MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 10, 2011, 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
Jay W. Beattie
Michael Brian*
Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Kristen S. David
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Robert M. Keating
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Mark R. Weaver*
Hon. Charles M. Zennaché

Members Absent:

Arwen Bird
Hon. Robert D. Herndon
Hon. Lauren S. Holland
Leslie W. O'Leary
Hon. David F. Rees
Hon. Locke A. Williams

Guests:

David Nebel, Oregon State Bar

Council Staff:

Shari C. Nilsson, Administrative Assistant
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 1 E • ORCP 1 F • ORCP 2 • ORCP 7 D(3)(b) • ORCP 9 C, D, E • ORCP 19 B • ORCP 21 • ORCP 24 • ORCP 27 B • ORCP 36 • ORCP 36 C(6) • ORCP 39 • ORCP 43 • ORCP 44 • ORCP 47 • ORCP 47 A • ORCP 47 D • ORCP 54 A • ORCP 55 F(2) • ORCP 55 F(3) • ORCP 57 F • ORCP 68 • ORCP 68 C(4)(c) • ORCP 83 A			

I. Call to Order (Mr. Buckle)

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

II. Introductions (all)

A. Guests

Mr. Buckle asked all members and guests to introduce themselves.

B. Welcome of new members

Mr. Buckle welcomed new members Jay Beattie, Robert Keating, and Judge Timothy Gerking.

C. Hand out current roster and note corrections

Mr. Buckle asked all members to review the roster (Appendix A) and to let Ms. Nilsson know if any changes to their information needed to be made.

III. Approval of December 11, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft December 11, 2010, minutes (Appendix B) which had been previously circulated to the members. Prof. Peterson pointed out two errors in the minutes: 1) a typographical error on page B-5 where the word "is" needed to be changed to "it"; and 2) an additional typographical error on page B-6 where a reference to Appendix F needed to be changed to Appendix E. A motion was made to approve the minutes with those changes, the motion was seconded, a voice vote was taken, and the minutes were unanimously approved as corrected.

IV. Council Rules of Procedure per ORS 1.730(2)(b) (Mr. Buckle)

A. Review

Mr. Buckle stated that the Council's Rules of Procedure had been amended at the beginning of the previous biennium and asked Council members to review the Rules (Appendix C).

Mr. Buckle noted that late last year, the Board of Bar Governors had appointed a new member to fill a vacancy on the Council, and the appointment had disturbed the even distribution between members of the plaintiffs' bar and the defense bar. He stated that there appeared to be a disconnect between the Council's tradition of an even split and the Bar's criteria for appointments, and that he had met with the appointments committee and explained the tradition, history, and need for equal representation. Mr. Buckle explained that, as a result, the 2 newly appointed attorney members on the Council are both members of the defense bar, and the balance between the sides has now been restored.

Ms. David stated that it is good to educate colleagues about why the Council is evenly divided, and that it is everyone's duty to reach out and tell our respective networks what the Council does because not everyone knows.

B. Council Timeline

Mr. Buckle pointed out the timeline (Appendix D) which gives an overview of the Council's process for the biennium. He asked that Council members review it.

V. Annual election of officers per ORS 1.730(2)(b) (Mr. Buckle)

A. Chair

Mr. Buckle asked the members for nominations for chair. Mr. Cooper was nominated by Mr. Bachofner. A motion was made to elect Mr. Cooper as chair. The motion was seconded and was passed in a voice vote with 17 members in favor, no votes in opposition, and no abstentions.

B. Vice-Chair

Former Chair Buckle turned the meeting over to newly-elected Chair Cooper. Mr. Cooper then asked the members for nominations for vice-chair, and proceeded to nominate Ms. David. A motion was made to elect Ms. David as vice-chair. The motion was seconded and was passed in a voice vote with 17 members in favor, no votes in opposition, and no abstentions.

C. Treasurer

Mr. Cooper noted that, by tradition, the public member is usually elected as treasurer. Ms. Bird was nominated by Mr. Buckle. A motion was made to elect Ms. Bird as treasurer. The motion was seconded and was passed in a voice vote with 17 members in favor, no votes in opposition, and no abstentions.

