

**MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**  
 Saturday, May 8, 2010, 9:30 a.m.  
 Oregon State Bar Center  
 16037 SW Upper Boones Ferry Rd.  
 Tigard, OR 97224

**ATTENDANCE**

Members Present:

Hon. Rex Armstrong  
 John R. Bachofner  
 Arwen Bird  
 Michael Brian\*  
 Eugene H. Buckle  
 Brian S. Campf  
 Brooks F. Cooper  
 Don Corson  
 Kristen David  
 Martin E. Hansen  
 Hon. Robert D. Herndon  
 Hon. Rives Kistler  
 Maureen Leonard  
 Hon. Eve L. Miller  
 Leslie W. O'Leary  
 Kathryn M. Pratt  
 Hon. David F. Rees  
 Hon. Charles M. Zennaché\*

Members Absent:

Hon. Jerry B. Hodson  
 Hon. Lauren S. Holland  
 Hon. Mary Mertens James  
 Mark R. Weaver  
 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
<ul style="list-style-type: none"> <li>• ORCP 9F</li> <li>• ORCP 21A</li> <li>• ORCP 38C</li> <li>• ORCP 44</li> <li>• ORCP 54</li> <li>• ORCP 54B(3)</li> <li>• ORCP 54E</li> <li>• ORCP 58</li> <li>• ORCP 69</li> <li>• ORCP 71B</li> </ul>	<ul style="list-style-type: none"> <li>• ORCP 1E</li> <li>• ORCP 7D(3)(a)(iv)</li> <li>• ORCP 18A</li> <li>• ORCP 19C</li> <li>• ORCP 47</li> <li>• ORCP 47E</li> <li>• ORCP 55</li> <li>• ORCP 64F</li> <li>• ORCP 68</li> <li>• ORCP 68C(4)(a)</li> <li>• ORCP 69A</li> <li>• Federalizing ORCP</li> <li>• Moving venue to ORCP</li> <li>• Counterclaims in Domestic Relations Motions</li> </ul>		<ul style="list-style-type: none"> <li>• Standardizing time increments in ORCP</li> </ul>

I. Call to Order (Mr. Buckle)

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

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of April 10, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft April 10, 2010, minutes (Appendix A) which had been previously circulated to the members. A motion was made and seconded, a voice vote was taken, and the minutes were approved with no amendments or corrections.

IV. Administrative Matters (Mr. Buckle)

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the website report (Appendix B) and noted that the Council had received two inquiries since its last meeting. The first inquiry was by an attorney looking for a missing attachment to a 2004 set of meeting minutes. Ms. Nilsson enlisted the assistance of Mr. Corson in tracking down this document, sending it to the attorney, and adding it to the legislative history on the website. The other inquiry was from a law student looking for the amendments that became effective January 1, 2010. Ms. Nilsson realized that there was a missing link on the website and repaired that problem, and referred the law student to the new link.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner stated that the committee was unable to meet between the last Council meeting and this one. Mr. Cooper stated that he did research regarding Washington's rule requiring disclosure of insurance coverage, CR 26(b)(2), and contacted a few attorneys who practice in Washington, primarily in injury cases. He stated that there may be a change worth proposing after a bit more research, and that he will have a report for the committee in the next week. Mr. Bachofner stated that the committee will have a written proposal for the Council by the June meeting.

Mr. Buckle noted the suggestion to adopt the Multnomah County Motion Panel Statement of Consensus as an amendment to ORCP 44, submitted by attorney Christopher Piekarski. (Appendix C). Mr. Cooper stated that he has received information from the plaintiff's lawyer in the recent Multnomah County case

that prompted Mr. Piekarski's suggestion. The case involved a ruling initially requiring an expert witness to produce personal tax records, and that the issue is more complicated than it first appeared. He stated that he believes that it is too late in the biennium to consider making such a change and suggested placing the issue on the agenda for next biennium. Mr. Bachofner stated that the committee will discuss this issue again and report its recommendations to the Council.

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

Mr. Corson reported that no new issues had been raised regarding the committee's proposed amendment to ORCP 38C (Appendix D). He stated that this amendment will be presented to the Council at the September meeting for a vote on whether to publish it.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees stated that the committee has not had a formal meeting since the last Council meeting, but that he and Ms. Leonard have spoken about the issues at hand. He stated that the committee will have an amendment available at the next Council meeting regarding changing the timing in ORCP 54E. Judge Rees also stated that Ms. Leonard had presented him with a scenario in which making ORCP 54E reciprocal may make sense. Ms. Leonard stated that, in contract claims with attorney fee provisions and claims and counterclaims, reciprocity can make a difference and one side should not be disadvantaged by not having it available. Judge Rees noted that the full committee still needs to meet, but that he anticipates that a draft amendment will be available to the full Council in June.

Mr. Bachofner suggested that the committee meet again because there is an issue that has come up recently that raises concern about taking the teeth out of ORCP 54E in terms of not being able to cut off the right to attorney fees. He noted that it began with a case dealing with ORS 20.080 and that it has also been applied in the ORS 742.061 context. Judge Rees stated that this may be a substantive rather than procedural issue.

Prof. Peterson asked whether an inquiry had been sent to the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) regarding the timing and reciprocity issues. Mr. Bachofner stated that this has not yet been done. Mr. Bachofner agreed to send an e-mail to OADC and Ms. Leonard to OTLA. Mr. Buckle stated that he anticipates that these may be controversial issues and that it is helpful to get feedback as early as possible. He noted an instance in the past when a proposed amendment was made available for comment at a late date, which caused an outcry from the bar.

