MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 5, 2010, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

ATTENDANCE

Members Present:

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

Members Absent:

Hon. Rex Armstrong
Arwen Bird
Eugene H. Buckle
Hon. Robert D. Herndon
Hon. Mary Mertens James

Guests:

David Nebel, Oregon State Bar

Council Staff:

Mark A. Peterson, Executive Director

*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 7 • ORCP 21 • ORCP 36 • ORCP 38 • ORCP 43 • ORCP 44 • ORCP 54 • ORCP 55 • ORCP 68 • ORCP 69 • ORCP 71	• 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 • Counterclaims in Domestic Relations Motions		• Standardizing time increments in ORCP • ORCP 68 - hearing on objection to attorney fees • ORCP 44 - medical examinations • ORCP 57 - alternate jurors • ORCP 55 - subpoenas for inmates • ORCP 54 - allow dismissal of specific claims

I. Call to Order (Mr. Cooper)

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

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of May 8, 2010, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft May 8, 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 (Prof. Peterson)

Prof. Peterson noted that the website report (Appendix B) shows that there has been continued activity on the website and that 61% of the visitors are new visitors who are finding and using the resource. He stated that the information on the website continues to become more comprehensive and more helpful, and encouraged Council members to review the website and let Ms. Nilsson know if they have any suggested changes.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner stated that the committee had met several times since the last Council meeting and drafted a proposed amendment to ORCP 36 (Appendix C). He stated that everyone on the committee had agreed that some expansion of insurance coverage discovery would be helpful in order to make certain that plaintiffs are aware of any reservation of rights or denial of coverage, in the hope that this would move parties toward resolution of their cases. Mr. Bachofner reported that the committee had looked at three different proposals: one that mirrored Washington's rule [CR 26(b)(2)]; one that included very different protections for work product; and the proposal currently before the Council, which the committee felt was the best compromise.

Mr. Bachofner noted that Mr. Buckle had received feedback from two attorneys who opposed the amendment because it made the procedure more like an interrogatory. Judge Miller stated it was her understanding that those attorneys felt that it is not appropriate to ask a party to identify the specific provision that

the insurance company relied upon, but that they did not object specifically to disclosure that a reservation of rights or denial of coverage exists. Ms. David indicated that she agreed that the change would require the responding attorney to interpret what happened in the past, which could be difficult. Mr. Bachofner commented that he had e-mailed one of the lawyers who provided the initial feedback to explain the committee's reasoning, but had no response. He stated that his understanding of the objection is that it would require a defense attorney to explain a coverage denial to the plaintiff's attorney. He noted that the intent of the committee was to identify what the insurance company has identified as the policy provision in their coverage denial letter, not to require anyone to reveal that letter. Mr. Bachofner stated that this change would give the plaintiff's attorney the tools needed to make an independent investigation. Mr. Cooper suggested that the proposal is an attempt to balance the privilege of the insured, the insurance company, and their defense attorney with the desire for judicial efficiency. He agreed that this is the closest thing to an interrogatory in the ORCP, but that this proposal is a compromise between the more broad Washington rule, which requires production of the letter, and existing Oregon law. Judge Miller noted that Mr. Cooper has spoken with Washington attorneys who indicated that they had never had a problem with the Washington rule which requires disclosure of the actual letter. Mr. Bachofner stated that there may be cases where the contents of the letter would reveal a confidentiality between the insured and the insurance company which could compromise the insured's defense, and this is why the committee chose not to require disclosure of the actual letter.

Ms. Pratt stated that, by choosing not to adopt the Washington rule, the intent of the committee is that the substantive law of work product and privilege will apply to the question of whether the reservation of rights letter is discoverable, and that this amendment is in no way intended to address that question. She asked whether the committee can draft a memorandum that makes this clear for the record. Judge Holland commented that the history of the Council has been to ensure that amendments are drafted so that no additional explanation from the Council is needed. Mr. Cooper noted that the meeting minutes will serve as a record of the Council's intent. Prof. Peterson stated that, at one point, the Council did include editorial comments for each rule, but that was prior to *PGE v BOLI*, 317 Or 606, 859 P2d 1143 (1993), and is no longer the Council's practice. He observed that the reason for the amendment will be articulated clearly at the September meeting and reflected in those minutes as well.

Mr. Cooper asked for general consensus that the proposed amendment be considered for publication at the September Council meeting. There were no objections.

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

Mr. Corson stated that the committee has made no further changes and that he anticipates that the committee's draft (Appendix D) will be submitted at the September meeting for the Council's vote on whether or not to publish. Judge Zennaché asked about the title of ORCP 38C, "Foreign Depositions," since the paragraph does not refer to depositions but, rather, to foreign subpoenas. Mr. Corson replied that the existing language of ORCP 38C is entitled "Foreign Depositions," and that the committee had not considered the title. Prof. Peterson pointed out that the title of the rule also states "Foreign Depositions." Judge Holland noted that the main reason for a foreign subpoena being issued is for a deposition. Judge Miller observed that someone looking for how to issue a foreign subpoena might miss it if it is not listed in the title or index. Mr. Cooper stated that ORCP 55 talks about subpoenas and that ORCP 38 does not. He asked the committee to meet again to consider whether to change the title or subtitle in question. Mr. Corson agreed.

Justice Kistler asked whether the second sentence in ORCP 38C(4) is intended to limit jurisdiction regarding other problems that might arise regarding a subpoena or the deposition process. He was concerned that, the way the sentence is worded, someone could read it as limiting jurisdiction if other issues or claimed abuses were present. Mr. Corson replied that the concern was making the out-of-state attorney subject to jurisdiction in Oregon, and that the intent was to make the act of obtaining a subpoena in Oregon an administrative act. He stated that the intent of the second sentence was an attempt to carve out an exception to that general rule if an abuse were to take place. Mr. Bachofner wondered whether the committee had considered violations of the Rules of Professional Conduct. Mr. Corson stated that it had not. Prof. Peterson suggested changing the language to "violation of the Oregon Rules of Civil Procedure or other applicable law."

Judge Miller asked whether there is anything in the statutes or the ORCP which generically covers misconduct, so that this issue would not specifically need to be included in each ORCP. Ms. Pratt replied that the inherent powers of the court to sanction are limited to the extent that the court has some authority over the party or the attorney. Judge Miller noted that there are many instances in which people abuse process and it is addressed in some way and that, each time the Council creates a rule, it does not necessarily need to include a remedy for a person or party alleging abuse. Mr. Cooper stated that the only reason he sees for including it specifically in ORCP 38 is to make it clear that a person cannot use Oregon courts and claim Oregon courts cannot control that person's conduct. Mr. Corson observed that the idea was that, if someone were to bring a problem or objection to the court, the situation would revert to "normal" court mode and would no longer be an administrative matter. Mr. Hansen stated that

the Uniform Interstate Deposition and Discovery Act Committee's concern was to make clear that out-of-state lawyers obtaining subpoenas are not practicing law in Oregon and do not need *pro hoc vice* counsel unless something goes wrong in the process.

Judge Zennaché posited that, if an out-of-state party were to abuse the process by filing repeated subpoenas in Oregon, this language may preclude the party being wronged from bringing some type of abuse of process claim against the harassing out-of-state party. Mr. Cooper responded that ORCP 38C(5) specifically states that one can file a motion for a protective order or a motion to quash. Judge Zennaché pointed out that this is different from a suit for damages for emotional distress or financial costs for hiring a lawyer, and wanted to make clear that there is no intent to preclude that kind of action. Judge Rees stated that the rule does not say that those activities would not be relevant to an inquiry on whether there is jurisdiction but, rather, that they do not constitute an appearance in court. He noted that, if someone engaged in a series of abusive tactics in Oregon, a judge would go through the normal constitutional analysis on whether those activities were sufficient to constitute either specific or general jurisdiction. Justice Kistler stated that his concern was that the words "conferring jurisdiction" imply that there may not be jurisdiction otherwise, and wanted to make clear that the committee did not intend to preclude that normal inquiry. Judge Rees asked whether changing "confer jurisdiction" to different language would solve the problem. Mr. Corson suggested language such as "allows a court to impose an sanctions" rather than using the word jurisdiction. He stated that the committee will consider these issues and circulate a new draft to the Council for consideration well before the Council's September meeting.

3. Rule 54 Issues Committee (Ms. Leonard)

Ms. Leonard discussed the committee's proposed changes to Rule 54 (Appendix E). She stated that the committee had made a change to Rule 54A(1) to give direction that one of the parties needs to submit a judgment, because the court does not do it. She stated that the committee expanded the timeline for an offer of judgment in Rule 54E (from 10 to 14 days) and acceptance of an offer of judgment (from 3 to 5 days). Ms. Leonard noted that the committee had considered the issue of making Rule 54 reciprocal, but had come to the conclusion that this would not serve any clear purpose. She stated that she and Mr. Bachofner had contacted the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC), respectively. She reported that she had received 17 responses from OTLA regarding the timelines and reciprocity, and noted that the almost-uniform response was that increasing the time for offer and acceptance was appropriate and that the majority had agreed with the times proposed by the committee. She stated that a few had suggested increasing the time for offer of judgment to 30 days. Ms. Leonard observed that

there are some OTLA members who felt that reciprocity would be a good idea, but none who could give an example of how it would work. She stated that some were using the California rule [California Code of Civil Procedure Section 998] as their reference point, but that this is a very different rule dealing with shifting discovery costs and enhanced costs, not attorney fees. Mr. Bachofner stated that OADC members agreed that increasing the timelines was a good idea, but that they saw no benefit to allowing the rule to be reciprocal. He reported that one attorney had suggested increasing the time for offers of judgment to 30 days.

Judge Miller stated that Clackamas County has a practice of having pre-trial settlement conferences about a month ahead of trial and, most of the time, the attorneys have discovery completed and would be prepared to go to trial. Mr. Bachofner remarked that he feels that the opportunity to present the offer to allow judgment is best after the settlement conference because information comes up for both sides to consider, so it is another opportunity for people to offer to settle. Mr. Brian stated that he would like 30 days for the offer for two reasons: 1) if you get it too close to trial, all the work has already been done and getting the offer of judgment earlier will allow for cost savings; and 2) from the court's standpoint, it should be done more than a few weeks before trial so that other trials can be scheduled in its place. Judge Miller stated that she would be willing to ask her court to schedule pre-trial settlement conferences 45 days ahead of trial if the time for offers of judgment was increased to 28 or 30 days. Mr. Bachofner pointed out that this has a real effect on smaller cases, where costs create a larger impact, as the amount of costs relative to the expected damage award is much higher. He suggested that, in the overwhelming majority of personal injury cases, attorneys do not prepare until a few days before trial and, if making an offer of judgment is required too early, parties may not take a legitimate hard look at the offer and settlement may not be encouraged. He stated that he feels that 30 days is too far out. Judge Miller observed that, in terms of offers of judgment, the earlier the better, since many times parties will not settle a few weeks before trial because they already have too much money and time invested in trial preparation.

Judge Zennaché stated that this change would not preclude other settlement structures or strategies to settle earlier since ORCP 54 is the "last-ditch offer" situation. Mr. Cooper noted that the rule does not prevent a party from sending an offer of judgment on the day they get served. Ms. Leonard reported that the committee had a discussion with a practitioner who had a high-volume, small-case practice who advocated for a 30 day period for offer of judgment. She stated that practices with regard to offers of settlement are practice-sensitive, but noted that different practitioners with the same type of practice may have different styles. Ms. Pratt stated that the Council needs to assume that lawyers will do their jobs properly and not necessarily tailor its amendments to different

practice styles. Mr. Brian stated that, in a personal injury case, settling the case is the easy part; the difficult part is dividing the money between the lien holders and subjugation right holders. He remarked that it is nearly impossible to get those calculations worked out in 3 or 7 or even 10 days, and proposed allowing 30 days before trial to make the offer and 10 days to accept. Mr. Bachofner countered that he feels that there is a stronger likelihood to have a resolution if an offer is made closer to trial rather than 30 days out. Judge Miller agreed and stated that this is because discovery is usually done by that point and people start to "get real." Ms. Pratt noted that ORCP 54E is not really intended for situations where everyone agrees on settlement but, rather, it can be used as a tactical weapon to force the other side to evaluate its case.

Judge Zennaché asked whether ORCP 54A(1) could be amended to allow dismissal of specific claims; Ms. Leonard replied that investigating that issue was one of the committee's charges, and that it was determined that it may not be feasible because limited judgments can be used to dismiss parties but not claims. Judge Zennaché suggested that the Council re-evaluate this issue next biennium.