VI. Reports Regarding Last Biennium (Mr. Cooper)

A. Promulgated Rules (Prof. Peterson)

Prof. Peterson stated that the nine rules that the Council promulgated last biennium (Appendix E) will become effective January 1, 2012, since the Legislature did not vote to amend or repeal any of them. Mr. Cooper noted that the Legislature on occasion does make changes to the ORCP without the Council's input, which is bothersome because most legislators are not lawyers, have not been exposed to justice system, and are unfamiliar with the rules. He asked that, if Council members hear that a legislator is thinking about proposing a change to the ORCP, members should bring this to the attention of the Council so that we can work with the Legislature.

B. 76th Legislative Assembly's ORCP amendments outside of Council amendments (Prof. Peterson)

Prof. Peterson pointed out one change to the ORCP that the Legislature did make last biennium: a technical change to the notice portion of ORCP 7 which adds the Bar's website in addition to its telephone number. He stated that the Bar's lawyer referral service department had asked the Legislature to make the change, and that the Bar is now aware that such requests should be made to the Council. Prof. Peterson also reported on three other bills which were drafted during the previous legislative session which would have made changes to the ORCP but which did not pass:

- SB 283, dealing with tort issues, which was referred to the Judiciary Committee and did

not get a hearing;

- HB 3215, referring to class actions, which was referred to the Judiciary Committee, received one public hearing, and died; and
- HB 3519, also dealing with tort issues (which is apparently introduced every session), which was referred to the Health Care and Ways and Means committees, received one public hearing, then died.

Prof. Peterson stated that, other than the technical fix to ORCP 7, nothing else affecting the ORCP made it through the Legislature.

VII. Administrative Matters (Mr. Cooper)

A. Funding (Prof. Peterson/Mr. Nebel)

Mr. Cooper took the opportunity to explain that, in addition to the Bar's providing meeting space and conference calling support, the Bar also provides the Council with $8,000 for reimbursement of member travel expenses. He stated that these funds are in addition to the $52,000 the Council receives from the State. Prof. Peterson thanked Mr. Nebel for his excellent support in helping to secure general funds from the Legislature for the Council.

Mr. Nebel stated that Mr. Cooper, Ms. David, and Prof. Peterson provided great support when they testified regarding Council funding during a Ways and Means subcommittee hearing. He noted that it is always hard to fathom where the budget will end up from one session to the next, and that the funding result last biennium was not bad considering the budget climate. Prof. Peterson reinforced Ms. David's idea that Council members update legislators on the Council's work so that we do not remain anonymous to them and that they are aware of the Council's important function.

Judge Gerking asked if contact with legislators is a coordinated project. He stated that he knows Dennis Richardson personally because he was a former colleague and that he would be happy to contact him. Mr. Cooper confirmed that Council members look for connections with people they know. Ms. David stated that she has been contacting Mr. Richardson but that she is happy to let Judge Gerking do so because of the personal connection. Ms. David briefly explained the e-mail update process: that each Council member has legislators whom they are responsible for contacting, and that she usually drafts an e-mail template for members to personalize after each meeting. She stated that she and Ms. Nilsson will put together a current list of legislator contacts which can be modified at the next meeting.

B. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the website report (Appendix W). She noted that, given the number of visitors and the fact that Council staff received relatively few inquires via telephone or e-mail, it appears that the website is proving to be a useful resource. Mr. Buckle asked if the number of visitors has gone up or down. Ms. Nilsson replied that it seems to be consistent with previous reporting periods and noted that the process of scanning documents and uploading them to the website continues.

Ms. Nilsson noted that the process of scanning and uploading documents from past biennia is slow since the archived documents frequently need to be reorganized before the scanning process can proceed. Mr. Cooper asked whether Council members can assist with organizing the materials so that the scanning can proceed. Ms. Nilsson replied that it would be more helpful for

Prof. Peterson to assist her in the actual organizing and to perhaps have law clerk assistance with the scanning portion.

Mr. Bachofner suggested adding a link to the Oregon Judicial Department on the Resources tab of the Council's web page. Judge Miller asked whether there is a link to the Council's web page on the OJD's website so that self-represented litigants can see where the rules come from. Ms. David stated that the majority of the users of the court rules when it comes to civil litigation are attorneys, and that self-represented litigants may not gain much from the Council's website. She added that the Council had talked previously about including additional links for self-represented litigants on its website, but thought it was not appropriate.

VIII. Old Business (Mr. Cooper)

There was no old business which required discussion.

