS studies were designed in part to examine these beliefs more deeply and better understand what is working – and not working – in Oregon civil litigation from a quantitative perspective.

The instant study focused on the processing of contract and tort cases in the Circuit Court of Multnomah County, Oregon. IAALS researchers examined the dockets of nearly 500 cases that closed between October 1, 2005 and September 30, 2006, and recorded critical events and other information from the life of each case. In particular, researchers tracked motion practice, requests to deviate from scheduled events, the time between key events in the case, and the overall time from filing to disposition for each case. The study's key findings follow.

Contract cases tended to be resolved within four months after filing, a majority of them by default judgment. Tort cases tended to take longer to resolve, most frequently by settlement.

Contract cases were the most predominant case type in Multnomah County Circuit Court, representing approximately two-thirds of all closed cases in the October 2005-September 2006 time frame. In this study, a surprisingly large number of those cases – 52% – were terminated by default judgment. Perhaps because defaults were so common, the median time to disposition of all contract cases was less than four months. Only 12% of contract cases were terminated by settlement, and only 1% each were resolved by summary judgment, arbitration, or trial.

Tort cases in Multnomah County exhibited a wider variety of case length and type of disposition. The median time to disposition was exactly one year for tort cases, although forcible entry and property damage cases tended to be completed in less than three months on average, and fraud cases averaged more than three years from filing to final disposition. Slightly more than half of all tort cases settled, and another sixth were removed to federal court. As with contract cases, there were few resolutions by summary judgment, arbitration, or trial.

Parties filed relatively few disputed motions, such as motions to dismiss, motions for summary judgment, or motions to compel discovery. When motions were filed, on average they were resolved more quickly, and granted less frequently, than corresponding motions in federal court.

One of the most striking features of the Multnomah County cases was the relative dearth of disputed motion practice. Out of 495 cases, the study recorded only 54 motions challenging the sufficiency of the pleadings, 21 motions to compel discovery, and 91 motions for summary judgment. Motions to dismiss and motions for summary judgment were filed at roughly half the rate in Multnomah County than the equivalent motions were in the U.S. District Court for the District of Oregon, and also granted much less frequently than in federal court. Motions to compel were filed at about one-eighth the rate of the federal court – perhaps because the applicable rules of civil procedure in state court already restrict discovery much more significantly than in the federal system.

Even though plaintiffs in Multnomah County are required to plead "ultimate facts" supporting the allegations in their complaints, the sufficiency of the complaint was challenged at a much lower rate than in federal court.

The state courts in Oregon use a system of fact pleading that requires a party to include in the complaint the "ultimate facts" supporting that party's allegations. This requirement stands in stark contrast to the notice pleading system in the federal courts, which (at the time the cases in this study were pending) required only that the plaintiff provide a "short and plain statement of the claim showing that the pleader is entitled to relief."

One frequently voiced concern about fact-based pleading standards is that they set a higher bar for plaintiffs, and increase the likelihood that a defendant will seek – and that the court will grant – dismissal of the case at the pleading stage. The Oregon data strongly refute this presumption. Despite the ostensibly higher fact pleading standard, the legal sufficiency of contract and tort complaints in Multnomah County was challenged much less frequently than for similar cases in federal court, and motions to dismiss were granted at a much lower rate (46% in Multnomah County versus almost 63% in federal court). These numbers were even more striking for cases alleging civil discrimination: not a single discrimination case was dismissed on sufficiency grounds at the pleading stage in Multnomah County (as opposed to 68% of equivalent cases for which dismissal was granted in the U.S. District Court for the District of Oregon), and summary judgment motions in discrimination cases were filed in Multnomah County at one-fifth the federal rate.

Parties rarely sought to extend or continue pretrial deadlines. Where continuances were requested, they related almost exclusively to rescheduling court hearings or trial.

The study found virtually no motions to extend deadlines during the ordinary pretrial process. Whereas motions to extend time to answer the complaint, respond to motions, file or respond to discovery requests, or file additional material with the court are commonplace in federal civil cases, the parties in Multnomah County only sought such extensions on the rarest of occasions. There

were only two exceptions to this general trend: motions to stay or continue a hearing with the court, and motions to continue the trial date. When requested, these motions were granted almost all of the time.

Relatively few cases participated in court-ordered arbitration.

Oregon law mandates that Circuit Court claims involving only requests for monetary relief of $50,000 or less be subject to arbitration. About 10% of the cases in this study were initially scheduled for arbitration, but less than 3% of cases actually proceeded to arbitration and received an award. Nearly half of cases put down for mandatory arbitration settled after the arbitration was scheduled but before it could occur.

Thoughts for a national audience

Some of the key findings from the Multnomah County study offer lessons for other state and federal courts. In particular, this study suggests that restrictions on the use of discovery devices and the narrowing of issues through fact-based pleading are consistent with limited motion practice, relative speed in resolving cases, and a legal culture that provides high attorney satisfaction. We cannot – and do not – suggest that these practices are the sole cause of such positive outcomes, but we *can* say that such practices do not hinder these outcomes.

We hope that this report will spur new discussions about ways to make the American civil justice system as fair, efficient, and cost-effective as possible. While some lessons drawn from the Oregon experience are more easily transferable than others, the broad conclusions about the overall effectiveness of the Oregon state system should encourage constructive dialogue in every state and federal jurisdiction across the country.

I. INTRODUCTION

This is a study of civil case processing in Oregon state court – in particular, the Circuit Court of Multnomah County, which encompasses much of the Portland area. The study examined the dockets of nearly 500 closed contract and tort cases in order to better understand aspects of Oregon civil pretrial practice – aspects such as scheduling, motion practice, time between events, and time from filing to disposition.

While the conclusions from this study stand on their own, they also may be viewed as a bridge between two other studies of Oregon pretrial procedure recently completed by the Institute for the Advancement of the American Legal System at the University of Denver (IAALS). The first study, published in January 2009, examined nearly 7,700 closed civil cases in eight federal district courts – including more than 1,300 cases from the U.S. District Court for the District of Oregon.[1] Like the Multnomah County study here, the federal study reviewed case dockets to better understand scheduling, motion practice, and time between events in civil cases.

The second study was a survey of the Oregon bench and bar concerning Oregon civil procedure, completed in March 2010 (Oregon Rules Survey).[2] That survey asked respondents to offer their perspectives on various aspects of the rules that govern civil cases in Oregon state court, including rules concerning fact pleading, limits on fact discovery, expert witnesses, trial scheduling, and mandatory arbitration. While survey respondents drew from their professional experience, many of the questions in the survey necessarily required a subjective response. The docket data in the Multnomah County study supplement the survey by offering an objective framework for the perspectives of the bench and bar on these issues.

In order to derive the highest benefit from bridging these three studies, this report sets out its findings in two different ways. First, we discuss the Multnomah County docket data directly, using responses from the Oregon Rules Survey to provide additional context for the findings. In the second part of the findings, we compare the Multnomah County data to the data gleaned from the federal docket study, in order to determine notable similarities and differences in caseflow and case processing between the state and federal courts in Oregon.

This report is intended to be illustrative, not exhaustive. Many of the findings are worthy of further examination, and additional study is welcome. We hope, however, that these findings will help inform the broader national discussion of the effectiveness and the United States civil justice system.

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[1] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009).

[2] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SURVEY OF THE OREGON BENCH AND BAR ON THE OREGON RULES OF CIVIL PROCEDURE (2010) [*hereinafter* OREGON RULES SURVEY].

II. WHY OREGON? LESSONS FOR A NATIONAL AUDIENCE

The decisions to conduct a state case processing study, and to focus on Oregon for that study, were not arbitrary. In comparison to the heyday of caseflow management research in the 1970s and 1980s, there has been relatively little examination of civil case processing in the past two decades. Most of the research in the last twenty years has been aimed at federal courts, largely in response to Congressional curiosity about the impact of the Civil Justice Reform Act of 1990.[3] It would be a mistake, however, to limit caseflow studies to the federal arena. Nearly all civil cases in the United States are filed in state court, and the variety of rules and procedures adopted in state court systems around the country offers potential lessons about efficient practices in bringing cases to judicial resolution.

So state courts matter. But why look specifically at Oregon? The short answer is that, at least anecdotally, the system works well. In fact, lawyers – representing both plaintiffs and defendants – prefer to litigate in Oregon state court in comparison to federal court or neighboring state courts.[4]

The possible reasons for this preference are multi-layered. To begin with, Oregon attorneys are fiercely proud of their state's legal culture. In the Oregon Rules Survey, 86% of respondents said that the culture of the Oregon bar enhances the civility of litigation.[5] One respondent specifically emphasized his preference for Oregon over other state courts in which he had practiced, "primarily because of the camaraderie of the [Oregon] bar."[6] Another respondent remarked, "We have an amazingly professional and ethical practice in Oregon, and I want it to stay that way as long as possible."[7]

A constructive legal culture is not the only proffered explanation for attorney satisfaction. Some have also speculated that the legal culture in Oregon is influenced, at least in part, by its civil rules. In a time when the costs of pretrial discovery nationally are considered to be skyrocketing, another state's highest court cited Oregon's rules as creating a "sanctuary of sanity"[8] that contributes to a process that reduces the cost of civil litigation for all users. Similarly, many respondents to the Oregon Rules Survey suggested that the state's trial courts are faster and more flexible than their federal counterpart. Summing up this sentiment, one commentator has suggested that:

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[3] Civil Justice Reform Act, Pub. L. No. 101-650, *codified at* 28 U.S.C. § 471 *et seq.* Efforts to evaluate the impact of the Act include JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) and JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY (1997).

[4] OREGON RULES SURVEY, *supra* note 2, at 12-15.

[5] *Id.* at 46.

[6] *Id.* at 49.

[7] *Id.*

[8] State ex rel. Crown Power and Equipment Co., L.L.C. v. Ravens, 2009 WL 3833830, *6 (Mo. Nov. 17, 2009) (Wolff, J., concurring).