Judge Miller suggested that, since the Council has been contemplating standardizing the time increments in the ORCP, the committee consider 7 days rather than 5 days for acceptance of the offer of judgment. Mr. Bachofner stated that the committee had considered this but determined that there was a situation in which 7 days would be less than 5. Mr. Cooper remarked that changing to either 5 or 7 would be fine at this point, since they will all be revisited next biennium. He asked the committee to reconsider the time increments and to provide the Council with a modified amendment (if they so choose) before the September meeting.

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

Ms. David referred the Council to the committee's report (Appendix F) and stated that, after much discussion and deliberation regarding more extensive changes to the rules governing electronic discovery, she and the committee agreed to make more minimal changes only to ORCP 43 (Appendix F) because it seemed to be a good fit for Oregon practitioners. She noted that, if it appears that later modifications are necessary, those can be made next biennium. Judge Hodson noted that he liked many of the drafts that the committee considered, but that he supports this baby step in clarifying the rules on electronically stored information (ESI). Mr. Cooper asked who would pay if a party insisted that information be provided in a certain format. Judge Zennaché replied that this would be handled in the same manner as any other cost dispute; if the parties cannot agree, they will ask for a ruling from the judge. Mr. Cooper asked that the minutes reflect that the Council did not intend the rule to require a party to provide any ESI in a particular format, regardless of cost. Ms. Pratt reiterated

that this issue is for the courts to decide.

Mr. Hansen noted that there appears to be a conflict between the first sentence in the proposed ORCP 43E, which states that "electronically stored information may be produced in printed format unless specifically requested in an electronic form," and the third sentence. He stated that the rule does not state that the ESI must be produced in writing if requested. Ms. David indicated that the committee contemplated the "may" in the first sentence to be permissive, and that the third sentence was merely to acknowledge that the person providing the ESI may determine that it can only be provided in a certain form. Mr. Hansen stated that he does not mind having an exception if it is not feasible to provide the information in printed format but that, if a party could easily print out a document, it does not appear that the party could be required to provide it in this format because the first sentence states that it "may" be printed. Ms. Pratt noted that the last sentence states that the requestor can specify the form, which would include paper. Judge Zennaché related that the committee was attempting to distinguish between ESI generally and requests to receive ESI in an electronic form. He stated that the last two sentences only apply when ESI is sought in electronic form, not in paper form. Mr. Hansen stated that he merely wanted to ensure that a simple request for an item in paper form would be responded to with documents provided in paper form. Judge Zennaché pointed out that the format should be specified in the request.

Mr. Bachofner observed that the amendment only addresses requests for ESI, and that ORCP 43B(1) already provides that a party may designate a reasonable place and manner for the inspection and copying; a party can thus designate they would like the information on paper. Judge Rees suggested eliminating the words "in electronic form" from 54E. Judge Zennaché stated that the intention of the committee was to make a distinction between things that happen to be stored electronically, such as photographs, and those that a party would specifically want to have in electronic form. Judge Hodson agreed that Judge Rees' suggestion to remove the words "in electronic form" would work and not change the intent of the committee. Mr. Bachofner replied that this does not accomplish the purpose for which this section was designed. Ms. David noted that the committee could possibly break the section into two subparagraphs, with one to specifically address ESI. Ms. Pratt stated that the committee intended to preserve flexibility in the rule for people to ask for what they need rather than to automatically receive more information than necessary or information in an electronic format that they cannot read.

Mr. Cooper asked whether, in light of these comments, it would be worth the committee taking another look at the language of the proposed rule. Ms. David replied that the committee can meet one more time to determine whether refining the existing language would create further clarity to assist practitioners.

Judge Zennaché reminded the Council that the committee arrived at the simplified form after considering far more specific and complicated versions and rejecting them in favor of simplicity. Mr. Cooper stated that he would not necessarily expect a different version, but asked that the committee give additional consideration. Judge Miller suggested keeping the proposed amendment in its current form, as the committee has already been over the issue. Mr. Bachofner again stated that he believes that ORCP 43B(1) already addresses the issue that Mr. Hansen raised.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper stated that the committee had reported at the previous Council meeting and recommended issues to put on the agenda for the next biennium. He noted that the committee had nothing more to report at this time.

6. Counterclaims in Domestic Relations Motions (Judge Miller)

Judge Miller stated that she had asked for this item to be added to the agenda only because she wanted to bring to the attention of the Council an e-mail she received from Bruce Miller regarding this issue (Appendix G). She pointed out that no further action or discussion was necessary.

7. Default Judgment Committee (Ms. David)

Ms. David referred the Council to the committee's memorandum on the "appearance v. pleading" issue (Appendix H). She noted that the committee had carefully considered the rules and determined that the current rules provide a mechanism to get the case at issue without the need for further clarification. She noted that three Oregon counties have been routinely ruling that, even though a motion had been filed and a first appearance fee had been paid, the defendant has not "appeared" because an answer had not been filed. She stated that it is a bench and bar education issue but that, if the problem continues, it is likely a Uniform Trial Court Rules fix rather than an ORCP fix. Judge Miller asked whether the issue has been addressed in an appeals court. Ms. Pratt replied that there is case law on the issue and that she routinely points it out to the court and gets the case reinstated. Ms. David suggested that there is no need for further action on this issue.

Ms. David stated that the committee had drafted a memorandum regarding the "extrinsic v. intrinsic fraud" issue (Appendix H) which provides the reasons that the committee feels that ORCP 71B should be modified to remove this distinction. Mr. Bachofner asked whether this is a substantive issue. Ms. Pratt pointed out that the federal rules long ago included this distinction, and that many states including Oregon adopted the distinction as part of their rules. She

stated that, over time, courts across the country have come to realize that this creates a morass in the case law because nobody really knows what extrinsic and intrinsic fraud are. She noted that the federal courts removed the distinction from their rules, that state courts have been systematically removing it from theirs, and that Oregon is in a very small minority that still include it. Mr. Bachofner observed that Oregon does not explicitly state the distinction in its rule right now, but that it is a court-imposed distinction. Ms. David stated that case law in Oregon has interpreted ORCP 71B to have that distinction, which means that something needs to be done to fix it. Ms. Pratt observed that case law developed the way that it has because Oregon originally adopted the federal rule and our case law was following the federal rule; when the federal rule changed, Oregon's case law never caught up.

Mr. Corson asked whether line 13 needs to include the words "previously called." Prof. Peterson concurred. Ms. David stated that the committee had likely pulled it from case law discussion but that the language may be redundant. Mr. Bachofner suggested instead inserting the words "intrinsic or extrinsic" in front of "fraud" on line 13. Judge Zennaché noted that the committee was trying to eliminate the entire distinction. Ms. Pratt stated that a lot of time and money is wasted by attorneys and the courts on the distinction. Mr. Corson remarked that he is not arguing with the concept, just the word smithing. Ms. David suggested eliminating the words "previously called." Ms. Pratt noted that the committee had not researched whether there are other types of fraud, so Mr. Corson's suggestion may have unintended ramifications. Judge Zennaché stated that the committee was trying to make it clear that the distinction is being killed. Prof. Peterson pointed out that the fact that the Council has made an amendment and that the minutes reflect this should make clear that the distinction has been abolished. Mr. Cooper noted that adding the words "whether previously called" should be a clear signal that the previous distinction no longer matters because it is in a parenthetical and referred to in the past tense.

Ms. David stated that the other charge of the committee was a reorganization of ORCP 69 to assist practitioners with the proper procedure, and that the resulting reorganization breaks the procedure into distinct steps:

> ORCP 69A: when a party has given a notice that they intend to appear
> ORCP 69B: when a party wishes to take default, it first needs to file and serve a notice of intent to take default
> ORCP 69C: motions for orders of default
> ORCP 69D: motions for judgments by default
> ORCP 69E: motor vehicle cases
> ORCP 69F: setting aside default judgments.

Ms. David noted a correction that should be made to line 13 of Appendix H, page 11: "unless shortened by the court, prior to [*entry of*] **applying for** the order of default." Ms. Pratt stated that, under Oregon statutory mandate, the effective date of the default is actually upon the entry of the default, not the signing of the order. She noted that, in counties where entry of the order occurs a long time after the order is signed, keeping the "entry of" language would effectively make the 10 day rule ineffective. Judge Miller observed that the time between filing and actually having something entered and docketed is getting longer and longer with budget cuts.

Ms. David reiterated that much of the language is the same or very similar to the existing ORCP 69, but that the format is more chronological and provides a sort of checklist so that the court can determine that all of the elements have been met. She stated that this makes the process more efficient for practitioners, judges, and court staff. Ms. David reported that the committee had debated whether there was a need to create a new mechanism for parties to directly ask for costs, disbursements, and attorney fees and to receive them quickly and efficiently under the default judgment request, or whether a party would need to prepare a statement of costs, disbursements, and attorney fees pursuant to ORCP 68 and wait for those timelines. She stated that the committee ultimately determined that ORCP 68 states that, if a party is in default, it does not need to be served, and attorney fees and costs can be included in the default judgment; however, ORCP 68 needs to be followed for any remaining parties in the case. Ms. David pointed out that a court would not assess all of the costs and fees to the defaulted party if there are other defendants still in the case, so it would not act until the issue is ripe and there is a determination by general judgment. Judge Miller stated that, as a practical matter, she did not believe that attorneys ask for attorney fees when they are seeking a limited judgment based on a default of one party. Judge Holland stated that Lane County sees it a lot and that it causes problems such as each plaintiff seeking a limited judgment for attorney fees against each defaulted defendant. Judge Miller reiterated that it seems inappropriate to address attorney fees until the entire case is resolved and they can either be apportioned or assessed to one party. Ms. David stated that, under the proposed ORCP 69D(3), the court may conduct a hearing as it deems necessary and proper to address any of the issues in determining the amount of the judgment, and that the committee determined that this would include any issues about attorney fees, costs, and disbursements. She noted that the committee wanted to leave the issue as much as possible with the discretion of the court. Judge Miller observed that educating the courts that they do not have to address the attorney fee issue until they deem it necessary may alleviate some of the current problems.

Judge Holland wondered whether the language in ORCP 69D(3) that states "or order that issues be tried by a jury" might be seen as making a substantive

change that states that all parties are allowed a jury. Ms. David noted that this language was not changed from the existing ORCP 69. Mr. Brian asked to what the words "make an order of reference" in the proposed ORCP 69D(3) refer. Prof. Peterson replied that this is a reference to a special master. Ms. Pratt noted that, when the original rule was modeled on the federal rule, it included this reference. Judge Zennaché pointed out that this can also refer to a reference judge and asked whether some counties still use reference judges for juvenile or family law matters. Ms. David stated that Clackamas County does.

Ms. David noted that a rewrite of ORCP 69 was added to the Council's agenda at the end of last biennium, and the Council determined that there was not enough time to address the issue properly. She stated that the current version allows clerks of the court to enter default judgment in certain cases but that, when the Council polled the courts, they found that clerks do not do this on their own any longer. Ms. David noted that the committee eliminated that provision, but kept some of the language with additional requirements for contract or motor vehicle cases. She reiterated that much of the language of the proposed draft is similar to that in the old rule. Judge Zennaché recalled that the committee was going to research the language in the proposed ORCP 69C(1)(f) relating to contracts, and determine whether it should be included. Ms. Pratt stated that the current rule allows clerks to enter judgments only in certain cases where the court has jurisdiction because the party was personally served in Oregon, and that this language carried through to the new version. Prof. Peterson asked, if this specialized jurisdiction requirement was limited to judgments entered by the clerk, whether there is a need to keep it. Judge Zennaché opined that he feels the language should be removed. Ms. Pratt stated that this provision was designed to protect against huge judgments for a sum certain against a party that was not present in Oregon to defend themselves, and that it is unique to contract cases where a *prima facie* hearing on damages was not held because of the sum certain provision. She noted that, if the Council were to make a policy decision that it is permissible to serve someone in Alaska and get a default judgment in Oregon on sum certain, it would be changing a long-standing practice.

Judge Zennaché asked why those cases are being treated differently, since ORCP 69C(1)(a) already states that the party to be defaulted has to have been served by summons pursuant to ORCP 7 or has to otherwise be subject to the jurisdiction of the court. He noted that the old language made sense if the idea was to restrict when a clerk could enter a judgment but that, if it is a judge entering the judgment, the judge will determine if there is proof of proper service. Ms. David recalled that there was a case that specifically dealt with personal service for contract cases in Oregon. She stated that she will look for that case and that, if there is no such case, the language in C(1)(f) is redundant and the committee should remove it.

Justice Kistler observed that ORCP 69A(1) authorizes taking a default if a person fails to appear by motion or answer or fails to otherwise defend, and asked what actions would be included in "otherwise defend." Judge Zennaché noted that, by statute one can simply file an "appearance" in domestic relations cases, and that this alone puts the case in issue. Prof. Peterson stated that, in eviction actions, one appears merely by appearing in court at the day and time the summons indicates. Judge Zennaché remarked that writs can also be included in this category.