IX. New Business (Mr. Cooper)

A. Potential amendments carried over from last biennium

1. Discord between ORCP 1 E and ORCP 83 A (Appendix F)

Mr. Cooper explained that attorney Sean Currie had submitted a suggestion last biennium which pointed out that ORCP 1 E and 83 A contain different language for the oath of a declaration. Prof. Peterson pointed out that there is also another concern about declarations (the distinction between Rule 1 E and Rule 47, Appendix L) and that, if a committee were to be formed, those should be looked at together. After some discussion, the Council formed a committee to examine this issue. Committee members are: Mr. Bachofner, Mr. Campf, and Justice Kistler.

2. ORCP 19 B - claim preclusion v. issue preclusion (*State ex rel Dorothy English v Multnomah County*) (Appendix G)

Ms. David explained that, two biennia ago, a Council committee looking at affirmative defenses examined issue preclusion v. claim preclusion and that this case was brought to the Council's attention when it was decided last biennium because it contains some good language that the Council may wish review in reconsidering the affirmative defenses listed in ORCP 19 B. Prof. Peterson pointed out that ORCP 19 B currently uses the language *res judicata.* Ms. David stated that she has the research that the prior committee did and any new committee can look at that research. After further discussion, the Council formed a committee to examine this issue. Committee members are: Ms. David, Judge Hodson, and Ms. Leonard.

3. ORCP 44 - medical examinations: allow disclosure by affidavit the percentage of examiner's income for forensic work and amount of charges. Mult. Co. Consensus Panel Ruling 2(A)(3) (Appendix H)

Mr. Cooper stated that the next suggestion from attorney Christopher Piekarski was a suggestion to change ORCP 44 to make the rule consistent with the Multnomah County Consensus Panel Ruling – to allow disclosure of an expert's income and the amount of charges. Judge Miller pointed out that a survey of judges was conducted and, in the responses, a certain group of judges talked about this subject at length, and that most judges outside of Multnomah County would say that they do not wish to have their judicial discretion unnecessarily restricted. Mr. Cooper stated that he feels that this proposal seems to attempt to constrain the discretion of the bench, and that he is averse to doing this unless there is an awfully good reason.

Ms. David stated that she knows that Clackamas County is in the process of revising its Consensus Panel Ruling about this issue and that this information would be helpful to any committee that is formed. Judge Miller suggested that it would be helpful to poll the county circuit courts to see which counties have Consensus Panel Statements regarding this matter. She stated that, if the majority of counties are already doing the same thing, there would be no reason for a rule change. Mr. Cooper recommended sending an e-mail to presiding judges to ask this question. Mr. Weaver stated that there was a committee last biennium that looked at a similar issue and that Judge Miller had sent an e-mail to judges, so some of this work may have been done already. Judge Miller recalled that the subject matter of that poll was "independent medical examinations" and that Prof. Peterson had written the poll for her. Prof. Peterson stated that he and Ms. Nilsson would look for the poll language.

Mr. Buckle asked the judges on the Council whether they would prefer not have a statewide rule of this nature. Judge Miller replied that there are two different issues: consistency within a county, and statewide consistency. She stated that she would probably not want a statewide rule because what works in a big city may not work in a rural community but that, within a county, the fear is that there will be judge shopping or inconsistency if there is no uniform rule. She noted that, if a poll shows that it appears that all counties are doing it the same way, an ORCP or UTCR change could be made. Mr. Keating asked how a new member can get input to a committee on which they do not serve. Mr. Cooper stated that any member is welcome to attend a committee meeting or to call a committee member, and Judge Miller pointed out that, when a committee comes back to report to the Council, it also asks all members for input. Judge Gerking suggested that, if a committee is going to look at Rule 44, it should also look at the name of the rule. Prof. Peterson stated that the examination could simply be called a "Rule 44 Medical Examination."

The Council formed a committee to examine this issue. Committee members are: Mr. Bachofner, Mr. Brian, Mr. Cooper, Judge Gerking, and Mr. Keating.

4. ORCP 54 A - allow dismissal of specific claims (CARRYOVER FROM 2009-2011 BIENNIUM'S RULE 54 COMMITTEE)

Mr. Cooper noted that this was a carryover item from last biennium. Prof. Peterson stated that the committee that examined the issue last biennium ultimately amended ORCP 54 A to allow dismissal of individual parties, but not of specific claims. After careful consideration, the Council declined to form a committee to examine this issue.