> The cause may be the laid-back lifestyle and good health of Oregonians, the sylvan setting, the mild climate, the good food and wine, and the frequent vision of snow capped mountains in the Cascade range. I also suspect, though, that Oregon rules of civil procedure permit fewer opportunities to engage in "litigation within litigation." I certainly know that to be true with respect to discovery.[9]

There are indeed significant differences between the rules of civil procedure in Oregon Circuit Court and corresponding rules in neighboring state courts and the federal system, and one purpose of this study is to ascertain the impact of those differences on the flow of civil litigation. While some state court systems adopted some or all of the Federal Rules of Civil Procedure (FRCP) as their own state rules after 1938, Oregon did not do so. In the early 1980s, however, Oregon did replace its longstanding statutory civil procedure code with a new set of procedural rules called the Oregon Rules of Civil Procedure (ORCP).[10] The ORCP represent a combination of prior Oregon statutory civil code, procedural rules from other states, and selected aspects of the FRCP.[11] While an attorney practicing in Oregon would recognize the civil pretrial process as broadly similar to any jurisdiction in the United States, there are a number of important differences that potentially impact speed, cost, and satisfaction in civil litigation. For example, the Oregon Circuit Court employs fact pleading, requiring complaints to contain a "plain and concise statement of the ultimate facts constituting a claim for relief ."[12] The ORCP also do not permit certain forms of pretrial discovery, including interrogatories and discovery concerning independent expert witnesses. Furthermore, the state court's case management practices are designed to bring a majority of cases to trial or resolution within one year of filing.

This study is intended in part to determine whether and how these rules and guidelines are enforced, and how their enforcement impacts civil case processing – either directly through changes in the time between events or the filing of motions, or indirectly through influences on the legal culture and the attitudes of attorneys and judges. Certain lessons from this study may be transferable to other courts, especially those using different approaches to those in Multnomah County.

III. STUDY METHODOLOGY

This study considered exclusively contract and tort cases that were closed in Multnomah County Circuit Court between October 1, 2005 and September 30, 2006 (including cases that were reopened and reclosed during that time frame). This court has the largest civil docket of any of the state's 27

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[9] Douglas M. Branson, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, 48 CASE W. RES. L. REV. 459, 472-73 (1998).
[10] *See* Frederic R. Merrill, *The Oregon Rules of Civil Procedure – History, Background, Basic Application, and the "Merger" of Law and Equity*, 65 OR. L. REV. 527, 527 (1986).
[11] Lois Lindsay Davis, Note, *Civil Procedure*, 16 WILLAMETTE L. REV. 703, 703 (1979).
[12] OR. R. CIV. P. 18.

general jurisdiction circuit courts.[13] During the 2005-06 period there were 38 judges working in the general jurisdiction court.[14]

The State of Oregon Judicial Department graciously assisted IAALS in identifying the population of closed cases eligible for the study, and provided a list of all civil cases closed in Multnomah County during the relevant time frame. IAALS researchers then limited this list – which originally totaled more than 14,500 cases – to only contract and tort actions. From this smaller list (which still contained over 11,000 closed cases), a random sample of approximately 500 cases was selected for actual analysis; contract and tort cases were sampled in the same proportion as they appeared in the original closed case list. Contract cases were simply so designated, but tort cases were broken out into more than a dozen different case types. The final case list included cases designated as:

- Civil Contract
- Civil Damages: Property
- Civil Defamation
- Civil Discrimination
- Civil False Arrest/Imprisonment
- Civil Fraud
- Civil Forcible Entry/Detainer
- Civil Malpractice: Legal
- Civil Malpractice: Medical
- Civil Negligence
- Civil Personal Injury
- Civil Tort: Products Liability
- Civil Wrongful Death.

The Oregon Judicial Department also granted IAALS permission and training to access the Oregon Judicial Information Network (OJIN), the electronic docketing system for the Oregon state courts. Through OJIN, IAALS researchers were able to review individual case dockets for relevant information. That information was entered into a customized database developed specifically for this study.

A. THE STUDY DATABASE

The database for this study was modeled to mirror as closely as possible the database used in the IAALS federal docket study, in an effort to create content that was amenable to comparison.[15] The

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[13] *See* 2009 CIRCUIT COURT CASE STATISTICS (e.g., for the year 2006, Multnomah County Circuit Court saw 13,781 civil cases filed comprising over 26% of all civil cases filed in Oregon circuit courts that year), *available at* http://courts.oregon.gov/OJD/OSCA/statistics.page?.

[14] *See* 2006 State of the Oregon Courts: Justice in the 21st Century, at 33.

[15] For information on the development of the IAALS federal database, see CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS, *supra* note 1, at 24-26.

dataset broadly included eight types of information: (1) basic case information, (2) the judge(s) assigned to the case, (3) discovery motions, (4) dispositive motions, (5) other relevant motions, (6) trials, (7) scheduling and continuances, and (8) arbitration information.

Basic case information included the following:

- The nature of the suit/case type
- The case number
- Date filed
- Date closed
- Name of the lead plaintiff and lead defendant
- Number of total plaintiffs and number of total defendants
- Number of total plaintiffs' lawyers and total defendants' lawyers
- Whether any defendant filed counterclaims or claims against a third party
- The case's progress at the point it was terminated[16]
- The case's final disposition; and
- If the case was ever reopened and reclosed, the dates of reopening or reclosing.

Cases in Multnomah County Circuit Court are not assigned to a single judge; rather, motions and other pretrial procedures are handled by different judges throughout the life of the case.[17] Accordingly, IAALS researchers recorded information on each judge who presided over the case or portions of the case. This included date of initial assignment.

Researchers entered information on every discovery motion and dispositive motion recorded in the OJIN system. Each motion was designated by type with the date filed, party filing, the date of ruling (if available), and whether a hearing was held to consider the motion. A number of other motions deemed relevant to the study, mostly concerning extensions of time or postponing a hearing, were also recorded in the same manner.

Trial settings, if available, were recorded, along with any pretrial hearings. If trials were conducted, the length of trial was noted, as was the verdict and the amount of any judgment. Any post-trial motions and dispositions were also entered. In addition, information on arbitrations was tracked to reflect the party requesting arbitration (or whether it was court ordered), disposition of decision, original deadlines, continuances, and any appeals of arbitration decisions to the Circuit Court.

Requests for continuances of discovery deadlines, dispositive motion hearings, pre-trial conferences, and trial dates were also recorded. These requests were tracked to include information on the requesting party, reasons for the continuance, date of ruling, and new dates scheduled as applicable.

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[16] Progress at the point of termination, and case disposition, are not delineated in the OJIN system. Researchers utilized a set of termination codes based on those in the federal CM/ECF system, and adapted to fit Oregon's rules.
[17] This practice varies in other Circuit Courts in the Oregon state system.

B. Data Entry and Analysis

A law student at the University of Denver Sturm College of Law was hired to enter the data from the OJIN system. The student was trained on the database and supervised by IAALS staff throughout the data entry process. Two members of the IAALS research staff and a University of Denver statistics professor, Sachin Desai, also performed limited data entry.

The OJIN system does not provide links to electronic versions of the filed documents. As such, during data entry, researchers had to rely exclusively on the designations listed on the case docket itself. This required some interpretation of the information listed. For example, entries for court orders frequently listed a separate designation for the date the judge signed an order, while the date of entry of the actual order was for a later date. This appeared to be a result of a delay in physically filing the order by the clerk's office. As such, to maintain consistency, if an order indicated that it was signed on a different date than the actual filing date, the date the order was signed was recorded to reflect the date of ruling.

The data in this report were not subjected to a formal inter-rater reliability study, because one person entered almost all of the information. As with the federal docket study, ongoing efforts to promote consistency in data entry were maintained throughout the project, including an initial training session with intense supervision over the data entry by an IAALS Research Analyst who had worked on the federal study. The student entering the data received immediate feedback on questions regarding the data, and engaged in regular meetings with the research staff to discuss questions and identify trends in the data throughout the course of data entry. The student also maintained a log of notes for each case entered.

Once data entry was complete, the data were scoured for obvious errors and any discrepancies were researched and addressed. The final verified data were subjected to a range of statistical analyses, which are discussed later in this report. In total, 495 cases were analyzed.

IV. Findings

A. Multnomah County Data

This section sets out the key findings from the Multnomah County study, and is organized by the ordinary sequence of pretrial events. There were some clear trends in the data. First, the Multnomah County cases saw relatively limited motion practice at every stage of the pretrial process, especially with respect to motions to compel discovery or similar disputed discovery motions. Likewise, parties generally did not ask the court for permission to deviate from original deadlines – at least until trial, when a significant number of continuances were sought and granted. Finally, tort and contract cases tended to be terminated in very different ways, with tort cases much more likely to settle before trial and contract cases much more likely to be resolved through a default judgment.

1. SCHEDULING AND CIVIL CASEFLOW

a. Standards for timely disposition

Between 2003 and 2008, Oregon Circuit Courts collectively averaged a little over 600,000 case filings per year.[18] General civil cases[19] made up a small but growing percentage of these cases, from 7.7% of total filings in 2003 to 12.7% in 2008. Multnomah County Circuit Court has seen a lower percentage of general civil cases as part of the court's overall docket than the statewide average, with civil cases comprising 9.5% of total case filings in 2008.

Since the creation of Oregon's unified court system in 1983, the Oregon Supreme Court has promulgated Unified Trial Court Rules (UTCR) to promote "just, speedy, and inexpensive case resolution; efficient use of court time and resources; and uniform, consistent practice in every judicial district."[20] Circuit courts are permitted to adopt Supplemental Local Rules (SLR) to govern local practice as long as they are consistent with the UTCR, the ORCP, and state laws.

The UTCR provide for rapid trial settings in civil cases. Once all named defendants to a complaint have made an appearance, the case is deemed "at issue" 91 days after the filing of the complaint or when the pleadings are complete, whichever is earlier.[21] The parties have 14 days after the case is at issue to agree among themselves and with the court on a trial date, which must fall within one year from the filing of the complaint.[22] If the parties fail to agree on a date or fail to confer with the court in that time frame, the clerk of the court is required to set a trial date "at the convenience of the court."[23]

Parties may move to designate a civil matter as "complex." Cases designated complex are not subject to the UTCR's one year trial setting guidelines although they still must be set "as soon as practical" and "in any event, within two years from the date of filing unless, for good cause shown, the trial date is extended by the assigned judge."[24]

In addition, the Oregon Judicial Conference has established Standards for Timely Disposition for all cases.[25] For general civil matters, timely disposition is defined as 90% of all civil cases settled, tried or otherwise concluded within 12 months of the date of case filing, 98% within 18 months of

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[18] Annual Report for the Oregon Judicial Branch, 21 (2008), *available at* http://courts.oregon.gov/OJD/docs/OSCA/2008_Oregon_Annual_Report.pdf.

[19] Oregon also delineates small claims cases as civil matters. The statistics for those are excluded in this research because of the differences in procedure applied to those cases and the frequent summary nature of the proceedings do not provide meaningful information for purposes of this study nor do they provide a ready comparison to the federal docket study data.