Mr. Cooper stated that OTLA members have been having a discussion on Council matters in general, and that many feel that making ORCP 54E reciprocal would be a fair change. Mr. Buckle noted that his initial reaction is that making an award of attorney fees reciprocal is not a good idea because it adds another potential exposure or pressure to the defense. Judge Rees stated that, in the garden variety case where fee shifting is not available, this change would make no difference since a winning plaintiff is entitled to costs. Mr. Bachofner wondered whether, if the purpose of making the rule bilateral is an attorney fee issue, it is a change that the Council can even make to ORCP 54. He noted that he is in favor of reciprocity if it assists the parties in coming to a resolution before trial, but that he has seen recent cases where a party continues the case just because it can receive attorney fees, despite the fact that the parties have resolved all other issues. Judge Armstrong stated that there is probably nothing that the Council can do to prevent that from happening, because it has to do with statutes and how they are applied based on case law. He stated that ORCP 54E applies except when fee shifting statutes will be interpreted to make ORCP 54E inapplicable, and that will undermine the impetus to settle cases that may otherwise be present.

Mr. Bachofner noted that the case interpretation was that the statute was more specific but, if there is more specificity in ORCP 54E, that may also be helpful. Judge Rees noted that the Council cannot amend statutes to alter their relationship with ORCP 54E. He stated that there is a pre-filing procedure in an ORS 20.080 case where the defendant has an opportunity to resolve the dispute and avoid attorney fees. Mr. Bachofner stated that this may not be a situation where the Council amends ORCP 54E to eliminate fees, but to cut off fees so that the plaintiff's trouble and expenses associated with trial are compensated. Judge Armstrong stated that, in light of the language of the statute, there is nothing the Council can do. Mr. Buckle noted that, if a lawyer representing a plaintiff is prolonging the case to get more fees, a trial judge can reduce those fees. Mr. Hansen stated that the fees may be reduced, but not eliminated. Judge Miller stated that it is unusual for a judge not to take into account when the case could have settled when determining attorney fee awards. She noted that, if there are statutes that overlay, the Council cannot address those, and she is not sure how much discretion a judge has in adjusting attorney fees in those cases. Mr. Buckle stated that judges have complete discretion. Judge Miller stated that they do under ORCP 68, but some of these issues become litigation unto themselves and the judge needs to spend a lot of time figuring out the interplay between the fee shifting statute involved and ORCP 54E as interpreted in recent appellate decisions.

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

Ms. David reminded the Council that an e-mail regarding potential e-discovery amendments had gone to every judge in state, and that she had received a lot of feedback. She noted that many judges do not believe that e-discovery is within

their jurisdiction, and that the amendments need to, at a minimum, revise the language to make it clear that electronically stored information is discoverable. She stated that the committee has opted to err on the side of caution in making changes. Ms. David stated that she and Ms. Pratt had attended an Oregon State Bar continuing legal education seminar on e-discovery, and that the presenters observed that Oregon attorneys like the idea of meeting with the other side to confer. She noted that there is a definite push back in Oregon against making the ORCP similar to the federal rules. Ms. David noted that she was originally a proponent of outlining a specific procedure for e-discovery, but that the committee has decided that these are learning issues that can be dealt with in CLEs instead. She stated that the committee will draft a memorandum that will indicate that best practices dictate conferral, but that this will not be included in the amendment since no other ORCP gives so much detail about procedure.

Ms. David stated that the committee will have a new draft amendment at the next Council meeting. Ms. Pratt stated that, if judges at the state court level feel that there is not sufficient cooperation, the Uniform Trial Court Rules (UTCRC) can be amended to require conferral. She noted that judges usually send the attorneys back to confer anyway, and the same objective can be reached by modification of the UTCRC or Supplemental Local Rules (SLR). Mr. Buckle asked whether some trial judges are denying e-discovery under the current ORCP. Ms. Pratt responded that some judges are not as familiar with the technical aspects of e-discovery and will allow e-mail to be discovered as a printout, but that they do not understand why someone would need the underlying metadata. She noted that putting e-discovery in the ORCP 43A definition of what documents may be subject to discovery will force judges to look at the issue. Ms. Pratt stated that making this change will accomplish the goal, and that the Council can take further steps later if necessary. She noted that Oregon is in the very small minority of states that have not yet addressed the issue of e-discovery, and that it is time to remedy this.

#### 5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper stated that the committee had met previously and considered a number of proposals on which it is not recommending that action be taken. He stated that the committee is also at this time not recommending the amendment of ORCP 9F to remove of the additional three days, as are provided for mailing, if documents are if served by fax. He stated that this may be a change worth making but that the committee feels it would be better to wait and make this change at the same time that standardizing the timing increments in the entire ORCP is done. The committee will have a report for the Council at the next meeting.

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

Judge Miller submitted a memo to the Council regarding this matter (Appendix E). She noted that the UTCR committee had formed a work group regarding this issue. The committee recommended taking no action unless and until the UTCR committee states that it recommends an ORCP change.