5. ORCP 55 F(3) - subpoenas for inmates (Appendix I)

Mr. Cooper stated that this suggestion came from Judge J. Burdette Pratt in Malheur County and is regarding the use of subpoenas duces tecum by inmates in post-conviction relief. Mr. Cooper stated that Judge Pratt's concern seems to be that an inmate would obtain information or documents and that there is no way to prevent the inmate from giving the information or those documents obtained to everyone else in the prison when perhaps it should not be distributed so widely, since protective orders do not have so much effect on people serving multi-decade sentences. Prof. Peterson will contact Judge Pratt and obtain more specific details about the problem before a committee is formed.

6. ORCP 57 F - alternate jurors (Appendix J)

Mr. Cooper explained that Judge Susie Norby in Clackamas County had provided a very detailed suggestion to the effect that alternate jurors being should be allowed to be present during deliberations. Judge Miller stated that there has been some movement afoot about not telling the jurors who the alternate jurors are. Judge Gerking stated that this is the procedure in Jackson County; the jurors do not know who the alternates are until just before deliberations. Judge Miller explained that, in some proposals, the alternates would not be chosen until the end of the case and that the deliberating jurors would then be drawn by lot. Mr. Cooper clarified that Judge Norby's proposal is that, instead of dismissing alternates when deliberations begin, they would be kept on during deliberations in case a juror needs to leave in the middle of deliberations, so that the alternate does not need to be brought up to speed. Mr. Keating expressed concern that complications could arise due to the "9 must agree" rule when there are multiple questions if the jurors do not know, with fourteen people in the room, who the twelve actual jurors are. Judge Zennaché stated that judges are currently required to discharge alternates once deliberations begin. He also pointed out that, if changes are made to the ORCP, we may need to look at changes to criminal statutes that mirror the ORCP.

The Council formed a committee to examine this issue. Committee members are: Judge Armstrong, Mr. Buckle, Judge Miller, Ms. O'Leary, and Judge Zennaché.

7. ORCP 68 C(4)(c) - hearing only if requested on objection to attorney fees (Appendix K)

Mr. Cooper explained that the proposal from Judge Deanne Darling is to make attorney fee hearings optional. In some instances, the issue is a narrow legal one and the attorneys are content to have the court decide based on their written submissions. Ms. David pointed out that there are two more issues about ORCP 68 on the agenda and

stated that there tends to be a lot of confusion over attorney fee petitions and that ORCP 68 may need a complete re-ordering similar to what the Council did with ORCP 69 last biennium.

The Council formed a committee to examine ORCP 68 issues. Committee members are: Judge Armstrong, Mr. Bachofner, Mr. Cooper, Ms. David, Professor Peterson, and Judge Zennaché.

8. Standardizing (7 day) time increments in the ORCP (CARRYOVER FROM 2009-2011 BIENNIUM)

Mr. Cooper explained that a wholesale change to the ORCP to standardize time increments and to move to a "days are days" system of counting like the federal rules would require numerous amendments of the ORCP and then, likely, numerous changes to the UTCR. He noted that this issue was a carryover from last biennium. Mr. Bachofner stated that, in addition to the time factor, there was also a question of funding and a concern by the Chief Justice about the financial impact of reprinting all of the materials that would need to be changed due to changed time increments. Ms. David noted that the Council had decided that, going forward, it would always use increments of 7. She also pointed out that ORCP 47 uses 5 and 20 day increments, and that ORCP 47 is one of the items on the agenda so, if a committee is formed for that rule, the time increments can also be looked at. The Council declined to form a committee to examine this issue.

B. Potential amendments submitted since the December, 2010, meeting

Prof. Peterson explained that many of the new suggestions before the Council came from the surveys which were sent to several Bar sections and committees as well as to all Oregon judges (Appendices M, O). He stated that, when he was compiling suggestions from the surveys, a portion of the suggestions from attorneys was missed during the printing of the Excel sheets and that those suggestions will be brought for the Council's consideration during the October Council meeting.

1. ORCP 1 E conflict with ORCP 47 D (Appendix L)

This issue was submitted by attorney Paul Merrell. Mr. Cooper reminded the Council that this issue was already discussed when item IX(A)(1) of the agenda was discussed earlier and that a committee was formed.