[20] Uniform Trial Court Rules, http://www.ojd.state.or.us/programs/utcr/index.htm.

[21] UTCR 7.020(4).

[22] UTCR 7.020(6).

[23] UTCR 7.020(7).

[24] UTCR 7.030(4).

[25] Oregon Judicial Conference Standards for Timely Disposition, http://courts.oregon.gov/Multnomah/docs/AboutUs/OregonJudicialConferenceStandardsForTimelyDisposition_StandardsForTimelyDisposition.pdf.

such filing, and the remainder within 24 months of such filing, except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur. Judges are required to "bear in mind that the court's obligation is to meet these standards" when considering requests for continuances, and "parties should be able to rely on these time lines for the disposition of filed actions."

Most cases in the Multnomah County study did in fact terminate within one year, with a mean time from filing to disposition of 295.5 days and median time to disposition of only 127 days. However, 22.4% of cases took more than one year to complete, and 8.7% took more than two years. Furthermore, there was substantial variation in the overall time to disposition based on case type. Most tort cases took considerably longer on average to resolve than contract cases. Among tort cases, forcible entry, wrongful death and property damage cases tended to move the most quickly on average, while fraud and product liability cases took the longest on average, with a mean and median time of more than three years from filing to final resolution. Table 1 below shows the number of cases logged per case type, and the mean and median times to disposition for each type.

TABLE 1
TIME TO DISPOSITION FOR MULTNOMAH COUNTY CONTRACT AND TORT CASES

NATURE OF SUIT	CASES LOGGED	MEAN TIME TO DISPOSITION (DAYS)	MEDIAN TIME TO DISPOSITION (DAYS)
All Contract	**332**	**199.02**	**114.5**
All Tort	**163**	**492.06**	**365**
Damages: Property	8	105.38	77.5
Defamation	1	416.00	416
Discrimination	21	844.24	852
False Arrest/Imprisonment	2	408.00	408
Fraud	6	1301.17	1183
Forcible Entry/Detainer	8	25.13	8
Malpractice: Legal	3	383.00	239
Malpractice: Medical	2	209.50	209.5
Negligence	19	320.89	250
Personal Injury	89	470.42	407
Tort: Products Liability	3	927.67	1093
Wrongful Death	1	78.00	78
TOTAL CASES	**495**	**295.51**	**127**

There was also considerable variation between contract and tort cases in the nature of the final disposition. More than half of the contract cases terminated in a default judgment, with another 20% falling into the catch-all category of "other dismissal." Only 12% of contract cases settled. By contrast, more than half of the tort cases in the study terminated as a result of settlement, while another 17% were removed to federal court. For both contract and tort actions, 2% of less of cases terminated as a result of summary judgment, arbitration awards, or trial.

FIGURE 1
DISPOSITION OF MULTNOMAH COUNTY CONTRACT CASES

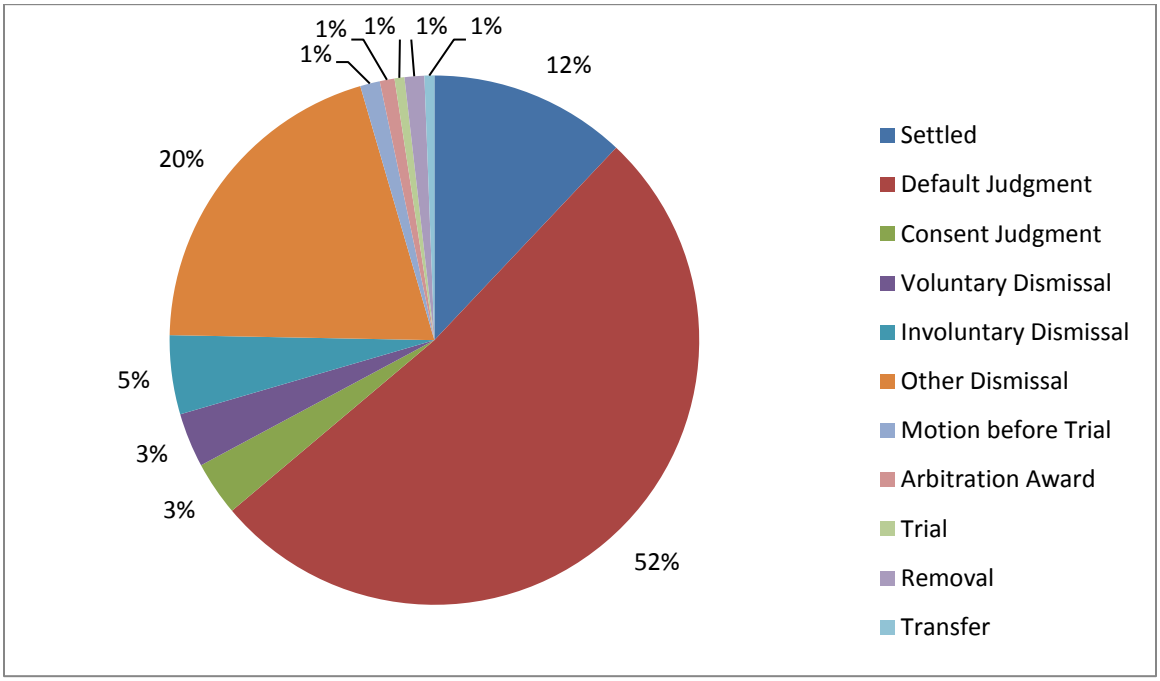
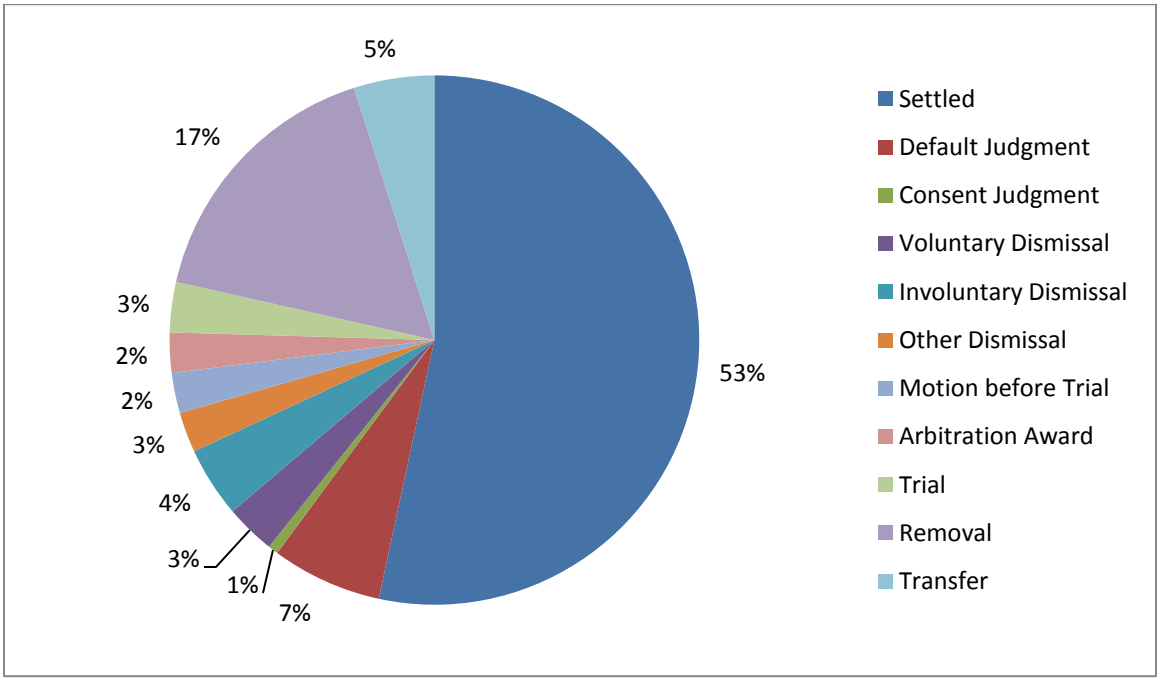


FIGURE 2
DISPOSITION OF MULTNOMAH COUNTY TORT CASES



2. Scheduling and continuances

This study observed very few motions to extend deadlines in the Multnomah County court. Although the study protocol required researchers to log motions to extend time to answer a complaint or counterclaims, serve discovery requests, respond to discovery requests, respond or reply to a discovery motion, respond or reply to a non-discovery motion, continue the overall discovery or dispositive motion deadline, or otherwise continue a deadline or scheduled event, virtually no such motions were observed in any of the 495 Multnomah County cases studied. Where parties did make requests to extend time, they were almost entirely confined to motions to stay or continue a hearing, or to continue the trial date.

Motions to continue a trial date must be signed by the attorney of record and contain a certificate stating that counsel has advised the client of the request. The motion must set forth, among other things, the reason for the requested postponement, the date(s) of previous trial settings and postponements (if any), and whether any parties to the proceeding object to the requested postponement.[26] While the information available on the OJIN dockets did not usually explain the reason provided for a requested trial continuance, every continuance in the study that was requested was in fact granted.

TABLE 2
MOTIONS TO EXTEND OR CONTINUE A DEADLINE OR EVENT

MOTION TYPE*	NUMBER FILED	PCT. OF TOTAL FILINGS GRANTED
Stay or continue hearing	141	99.28
Respond or reply to non-discovery motion	7	100.00
Continue trial date	88	100.00

* Other motions to extend deadlines were included for tracking, but no such motions were observed.

The relative absence of docketed motions to extend or continue deadlines may be a function of the rules and culture of Oregon state practice. First, the court sets relatively few hard deadlines prior to trial. Deadlines that are relatively common in other jurisdictions, such as a discovery cutoff or the deadline for filing dispositive motions, are uncommon in Oregon. Second, where deadlines are established, in most cases they are set initially by agreement of the parties, so the possibility of a scheduling conflict is lessened. Third, changes to some deadlines may be arranged by agreement of the parties and filed with the court by letter rather than by formal motion.