7. Default Judgment Committee (Ms. David)

Ms. David noted that the committee has been working on three different issues:

- A. Appearance v. pleading. Ms. David stated that the committee had not finalized its memorandum on this issue in time for the Council meeting. She stated that the committee's conclusion is that it is an education issue, not a rule change issue.
- B. ORCP 71, extrinsic v intrinsic fraud. Ms. David stated 27 states have abolished the difference between extrinsic and intrinsic fraud as a basis for setting aside judgments, so the committee has decided to recommend doing so in Oregon as well. Judge Zennaché stated that he has drafted an amendment to modify ORCP 71B and a memorandum regarding the committee's recommendation, but that the committee has not yet had a chance to review these documents. Judge Zennaché stated that he will forward the ORCP amendment to Ms. Nilsson so that she can put it into the proper legislative format.
- C. ORCP 69. Ms. David stated that the committee has gone through three versions of a draft amendment and is fine-tuning on the issue of attorney fees. The committee will have a draft amendment for the Council's consideration at the next meeting.

8. Time Issues (Ms. Pratt)

Judge Miller provided the Council with a memo (Appendix F) regarding the committee's contacts with the Chief Judge and Bruce Miller, UTCR Reporter. She noted that Mr. Miller formed a subcommittee to study the economic feasibility of standardizing time increments in the ORCP. Judge Miller stated that there is also a question of whether the Oregon Judicial Information Network is capable of being modified to handle such time changes. She observed that the Council will not be able to make such changes this biennium and suggested the item be moved to the agenda for next biennium.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Judge Herndon stated that the committee had not heard from Senator Suzanne Bonamici and that no further action has been taken on this matter.

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

Mr. Hansen presented the Council with his memo (Appendix G) which states the reasons that the Council has decided not to take any action with regard to this matter.

11. ORCP 21A (Prof. Peterson)

Prof. Peterson stated that the committee corresponded via e-mail regarding this issue. Mr. Corson reminded the Council that the last sentence of ORCP 21A allows a court to enter a judgment of dismissal or to defer entry of judgment on a successful ORCP 21A(3) motion where another action is pending, and that the last few words of ORCP 21A, which refer to ORCP 54B(3), do not appear to serve a purpose. Mr. Corson stated that he contacted Prof. Maury Holland, former executive director of the Council, to get more history on the issue. Mr. Corson stated that Prof. Holland's recollection is different from Mr. Hansen's, but that Mr. Corson himself sees no loss or damage from removing the reference.

Mr. Hansen stated that the language allows the court discretion to grant the motion to dismiss or to stay decision on the motion to see what happens with another pending case. He stated that he recalls the language being included so that it was clear that some courts would defer until the docket cleanup and, if the case was still around when the docket cleanup occurred, the case would be dismissed. Mr. Hansen did, however, agree with Mr. Corson that nothing will be lost by removing the language because it talks about deferred entry of judgment, which can happen for any number of reasons. Prof. Peterson stated that he also believes that, as long as the court has the power to defer entry of judgment in an ORCP 21A(3) case, ORCP 54B(3) continues to be available to the courts to dismiss inactive cases from their dockets. He also noted that UTCR 7.020(5) provides guidelines for docket cleanup, so the court will be sending notice of intent to dismiss if cases linger too long, and it will be up to the party to file a motion if there is good cause to keep the case deferred rather than dismissed. Mr. Corson stated that the committee recommends that the Council vote to publish the proposed amendment (Appendix H) at the September meeting.

B. Communication with Legislators (Ms. David)

Ms. David apologized for not sending a draft e-mail that Council members can send to legislators. She stated that she will draft an e-mail which includes a discussion of what will happen in the June and September Council meetings.

VI. New Business (Mr. Buckle)

A. Council Timeline

Mr. Buckle asked for reassurance from committees that they will have either a report or a draft amendment(s) ready for the June Council meeting. Mr. Corson strongly suggested that, if a committee wants an amendment to be on the September agenda so that the Council may vote on whether to publish, the final language needs to be presented by the June meeting.

Mr. Buckle noted the possibility of needing a meeting between June and September, but that the Council will make that decision depending on how things go in June. Judge Zennaché asked all committees to commit to submitting drafts or memos at least a week before the June meeting so that Council members have enough time to review them thoroughly.

VII. Adjournment

Mr. Buckle adjourned the meeting at 10:30 a.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director



**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

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ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
<ul style="list-style-type: none"> <li>• ORCP 9</li> <li>• ORCP 21A</li> <li>• ORCP 36</li> <li>• ORCP 38</li> <li>• ORCP 39</li> <li>• ORCP 43</li> <li>• ORCP 44</li> <li>• ORCP 46</li> <li>• ORCP 54A</li> <li>• ORCP 54B(3)</li> <li>• ORCP 55</li> <li>• ORCP 64F</li> <li>• ORCP69</li> </ul>	<ul style="list-style-type: none"> <li>• ORCP 1E</li> <li>• ORCP 7D(3)(a)(iv)</li> <li>• ORCP 18A</li> <li>• ORCP 19C</li> <li>• ORCP 47</li> <li>• ORCP 47E</li> <li>• ORCP 55</li> <li>• ORCP 64F</li> <li>• ORCP 68</li> <li>• ORCP 68C(4)(a)</li> <li>• ORCP 69A</li> <li>• Federalizing ORCP</li> <li>• Moving venue to ORCP</li> </ul>		

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. 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 C) 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 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 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 (UTC) 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 compiled, 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 D). 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 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 E) 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 it will 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 F) 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

**Council on Court Procedures  
Website/Inquiries Update  
Reporting Period: 4/9/10 - 5/7/10**

I. Inquires

An attorney contacted the Council regarding a missing attachment to the December 2004 minutes regarding amendment of ORCP 67. I was unable to locate it in the Council archives, but Don Corson helped me track it down. It was sent to the attorney and added to the paper and web archives.