Justice Kistler asked about the requirement of E(2) that one must file either an affidavit or declaration that says a person was served by first class mail *and* by certified, registered, or express mail. He wondered whether service must be made by both first class and another form of mail. Ms. David stated that this is the procedure set out in ORCP 7. Mr. Cooper pointed out that, if someone in the home other than the defendant signs for the certified mail, that is the equivalent of sub-service on a resident in the home, and that mail properly addressed with first class postage and return address is presumed delivered because of the very low error rate of the post office. He stated that, if the attorney gets the U.S. Postal Service postcard back showing that someone in the house signed for the mail, and that the regular mail does not come back to the attorney's office, the court has told us that is a sufficient due process consideration. Mr. Bachofner also stated that there is typically a delay associated with receiving mail which requires a return receipt, but not with first class mail, and that there is case law that discusses the issue.

8. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Prof. Peterson related to the Council that Sen. Suzanne Bonamici had e-mailed him and let him know that she has been reading the Council minutes and that she understands that the Council believes that the issue is substantive but that, if the Legislature makes new law regarding this issue, the Council will make any necessary amendments to the ORCP. Mr. Cooper indicated that, if the senator contacts the Council regarding the steps that the Legislature is taking with this regard, the Council will be happy to designate a representative or two to attend committee meetings or do any other work that could be of assistance to the Legislature.

9. ORCP 21 (Prof. Peterson)

Mr. Corson reminded Council members that, pursuant to the discussion at the last Council meeting, he had drafted an amendment to ORCP 21 (Appendix I). Mr. Cooper stated that this amendment will be on the agenda for voting on whether to publish in September.

B. Communication with Legislators (Ms. David)

Ms. David stated that she did not have a chance to finalize a draft to send to legislators, but that she will do so as soon as possible.

VI. New Business (Mr. Cooper)

A. Drafts of Proposed Amendments (Prof. Peterson)

Prof. Peterson raised the issue of whether amendments drafted by committees and discussed only within those committees, as opposed to being presented to the full Council for discussion, should be made part of the Council's legislative history. Mr. Cooper opposed this. He pointed out that the Council is a statutorily created body and in effect a sub-branch of the Legislature because what it promulgates and publishes becomes law if the Legislature does not change or veto it. Mr. Cooper expressed concern about creating legislative history where that history was created by less than a full set of the Council and not considered or voted on by the entire Council. He stated that he believes that the only official business of the Council that occurs is during a full Council meeting. Judge Herndon agreed. Mr. Bachofner agreed that these drafts should not be made a part of the legislative history, but stated that he believes that committee meetings should be considered part of the work of the Council. Judge Miller stated that the mere fact that a committee considered an idea does not mean that a committee draft needs to be part of any legislative history.

Mr. Cooper asked whether, if the Council decides to adopt this policy, it should amend its bylaws to reflect this. He noted that there are strict requirements for amending bylaws, and asked whether the Council would like to further discuss instituting a requirement that committees produce some type of written document that becomes a part of the Council's official record. The Council demurred.

VII. New Proposed Amendments (Prof. Cooper)

Mr. Cooper referred the Council to the new amendments received from Judge Norby and Judge Pratt (Appendix J). Judge Miller stated that she had initially received these suggestions, along with an additional proposal from Judge Darling (Appendix K), and that they may have been prompted by a survey that she sent out for the general discovery committee regarding ORCP 44. She noted that she had replied to all three judges to let them know that it is late in the cycle and that any issues the Council considers next biennium would not become amendments to the rules until 2014, but that the Council would certainly consider them. Judge Miller also provided the Council with e-mails she had received (Appendix L) commenting on Rule 44 Medical Examinations outside of the Survey Monkey results which were included in the meeting packet (Appendix M).

Mr. Cooper stated that it is unlikely that the Council will be able to take any action on these proposals this biennium, given that the votes on whether to publish proposed amendments will be taken at the next Council meeting. Mr. Cooper suggested asking Prof. Peterson to write to all of the judges stating that these issues will be on our agenda for consideration at our first meeting in the next biennium. He also suggested considering drafting a generalized survey to be sent to the bench, OTLA, and OADC at the beginning of each biennium. He stated that this is a more proactive approach than relying on people going to the website and filling out the suggestion form. Ms. Pratt noted that there are bar members who are not members of OTLA and OADC. Judge Miller suggested including the litigation section, and Mr. Bachofner suggested sending the survey to the entire Bar. Prof. Peterson noted that Ms. Nilsson did research and found that Survey Monkey is only free for 100 respondents per survey. He stated that perhaps the Oregon State Bar can provide Survey Monkey assistance as it did last biennium. Mr. Nebel was uncertain as to the terms of the Bar's contract with Survey Monkey. Judge Miller noted that Ms. Nilsson split the ORCP 44 survey into two identical surveys and asked judges in the tri-county area to fill out one survey and judges in the rest of the state to fill out the other. She pointed out that the surveys were identical, but that splitting the respondents allowed the Council to stay under the 100 respondent limit.

Judge Miller spoke more specifically of the ORCP 44 survey and stated that it was sent to approximately 200 judges, with 36 responses. Mr. Cooper noted that this result was very good. Judge Miller remarked that surveys tend to get people thinking about issues and that, even if a respondent did not have a suggestion right away, he or she would know who to contact if one arose later. Judge Zennaché noted that the responses Judge Miller received from Judge Rasmussen and Judge Veloure were merely survey responses and did not suggest any rule changes. Mr. Cooper suggested that he, Mr. Buckle, Mr. Nebel, and Prof. Peterson think about the Survey Monkey idea between now and December and report their ideas to the Council at that time. He noted that the Council would then have the full legislative session to craft the survey.

VIII. Adjournment (Mr. Cooper)

Mr. Cooper adjourned the meeting at approximately 12:00 p.m. The next Council meeting will be on September 11, 2010, at which time Council members will vote on which proposed amendments to publish.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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
• ORCP 9F • ORCP 21A • ORCP 38C • ORCP 44 • ORCP 54 • ORCP 54B(3) • ORCP 54E • ORCP 58 • ORCP 69 • ORCP 71B	• 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 • Counterclaims in Domestic Relations Motions		• Standardizing time increments in ORCP

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 (UTCR) 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 UTCR 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 feasability 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 G) 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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 5/8/10 - 5/28/10

I. Inquires

The Council received no inquiries during this reporting period, but did receive two new proposals for discussion.

II. Website Statistics

Attached are analytical reports detailing visits made to the Council's website. The site had 103 visits from 75 unique visitors and 233 page views in this period. 61% of the visits were from new visitors and the average time spent on the site was just over 2 minutes. The top ten pages visited were as follows:

- index.htm (home page)
- LegislativeHistoryofRules.htm (lists all amendments by rule)
- resources.htm (resources)
- Past_Biennia.htm (legislative history by biennium)
- Current_Biennium.htm (this biennium's activity)
- Council_Membership.htm (membership)
- CurrentBienniumMeetings.htm (meeting schedule)
- e-discoverydrafts.htm (page put up for bench and bar to comment on e-discovery drafts)
- contact.htm (contact us page)
- LegislativeHistory.htm (former page that listed Council legislative history – now called "past biennia," see above)

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

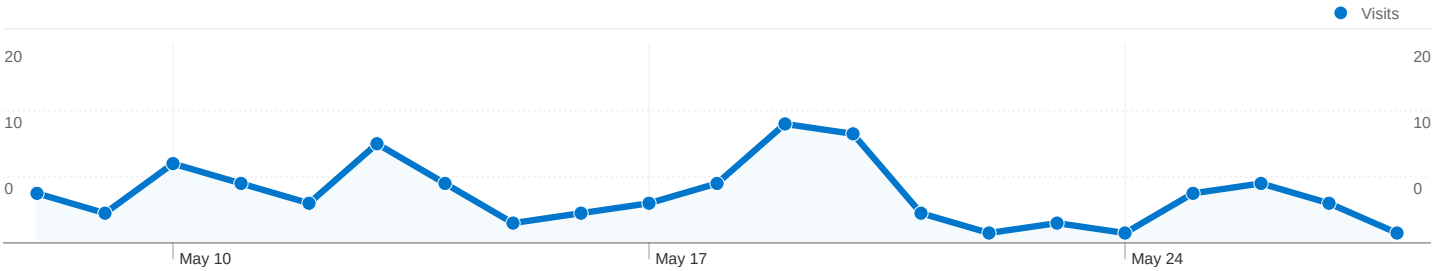
Council on Court Procedures
June 5, 2010, Meeting
Appendix B-1

www.lclark.edu/~ccp

Dashboard

May 8, 2010 - May 28, 2010

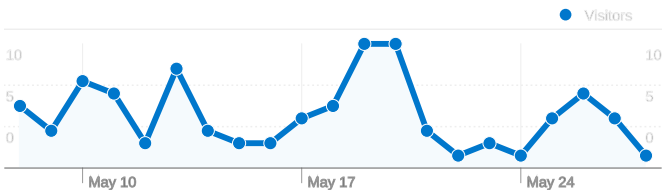
Comparing to: Site



Site Usage

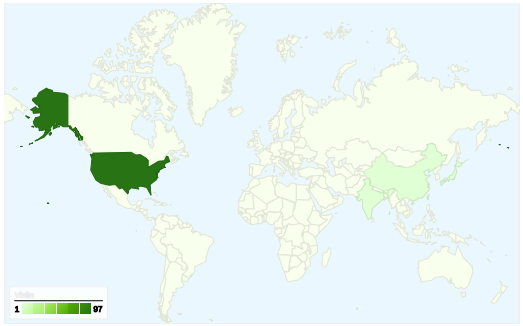
103 Visits	60.19% Bounce Rate
233 Pageviews	00:01:49 Avg. Time on Site
2.26 Pages/Visit	61.17% % New Visits

Visitors Overview

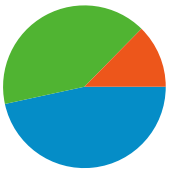


Visitors
75

Map Overlay



Traffic Sources Overview



- Search Engines
  48.00 (46.60%)
- Referring Sites
  42.00 (40.78%)
- Direct Traffic
  13.00 (12.62%)

Content Overview

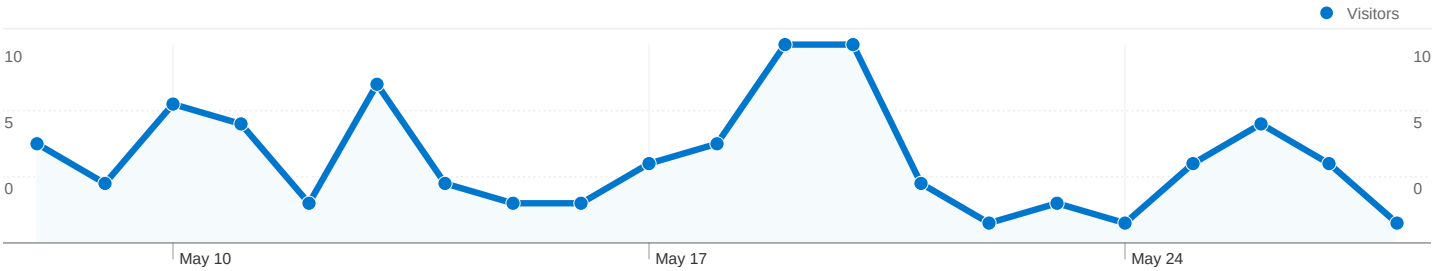
Pages	Pageviews	% Pageviews
/~ccp/index.htm	79	33.91%
/~ccp/LegislativeHistoryofRules	26	11.16%
/~ccp/resources.htm	25	10.73%
/~ccp/Past_Biennia.htm	24	10.30%
/~ccp/Current_Biennium.htm	23	9.87%