The near-universal granting of hearing and trial continuances may also be influenced by a combination of Oregon's litigation rules and culture. Motion hearings are set by praecipe, which

[26] UTCR 6.030(2).

requires the parties to confer on possible dates before contacting the court. Because there are rarely disputes about the propriety or timing of a new date, most continuances are unopposed and granted. Similarly, a party may request that a trial date be reset in the ordinary course, as long as the request is made more than 30 days before the scheduled trial date, and the continuance would not cause the case to be pending for more than twelve months (for ordinary cases). It is worth noting is this regard that the commentary to the UTCR regarding trial continuances "recommends that the court generally allow a motion … if the new trial date requested can be reasonably accommodated on the court's docket."[27]

2. PLEADING PRACTICE

Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition."[28] If the demand includes a claim for money the pleading must also state the amount claimed.[29] The Oregon Supreme Court has interpreted these rules to mean that "whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."[30] Thus, a pleading is sufficient even if it contains "an allegation of material fact as to each element of the claim for relief, even if vague."[31] Legal conclusions are disregarded except to the extent they are supported by facts that would prove them.[32] In reviewing a motion to dismiss, all allegations and the reasonable inferences to be drawn therefrom are accepted as true.[33]

Respondents to the Oregon Rules Survey were generally quite supportive of the state's fact-based pleading system. Sixty-eight percent agreed that fact-based pleading reveals facts early in the case, and 64% agreed that fact-based pleading narrows issues early in the case.[34] Furthermore, almost three times as many respondents with relative comparative experience thought that the requirement to plead ultimate facts increased the efficiency of litigation as believed that such pleading standards decreased efficiency.[35]

Oregon survey respondents were somewhat divided in their perceptions as to how often parties litigate the scope and adequacy of the pleadings. Fifty percent of respondents stated that this type of satellite litigation "almost never" or "only occasionally" occurs, but 19% said it "often" occurs and 8% said it "almost always" occurs.[36]

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[27] *Id.*, 1993 Commentary.
[28] OR. R. CIV. P. 18A.
[29] OR. R. CIV. P. 18B.
[30] Davis v. Tyee Indus., Inc., 668 P.2d 1186, 1193 (Or. 1983).
[31] McAlpine v. Multnomah County, 883 P.2d 869, 870 (Or. Ct. App. 1994).
[32] Huang v. Claussen, 936 P.2d 394, 394 (Or. Ct. App. 1997).
[33] *Id.*; McAlpine, *supra* note 31.
[34] OREGON RULES SURVEY, *supra* note 2, at 16 & Fig. 8.
[35] *Id.* at 19 & Fig. 11.
[36] *Id.* at 23 & Fig. 15.

In fact, the Multnomah County data demonstrate that fact-based pleading does *not* lead to high amounts of satellite litigation or actual dismissals. Oregon Rule of Civil Procedure 21 provides for an array of dispositive motions at the pleading stage, including motions for judgment on the pleadings and motions to dismiss for "failure to state ultimate facts sufficient to constitute a claim."[37] In practice, it is not uncommon for the court to allow a plaintiff ten days to replead if the complaint is dismissed or stricken. The Multnomah County data, however, revealed relatively few instances in which a party affirmatively sought dismissal or judgment in the first instance based on the substance of the pleadings. As shown in Table 3 below, the study logged only 56 motions brought under Rule 21, the ORCP counterpart to Federal Rule of Civil Procedure 12. These motions only received a ruling 57% of the time, but rulings tended to occur within two months of filing.

TABLE 3
MOTIONS UNDER ORCP 21

MOTION TYPE	NO. FILED	PCT. WITH RULING	PCT. OF TOTAL FILINGS GRANTED IN FULL	PCT. OF TOTAL FILINGS GRANTED IN PART	DAYS FROM FILING TO RULING	
					Mean	Median
Dismiss under Rule 21(A)	28	53.57	28.57	17.86	93.6	76
Judgment on the Pleadings under Rule 21(B)	2	50.00	50.00	0.00	55.0	55
Strike pleadings under Rule 21(E)	19	63.16	21.05	26.32	38.1	40
Rule 21 request (subsec. unknown)	7	71.43	14.29	28.57	45.0	43
TOTAL	**56**	**57.14**	**25.00**	**21.43**	**64.8**	**55**

3. DISCOVERY PRACTICE

In comparison to the Federal Rules of Civil Procedure, Oregon's civil rules impose stricter limitations on the use of discovery devices. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all. Furthermore, discovery of expert witnesses is significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. The prevailing opinion at bench and bar is that the absence of specific rules regarding experts makes expert discovery essentially unavailable.[38]

[37] *See, e.g.*, Marks v. McKenzie High Sch. Fact-Finding Team, 878 P.2d 417, 420 (Or. 1994); First Interstate Bank or Ore., N.A. v. Haynes, 743 P.2d 1139, 1140 (Or. App. 1987).

[38] *See* Poppino v. Columbia Neurosurgical Assocs., L.L.C., 2006 WL 4041462 (Or. Cir. Aug. 5, 2006) ("To this court's knowledge, Oregon remains the only jurisdiction in the country which does not require some type of expert witness disclosure or discovery in civil litigation.").

Perhaps due in part to these restrictions, the number of discovery motions recorded on the docket sheets was quite low. In all, only 54 motions concerning any aspect of discovery were observed, and less than half of that total (21 in all) sought to compel discovery responses. Obviously there should be no motions to compel interrogatory answers or expert discovery when such discovery devices are not permitted in any event. Still, the absence of any motions to strike discovery requests or responses, quash discovery requests, or sanction any party for failing to cooperate in discovery was notable – especially because attorneys in the Oregon Rules Survey indicated that they would prefer that the court impose sanctions more frequently.[39]

Another possible explanation for the low number of disputed discovery motions is the consensus statement of the Civil Motions Panel of the Circuit Court. The Civil Motions Panel is a "voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specifically to a judge."[40] The Panel's consensus statement indicates areas in which panel members have ruled similarly over time. Much of the consensus statement concerns the conduct of discovery, including depositions and discoverable subject matter.[41] Even though the consensus statement has no binding force, it may be hypothesized that lawyers familiar with the statement forgo filing certain discovery motions if the consensus counsels against granting the motions.

TABLE 4
MOTIONS RELATED TO DISCOVERY

MOTION TYPE	NO. FILED	PCT. WITH RULING	PCT. OF TOTAL FILINGS GRANTED	DAYS FROM FILING TO RULING	
				Mean	Median
Admit Electronic Discovery	1	0.00	0.00	---	---
Commission to Take Out of State Discovery	3	100.00	100.00	0	0
Compel Production (Documents)	8	62.50	37.50	27.4	35
Compel Production (Multiple Issues)	1	100.00	100.00	0	0
Compel Production (Unknown Issues)	12	75.00	66.67	26.0	23
Leave to Conduct Additional Discovery	6	100.00	33.33	43.2	55
Limit Discovery	2	0.00	0.00	---	---
Protective Order	21	83.33	61.90	5.3	0
TOTAL	**54**	**77.78**	**55.56**	**17.3**	**7**

[39] OREGON RULES SURVEY, *supra* note 2, at 52. Attorneys also indicated their belief that courts rarely impose sanctions, even when warranted. *Id.*, fig. 48. Perhaps the belief that motions for sanctions are unlikely to be granted contributes to the low filing rate.
[40] Civil Motions Panel Statement of Consensus, *available at* http://courts.oregon.gov/Multnomah/docs/CivilCourt/CivilMotionPanel_CivilMotionPanelStatementOfConsensus.pdf.
[41] *See id.*

4. DISPOSITIVE MOTION PRACTICE

a. Dismissals on procedural grounds

Many cases in Multnomah County (especially contract actions) were dismissed on grounds not directly related to the substantive merits of the case. In some instances the cases were dismissed voluntarily by the plaintiff, in others involuntarily by the court. Most common were default judgments, which were frequently sought and almost always granted.

One form of technical dismissal worthy of more extended discussion is a "Rule 7 notice," so named because it is authorized by UTCR 7.020. That rule requires the plaintiff to file a return or acceptance of service on the defendant within 63 days of the filing of a complaint; if the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.[42] As shown in Table 5 below, in less than 40 percent of cases did the court act on the notice and close the case, and the median time to act was 61 days – more than twice the time anticipated by the rule. Moreover, in many cases in which a Rule 7 notice did result in a technical dismissal, the case was almost always reopened at the plaintiff's request. Rule 7, then, frequently acted to grant a *de facto* continuance to the plaintiff if service could not be made within the time frame contemplated by the rules.

TABLE 5
MOTIONS TO DISMISS OR TRANSFER ON PROCEDURAL GROUNDS

MOTION TYPE	NO.	PCT. WITH RULING	PCT. OF TOTAL FILINGS GRANTED	DAYS FROM FILING TO RULING	
				Mean	Median
Default Judgment	209	98.56	97.61	1.6	1
Dismiss Voluntarily under Rule 54(A)(1)	241	99.17	99.17	2.3	0
Dismiss Involuntarily under Rule 54(B)(1) (Failure to comply with rule or order)	1	0.00	0.00	---	---
Dismiss Involuntarily under Rule 54(B)(3) (Want of prosecution)	71	49.30	49.30	46.2	47
Dismiss Involuntarily under Rule 54(B) (subsection unknown)	14	85.71	85.71	18.6	3.5
Order to show cause why claims should not be dismissed	52	21.15	21.15	43.2	41
Order to show cause why parties should not be dismissed	2	100.00	100.00	0.0	0
Rule 7 notice	281	37.72	37.72	70.3	61
Transfer to another court	17	70.59	58.82	20.0	14

While Table 5 describes the total number of motions filed for each category, it is important to remember that a single case may see several permutations of the same motion. In particular, motions for a default judgment or voluntary dismissal, or a Rule 7 notice, are typically filed

[42] UTCR 7.020; *In re Worth*, 82 P.3d 605, 610 n.8 (Or. 2003).

separately for each party. In certain cases in the study, a plaintiff brought suit against multiple defendants, and ultimately filed a separate motion for each defendant.

b. Summary judgment

Under ORCP 47, motions for summary judgment are to be granted "if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."[43] Oregon state courts are required to consider the record in a manner most favorable to the adverse party.

Motions for summary judgment were sought and granted relatively rarely in Multnomah County Circuit Court. Only 91 such motions were filed in the 495 cases studied, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). The seemingly low overall numbers might be partially explained as an outgrowth of Oregon's rules concerning expert witnesses. ORCP 47E declares that summary judgment motions under this rule "are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions," and further provides that a party may defeat summary judgment simply by filing "an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact."[44] While the affidavit surely must be presented truthfully and in good faith, this relatively easy way of presenting a dispute of material fact may discourage some parties from seeking summary judgment, on the assumption that it is likely to be defeated.

Interestingly, more than half of the summary judgment motions filed in Multnomah County never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part. When the court did rule, however, it tended to do so rather quickly; the median time to ruling was less than two months after filing, and only four motions in the study took more than three months to receive a ruling.