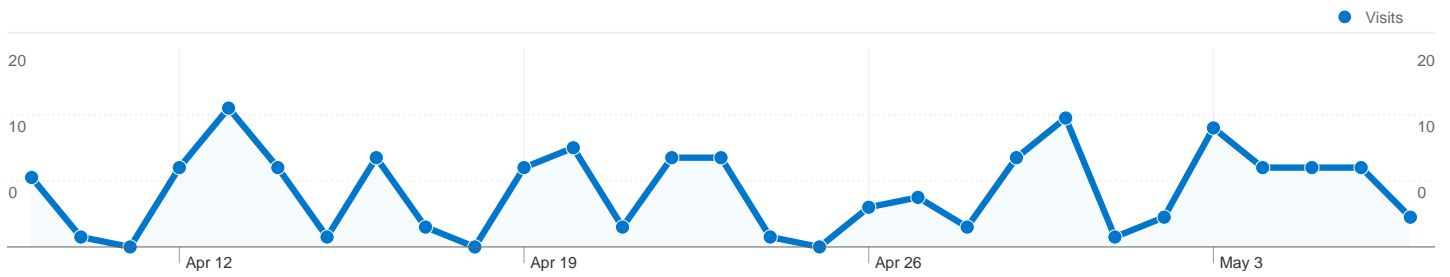
A law student contacted the Council looking for the ORCP changes effective January 1, 2010. I noted that a link to this document was missing from the website, added the link back in, and informed the student.

II. Website Statistics

Attached are analytical reports detailing website visitors, traffic sources, and most visited pages. The website had 165 visits from 131 unique visitors, and 435 page views in this period. 66% of the visits were from new visitors and the average time spent on the site was just over 2 minutes. Most of the visits came from the Portland and Salem areas.

Respectfully submitted,

Shari Nilsson  
Council Administrative Assistant



**Site Usage**

**165** Visits

**49.70%** Bounce Rate

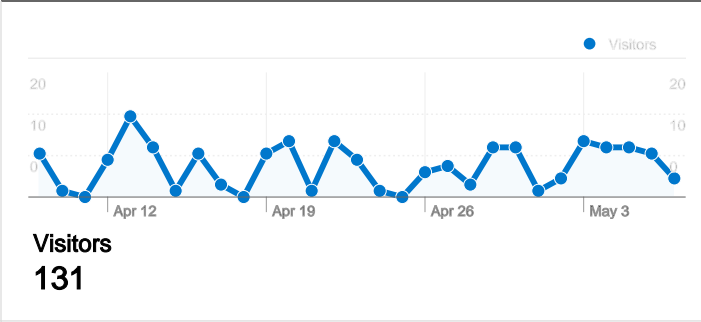
**435** Pageviews

**00:02:10** Avg. Time on Site

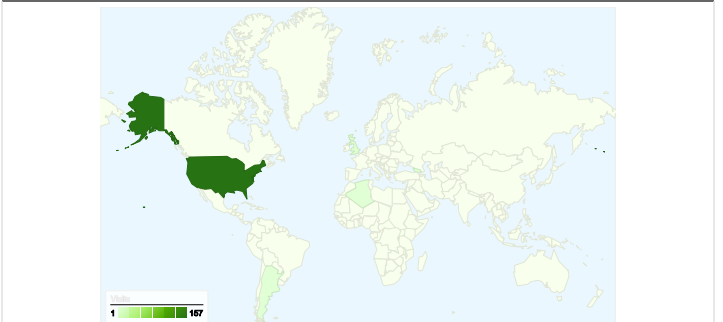
**2.64** Pages/Visit

**66.06%** % New Visits

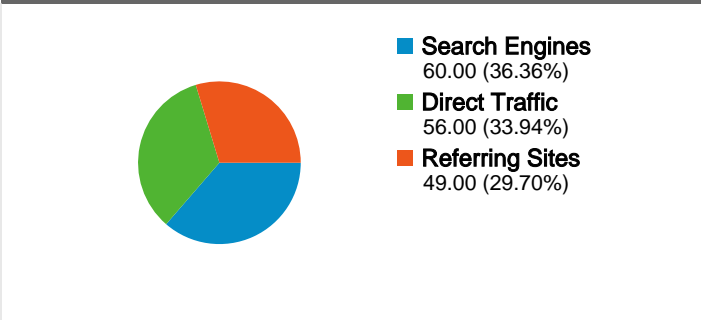
**Visitors Overview**



**Map Overlay**

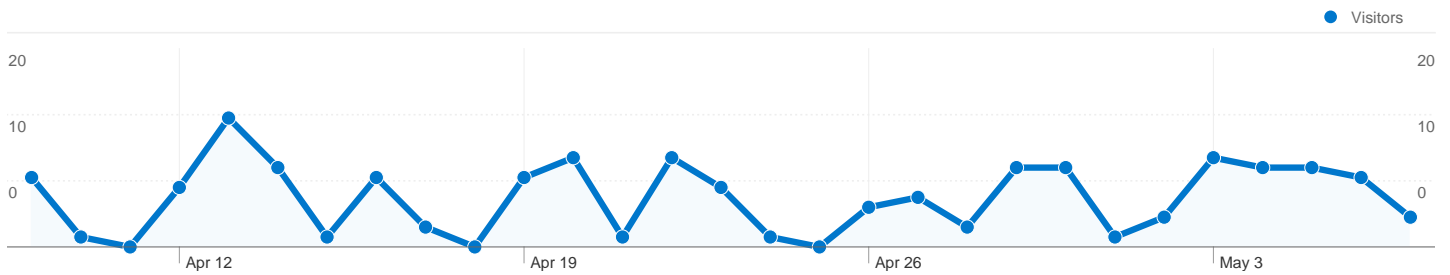


**Traffic Sources Overview**



**Content Overview**

Pages	Pageviews	% Pageviews
/~ccp/index.htm	151	34.71%
/~ccp/Past_Biennia.htm	60	13.79%
/~ccp/LegislativeHistoryofRules	53	12.18%
/~ccp/e-discoverydrafts.htm	37	8.51%
/~ccp/Current_Biennium.htm	35	8.05%