2. ORCP 1 F, ORCP 2, ORCP 9 C, D, E - encourage and support transition to electronic filing in state courts (Appendix M)

Mr. Cooper noted that the Council had made a minor change, ORCP 1 F, last biennium that made it explicit that filing can be electronic, and has been supportive of this transition. The Council declined to form a committee specific to this issue.

3. ORCP 7 D(3)(b) - registered agent v. managing agent (Appendix N)

Prof. Peterson noted that an attorney, Blake Fry, had contacted former Council member Don Corson to ask why the Council had removed the "managing agent" as a corporate agent who could be served from ORCP 7 D(3)(b). Prof. Peterson noted that last biennium the Council had made the rule mirror the positions which really exist in corporations, and suggested that, if a party is going to have to pierce the corporate veil to serve the alter-ego corporation or subsidiary corporation, that party might as well go ask a judge if service can be accomplished in that manner as an alternative to Rule 7 regular service. After careful consideration, the Council declined to form a committee to examine this issue.

4. ORCP 21 - beef up Rule 21 to remedy the mischief ORS 31.150 is supposed to address (Appendix M)

Mr. Cooper noted that the suggestion is to beef up Rule 21 to allow a party to quickly quash an action which the party thinks is brought just to silence that party's voice. After careful consideration, the Council agreed that ORCP 21 appears to be adequate in its present form and declined to form a committee to examine this issue further.

5. ORCP 24 - Oregon should adopt compulsory counterclaims (Appendix O)

After some discussion, the Council decided to add this issue to the committee formed in item XI(A)(2) earlier in the agenda. Judge Gerking asked to be added to the committee.

6. ORCP 27 B - qualifications for guardians ad litem (Appendix P)

Mr. Cooper explained that, currently, guardians ad litem are appointed without notice to anyone and without any review of who they are or what their interest might be in the real party in interest in the action. He stated that the Council looked at this issue two biennia ago and decided not to make changes because problems could arise when a minor's claim is approaching a statute of limitations and there is a need to have somebody appointed without delay to file a case. Mr. Cooper stated that Judge Keith Raines and Judge Rita Cobb are seeing a problem with the use of guardians ad litem being appointed in a family law context, where children or relatives of elderly people, who have a direct financial interest in their estates, are getting appointed as guardians ad litem. He stated that these guardians ad litem are filing divorce cases for these elderly people and the parties in the divorce cases do not even know they are getting divorced. Ms. David wondered whether this was a substantive or procedural issue. Mr. Cooper stated that he is not sure but that a committee can look at that issue.

The Council formed a committee to examine this issue. Committee members are: Mr. Cooper and Judge Miller.

7. ORCP 36 - discovery rules allow for financial abuse and tools to reign in abuse are awkward, time-consuming, and inefficient with little hint at consistent standards (Appendix O)

After careful consideration, the Council declined to form a committee to examine this issue.

8. ORCP 36 - add language regarding proportionality regarding discovery to give judges flexibility to limit discovery (Appendix O)

Mr. Cooper noted that judges already have the flexibility to limit discovery. After careful consideration, the Council declined to form a committee to examine this issue.

9. ORCP 36 and ORCP 39 - whether ORCP applies to Family Abuse Prevention Act and Elderly and Disabled Persons Abuse Prevention Act as depositions could be used to intimidate a petitioner (Appendix O)

Mr. Cooper noted that this suggestion had come from the Council's survey of judges, and that the judge had neglected to include his or her name but had asked that Judge Maureen McKnight be involved in any discussions on the matter. Mr. Cooper will write to Judge McKnight and ask if she may know the judge who wrote the suggestion so that we can get more specific information regarding this proposal.

10. ORCP 39 C(6) - require designations of the deponent in advance of the deposition (Appendix Q)

Mr. Cooper stated that former Council member Don Corson had submitted a suggestion regarding ORCP 39. He stated that, when seeking corporate designee depositions under ORCP 39 C(6), the party being deposed does not have to identify the deponent in advance. He stated that Mr. Corson would like the designation to be required before the deposition is conducted. Ms. Gates confirmed that she has had this happen often: either the party does not think they have a requirement to designate or, when they realize they sort of have one, they wait until the last minute or just show up with the designee. The Council formed a committee to examine this issue. Committee members are: Mr. Bachofner, Ms. Gates, and Judge Gerking.