TABLE 6
MOTIONS FOR SUMMARY JUDGMENT

MOTION TYPE	NO. FILED	PCT. WITH RULING	PCT. OF TOTAL FILINGS GRANTED IN FULL	PCT. OF TOTAL FILINGS GRANTED IN PART	DAYS FROM FILING TO RULING	
					Mean	Median
Full Summary Judgment	79	49.37	22.78	8.86	71.9	57
Partial Summary Judgment	12	25.00	16.67	0.00	59.7	57
TOTAL	**91**	**46.15**	**21.98**	**7.69**	**71.1**	**57**

[43] OR. R. CIV. P. 47C.
[44] OR. R. CIV. P. 47E.

5. MANDATORY ARBITRATION

Oregon law requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.[45] In Multnomah County parties may agree to mediate any civil matter otherwise subject to mandatory arbitration as long as the mediation takes place in the same time period required for the court-annexed mandatory arbitration program.[46]

Parties to civil actions in Multnomah County who are required to participate in dispute resolution in civil cases must file a certificate indicating that they have done so within 270 days from the filing of the first complaint or petition in the action.[47] For cases exempt from dispute resolution requirements, parties nevertheless are required to participate in a judicial settlement conference before a matter may proceed to trial.[48]

The mandatory arbitration provisions are part of a larger cultural movement in the Oregon Circuit Court to foster all forms of dispute resolution that are appropriate to the matter filed – including trials, arbitration, mediation, judicial settlement conferences, and inter-party negotiations. This approach views alternative (or "appropriate") dispute resolution as another tool to moving cases toward resolution within the time frames set by the Oregon Judicial Conference.

In the Oregon Rules Survey, the majority of respondents who had at least one case proceed through arbitration reported their belief that mandatory arbitration decreased overall time to disposition and cost to litigants; however, one-third of respondents also indicated their belief that mandatory arbitration reduced the fairness of the process.[49] A majority of respondents further indicated that in their experience, losing parties only "occasionally" or "almost never" appeal the arbitration award.[50]

The Multnomah County docket study showed that mandatory arbitration occurred relatively rarely for contract and tort cases. Of the 495 cases reviewed, in only 51 did the court actually schedule an arbitration, and in fewer than one-third of those cases was the arbitration actually conducted. In almost half the cases in which arbitration was scheduled, the case settled before the arbitration could be held. Because arbitrations tended to be scheduled within a month of the court's first raising the issue, the high settlement rate suggests that an impending arbitration hearing may push the parties toward settlement more quickly.

As shown in Table 7 below, arbitrations tended to be scheduled and conducted more frequently in tort cases than in contract cases. All but six of the tort cases in which an arbitration was scheduled involved personal injury claims.

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[45] *See* OR. REV. STAT. §36.400 *et seq.*
[46] SLR 12.025(2).
[47] SLR 7.075(2).
[48] SLR 7.075(3).
[49] OREGON RULES SURVEY, *supra* note 2, at 60.
[50] *Id.* at 61.

The study logged five appeals of arbitration awards in the sixteen cases in which awards were given. All of the appeals were by defendants.

TABLE 7
ARBITRATIONS IN CIRCUIT COURT FOR MULTNOMAH COUNTY

	TOTAL CASES FILED	ARBITRATION SCHEDULED	ARBITRATION CONDUCTED	SETTLED BEFORE ARBITRATION	ARBITRATION NOT CONDUCTED – OTHER[51]
Contract Cases	332	22	6	8	8
Tort Cases	163	29	10	16	3
All Cases	**495**	**51**	**16**	**24**	**11**

6. TRIAL

The Oregon Constitution guarantees the right of trial by jury in civil cases "shall remain inviolate."[52] Nevertheless, many trials are conducted by the court alone. ORCP 51 provides that trial of all issues of fact shall be by jury unless the parties stipulate to a trial without jury.[53] The number of civil cases concluded by trial, jury or bench, are quite low at the state level and in Multnomah County. For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.

This study logged an identical rate of terminations by trial for Multnomah County: 1.4% of contract and tort cases in the study reached a trial verdict. In all, seven cases in the study were terminated by trial verdict – two bench trials and five jury trials. Three of these trials (all jury trials) ended in judgments for the plaintiff, with awards ranging from approximately $35,000 to approximately $1.025 million. In five other cases, a trial commenced but the parties settled the case during the trial process and before a verdict was reached.

B. COMPARING STATE AND FEDERAL DATA

In this section, we compare some of the Multnomah County data with corresponding data from the United States District Court for the District of Oregon. As discussed below, by most measures the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time. These conclusions should not be read to say that the state civil justice system is preferable for every case, or that attorneys and judges who practice in federal court are not industrious, diligent or cost-conscious. The comparison, however, offers valuable feedback for those interested in investing every court system with the ability to assure the just, speedy and inexpensive resolution of every civil action.

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[51] In eleven cases, a scheduled arbitration was not held because the case was removed to federal court (2 cases), the case was dismissed for a party's failure to comply with the rules (6 cases), or for a reason not provided on the docket sheet.
[52] OR. CONST. §17. *See also* OR. R. CIV. P. 50 ("The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.").
[53] OR. R. CIV. P. 51C(1).

1. METHODOLOGY FOR THE COMPARISON

The IAALS federal docket study logged data from the dockets of 1,362 civil cases filed in the U.S. District Court for the District of Oregon that closed between October 1, 2005 and September 30, 2006 – the same one-year time period as the cases in the Multnomah County study. Of these nearly 1,400 federal cases, 878 may be categorized broadly as contract or tort cases.[54] Of the 878 cases, 203 are contract cases and 675 are tort cases (including 478 cases alleging discrimination or civil rights abuses).

Many of the data categories used for the federal study were identical or substantially similar to the data categories used for the Multnomah County study. For example, both studies logged all discovery and dispositive motions and orders, scheduling orders, and requests for extensions or continuances.

There are, of course, inherent challenges in comparing data from state and federal systems. Many different variables contribute to the processing of each case, including (among other things) case type, judge, prevailing legal culture, and applicable procedural rules. Despite these challenges, however, there is considerable value to the Oregon state-federal comparison. The legal culture in Oregon is reasonably uniform, with significant overlap between attorneys in state and federal court.[55] For purposes of this study, the cases being compared have been limited to contract and tort actions; cases that are exclusively the province of either the federal or state court system have been excluded. We are left to test differences in civil rules and case management practices, and these differences (or similarities, as the case may be) offer interesting insight into more efficient practices generally.

Throughout this section, wherever total numbers are compared between state and federal court, the numbers have been normalized. For example, the number of summary judgment motions recorded is provided not in absolute terms, but as a ratio of summary judgment motions filed per 100 cases.

2. TIME TO DISPOSITION

Overall, the time to disposition of cases in Multnomah County was three to four months faster on average than the time to disposition in the U.S. District Court for the District of Oregon, as

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[54] Specifically, the Oregon federal cases that were classified as Insurance, Marine Contract, Negotiable Instrument, Franchise, Contract Product Liability and Other Contract according to the federal nature of suit classification system were considered to be "contract" cases for purposes of this comparison, and Oregon federal cases classified as Torts to Land, Tort Product Liability, Airplane Product Liability, Assault Libel & Slander, Federal Employers Liability, Marine Product Liability, Motor Vehicle, Motor Vehicle Product Liability, Personal Injury – Medical Malpractice, Personal Injury – Product Liability, Other Personal Injury, Asbestos Personal Injury – Product Liability, Truth in lending, Other Fraud, Property Damage – Product Liability, Other Personal Property Damage, Voting, Employment, Housing/Accommodations, Welfare, Americans with Disabilities Act – Employment, Americans with Disabilities Act – Other, and Other Civil Rights were considered to be "torts" cases for purposes of this comparison.

[55] Over 70% of the respondents to the Oregon Rules Survey indicated litigation experience both in Oregon Circuit Court and in the U.S. District Court for the District of Oregon. *See* OREGON RULES SURVEY, *supra* note 2, at 12.

demonstrated in Figure 3 below. The difference was apparent even when the federal cases were limited to contract and tort cases, to correspond to the case types tracked in Multnomah County.