Council on Court Procedures
June 5, 2010, Meeting
Appendix B-2

www.lclark.edu/~ccp

Visitors Overview

May 8, 2010 - May 28, 2010
Comparing to: Site



75 people visited this site

103 Visits

75 Absolute Unique Visitors

233 Pageviews

2.26 Average Pageviews

00:01:49 Time on Site

60.19% Bounce Rate

61.17% New Visits

Technical Profile

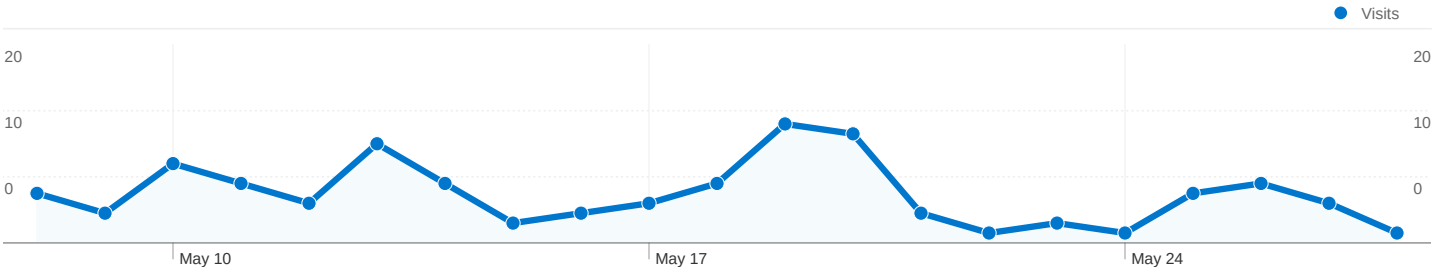
Browser	Visits	% visits
Internet Explorer	61	59.22%
Firefox	28	27.18%
Safari	8	7.77%
Chrome	6	5.83%

Connection Speed	Visits	% visits
Cable	31	30.10%
Unknown	25	24.27%
T1	19	18.45%
DSL	16	15.53%
OC3	11	10.68%

www.lclark.edu/~ccp

Traffic Sources Overview

May 8, 2010 - May 28, 2010
Comparing to: Site

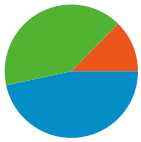


All traffic sources sent a total of 103 visits

12.62% Direct Traffic

40.78% Referring Sites

46.60% Search Engines



Search Engines
48.00 (46.60%)
Referring Sites
42.00 (40.78%)
Direct Traffic
13.00 (12.62%)

Top Traffic Sources

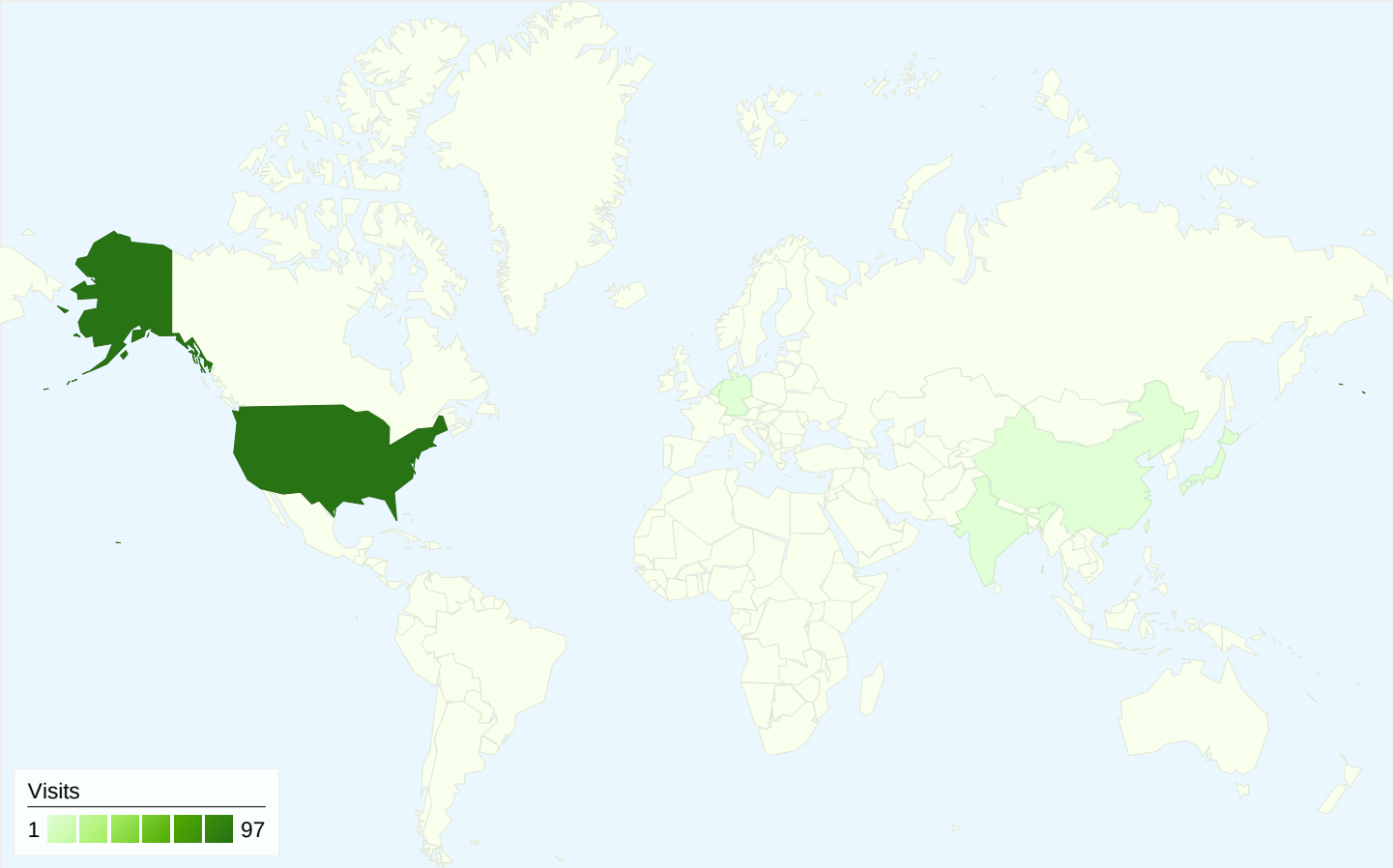
Sources	Visits	% visits
google (organic)	45	43.69%
co.lane.or.us (referral)	14	13.59%
(direct) ((none))	13	12.62%
courts.oregon.gov (referral)	12	11.65%
councilоncourtprocedures.org	9	8.74%

Keywords	Visits	% visits
oregon council on court	8	16.67%
council on court procedures	5	10.42%
council on court procedures	5	10.42%
court procedures	4	8.33%
"orcp 8"	2	4.17%

Council on Court Procedures
June 5, 2010, Meeting
Appendix B-4

Map Overlay

May 8, 2010 - May 28, 2010
Comparing to: Site



103 visits came from 7 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
103 % of Site Total: 100.00%	2.26 Site Avg: 2.26 (0.00%)	00:01:49 Site Avg: 00:01:49 (0.00%)	61.17% Site Avg: 61.17% (0.00%)	60.19% Site Avg: 60.19% (0.00%)

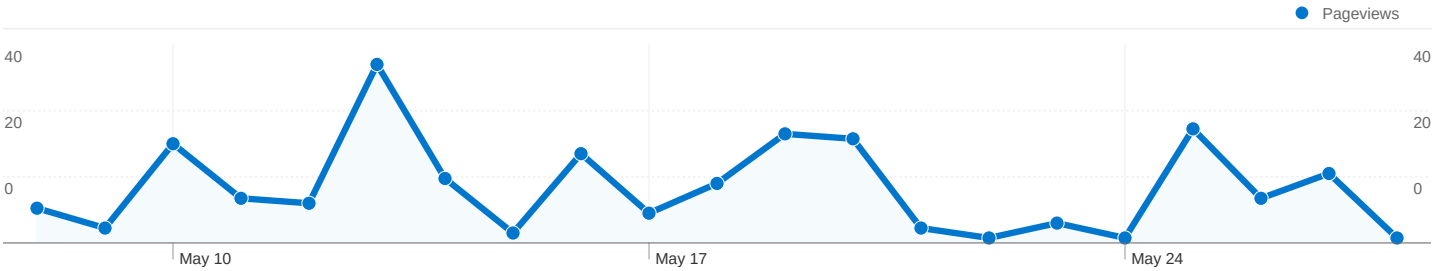
Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	97	2.30	00:01:55	59.79%	58.76%
Japan	1	1.00	00:00:00	100.00%	100.00%
India	1	1.00	00:00:00	100.00%	100.00%
China	1	1.00	00:00:00	100.00%	100.00%
Hong Kong	1	1.00	00:00:00	100.00%	100.00%
Germany	1	5.00	00:00:46	100.00%	0.00%
Netherlands	1	1.00	00:00:00	0.00%	100.00%

1 - 7 of 7

www.lclark.edu/~ccp

Content Overview

May 8, 2010 - May 28, 2010
Comparing to: Site



Pages on this site were viewed a total of 233 times

233 Pageviews

176 Unique Views

60.19% Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	79	33.91%
/~ccp/LegislativeHistoryofRules.htm	26	11.16%
/~ccp/resources.htm	25	10.73%
/~ccp/Past_Biennia.htm	24	10.30%
/~ccp/Current_Biennium.htm	23	9.87%

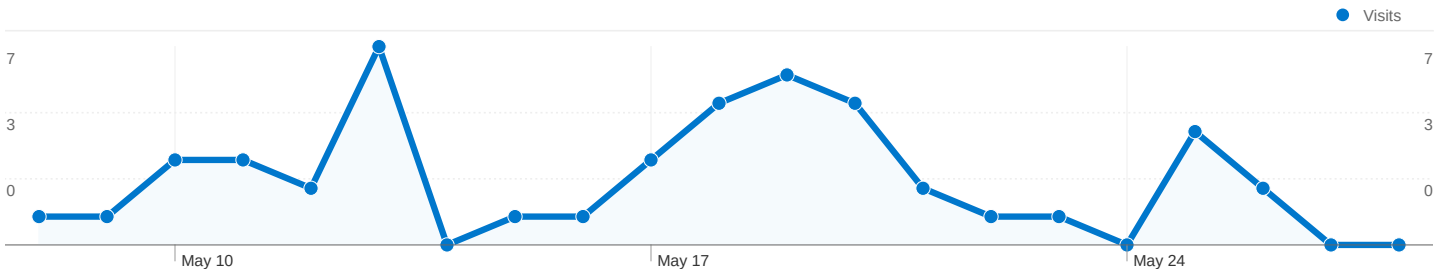
Council on Court Procedures
June 5, 2010, Meeting
Appendix B-6

www.lclark.edu/~ccp

Keywords

May 8, 2010 - May 28, 2010

Comparing to: Site



Search sent 48 total visits via 26 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
48	2.83	00:02:27	75.00%	52.08%
% of Site Total: 46.60%	Site Avg: 2.26 (25.25%)	Site Avg: 00:01:49 (34.93%)	Site Avg: 61.17% (22.62%)	Site Avg: 60.19% (-13.47%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	8	5.88	00:11:19	75.00%	25.00%
council on court procedures	5	5.40	00:02:35	60.00%	0.00%
council on court procedures oregon	5	2.20	00:01:20	40.00%	40.00%
court procedures	4	1.00	00:00:00	100.00%	100.00%
"orcp 8"	2	1.00	00:00:00	50.00%	100.00%
comments to oregon rules of civil proceudre	2	2.00	00:00:50	50.00%	0.00%
court procedure	2	3.00	00:00:23	100.00%	50.00%
orcp 9	2	1.00	00:00:00	100.00%	100.00%
brooks cooper, attorney at law portland	1	2.00	00:00:14	100.00%	0.00%
council court procedures oregon	1	2.00	00:00:22	0.00%	0.00%
council on court procecure oregon	1	1.00	00:00:00	100.00%	100.00%
current biennium	1	1.00	00:00:00	100.00%	100.00%
david rees portland judge	1	1.00	00:00:00	100.00%	100.00%
judge david f rees	1	1.00	00:00:00	100.00%	100.00%
orcp 1	1	1.00	00:00:00	100.00%	100.00%
orcp 40	1	1.00	00:00:00	100.00%	100.00%
orcp 43	1	1.00	00:00:00	0.00%	100.00%
orcp 52	1	1.00	00:00:00	100.00%	100.00%
orcp 52 a	1	1.00	00:00:00	100.00%	100.00%
orcp 8	1	1.00	00:00:00	100.00%	100.00%
oregon council court procedures	1	8.00	00:02:19	0.00%	0.00%