**131 people visited this site**

**165** Visits

**131** Absolute Unique Visitors

**435** Pageviews

**2.64** Average Pageviews

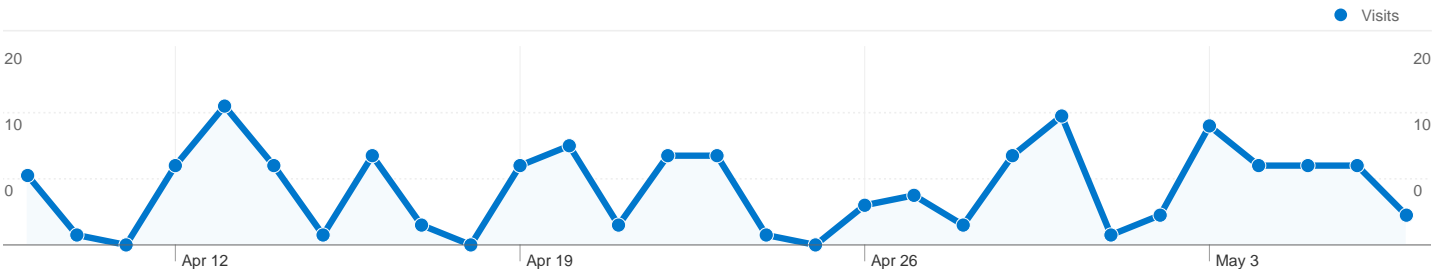
**00:02:10** Time on Site

**49.70%** Bounce Rate




**66.06%** New Visits

**Technical Profile**

Browser	Visits	% visits	Connection Speed	Visits	% visits
Internet Explorer	110	66.67%	T1	49	29.70%
Firefox	43	26.06%	Unknown	47	28.48%
Safari	8	4.85%	Cable	32	19.39%
Chrome	3	1.82%	DSL	30	18.18%
Mozilla	1	0.61%	Dialup	7	4.24%



**All traffic sources sent a total of 165 visits**

-  **33.94%** Direct Traffic
-  **29.70%** Referring Sites
-  **36.36%** Search Engines



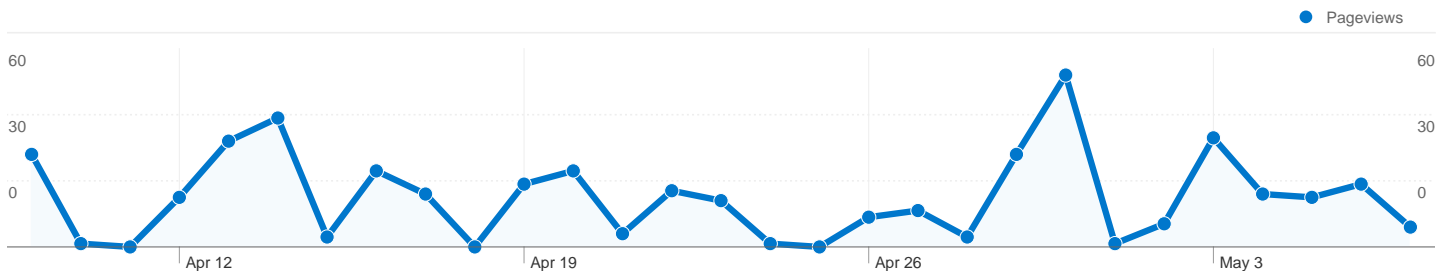
- **Search Engines**  
60.00 (36.36%)
- **Direct Traffic**  
56.00 (33.94%)
- **Referring Sites**  
49.00 (29.70%)

## Top Traffic Sources

Sources	Visits	% visits
google (organic)	57	34.55%
(direct) ((none))	56	33.94%
counciloncourtprocedures.org	18	10.91%
courts.oregon.gov (referral)	16	9.70%
bing (organic)	3	1.82%

Keywords	Visits	% visits
oregon council on court	16	26.67%
court procedures	5	8.33%
council on court procedures	4	6.67%
council on court procedure	2	3.33%
court procedure	2	3.33%