FIGURE 3
MEAN DAYS FROM FILING TO DISPOSITION – OREGON STATE AND FEDERAL COURTS

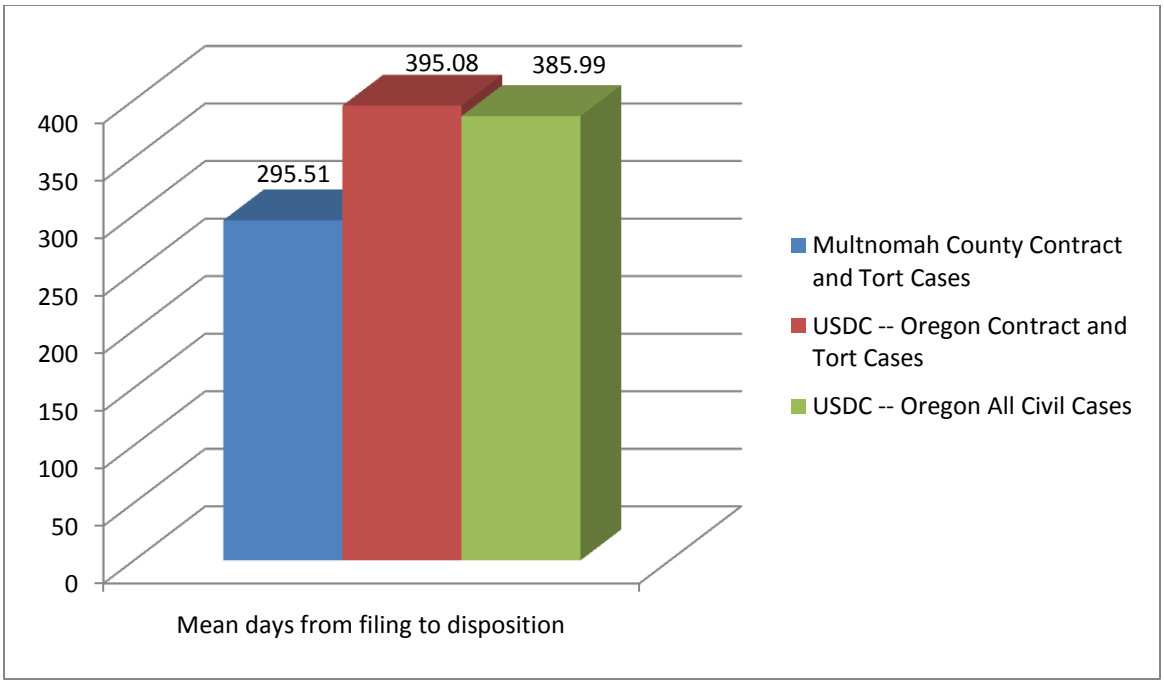
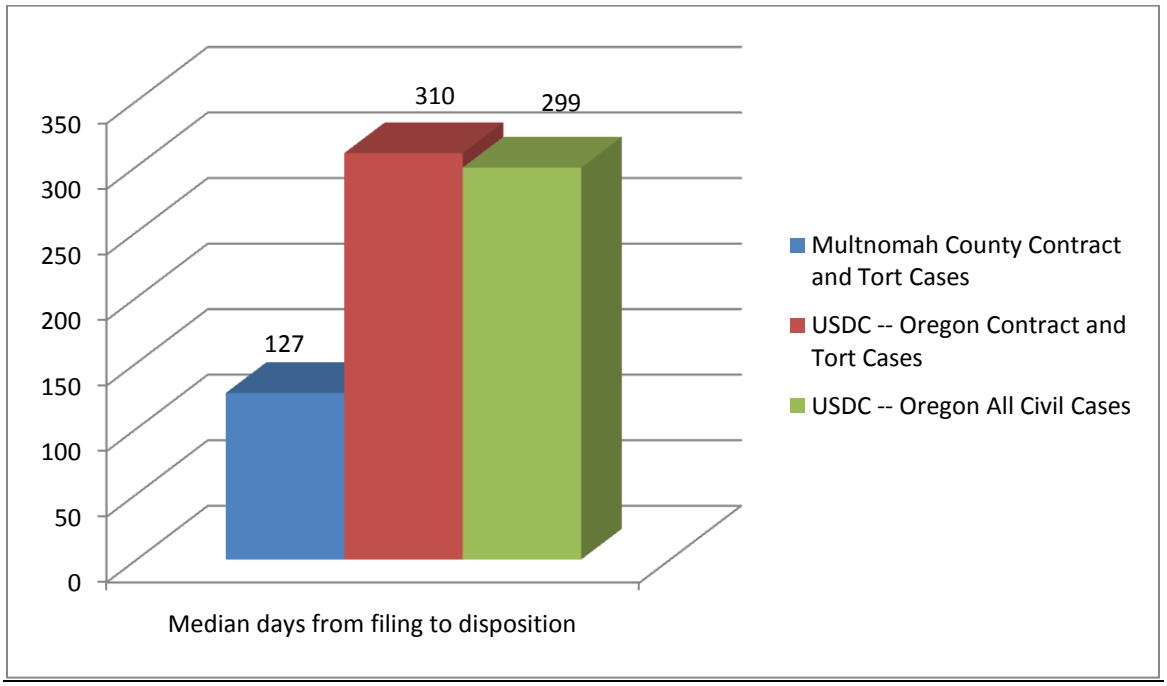


FIGURE 4
MEDIAN DAYS FROM FILING TO DISPOSITION – OREGON STATE AND FEDERAL COURTS



3. PLEADINGS

The filing rate of motions seeking to dismiss the case, strike pleadings, or for judgment on the pleadings, was considerably lower than that observed in the U.S. District Court for the District of Oregon. As shown in Figure 5, slightly more than 11 such motions were recorded for every 100 contract and tort cases in Multnomah County, compared more than 21 such motions per 100 contract and tort cases in the District of Oregon. These motions were also granted at a lower rate in state court – fewer than 47% of all such motions filed in Multnomah County were eventually granted in whole or part, as compared to more than 62% of equivalent (Rule 12) motions in federal court.

FIGURE 5
FILING RATES FOR MOTIONS TO DISMISS, STRIKE PLEADINGS, OR FOR JUDGMENT ON THE PLEADINGS IN OREGON STATE AND FEDERAL COURT

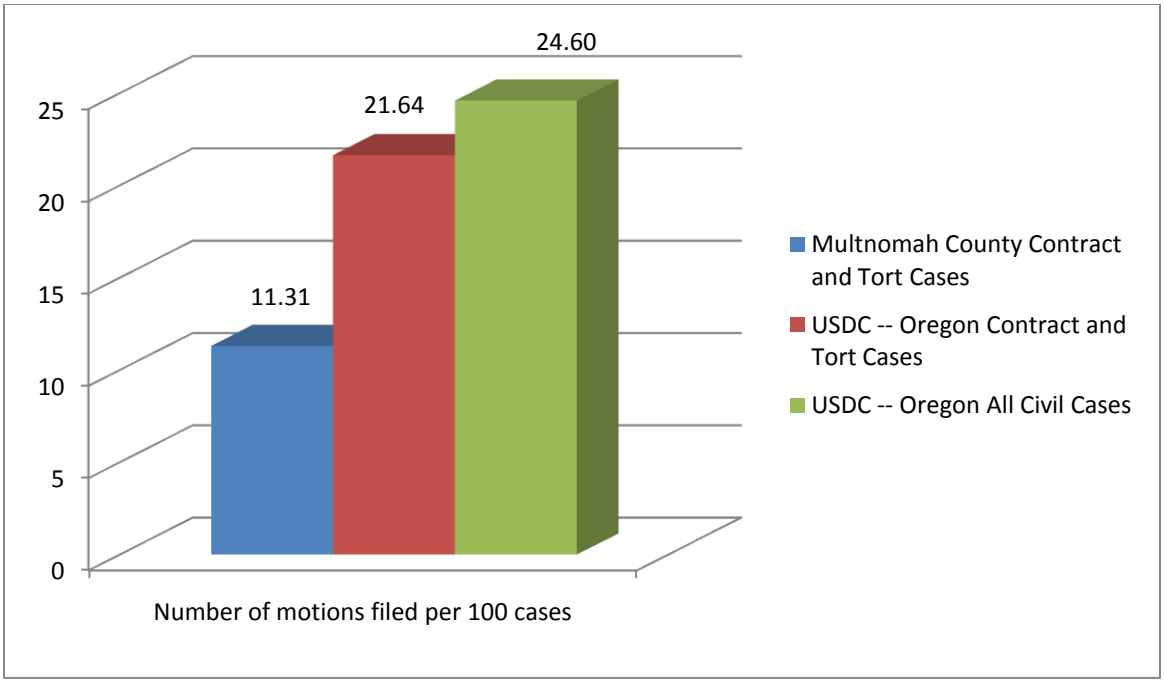
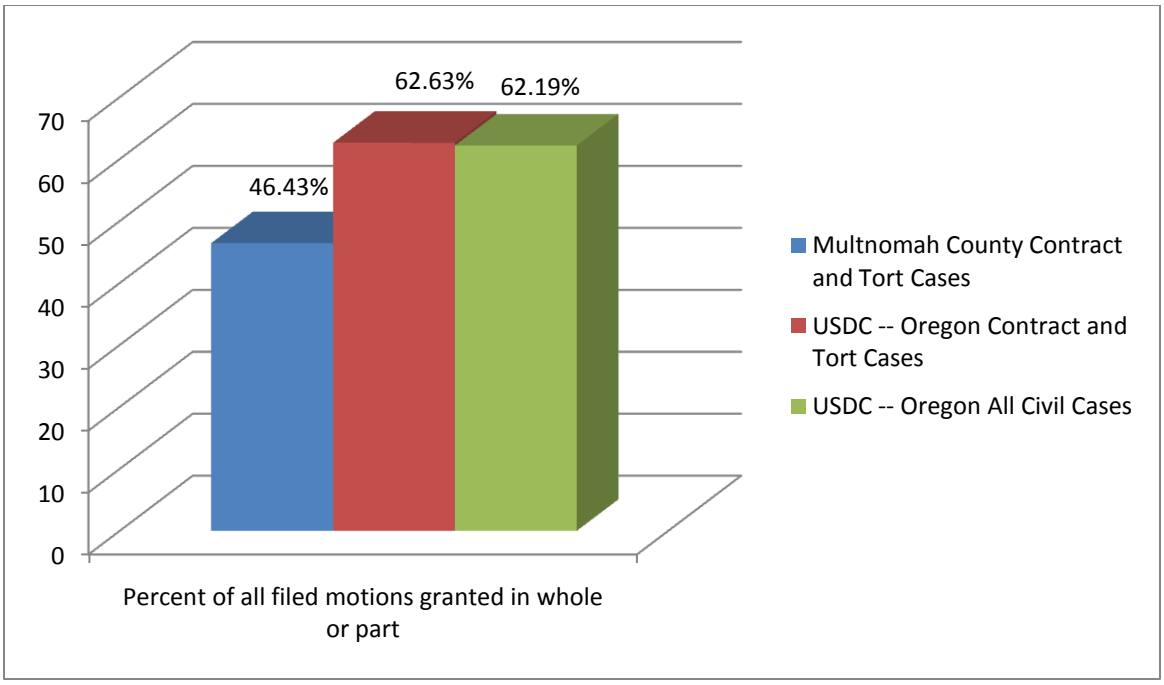


FIGURE 6
GRANT RATES FOR MOTIONS TO DISMISS, STRIKE PLEADINGS, OR FOR JUDGMENT ON THE PLEADINGS IN OREGON STATE AND FEDERAL COURT



The comparatively low filing and grant rates for motions to dismiss in Oregon state court offers powerful evidence that requiring parties to include facts in their initial pleadings does not necessarily result in more dismissals at the pleading stage. Indeed, many fewer cases per 100 were challenged on sufficiency grounds at the state level than in the federal court, where the wide open pleading standard of *Conley v. Gibson*[56] governed during the time period for this study.

Based on this study alone, it is not possible to say exactly why the comparative filing and grant rates for motions to dismiss in Multnomah County Circuit Court are so low. It may be that the inclusion of ultimate facts at the pleading stage bolster claims and make those claims more resistant to early dismissal on sufficiency grounds. Perhaps relatedly, it may be that defense lawyers do not believe that a motion to dismiss is cost-effective in most cases, given the relatively low grant rate. What is clear, however, is that cases in Multnomah County are less likely to be challenged at the pleading stage – and more likely to survive such a challenge – than similar cases in the federal court.