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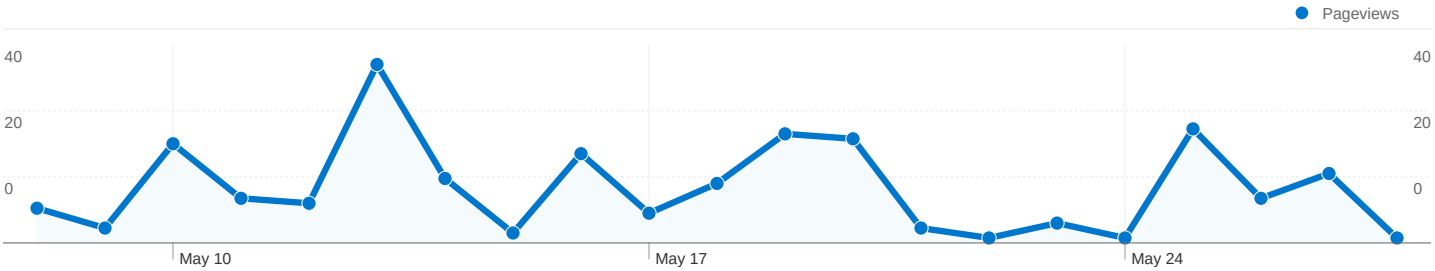
oregon council on court procedure	**1**	4.00	00:01:23	100.00%	0.00%
oregon court procedures	**1**	2.00	00:00:15	100.00%	0.00%
oregon rules of civil procedure	**1**	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure 38	**1**	1.00	00:00:00	100.00%	100.00%
oregon rules of evidence in court	**1**	3.00	00:00:25	100.00%	0.00%
					1 - 26 of 26

www.lclark.edu/~ccp

Top Content

May 8, 2010 - May 28, 2010
Comparing to: Site



13 pages were viewed a total of 233 times

Content Performance

Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
233	176	00:01:26	60.19%	44.21%	$0.00
% of Site Total: 100.00%	% of Site Total: 100.00%	Site Avg: 00:01:26 (0.00%)	Site Avg: 60.19% (0.00%)	Site Avg: 44.21% (0.00%)	Site Avg: $0.00 (0.00%)

Page	Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
/~ccp/index.htm	79	64	00:00:58	43.55%	44.30%	$0.00
/~ccp/LegislativeHistoryofRules.htm	26	24	00:01:50	92.86%	73.08%	$0.00
/~ccp/resources.htm	25	24	00:03:57	100.00%	76.00%	$0.00
/~ccp/Past_Biennia.htm	24	11	00:03:59	100.00%	20.83%	$0.00
/~ccp/Current_Biennium.htm	23	13	00:00:58	33.33%	17.39%	$0.00
/~ccp/Council_Membership.htm	15	14	00:00:35	66.67%	53.33%	$0.00
/~ccp/CurrentBienniumMeetings.htm	11	8	00:00:14	0.00%	63.64%	$0.00
/~ccp/e-discoverydrafts.htm	9	2	00:00:43	0.00%	22.22%	$0.00
/~ccp/contact.htm	8	5	00:00:19	0.00%	25.00%	$0.00
/~ccp/LegislativeHistory.htm	5	4	00:00:15	0.00%	0.00%	$0.00
/~ccp/order.htm	4	4	00:00:09	100.00%	25.00%	$0.00
/~ccp/For_Council_Members.htm	3	2	00:00:08	0.00%	0.00%	$0.00
/Advisory_Board.htm	1	1	00:00:00	100.00%	100.00%	$0.00

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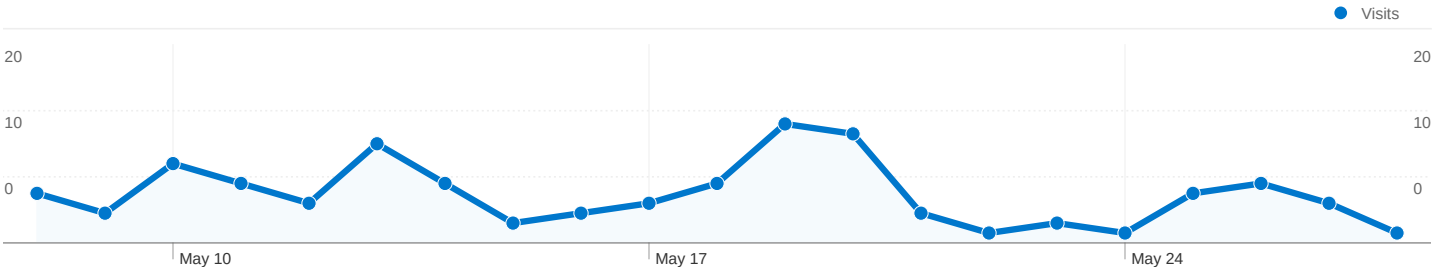
New vs. Returning

May 8, 2010 - May 28, 2010
Comparing to: Site

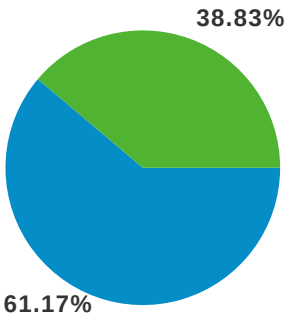


103 visits from 2 visitor types

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
103	2.26	00:01:49	61.17%	60.19%
% of Site Total: 100.00%	Site Avg: 2.26 (0.00%)	Site Avg: 00:01:49 (0.00%)	Site Avg: 61.17% (0.00%)	Site Avg: 60.19% (0.00%)

Visitor Type	Visits	Visits	Visits
New Visitor	63	61.17%	
Returning Visitor	40	38.83%	



1 - 2 of 2

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GENERAL PROVISIONS GOVERNING DISCOVERY

RULE 36

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, 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**:**

B(2)(a)(i) 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[.]**; and**

B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provision in any insurance agreement or policy upon which such a coverage denial or reservation of rights is based.

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 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 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.

Survey Regarding ORCP 44 Medical Examinations Edit

Tri-County Area

Design Survey | Collect Responses | Analyze Results

View Summary
Browse Responses
Filter Responses
Crosstab Responses
Download Responses
Share Responses

Default Report | + Add Report

Response Summary

Total Started Survey: 20
Total Completed Survey: 20 (100%)

PAGE: SURVEY

1. Do you hear motions pertaining to ORCP 44 MEs Create Chart Download

	Response Percent	Response Count
frequently	5.0%	1
occasionally	50.0%	10
infrequently	45.0%	9
answered question		20
skipped question		0

2. Do you believe that a uniform rule governing MEs would be Create Chart Download

	Response Percent	Response Count
helpful	73.7%	14
unnecessary	26.3%	5
answered question		19
skipped question		1

3. Has the circuit court in your county adopted any consensus statement (or informal consensus) regarding Create Chart Download

	Response Percent	Response Count
any limitations on or conditions accompanying MEs	100.0%	9
any financial disclosures required from persons who have performed MEs as a condition of giving evidence?	88.9%	8
answered question		9
skipped question		11

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4. Are there any comments you wish to offer regarding this issue? Download

		Response Count
	Hide replies	6

1.	I would like feedback regarding whether the exam should be referred to (in front of the jury) as an independent exam or ... another term. If the committee addresses that issue it would be helpful	Wed, May 26, 2010 1:18 PM	Find...
2.	While the existence of the consensus statemetn in Mult Co has no doubt limited the number of motions on this, they do come up. I have yet to hear a convincing argument for divergence the consensus statement. An uniform rule would doubtless further reduce the controversies regarding MEs.	Tue, May 25, 2010 4:03 PM	Find...
3.	As you know, the issue of who could attend hearings, whether they could be recorded, etc., was the subject of a huge debate just over 10 years ago. I still have voluminous materials from that time, which I believe were forwarded to the Council. If not, or if your archives have been purged, I would be happy to provide them. I'll forward our Multnomah County consensus statements by separate email.	Tue, May 25, 2010 3:52 PM	Find...
4.	Be fair and just.	Tue, May 25, 2010 3:33 PM	Find...
5.	Any rule should help to create a reliable open process by which plaintiff's participation can openly viewed by P's atty and a jury if necessary to ensure the fairness of the process. Financial arrangements of all experts if relevent to bias should be openly available to all parties	Tue, May 25, 2010 2:34 PM	Find...
6.	Any rule should help to create a reliable open process by which plaintiff's participation can openly viewed by P's atty and a jury if necessary to ensure the fairness of the process. Financial arrangements of all experts if relevent to bias should be openly available to all parties	Tue, May 25, 2010 2:34 PM	Find...

answered question	**6**
skipped question	**14**

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*Survey Regarding ORCP 44 Medical Examinations

Edit

Rest of State

Design Survey | Collect Responses | Analyze Results

View Summary
Browse Responses
Filter Responses
Crosstab Responses
Download Responses
Share Responses

Default Report | + Add Report

Response Summary

Total Started Survey: 16
Total Completed Survey: 16 (100%)

PAGE: SURVEY

1. Do you hear motions pertaining to ORCP 44 MEs

Create Chart | Download

	Response Percent	Response Count
frequently	0.0%	0
occasionally	31.3%	5
infrequently	68.8%	11
answered question		16
skipped question		0

2. Do you believe that a uniform rule governing MEs would be

Create Chart | Download

	Response Percent	Response Count
helpful	64.3%	9
unnecessary	35.7%	5
answered question		14
skipped question		2

3. Has the circuit court in your county adopted any consensus statement (or informal consensus) regarding

	Response Percent	Response Count
any limitations on or conditions accompanying MEs	0.0%	0
any financial disclosures required from persons who have performed MEs as a condition of giving evidence?	0.0%	0
answered question		0
skipped question		16

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4. Are there any comments you wish to offer regarding this issue? Download

		Response Count
Hide replies		7

1.	I am not sure that I have ever had a motion on this issue.	Wed, May 26, 2010 10:06 AM	Find...
2.	No	Wed, May 26, 2010 7:52 AM	Find...
3.	None.	Tue, May 25, 2010 4:27 PM	Find...
4.	I am concerned about any rule requiring general disclosure of overall income information for any expert or independent examiner as iinsuring a chilling effect on courts' and factfinders' access to valuable medical information. There are current, adequate ways to cross examine an examiner to put bias or motivation on the table, without requiring someone to disclose personal financial information. If any rule imposes this standard, this court may explore every reason to carve out an exception, in its discretion.	Tue, May 25, 2010 4:00 PM	Find...
5.	are we going to impose similar limitations and/or requirements on the plaintiff medical or chiropractic witnesses?	Tue, May 25, 2010 2:39 PM	Find...
6.	It might be a good idea to have IME's recorded, but I had defense counsel in one case state his expert was uncomfortable with being recorded. I have no idea what would be done or said that would make an IME uncomfortable, but I would point out that a plaintiff's regular physician is not recorded. The issue is overblown. I do not think any person other than the patient ought to be in the examine room unless the patient is regularly accompanied by someone when the patient sees the treating physician. Often, spouses do accompany each other because the patient's condition affects both. A parent normally accompanies a child. If no person usually accompanies a patient when seeing the treating physician, I see no need for it to happen with an IME. Again, the issue is overblown. The court should not have to deal with such issues as determining what type of recording or if the matter should be recorded or whether someone sits in the examine room and that person's role in the examine room. Both sides thinks the others expert is somehow tainted. Expert discovery might solve this issue.	Tue, May 25, 2010 2:36 PM	Find...
7.	seems to work well on a case by case basis. often the circumstances are different. would not be helpful to have a blanket rule	Tue, May 25, 2010 2:27 PM	Find...

answered question	**7**
skipped question	**9**

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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

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depositions taken within the United 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 whom 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.

/////

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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.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

A Service; when required. Except as otherwise provided in these rules, every order; every pleading subsequent to the original complaint; every written motion other than one which may be heard ex parte; and every written request, notice, appearance, demand, offer of judgment, designation of record on appeal, and similar document shall be served upon each of the parties. 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.

B Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party, by mailing it to such attorney's or party's last known address or, if the party is represented by an attorney, by telephonic facsimile communication device or e-mail as provided in sections F or G of this rule. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing a copy of the pleading or other documents with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon such party personally.

C Filing; proof of service. Except as provided by section D of this rule, all papers required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of

service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers. Where service is made by telephonic facsimile communication device or e-mail, proof of service shall be made by affidavit or declaration of the person making service, or by certificate of an attorney or sheriff. Attached to such affidavit, declaration, or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine, if facsimile communication is used. If service is made by e-mail under section G of this rule, the person making service must certify that he or she received confirmation that the message was received, either by return e-mail, automatically generated message, telephonic facsimile, or orally.

D When filing not required. Notices of deposition, requests made pursuant to Rule 43, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial. **Offers of compromise made pursuant to Rule 54E shall not be filed with the court except as provided in Rule 54E(3).**

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

F Service by telephonic facsimile communication device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an

attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.

G Service by e-mail. Service by e-mail is prohibited unless attorneys agree in writing to e-mail service. This agreement must provide the names and e-mail addresses of all attorneys and the attorneys' designees, if any, to be served. Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. Service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or otherwise unavailable.

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DISMISSAL OF ACTIONS; COMPROMISE

RULE 54

A Voluntary dismissal; effect thereof.