Pages on this site were viewed a total of 435 times

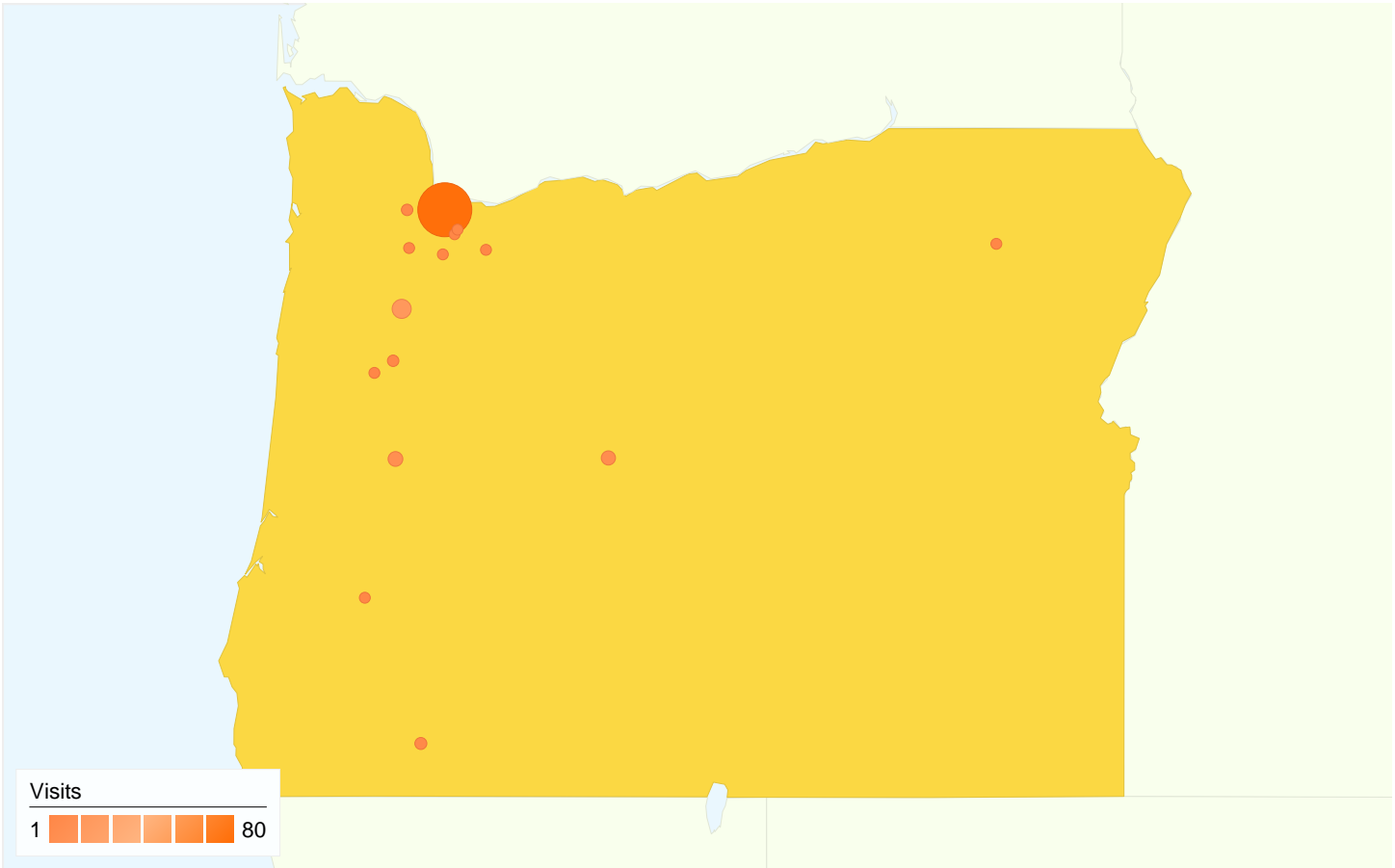
**435** Pageviews

**293** Unique Views

**49.70%** Bounce Rate

## Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	151	34.71%
/~ccp/Past_Biennia.htm	60	13.79%
/~ccp/LegislativeHistoryofRules.htm	53	12.18%
/~ccp/e-discoverydrafts.htm	37	8.51%
/~ccp/Current_Biennium.htm	35	8.05%



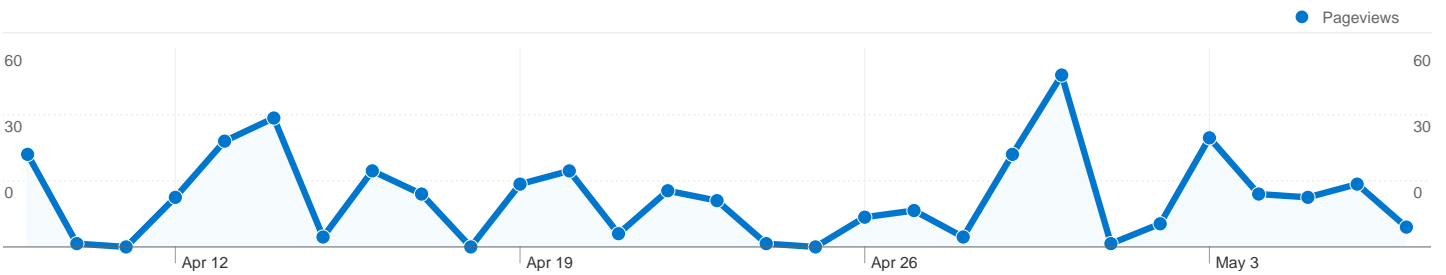
**This state sent 126 visits via 15 cities**

Site Usage

<b>Visits</b> <b>126</b> % of Site Total: 76.36%	<b>Pages/Visit</b> <b>2.88</b> Site Avg: 2.64 (9.28%)	<b>Avg. Time on Site</b> <b>00:02:26</b> Site Avg: 00:02:10 (12.08%)	<b>% New Visits</b> <b>57.14%</b> Site Avg: 66.06% (-13.50%)	<b>Bounce Rate</b> <b>42.06%</b> Site Avg: 49.70% (-15.36%)	
City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	80	3.28	00:03:12	46.25%	33.75%
Salem	16	2.62	00:01:27	62.50%	43.75%
Eugene	8	2.38	00:02:17	75.00%	37.50%
Bend	7	2.29	00:01:03	71.43%	57.14%
Medford	3	1.00	00:00:00	100.00%	100.00%
Hillsboro	2	1.50	00:00:04	100.00%	50.00%
Albany	2	4.00	00:00:51	50.00%	50.00%
Gladstone	1	1.00	00:00:00	100.00%	100.00%
La Grande	1	1.00	00:00:00	100.00%	100.00%