[56] 355 U.S. 41, 45-46 (1957) (holding that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

4. DISCOVERY MOTION PRACTICE

The small number of discovery motions in Multnomah County is striking when compared to similar motions filed in the federal district court in Oregon. As shown in Figure 7 below, in federal court more than 30 motions on disputed discovery (i.e., motions to compel, quash, strike discovery responses or issue discovery sanctions) were filed for every 100 contract or tort cases. In state court, that number was only about 4 motions per 100 cases. Indeed, as noted above, in Multnomah County not a single motion to quash discovery was observed; neither were there any motions seeking sanctions based on failure to cooperate in discovery. As indicated in Figure 8, where motions on disputed discovery were filed, they were resolved twenty days faster on average on the state court than in federal court.

FIGURE 7
FILING RATES FOR MOTIONS ON DISPUTED DISCOVERY IN OREGON STATE AND FEDERAL COURT

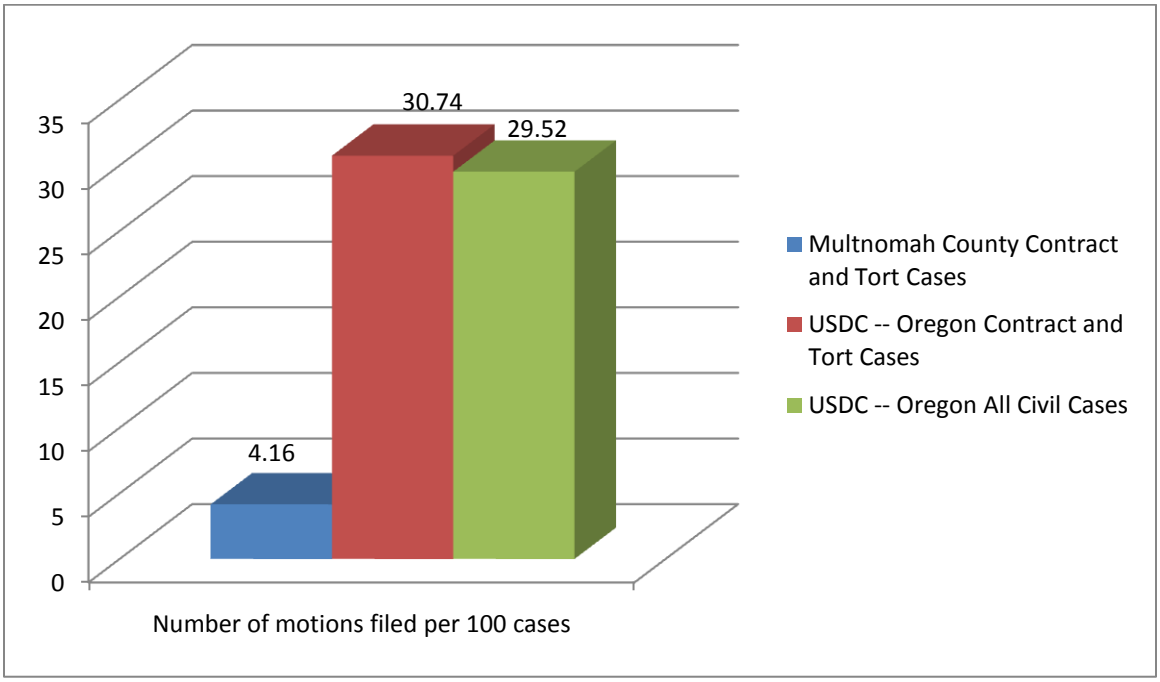
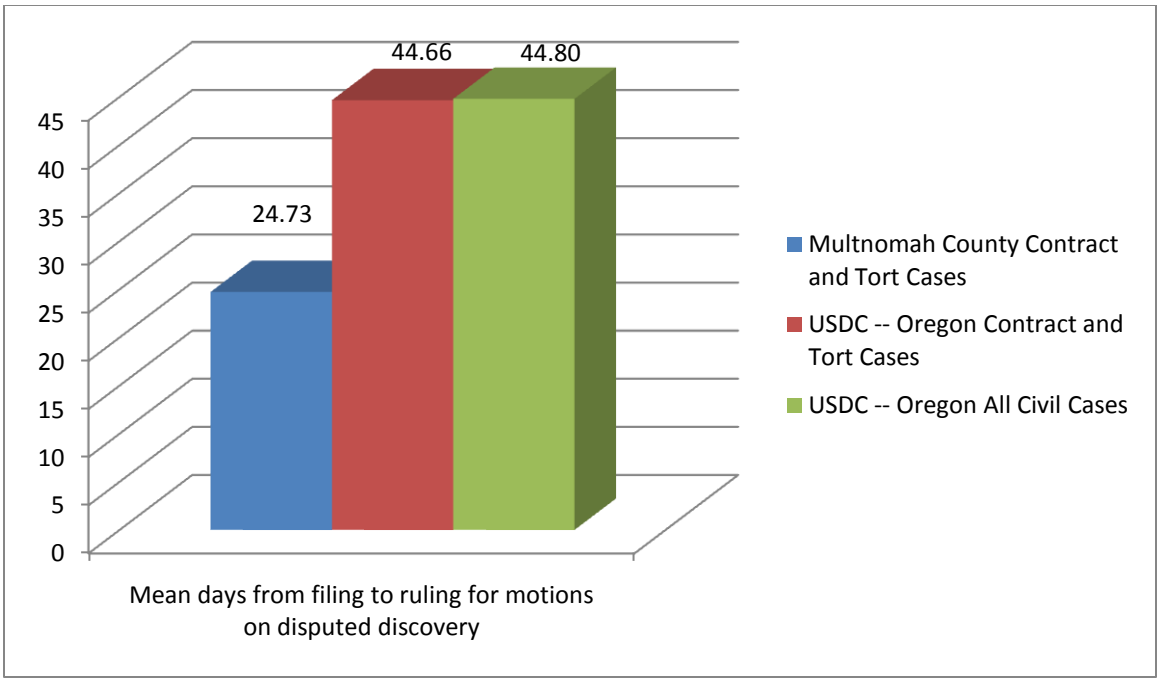


FIGURE 8
TIME TO RULE ON MOTIONS ON DISPUTED DISCOVERY IN OREGON STATE AND FEDERAL COURT



5. SUMMARY JUDGMENT

Similar to motions to dismiss or motions on disputed discovery, the filing and grant rates for motions for summary judgment were considerably lower in Multnomah County than in the U.S. District Court for the District of Oregon. As noted above, this may be attributable in part to the unique state rule that allows summary judgment to be defeated by an affidavit stating that an expert's testimony at trial will create a disputed issue of material fact. While this rule may discourage filing of summary judgment motions in state court, conversely the absence of such a rule may encourage filing of summary judgment motions in federal court, since parties may conclude that the chances of prevailing are higher. The numbers bear out this final supposition – almost 60% of motions for summary judgment in contract and tort cases in the U.S. District Court for the District of Oregon were granted, a rate twice that of the state court.

FIGURE 9
FILING RATES FOR SUMMARY JUDGMENT MOTIONS IN OREGON STATE AND FEDERAL COURT

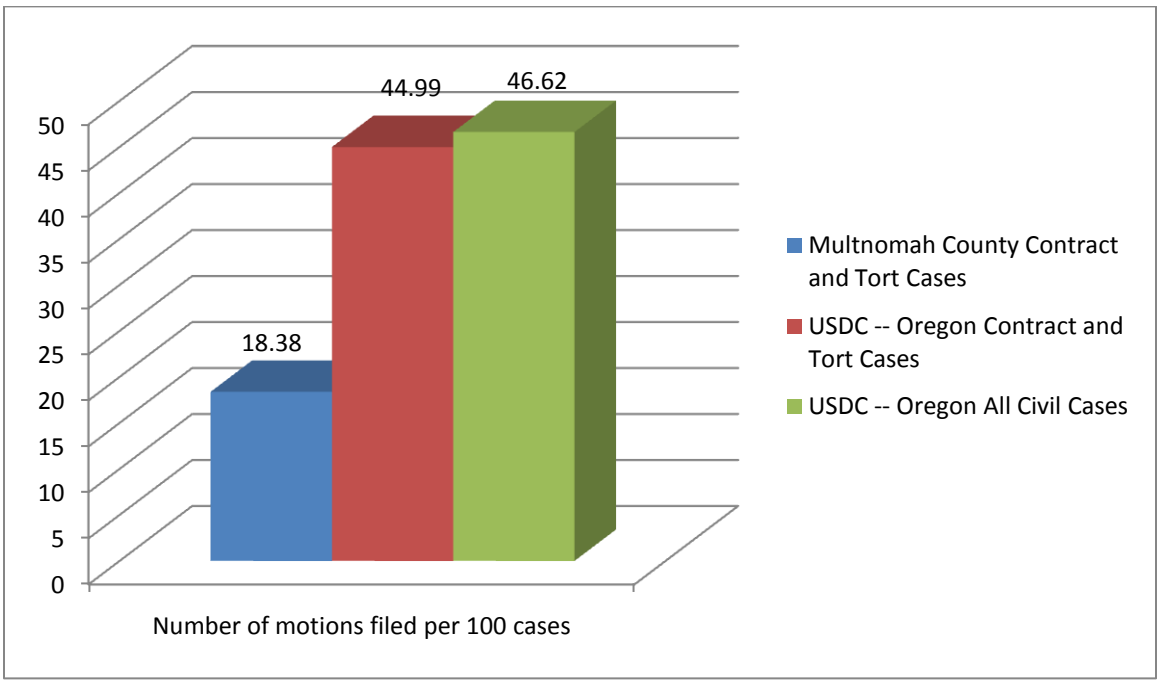
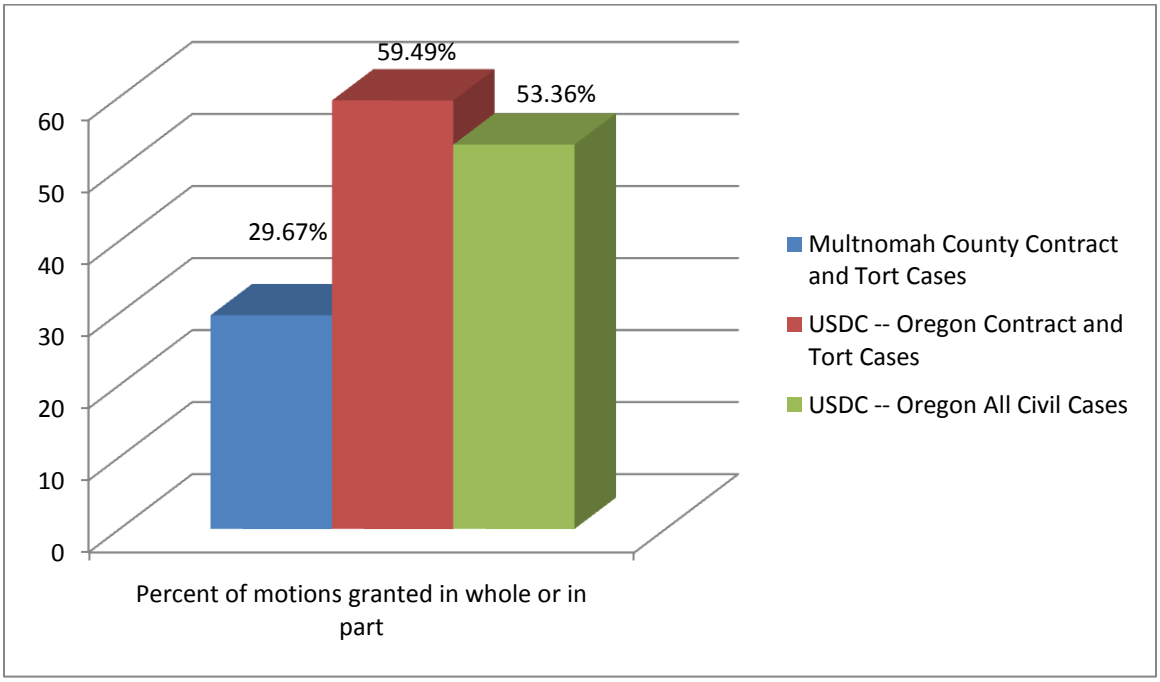