A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this state, **a plaintiff may dismiss** an action **in its entirety or as to one or more defendants** [*may be dismissed by the plaintiff*] without order of court**:** (a) by filing a notice of dismissal with the court and serving such notice on [*the defendant*] **all other parties not in default** not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, **the parties shall submit a form of judgment and** the court shall enter a judgment of dismissal.

A(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by **contract, statute, or** rule [*or statute*]. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

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B Involuntary dismissal.

B(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice[,] that a judgment of dismissal will be entered in each such case by the court for want of prosecution[,] unless**,** on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time[,] for want of prosecution of any action upon motion of any party thereto.

B(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication without prejudice.

C Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D Costs of previously dismissed action.

D(1) If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

D(2) If a party who previously asserted a claim, counterclaim, cross-claim**,** or third party claim that was dismissed with prejudice subsequently [*makes*] **files** the same claim, counterclaim, cross-claim**,** or third party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim**,** or third party claim and may enter a judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining the dismissal.

E Offer to allow judgment; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, [*the*] **any** party against whom a claim is asserted may, at any time up to [*10*] **14** days prior to trial, serve upon [*the*] **any other** party asserting the claim an offer to allow judgment to be [*given*] **entered** against the party making the offer for the sum, or the property, or to the effect therein specified. **Notwithstanding Rule 9C,** [*T*]**t**he offer shall not be filed with the court clerk or provided to any assigned judge, except as set forth in subsections E(2) and E(3) below.

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon[,] and file the same with the clerk before trial, and within [*three*] **five** days from the time [*it*] **the offer** was served upon such party asserting the claim; and thereupon judgment shall be given accordingly[,] as a stipulated judgment. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence at trial and may be filed with the court only after the case has been adjudicated on the merits and only if the party asserting the claim fails to obtain a judgment more favorable than the offer to allow judgment. In such a case, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

F Settlement conferences. A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion. Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.

MEMORANDUM

To: Council on Court Procedures

From: E-DISCOVERY COMMITTEE: Kristen David, Chair, Hon. Charles Zennache, Hon. Jerry Hodson, Kary Pratt, Brian Campf

Re: E-Discovery Rules

Date: May 27, 2010

Comments from the E-Discovery Committee

The E-Discovery Committee of the Council on Court Procedures spent nine months researching rules related to the preservation, retention and production of electronically stored information (hereinafter "ESI"). The Committee engaged in extensive discussions regarding the scope and challenges of E-Discovery to the many different types of litigation. The Committee published proposed rule changes to the bench and bar and in one month alone received 437 website visits to the proposed E-Discovery rules. After much discussion and debate, the Committee ultimately felt that a more conservative change to the rules would be most appropriate at this stage. The Committee however would like to share the following comments, concerns and feedback.

- Definition: ESI is a difficult term to define given the constant evolution of the electronic world. The committee considered adopting a standard definition but felt it would be outdated rather quickly. Instead, the Committee has incorporated ESI into the definition of "documents" within ORCP 43 which will apply ESI throughout the discovery rules.

- Timing of Rule Changes: The Committee noted that any rule changes this biennium would not be effective until 1/1/12, and any rule changes in the next biennium will not be effective until 1/1/14.

- ESI as Discoverable under Current Rules: While the Committee sought to clarify and create further rules regarding E-Discovery, it is clear to the Committee that ESI has been discoverable under the Oregon Rules of Civil Procedure. The Committee provided clarification in ORCP 43 that the term "documents" includes ESI. With that clarification, it was felt that additional changes to ORCP 36, 39 or 55were not needed.

- Versions A & B: The Committee obtained extensive feedback from the bench and bar regarding two proposed versions to the discovery rules to incorporate E-Discovery.
  - Long Version (Version A - ORCP 36, 39, 43, 46 & 55) required production of E-Discovery only if specifically requested, required parties to commence conferral within 14 days of service of an E-Discovery Request for Production and provided a detailed list of issues for conferral under ORCP 43 B(1). The Long Version also contemplated a "safe harbor" provision for sanctions

under ORCP 46.

- The Short Version (Version B - ORCP 43 & 55) was a more conservative change. It reiterated that information in electronic form is within the definition of discoverable "documents" and required conferral only if a request seeks information to be produced in electronic form.

- Feedback from the Bench and Bar: The Committee received over 50 emails, letters and telephone calls from attorneys, judges and interested lay persons regarding the potential changes to the ORCPs for E-Discovery. Feedback varied from do nothing to requests for extensive comprehensive changes. Many litigants who had been involved with E-Discovery battles were supportive of more detailed rule changes.

  - Scope and Form of Production - Specific Conferral Requirements and Early Deadlines: The Committee recognized that the scope of E-Discovery and the forms of production will be immensely different for different types of litigation matters. Clearly parties need to confer early on so as to address these complex issues. However, many litigators commented that Oregon attorneys are a congenial bunch and prefer to allow the parties to work out the discovery problems on their own without stringent rules. Ultimately the Committee chose not to include specific conferral requirements within ORCP 43 as UTCR 5.010 already requires the parties to confer. The Committee would still suggest parties discuss the following issues early on:
    - 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; and
    - Issues of privilege pertaining to ESI;

  - Safe Harbor Provisions: The Committee contemplated a provision similar to the federal rules which would protect a party in the event of lost data “as a result of routine good-faith operation of an electronic information system”. Ultimately, it was felt Courts have discretion of when to impose sanctions and therefore this was an unnecessary provision.

  - Access to Electronically Stored Information: The Committee also received feedback indicating there may be a need to educate the bench and bar that discovery of the ESI alone may not be sufficient if it is not accessible. (i.e. passwords, encryption keys, record formats and syntax, database schema, software versions, etc.) In the end, the Committee felt this type of information could be relayed to the bench and bar via seminars, books and best practices techniques.

- Federal Rules on E-Discovery: The Committee reviewed the federal rules on E-Discovery and had extensive discussion regarding the hurdles other states have faced in encompassing E-Discovery into civil procedure rules. It was noted that, in several publications, Oregon is listed as one of the last few remaining States that have not yet addressed E-Discovery.

- Reference Sources: The principles relating to ESI and E-Discovery outlined by The Sedona Conference were extremely helpful to the Committee. Their website contains useful information for judges and practitioners. www.thesedonaconference.org. In addition, the Conference of Chief Justices "Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information," is another helpful resource available to the bench and bar. These guidelines can currently be accessed at:
  http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf.

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 **or software** 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.

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(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, 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.

E Electronically Stored Information.

Electronically stored information may be produced in printed format unless specifically requested in an electronic form. A request seeking electronically stored information in an electronic form may specify the form in which the information shall be produced. If a request for electronically stored information in electronic form does not specify the form in which the information is to be produced, the responding party may produce it in either the form in which it is ordinarily maintained or in a reasonably usable form.

From: bruce.c.miller@state.or.us

Date: 05/17/2010 08:52 AM
Subject: Re: Proposed ORCP or UTCR rule change - family law cross motions

Good Morning!

I thought you all might like an update on this issue. The UTCR committee discussed it at their spring meeting on April 9 and decided to assign it to a work group for further study with additional discussion at the fall meeting on October 15. The work group includes Judge Thompson, Judge West, and Richard Weill. They would like to explore how various judicial districts handle the issue, whether SFLAC thinks this needs to be addressed by rule, and whether a UTCR provision would be appropriate. Russ L., they may contact you to see if you want to continue to pursue this thru the UTCR committee and if you have proposed wording for a rule.

Bruce

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MEMORANDUM

To: **Council on Court Procedures**

From: **ORCP 69 Committee (Kristen David, Chair, Hon. Charles Zennache, Mark Petersen, Kary Pratt, Maureen Leonard)**

Re: **"Appearances" v. "Pleadings"**

Date: **May 25, 2010**

Background: The Council on Court Procedures received several inquiries regarding an alleged problem between several ORCPs and UTCRs which require "appearances" versus "pleadings". More specifically, the question has arisen when the Courts have issued UTCR 7 notices to dismiss for failing to have the defendant file an Answer, when a defendant has "appeared" by filing a Motion but has not yet filed an Answer. In some instances cases have been dismissed despite the "appearance".

Question Presented: **Are amendments to the ORCPs necessary to resolve the apparent problem regarding "appearances" v. "pleadings"?**

Answer: **No, the ORCP 69 Committee does not believe there is any necessity for an ORCP rule change.**

Summary of Analysis: There are five rules which play into the analysis of an "appearance" versus a "pleading".

ORCP 7C(3) requires each Summons to state the following language:

> "NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY! You must "appear" in this case or the other side will win automatically. ***To "appear" you must file with the Court a legal paper called a "motion" or "answer".*** The "motion" or "answer" must be given to the court clerk or administrator within thirty (30) days along with the required filing fee."

ORCP 13 B provides that the "pleadings allowed" include the Complaint and Answer, as well as various cross-claims, third party complaints, etc.

ORCP 21 mandates that every defense to a Complaint shall be asserted in the responsive pleading thereto but that ***"some defenses shall be first made by motion".*** ORCP 21F & G specify which motions must be consolidated and raised upon the first appearance or are waived if not timely raised.

ORCP 69 provides that if a person has failed to plead or otherwise defend then a party

seeking affirmative relief may apply for an order of default. The rule goes on to provide that if the defendant has "***filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default***" then 10 days written notice must be provided prior to application for an order of default.

UTCR 7.020 has three provisions which rely on the "appearance" of a party. UTCR 7.020 provides in pertinent parts:

> (2) If no return or acceptance of service has been filed by the 63rd day . . . the case will be dismissed for want of prosecution . . . unless proof of service is filed, . . . good cause to continue the case is shown . . . ***or the defendant has appeared***.
>
> (3) If proof of service has been filed ***and any defendant has not appeared*** by the 91st day . . .
>
> (4) ***If all defendants have made an appearance***, the case will be deemed at issue 91 days after the filing of the complaint or when the pleadings are complete, whichever is earlier.

As a practical matter, Courts throughout the state want the case brought to issue (i.e. a Complaint and Answer filed), and therefore have used UTCR 7 as a means to get defendants to file an Answer.

After careful consideration of the rules, it is apparent that the current rules provide a mechanism to get the case "at issue" without the need for further clarification of the terms "appear" or "pleadings". The Committee concludes this is a bench and bar education issue and not an ORCP rule clarification issue.

MEMORANDUM

To: **Council on Court Procedures**

From: **ORCP 69 Committee (Kristen David, Chair, Hon. Charles Zennache, Mark Petersen, Kary Pratt, Maureen Leonard)**

Re: **OCRP 71 – Extrinsic vs Intrinsic Fraud**

Date: **May 25, 2010**

Background: The Council on Court Procedures received written inquiry from a practitioner asking that the Council "eliminate the archaic and unreasonable distinction between intrinsic and extrinsic fraud as a basis for seeking relief from a judgment".

Question Presented: **Should the Council abolish the distinction between "intrinsic" and "extrinsic" fraud in ORCP 71?**

Answer: **Yes, we recommend that the distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order under Oregon Rule of Civil Procedure 71B(1)[1] (hereinafter "ORCP 71B(1)") should be abolished.**

Summary of Analysis: The committee feels the distinction should be abolished for several reasons. First, the distinction between extrinsic fraud and intrinsic fraud is unclear and leads to extensive litigation over the issue which distracts from the underlying issue of addressing fraud. Second, maintaining the distinction has the unintended consequence of making it more difficult for parties who have been defrauded to get justice and rewarding those who engage in brazen dishonest behavior. Third, experience in other jurisdictions proves that abolishing the distinction had not undermined the finality of judgments.

Oregon is one of a mere sixteen jurisdictions that continue to recognize a distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order.[2] ORCP 71B(1), entitled "Relief from Judgment or Order," addresses "fraud," stating, in pertinent part, that:

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[1] ORCP 71B(1)

[2] Other jurisdictions include: Georgia, Illinois, Iowa, Louisiana, Mississippi, Nebraska, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Texas, Wisconsin, Connecticut, and Virginia.