11. ORCP 43 - Oregon lags behind other states and federal rules with respect to discovery of electronically stored information (Appendix M)

Mr. Cooper stated that the Council had dealt with this issue last biennium with its amendments to ORCP 43. Ms. David suggested forming a small committee to monitor the situation and to discuss whether there are any additional changes that need to be made by next January or February. Mr. Cooper mentioned that it might be worth reaching out to the bench in September or October of 2012 to see how the new rule is working. The Council formed a committee consisting of Mr. Campf, Ms. David, Judge Hodson, and Judge Zennaché.

12. ORCP 43 - Adopting federal rules on discovery so all objections to requests for

discovery are waived if response not provided within 30 or 45 days as required (Appendix O)

Prof. Peterson stated that the Council promulgated a rule to make this change (ORCP 43 B(3)) two biennia ago. Mr. Keating stated that he had an experience where a judge had refused to enforce this rule and that, in response to Mr. Keating's assertion that the rule is pretty clear that one has to respond within 30 days or waive any objection, the judge said "Well, that's just a technicality, can we get to the meat of this matter?" Judge Miller noted that the rule is in place but that, if judges are being lax about enforcing it, this is a judicial education issue. After careful consideration, the Council declined to form a committee to examine this issue.

13. ORCP 47 - require statements of undisputed facts in summary judgment motions as required in federal court (Appendix O)

After a brief discussion, the Council formed a committee to examine this issue. Committee members are: Mr. Cooper, Ms. David, Judge Herndon, Ms. Gates, Mr. Keating, and Judge Rees.

14. ORCP 47 A - making clear that summary judgment can be used to attack an affirmative defense (Appendix R)

This item, suggested by attorney Harry Auerbach, will be included in the committee formed to look at item IX(B)(13).

15. ORCP 55 F(2) - to allow Oregon non-party resident to be required to produce documents in response to a subpoena not only in resident's county, but within 50 miles of that county (Appendix S)

Mr. Cooper stated that this suggestion from attorney Paul Dodds relates to non-parties, and that there is some sensitivity to how much we can inconvenience a non-party. Mr. Buckle noted that this pertains to records only, and that records can be mailed. Judge Miller suggested that, if there are any limitations or expansions, it should be within so many miles of that person's place of business or residence as opposed to within a county. Judge Armstrong emphasized that this relates to documents, not appearances. Mr. Cooper observed that, when attorneys say "show up at this place or mail the documents to me," most people mail them. Mr. Beattie suggested that there be no geographic restriction on documents via mail. Judge Zennaché pointed out that the subpoena does require a person to show up on a certain date, and that the alternative is to mail the documents. Mr. Cooper observed that Mr. Dodds' concern is that, when he wants to subpoena documents, he has to find a location to which the person can deliver the documents in their county but, if the person lives in Washington County and he practices in Multnomah County, it seems no more burdensome to have the person drive to Multnomah County. Judge Armstrong noted that the problem will arise from time to time, and that one solution is to find an attorney in another county who will allow delivery of documents to his or her office. After some discussion, the Council agreed not to form a committee at this time, but to revisit this issue at a later meeting.

16. ORCP 68 - standardize practice, including statements for attorney fees and

procedures for handling them, to replace UTCR and SLR, which are burdensome (Appendix M)

Mr. Cooper reminded the Council that this issue was already discussed when item IX(A)(7) of the agenda was discussed earlier and that a committee was formed.

17. ORCP 68 - clarify what qualifies as a cost and what fees for what services are allowable (Appendix M)

Mr. Cooper reminded the Council that this issue was already discussed when item IX(A)(7) of the agenda was discussed earlier and that a committee was formed.

18. Affidavits in opposition to show cause orders which also request affirmative relief (UTCR 8.050) (Appendix T)

Judge Miller noted that attorney Russ Lipetzky had raised this issue with the Council last biennium. Ms. Nilsson stated that Mr. Lipetzky had copied her on an e-mail to another attorney (Appendix T) regarding the issue. Judge Miller stated that the committee which examined the issue last biennium had determined that it was a UTCR issue, and that Mr. Lipetzky had told her he was dropping the issue because a judge in Washington County who was on the UTCR committee said that, if they were going to do anything about it, they would make it specific that you cannot file a counterclaim and he did not want that to happen. The Council declined to form a committee to re-examine this issue. Mr. Cooper will e-mail Mr. Lipetzky and let him know of the Council's discussion.

19. Judges to read a statement to all unrepresented litigants that gives them basic information (Appendix M)

After careful consideration, and discussion of the fact that it would be impracticable to craft language that would fit all possible case types, the Council declined to form a committee to examine this proposal.