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

Clackamas	1	1.00	00:00:00	100.00%	100.00%
Newberg	1	3.00	00:00:30	100.00%	0.00%
Corvallis	1	1.00	00:00:00	100.00%	100.00%
Roseburg	1	1.00	00:00:00	100.00%	100.00%
Estacada	1	1.00	00:00:00	100.00%	100.00%
Canby	1	1.00	00:00:00	100.00%	100.00%
					1 - 15 of 15



**15 pages were viewed a total of 435 times**

**Content Performance**

Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	\$ Index	
<b>435</b> % of Site Total: 100.00%	<b>293</b> % of Site Total: 100.00%	<b>00:01:20</b> Site Avg: 00:01:20 (0.00%)	<b>49.70%</b> Site Avg: 49.70% (0.00%)	<b>37.93%</b> Site Avg: 37.93% (0.00%)	<b>\$0.00</b> Site Avg: \$0.00 (0.00%)	
Page	Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	\$ Index
/~ccp/index.htm	151	115	00:00:51	44.04%	44.37%	\$0.00
/~ccp/Past_Biennia.htm	60	32	00:02:09	0.00%	28.33%	\$0.00
/~ccp/LegislativeHistoryofRules.htm	53	37	00:01:32	84.21%	47.17%	\$0.00
/~ccp/e-discoverydrafts.htm	37	12	00:01:50	63.64%	29.73%	\$0.00
/~ccp/Current_Biennium.htm	35	18	00:01:55	20.00%	20.00%	\$0.00
/~ccp/resources.htm	28	21	00:01:10	40.00%	28.57%	\$0.00
/~ccp/order.htm	16	11	00:00:25	60.00%	37.50%	\$0.00
/~ccp/Council_Membership.htm	15	15	00:00:33	0.00%	46.67%	\$0.00
/~ccp/contact.htm	13	11	00:00:47	100.00%	53.85%	\$0.00
/~ccp/CurrentBienniumMeetings.htm	10	9	00:00:46	100.00%	70.00%	\$0.00
/~ccp/For_Council_Members.htm	6	6	00:00:06	0.00%	16.67%	\$0.00
/~ccp/LegislativeHistory.htm	6	3	00:02:17	0.00%	16.67%	\$0.00
/~ccp/minutes.htm	3	1	00:00:10	0.00%	0.00%	\$0.00
/search?q=cache:s4CYu_f3IMUJ:legacy.lclark.edu/~ccp/LegislativeHistoryofRules.htm+ORCP+68&cd=10&hl=en&ct=clnk&gl=us	1	1	00:00:00	100.00%	100.00%	\$0.00
/~ccp/AmendmentsPublishedforComment.htm	1	1	00:00:06	0.00%	0.00%	\$0.00

1 - 15 of 15



## Proposal for Amendment to Oregon Rules of Civil Procedure

<b>Date:</b>	Apr 9, 2010
<b>Name:</b>	Christopher Piekarski
<b>Firm:</b>	Allstate/Encompass Staff Counsel
<b>Address:</b>	1000 SW Broadway, Suite 1080 Portland, OR 97205
<b>E-mail:</b>	cpiek@allstate.com
<b>Phone:</b>	503-553-0360

**Describe the amendment you are proposing for the Council's consideration:**

RE: Medical experts

Create a rule essentially adopting the Multnomah County Motion Panel Statement of Consensus 2(A)(3) (relating to ORCP 44) with regard to disclosure of examiner's income; make this applicable to trial as well.

The Multnomah County Motion Panel Statement of Consensus rule says:

"3. We have ordered the pretrial disclosure of the percentage of an examiner's income received from forensic work and amount of the examiner's charges. We have ordered that the information be provided for the most recent three years. We have permitted the information to be provided by an affidavit from the examiner, instead of the underlying documentation. We have not conditioned the examination itself on the disclosure of the information."

The understanding between the plaintiff and defense bar has generally been that this "rule" delineates the extent to which medical experts can be required to provide financial documentation. They are, of course, open to examination by opposing counsel at trial as to bias based upon income, percentage of income from various sources, etc. The current "rule" provides for a reasoned, fair, and appropriate balance between overly invasive production demands by either party and the party's rights to information by which to evaluate and to examine the other side's expert. It has worked very well.

Currently, the rules vary court-to-court, even within the same courthouse. There is a tremendous need among the bar for uniformity, predictability, and efficiency in resolving these issues. A rule of Civil Procedure that resolved this issue is necessary, appropriate, and desirable for the interests of justice, professionalism, and fair access.