> On motion and upon such terms are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons…(c) fraud, misrepresentation, or other misconduct of an adverse party.[3]

Though there is no explicit distinction made between intrinsic and extrinsic fraud in the statutory language of ORCP 71B(1), Oregon case law has made it clear that relief from judgment or order cannot be granted for implicit fraud. The Oregon Supreme Court first drew a distinction between intrinsic fraud and extrinsic fraud, in a 1937 case entitled *Oregon-Washington R. & Nav. Co. v. Reid*.[4] The Court affirmed its *Oregon-Washington R. & Nav. Co.* reasoning and holding in a 1986 case, *Johnson v. Johnson*,[5] in which it reiterated that:

> It is not every species of fraud, however, that vitiates a judgment. It is fraudulent to give perjured testimony and such evidence may result in a judgment but, according to the great weight of authority, equity will not interfere for that reason alone, since the unsuccessful party had his opportunity to refute the false testimony. If the rule were otherwise, there would be no end to litigation.[6]

In *Johnson*, the Court explicitly declined to abolish the distinction between extrinsic fraud and intrinsic fraud as a basis for relief from judgment or order.[7] The Court also stated that precedent, including a United States Supreme Court case entitled *United States v. Throckmorton*,[8] and the fact that the legislature failed to abolish the distinction supported its decision to maintain the current Oregon rule.[9]

The distinction between extrinsic fraud and intrinsic fraud is confusing and extremely subjective. Extrinsic fraud is has been defined as "…fraud that has induced a party to default or to consent to a judgment against him or her."[10] In contrast, intrinsic fraud has been defined as:

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[3] ORCP 71B(1)
[4] *Johnson v. Johnson*, 302 Or 382, 389 (1986).
[5] *Johnson v. Johnson*, 302 Or 382, 389-90 (1986).
[6] *Id.* at 389 (quoting *Oregon-Washington R. & Nav. Co. v. Reid*, 155 Or 602, 609 (1937)).
[7] *Id.*
[8] *United States v. Throckmorton*, 98 U.S. 61 (1878). See also discussion below re: abolition of the distinction.
[9] *Johnson*, 302 Or at 389-90.
[10] 37 C.J.S. Fraud § 3 (2009).

> [A]ny fraudulent conduct of the successful party during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his or her injury after announcing that he or she was ready to proceed with trial.[11]

The subjectivity of the distinction between extrinsic leads to unnecessary time spent arguing over which type of fraud may be before the court and disparate treatment among cases. "[T]he problem is that the cases attempting to apply the distinction are inconsistent, and the definition of intrinsic fraud is incomprehensible. It also seems that in some cases of gross fraudulent presentation of facts or of perjury, some relief should be available.[12]"

Further, parties engaging in intrinsic fraud may even be rewarded by such behavior when faced with less sophisticated adversaries, such as pro se litigants. In such cases, the less sophisticated parties may not be aware or understand how to refute the fraudulent evidence. Perhaps even more troublesome is the fact that such a party may not know how to identify such fraudulent evidence. It is safe to assume that had a party known that the testimony or evidence presented was fraudulent, they would have addressed the issue in the course of the proceedings rather than resting the ultimate outcome of the case on the possibility of prevailing on a motion for relief from order or judgment. By allowing a distinction between extrinsic and intrinsic fraud to remain in place in Oregon, more sophisticated and crafty parties may be rewarded with an undeserved judgment simply by duping their adversary.

The United States Supreme Court and the federal court system has done away with the distinction. Just over a decade after deciding *Throckmorton*, the Supreme Court abandoned its hard line stance in favor of a narrower rule.[13] As more time passed, the federal distinction

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[11] *Id.*

[12] Council on Court Appointed Procedures, Oregon Rules of Civil Procedure and Amendments: Preliminary Drafts and Final Draft, at 65 (1979-1981 Biennium).

[13] In *Marshall v. Holmes*, 141 U.S. 589 (1891), a mere 13 years after its ruling in *Throckmorton*, the Supreme Court held that courts of equity could enjoin the enforcement of a judgment at law if that judgment was fraudulently

further tapered through case law until it was finally abrogated by the 1946 Amendment to Rule 60(b)(3) of the Federal Rules of Civil Procedure (hereinafter "FRCP 60(b)(3)").[14] Though there was no mention of relief from judgment based on fraud of any type under the Federal Rules of Civil Procedure as adopted in 1937, the 1946 Amendment to FRCP 60(b)(3) officially provided a relief from judgment for both intrinsic fraud and extrinsic fraud, thereby ending the federal distinction between intrinsic and extrinsic fraud as a basis for relief. FRCP 60(b)(3) currently states, in pertinent part, that:[15]

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons…(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party…

The Notes of the Advisory Committee on Rules for the 1946 Amendment serve to clarify the abandonment of the extrinsic/intrinsic distinction in case law. The Notes state that fraud, whether intrinsic or extrinsic, committed by an adverse party is an express ground for relief as "There is no sound reason for their exclusion."[16]

In addition to the federal courts, thirty-four states, the District of Columbia, and Guam have all explicitly abandoned the distinction between explicit fraud and implicit fraud as a basis for relief from judgment or order in their respective rules of civil procedure.[17] There is no evidence that those jurisdictions have courts inundated with motions for relief of judgment nor that that parties do not feel that their cases have achieved finality.[18]

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obtained by the use of a forged instrument and false testimony which was not discovered until after the judgment had been entered and the time for a new trial motion had run.

[14] Fed.R.Civ.P. 60(b)(3) Advisory Committee's Notes.

[15] *Id.*

[16] *Id.*

[17] *See* Honorable James J. Brown, Judgment Enforcement Sect. 8.11. (3rd Ed. 2009).

[18] It should be noted that most of the 37 jurisdictions have a time limit for moving for relief of judgment varying from six months to a "reasonable time." As such, the option to make such a motion is not without limits.

In conclusion, and for the foregoing reasons stated above, Oregon should amend ORCP 71B(1) to abolish the distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order. Doing so comports with widely accepted policy reasons such as deciding each case equitably and does not jeopardize the finality of judgments nor over-extend judicial resources.

RELIEF FROM JUDGMENT OR ORDER

RULE 71

A Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected as provided in subsection (2) of section B of this rule.

B Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud **(whether previously called intrinsic or extrinsic)**, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B(2) When appeal pending. A motion under sections A or B may be filed with and decided by the trial court during the time an appeal from a judgment is pending before an appellate court. The moving party shall serve a copy of the motion on the appellate court. The moving party shall

file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.

C Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, or the power of a court to grant relief to a defendant under Rule 7 D(6)(f), or the power of a court to set aside a judgment for fraud upon the court.

D Writs and bills abolished. Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A [*Entry of order of default.*] **In general.**

A(1) [*In general.*] When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to [*plead or*] **appear by filing a motion or answer, or** otherwise **to** defend as provided in these rules **or applicable statute**, the party seeking affirmative relief may apply for an order of default **and a judgment by default by filing a motion and affidavit or declaration in compliance with this rule.**

A(2) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to an order of default and judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a counterclaim or cross-claim.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

[*If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, notice, in the form prescribed by Uniform Trial Court Rule 2.010, of the intent to apply for an order of default must be filed and served upon the party against whom an order of default is sought at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, declaration, or otherwise and, upon such a showing, the clerk or the court shall enter the order of default.*

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

A(2)(a) that the plaintiff has complied with Rule 7 D(4)(a)(I); and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or

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could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail with return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.]

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, or cross-claimant.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then formal notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to entry of the order of default. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

[*B Entry of judgment by default.*

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

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

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

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

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

125.005, or a respondent as defined in ORS 125.005;

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

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

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(I), 7 D(3)(b)(I), 7 D(3)(c)(I), 7 D(3)(d)(I), 7 D(3)(e), or 7 D(3)(f).

B(2) By the court. In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. The party seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit or a declaration under this subsection, a default judgment may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits or declarations.

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

B(4) Non-military affidavit or declaration required. No judgment by default shall be entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the defendant is

or is not a person in the military service, or stating that plaintiff is unable to determine whether or not the defendant is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended, except upon order of the court in accordance with that Act.]

C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must be accompanied by an affidavit or declaration to support that default is appropriate and contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days prior to the motion or verification that the court shortened the time;

C(1)(d) that, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party seeking the order of default cannot submit an affidavit or a declaration under this subsection, an order of default may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27;

C(1)(e) that the defendant is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50

App. U.S.C.A. § 521, as amended, except upon order of the court in accordance with that Act; and

C(1)(f) that, if the action arises upon contract, that the summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7D(3)(c)(i), 7D(3)(d)(i), 7 D(3)(e), or 7 D(3)(f);

C(2) The court may grant an order of default if it appears the motion and affidavit or declaration has been filed in good faith and good cause is shown that entry of such an order is proper.

D Motion for Judgment by Default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration, establishing the relief to be awarded as follows:

D(1)(a) stating that an order of default has been granted;

D(1)(b) stating the relief sought including any amounts due as claimed in the pleadings;

D(1)(c) if costs, disbursements, and/or attorney fees are allowable based on a contract, statute, or rule, or other legal provision, a party may include costs, disbursements, and attorney fees awarded pursuant to Rule 68.

D(2) The form of judgment submitted shall comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

[*C Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71*

B and C.]

[*D Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.*

E "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.]

E Certain Motor Vehicle Cases. No order of default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i); and

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

F Setting aside an order of default or judgment by default.

For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

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

* * * * *

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Oregon Council on Court Procedures

Proposal for Amendment to Oregon Rules of Civil Procedure

Date:	May 26, 2010
Name:	Hon. Susie L. Norby
Firm:	Clackamas County Circuit Court
Address:	
E-mail:	
Phone:	

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

To The Council on Court Procedures:

This message regards the language in ORCP 57 F that reads: "An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict."

Under ORCP 58 D: "If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under ORCP 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed."

I write to request consideration of an amendment to ORCP 57 F, to allow flexibility in the discretion of the judge regarding the handling of alternate jurors when the jury retires to deliberate. When an alternate juror has attended a full trial, but not been seated among those who will deliberate, it would be preferable for the trial judge to have discretion to allow the alternate to sit silently in the jury room, without participating, in case a member of the regular jury becomes unavailable prior to verdict. If a regular juror becomes unavailable, then the alternate can be quickly seated and deliberations can continue without a gap.

I have had two trials in which attorneys made this request, and I took their waiver to any objection under ORCP 57 F on the record. I then gave a specific instruction to the jury, telling them that they could not include the alternate in any discussion or deliberation unless a juror was lost and the alternate seated. Then I allowed the alternate to be present through deliberations, and for the reading of the verdict. I would like to have the discretion to do this without taking a waiver. If the option appeared in the ORCP, I believe other judges may also consider

I am convinced that the jurors take the instruction not to allow the alternate to participate in deliberations seriously, and do not include the alternate in any way. I have asked about this when talking to jurors after taking verdicts, and have received most earnest responses that the alternate was entirely sequestered within the jury room.

This practice has many benefits. First, if a juror is lost, the alternate who steps in has the benefit of having heard all deliberations up to the time s/he was seated. No time is lost, and the new juror can jump right in with deliberations. Second, it makes it easier to get an alternate back if you need to do that during deliberations. Once an alternate is discharged, it can be difficult to retrieve them in the midst of deliberations if necessary. Third, juror satisfaction for all the jurors increases. Jurors generally bond with one another during the experience of a trial, and everyone feels bad when an alternate is excluded from the deliberation room. Even if the alternate is never seated, if allowed in the deliberation room s/he can still have the experience of knowing what goes on there and how the case is decided. It is more respectful of the time investment they have made, and makes the jurors who are deliberating feel that the process was more fair to not take advantage of a citizen then kick them out before "the good part."

I propose that the quoted language in ORCP 57 F be amended to read as follows:
"An alternate juror who does not replace a regular juror may be discharged as the jury retires to consider its verdict. If the alternate juror is not discharged as the jury retires to consider its verdict, the jurors shall be instructed by the judge that they must not include the alternate juror in deliberations in any way unless and until the alternate juror is called upon by the judge to replace a juror who is lost during the deliberation process."

Click to Submit via E-mail

Proposal for Amendment to Oregon Rules of Civil Procedure

Date:	May 17, 2010
Name:	J. BURDETTE PRATT
Firm:	Malheur County Circuit Court
Address:	
E-mail:	
Phone:	

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

I am writing to the circuit judges on the Council on Court Procedures regarding a concern I have for a serous potential for abuse by inmates using ORCP 55 F (3). We do a lot of Post Conviction Relief cases in Malheur County and recently we have been getting requests for large numbers of subpoenas duces tecum in blank from inmates representing themselves in PCR cases. They argue that they are entitled to them under Rule 55 F (3) for discovery purposes. My concern is that this will open the door to all kinds of mischief as the inmates can then serve them on anyone including, judges, attorneys, witnesses, victims, etc, demanding the production of all kinds of document to be delivered to them at the prison. There would then be nothing to prevent the further distribution of these documents to others in the prison for all kinds of illicit uses. While attorneys and judges would know to file a motion to quash, many lay people would not and would either 1) ignore the subpoena at their peril, 2) produce the documents or 3) have to hire an attorney to deal with the subpoena. There is no reason to believe that a protective order will have any impact on most inmates serving lengthy prison terms. Do any of you have a suggestion as to how we can avoid this problem under the current rules or how the rules can be amended in the future to deal with this problem?