FIGURE 10
GRANT RATES FOR SUMMARY JUDGMENT MOTIONS IN OREGON STATE AND FEDERAL COURT



6. A CLOSER LOOK AT DISCRIMINATION CASES

Much of the recent discussion concerning the rules of civil procedure at the both the state and federal levels has concerned the procedural circumstances of civil rights plaintiffs. Several commentators have argued, for example, that only a broad system of classical notice pleading (such as that permitted by the *Conley* case) combined with broad discovery can afford plaintiffs in discrimination suits a level playing field when they assert violations by government or business entities.[57] Such commentators have predicted that any change in pleading standards or limitations on discovery will make it extremely difficult for civil rights plaintiffs to gain fair access to the civil justice system. Among other things, these commentators predict that fact-based pleading – or even the qualitatively different "plausibility pleading" mandated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*[58] and *Ashcroft v. Iqbal*[59] – will create a massive growth in the filing and grant rates of motions to dismiss (causing many civil rights claims to be dismissed before the discovery stage), and that discovery limits will make it impossible for such plaintiffs who do survive a dismissal motion to collect adequate information, since virtually all relevant evidence lies in the hands of the defendant.

Oregon state law recognizes claims for discrimination and civil rights violations, and portions of Oregon statutes are designed to make state antidiscrimination law a mirror image of federal law.[60] Twenty-one state discrimination cases were included among the 495 Multnomah County cases studied. This is admittedly a small number of cases on which to base any significant conclusions, but even these limited data cut against the prognostications of most commentators. Specifically, as shown in Figures 11 and 12 below, the Multnomah County discrimination cases exhibited vastly lower filing and grant rates for motions to dismiss, motions on disputed discovery, and motions for summary judgment than federal civil rights and discrimination cases closed in the U.S. District Court for the District of Oregon in the same time frame.[61]

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[57] *E.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 101 (2010); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

[58] 550 U.S. 544 (2007).

[59] 129 S. Ct.. 1937 (2009).

[60] *See, e.g.*, Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 163 (Or. 2006) (discussing the portions of disability law designed to mirror the Americans with Disabilities Act); Hofsheier v. Farmers Ins. Exch., 963 P.2d 48, 49 (Or. App. 1998) (discussing a lawsuit involving discrimination allegations brought under the Federal Housing Act and Oregon state law).

[61] For this comparison, cases were drawn from the U.S. District Court for the District of Oregon from the following categories: Americans with Disabilities Act – Employment, Americans with Disabilities Act – Other, Employment, Housing/Accommodations, Voting, Welfare, and "Other Civil Rights."

FIGURE 11
FILING RATES PER 100 CASES FOR KEY MOTIONS IN OREGON STATE AND FEDERAL DISCRIMINATION/CIVIL RIGHTS CASES

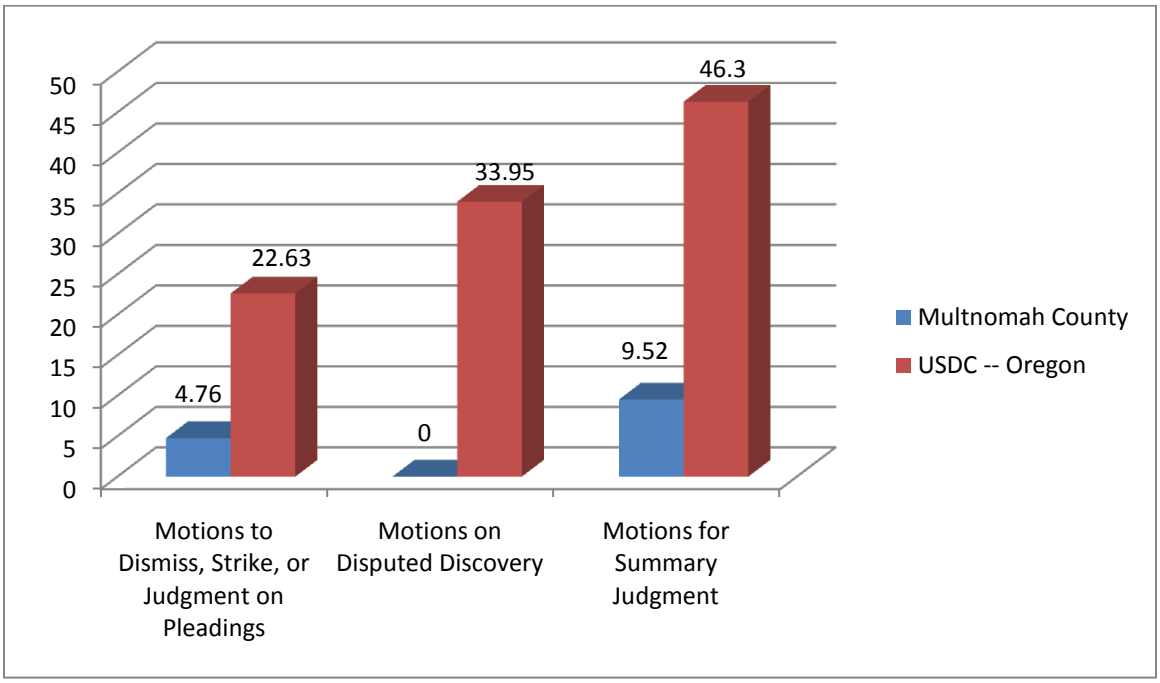
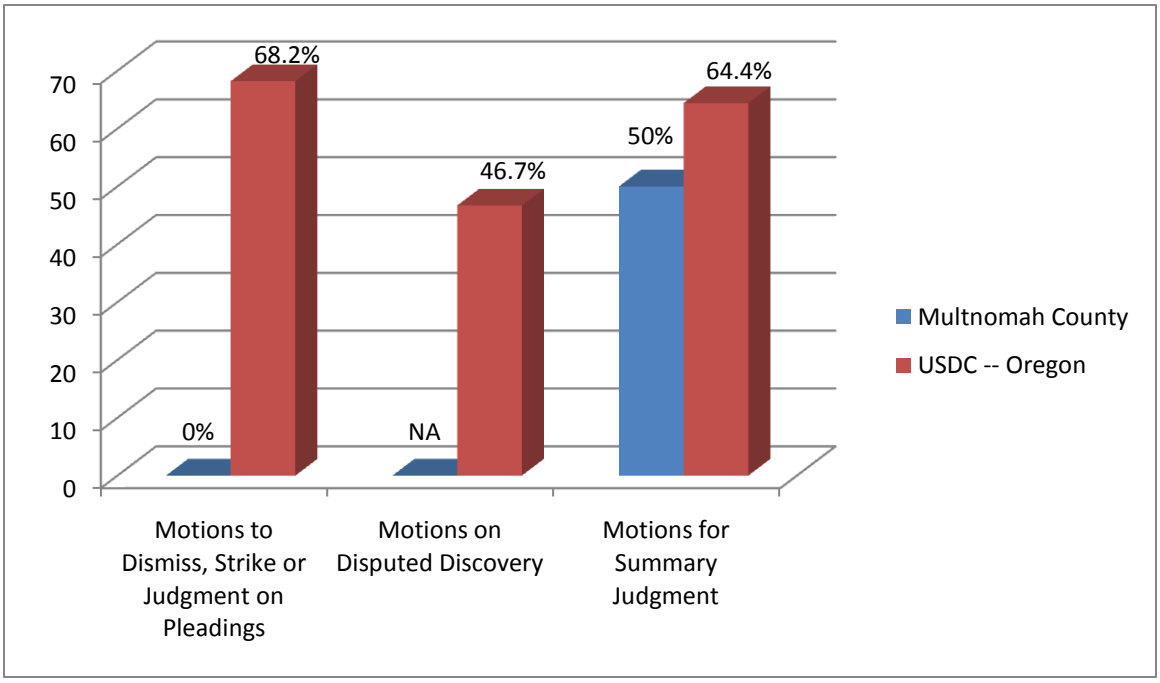


FIGURE 12
GRANT RATES FOR KEY MOTIONS IN OREGON STATE AND FEDERAL DISCRIMINATION/ CIVIL RIGHTS CASES (MOTIONS GRANTED IN WHOLE OR IN PART)



V. CONCLUSION

This study highlights some of the core characteristics related to the processing of contract and tort cases in the Circuit Court of Multnomah County, Oregon. Limited motion practice, the general absence of continuances and extensions of time, and relative efficiency in terminating cases are manifest. Furthermore, in comparison to the federal district court servicing the same geographic area and using the same pool of attorneys, the Multnomah County Court fares quite well with respect to moving cases to resolution effectively.

This report is not the end of the discussion. Indeed, we hope to see further examination of the Oregon courts, and comparative court systems in other states. Those familiar with and supportive of the Oregon state system should consider additional review in order to pinpoint the reasons behind the efficiencies noted in this study. Those inclined to be skeptical about the value of some of Oregon's civil rules – especially rules concerning fact pleading and limited discovery – might consider these findings with an open mind and ask whether some of the skepticism was misplaced.

In any event, let the discussion continue. The American civil justice system deserves nothing less.