1 **ORCP 38**

2 **PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN**  
3 **DEPOSITIONS**

4 **A Within Oregon.**

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

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

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

1 States under these rules.

2 **C Foreign depositions.**

3 *[C(1) Whenever any mandate, writ, or commission is issued out of any court of record in*  
4 *any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement*  
5 *it is required to take the testimony of a witness or witnesses in this state, witnesses may be*  
6 *compelled to appear and testify in the same manner and by the same process and proceeding as*  
7 *may be employed for the purpose of taking testimony in proceedings pending in this state.*

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

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

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

13 **C(1)(b) “State” means a state of the United States, the District of Columbia, Puerto**  
14 **Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory**  
15 **or insular possession subject to the jurisdiction of the United States.**

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

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

20 **C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in**  
21 **this state, the clerk, in accordance with that court’s procedure and requirements, shall**  
22 **assign a case number and promptly issue a subpoena for service upon the person to whom**  
23 **the foreign subpoena is directed. If a party to an out-of-state proceeding retains an**  
24 **attorney licensed to practice in this state, that attorney may assist the clerk in drafting the**  
25 **subpoena.**

26 *////*

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

2 (i) conform to the requirements of the Oregon Rules of Civil Procedure, including  
3 Rule 55, and conform substantially to the form provided in Rule 55A but may otherwise  
4 incorporate the terms used in the foreign subpoena as long as they conform to the Oregon  
5 Rules of Civil Procedure; and

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

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

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

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

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



To: Council Members

From: Eve Miller

Date: April 30, 2010

At the request of the Council, Kary Pratt and I contacted Chief Justice DeMuniz to discuss whether the Council should undertake amendments to the ORCP to make more uniform the time limits imposed throughout the Rules. The proposal under consideration would require a review of all Rules that have time limitations provide more standardization to the time periods. The Federal Rules of Civil Procedure were recently overhauled to standardize the time periods to increments of 7, 14 and 28 for any periods of time under 30 days. They were also modified to take a “days are days” approach.

As a result of our letter to Justice DeMuniz, Bruce Miller contacted Kary and me. As I understand, the TCA's have been asked to study the fiscal impact and as of this week only Doug Bray (Multnomah County) has responded.

Our committee recommends the proposal should be carried to the COCP's next cycle.

## **Counterclaims in Domestic Relations Motions**

To: Council Members

From: Eve Miller

Date: April 30, 2010

I had a recent conversation with Bruce Miller who advised me the UTCR Committee has formed a work group to discuss Russ Lipetzky's proposed rule. The work group consists of Judge Thompson, Washington County, Judge West, Union County, and Richard Weil, attorney.

I told Bruce that our committee had recommended tabling the issue for this cycle.

We continue to recommend that the Council take no action on this during this cycle but leave open the possibility for further work on this in the future.

# MEMORANDUM

TO: COCP FILE

FROM: MEH

DATE: 04/10/10

RE: "Must" v. "Shall" in ORCP

FILE NO: 06-168

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1. How Issue Presented.

During a review and adoption of the Uniform Foreign Deposition Act, a request was made by the Uniform Committee that the word "shall" replace the "must" in the draft adopted by the Council on Court Procedures. This prompted a review by the Committee of ORCP to determine how the words "must" and "shall" were utilized throughout the Rules. The question was whether or not there was a distinction between the terms and whether or not any revision to ORCP was required.

2. Conclusions from Review.

In a review of the Rules, it was determined that predominantly the term "must" is used throughout the Rules. However, it has been identified that the word "shall" has been utilized in both revisions and original rules and adoptions of new rules over the past twenty years. While no distinction between the meanings of the two words has been identified, it is apparent that in recent years the words "shall" has crept into the ORCP and replaced the prior term "must".

3. Is There a Problem?

The Committee reviewed the findings of the research concerning the existence of both the terms "must" and "shall" in the current ORCP. While the issue was raised during the adoption of yet a different rule, no one on the Committee identified any distinct objection or complaint that has arisen as a result of the usage of either "must" or "shall".

4. Whether to Change the Terms.

Given the Committee's findings that no distinct controversy or issues have arisen as result of the use of either "must" or "shall" the Committee decided to table any further review or revision based on these two terms. The Committee's feeling was that its time is best spent considering problems as they are presented to the Committee and resolving those

problems. In this case, while an issues was raised, no actual “problem” was identified, thus no resolution was required.

5. In the Future.

Since this issue has been brought to the Council’s attention, the Council agreed to be mindful of the use of either the term “must” or “shall” as additional rules are adopted or revised in the future. It was identified that eventually a need to conform the rules to a single term might be preferable. For the time being, until an actual problem arises from the use of either term, the Council will simply try to migrate the rules to uniform use of the term “must” whenever possible.

1       **DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION;**

2                               **MOTION FOR JUDGMENT ON THE PLEADINGS**

3   **RULE 21**

4               A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether  
5 a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive  
6 pleading thereto, except that the following defenses may at the option of the pleader be made by  
7 motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the  
8 person, (3) that there is another action pending between the same parties for the same cause, (4) that  
9 plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of  
10 service of summons or process, (6) that the party asserting the claim is not the real party in interest,  
11 (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a  
12 claim, and (9) that the pleading shows that the action has not been commenced within the time  
13 limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if  
14 a further pleading is permitted. The grounds upon which any of the enumerated defenses are based  
15 shall be stated specifically and with particularity in the responsive pleading or motion. No defense or  
16 objection is waived by being joined with one or more other defenses or objections in a responsive  
17 pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts  
18 constituting such defenses do not appear on the face of the pleading and matters outside the pleading,  
19 including affidavits, declarations and other evidence, are presented to the court, all parties shall be  
20 given a reasonable opportunity to present affidavits, declarations and other evidence, and the court  
21 may determine the existence or nonexistence of the facts supporting such defense or may defer such  
22 determination until further discovery or until trial on the merits. If the court grants a motion to  
23 dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended  
24 complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter  
25 judgment in favor of the moving party, stay the proceeding, or defer entry of judgment [*pursuant to*  
26 *subsection B(3) of Rule 54*].