J. BURDETTE PRATT
CIRCUIT COURT JUDGE
MALHEUR COUNTY CIRCUIT COURT
NINTH JUDICIAL DISTRICT

council on court procedures
Deanne DARLING to: ROBERT HERNDON, EVE MILLER 06/02/2010 11:05 AM

is one of you on this committee

if so i have a request

could we change orcp 68 C 4 c- i think it now requires a hearing on the atty fees petition-

i would suggest that the word "hear" be striken from the rule- and in stead that to get a hearing it must be requested in the pleading- else none- same as with summary judgment

if you think this is a good idea - can you carry it forward- or tell me what i should do about it

From: Karsten H RASMUSSEN/LAN/OJD
To: Eve MILLER/CLA/OJD@ojd
Cc: Charles M ZENNACHE/LAN/OJD@ojd
Date: 06/04/2010 11:18 AM
Subject: Re: A Short Survey for the Council on Court Procedures - ORCP 44

Hi Eve -

Thanks for your note. We have 1 civil motions judge, Mult Co has something like 22, so I suppose there is going to be some inconsistency. I just wonder if more judicial education - as you suggest - might not be a better approach than re-writing a rule which would, necessarily, mean encroaching on judicial discretion.

Thanks again.

KHR

Eve MILLER/CLA/OJD

06/03/2010 03:18 PM

To
Karsten H RASMUSSEN/LAN/OJD@ojd
cc
Charles M ZENNACHE/LAN/OJD@ojd, Lyle C VELURE/PlanB/OJD@ojd, Eugene Buckle <Ebuckle@cvk-law.com>
Subject
Re: A Short Survey for the Council on Court Procedures - ORCP 44Link

Karsten:
Thanks for your input. I will share your comments with the Council. It seems that some trial lawyers are finding inconsistent practices in certain counties.

I have not yet had time to review all of the survey results but appreciate your experiences as both a trial lawyer and a judge. I am certain that your comments will be of interest during the Council's discussion. Although I am somewhat a newcomer to the Council, it has been my

experience that after extensive research and discussion, the Council concludes that more education of judges is needed rather than a rule change.

If you would like to be in on future discussions I can notify of our meeting dates. Many people appear by phone. As I'm sure you know, you have a member of the Council on your bench, Judge Zennache.

Regards,
Eve

Eve L. Miller
Clackamas Co. Circuit Court
807 Main St. #206
Oregon City, OR 97045
Tel: (503) 655-8686
Fax: (503)650-0592
E-Mail: eve.miller@ojd.state.or.us

From: Karsten H RASMUSSEN/LAN/OJD
To: Eve MILLER/CLA/OJD@ojd
Cc: Lyle C VELURE/PlanB/OJD@ojd, Charles M ZENNACHE/LAN/OJD@ojd
Date: 06/02/2010 09:57 AM
Subject: Re: A Short Survey for the Council on Court Procedures - ORCP 44

Hi Eve:

I wanted to take a minute to write you an email on this issue.

In Lane County we have one civil motions judge. For the past 11 years, that judge has been either (now senior) Judge Lyle Velure or me. Both of us served 8 years (at different times) on the Council. Between us, we have handled many of these disputes, although I suspect many fewer per capita than other counties because our approach has been the same over a long period of time and most of the bar knows that. My current back-up on this assignment follows the same approach as I did when I was Judge Velure's back-up on the civil motions assignment.

Our rule has generally been this regarding Rule 44 medical examinations:

1. Defense counsel may send a Plaintiff anywhere in the state provided they make reasonable accommodations (time, travel expense, lost wages, hotel if nec., etc.) and pay in advance for those reasonable accommodations. Our view has been that the Plaintiff's atty can send their own client anywhere for either treatment or consultation, and it would be unfair to limit the defense more restrictively than the geographical boundaries of the state.

2. If recordation is an issue, I order that the exam shall be recorded by a method chosen by the defense which shall bear the expense of the recording. A copy of the recording shall be provided to Plaintiff's counsel. My view is that this is the defense exam, and having anyone other than the defense record the exam is asking for trouble. Defense counsel is an officer of the court, and the Plaintiff or the Plaintiff's friend is not.
3. Generally, I don't allow anyone to attend the exam with the Plaintiff absent some special circumstances. See my comment to #2, above.
4. I do not limit the inquiry of the Plaintiff in the exam. I don't see how - especially if causation is an issue - the mechanism of the accident is not medically relevant.
5. I require the examining doctor to provide information to defense counsel (to be provided to Plaintiff's counsel) regarding the % of the examiner's practice related to these types of examination and the amounts related thereto. Impeachment is appropriate on these two points, but much beyond that runs the risk of harassment not impeachment.
6. Although not asked in your inquiry, I would also note that at times I allow more than one exam if, for example, there are very medically distinct conditions, say brain and back injuries, arising out of the same accident.

I make this general comment: The existing, more general rule allows a judge to fashion a ruling that is driven by the facts of the case rather than a more rigid concept of what is fair without reference to the facts of the case. I often expand a little or contract a little on these general approaches listed above. A general rule like the one we have now allows for that.

Frankly, I was a Plaintiff's lawyer for 16 years and have been a judge for 11 and I have never seen a problem with abuse of these examinations. That does not mean there have not been any, but I make this point because I don't like changing existing rules unless there is a compelling reason to do so. I am not sure there is here. If there is a desire to change this rule, I would hope that the Council (which, by the way, seems unusually determined to make changes this year) would consider (a) my comments, (b) whether the need really exists for one rigid rule (I think we are doing fine here under the existing rule which gives the court some latitude - I might even say discretion - what a concept!), and (c) fairness to both parties (this is, after all, the only chance the defense gets to actually look at the Plaintiff).

The point of the ORCP is to provide a set of general rules of civil procedure that govern civil actions in Oregon. The trend towards writing a rule for every imaginable circumstance (which we see in the desire to constantly amend both the ORCP as well as - even more often - the UTCR) eats every day at the discretion we judges hold dear.

From: Lyle C VELURE/PlanB/OJD
To: Eve MILLER/CLA/OJD@ojd
Cc: Karsten H RASMUSSEN/LAN/OJD@ojd, Charles M ZENNACHE/LAN/OJD@ojd, Eugene Buckle <Ebuckle@cvk-law.com>
Date: 06/04/2010 11:43 AM
Subject: Re: A Short Survey for the Council on Court Procedures - ORCP 44

Eve

I would concur with Karsten's comments. I have been at this over 40 years and I hate to see rules fashioned that take the discretion away. I think the general guidelines that we developed in Lane County work quite well but still let the judges alter the rule to fit the specific case. There is no "one size fits all" in law or medicine. Thanks for doing a thankless job. Just don't let them alter a rule because some lawyer had a single bad experience.

Lyle

*Survey Regarding ORCP 44 Medical Examinations

Edit

Rest of State

Design Survey | Collect Responses | Analyze Results

View Summary
Browse Responses
Filter Responses
Crosstab Responses
Download Responses
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Response Summary

Total Started Survey: 16
Total Completed Survey: 16 (100%)

PAGE: SURVEY

1. Do you hear motions pertaining to ORCP 44 MEs

Create Chart | Download

	Response Percent	Response Count
frequently	0.0%	0
occasionally	31.3%	5
infrequently	68.8%	11
answered question		16
skipped question		0

2. Do you believe that a uniform rule governing MEs would be

Create Chart | Download

	Response Percent	Response Count
helpful	64.3%	9
unnecessary	35.7%	5
answered question		14
skipped question		2

3. Has the circuit court in your county adopted any consensus statement (or informal consensus) regarding

	Response Percent	Response Count
any limitations on or conditions accompanying MEs	0.0%	0
any financial disclosures required from persons who have performed MEs as a condition of giving evidence?	0.0%	0
answered question		0
skipped question		16

Council on Court Procedures
June 5, 2010, Meeting
Appendix M-1

4. Are there any comments you wish to offer regarding this issue? Download

			Response Count
		Hide replies	7
1.	I am not sure that I have ever had a motion on this issue.	Wed, May 26, 2010 10:06 AM	Find...
2.	No	Wed, May 26, 2010 7:52 AM	Find...
3.	None.	Tue, May 25, 2010 4:27 PM	Find...
4.	I am concerned about any rule requiring general disclosure of overall income information for any expert or independent examiner as iinsuring a chilling effect on courts' and factfinders' access to valuable medical information. There are current, adequate ways to cross examine an examiner to put bias or motivation on the table, without requiring someone to disclose personal financial information. If any rule imposes this standard, this court may explore every reason to carve out an exception, in its discretion.	Tue, May 25, 2010 4:00 PM	Find...
5.	are we going to impose similar limitations and/or requirements on the plaintiff medical or chiropractic witnesses?	Tue, May 25, 2010 2:39 PM	Find...
6.	It might be a good idea to have IME's recorded, but I had defense counsel in one case state his expert was uncomfortable with being recorded. I have no idea what would be done or said that would make an IME uncomfortable, but I would point out that a plaintiff's regular physician is not recorded. The issue is overblown. I do not think any person other than the patient ought to be in the examine room unless the patient is regularly accompanied by someone when the patient sees the treating physician. Often, spouses do accompany each other because the patient's condition affects both. A parent normally accompanies a child. If no person usually accompanies a patient when seeing the treating physician, I see no need for it to happen with an IME. Again, the issue is overblown. The court should not have to deal with such issues as determining what type of recording or if the matter should be recorded or whether someone sits in the examine room and that person's role in the examine room. Both sides thinks the others expert is somehow tainted. Expert discovery might solve this issue.	Tue, May 25, 2010 2:36 PM	Find...
7.	seems to work well on a case by case basis. often the circumstances are different. would not be helpful to have a blanket rule	Tue, May 25, 2010 2:27 PM	Find...

answered question	**7**
skipped question	**9**

Council on Court Procedures
June 5, 2010, Meeting
Appendix M-2

Survey Regarding ORCP 44 Medical Examinations Edit

Tri-County Area

Design Survey | Collect Responses | Analyze Results

View Summary
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Filter Responses
Crosstab Responses
Download Responses
Share Responses

Default Report | + Add Report

Response Summary

Total Started Survey: 20
Total Completed Survey: 20 (100%)

PAGE: SURVEY

1. Do you hear motions pertaining to ORCP 44 MEs Create Chart Download

	Response Percent	Response Count
frequently	5.0%	1
occasionally	50.0%	10
infrequently	45.0%	9
answered question		20
skipped question		0

2. Do you believe that a uniform rule governing MEs would be Create Chart Download

	Response Percent	Response Count
helpful	73.7%	14
unnecessary	26.3%	5
answered question		19
skipped question		1

3. Has the circuit court in your county adopted any consensus statement (or informal consensus) regarding Create Chart Download

	Response Percent	Response Count
any limitations on or conditions accompanying MEs	100.0%	9
any financial disclosures required from persons who have performed MEs as a condition of giving evidence?	88.9%	8
answered question		9
skipped question		11

Council on Court Procedures
June 5, 2010, Meeting
Appendix M-3

4. Are there any comments you wish to offer regarding this issue? Download

		Response Count
	Hide replies	6

1.	I would like feedback regarding whether the exam should be referred to (in front of the jury) as an independent exam or ... another term. If the committee addresses that issue it would be helpful	Wed, May 26, 2010 1:18 PM	Find...
2.	While the existence of the consensus statemetn in Mult Co has no doubt limited the number of motions on this, they do come up. I have yet to hear a convincing argument for divergence the consensus statement. An uniform rule would doubtless further reduce the controversies regarding MEs.	Tue, May 25, 2010 4:03 PM	Find...
3.	As you know, the issue of who could attend hearings, whether they could be recorded, etc., was the subject of a huge debate just over 10 years ago. I still have voluminous materials from that time, which I believe were forwarded to the Council. If not, or if your archives have been purged, I would be happy to provide them. I'll forward our Multnomah County consensus statements by separate email.	Tue, May 25, 2010 3:52 PM	Find...
4.	Be fair and just.	Tue, May 25, 2010 3:33 PM	Find...
5.	Any rule should help to create a reliable open process by which plaintiff's participation can openly viewed by P's atty and a jury if necessary to ensure the fairness of the process. Financial arrangements of all experts if relevent to bias should be openly available to all parties	Tue, May 25, 2010 2:34 PM	Find...
6.	Any rule should help to create a reliable open process by which plaintiff's participation can openly viewed by P's atty and a jury if necessary to ensure the fairness of the process. Financial arrangements of all experts if relevent to bias should be openly available to all parties	Tue, May 25, 2010 2:34 PM	Find...

answered question	**6**
skipped question	**14**

Council on Court Procedures
June 5, 2010, Meeting
Appendix M-4