20. Run rules through a translator as occurred with the federal rules to put them in plain English (Appendix M)

After careful consideration, and noting that the Council makes every effort to make its language as simple and understandable as possible when it crafts new rules and amendments, the Council declined to form a committee to examine this proposal.

21. Provide explicitly for every individual who is a party to participate pro se or through counsel in every aspect of a civil proceeding (Appendix O)

After careful consideration, the Council declined to form a committee to examine this proposal.

22. Taking exceptions to a jury instruction at a time other than immediately after the instruction is given - ORCP 59 H(1) (Appendix V)

Judge Gerking asked whether this issue is further complicated by the fact that many judges are instructing before final arguments. Mr. Cooper stated that there is appellate case law that states that, if an attorney does not except immediately after the instruction comes out of the judge's mouth, they waive the right to raise the issue on appeal. Judge Zennaché stated that in Lane County they are instructing more and more even before the case begins to give the jury some preparation, after discussing first with the attorneys out of the presence of the jury if they have any objection to this.

After some discussion, the Council formed a committee to examine this issue. Committee members are: Judge Armstrong, Mr. Beattie, Ms. Leonard, and Judge Zennaché.

C. Appointment of committees regarding any items listed in IX A & B

Appointment of committees was made at the time of the discussion of the agenda items.

D. Moment of Silence

Mr. Bachofner proposed that the Council observe a moment of silence in observance of the 10th anniversary of September 11, 2001. A moment of silence was observed in memory of those who lost their lives on that day.

X. Schedule Future Meeting Dates/Locations (Chair)

A. Hand out calendar with potential schedule (Appendix U)

Mr. Cooper led a discussion regarding dates and locations of future Council meetings. The following schedule was determined:

October 1, 2011 (Newport - Location TBD)
November 5, 2011 (Oregon State Bar)
December 3, 2011 (Oregon State Bar)
January 7, 2012 (Oregon State Bar)
February 4, 2012 (Oregon State Bar)
March 10, 2012 (Oregon State Bar)
April 14, 2012 (Eugene - Location TBD)
May 5, 2012 (Oregon State Bar)
June 2, 2012 (Medford - Location TBD)
September 8, 2012 (Oregon State Bar)
December 1, 2012 (Oregon State Bar)

XI. Adjournment

Mr. Cooper adjourned the meeting at approximately 11:55 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Oregon Council on Court Procedures
Roster
2011-2013 Biennium

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DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 11, 2010, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Arwen Bird
Michael Brian
Eugene H. Buckle
Brian S. Campf
Don Corson
Kristen David
Jennifer Gates
Martin E. Hansen
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary*
Hon. David F. Rees
Mark R. Weaver*
Hon. Locke A. Williams*
Hon. Charles M. Zennaché

Members Absent:

Brooks F. Cooper
Hon. Lauren S. Holland
Hon. Mary Mertens James

Guests:

David Nebel, Oregon State Bar

Council Staff:

Shari C. Nilsson, Administrative Assistant
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 9 • ORCP 21 • ORCP 38 • ORCP 43 • ORCP 54 • 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 • Claim preclusion v. issue preclusion • Discord between ORCP 1 E and 83 A	• ORCP 9 • ORCP 21 • ORCP 38 • ORCP 43 • ORCP 54 • ORCP 69 • ORCP 71	• 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 • Claim preclusion v. issue preclusion • Discord between ORCP 1E and 83A

Council on Court Procedures
September 10, 2011, Meeting
Appendix B-1

I. Call to Order (Mr. Buckle)

II. Introduction of Guests

There were no guests present requiring introduction. Mr. Buckle introduced Jennifer Gates, the newest member of the Council.

III. Approval of September 11, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft September 11, 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 process of scanning documents and uploading them to the website continues. She also pointed out that the inquiry from an attorney in Eastern Oregon without close access to a law library with Council materials shows that the website is proving to be a valuable resource for attorneys throughout the state.

B. Expiring Terms (Mr. Buckle)

Mr. Buckle noted that Mr. Corson's and Mr. Hansen's terms on the Council will expire in August of 2011. He thanked them for their valuable years of service on the Council.

Mr. Buckle also stated that there are six Council members with terms expiring in August who are eligible for reappointment: Mr. Campf; Ms. David; Mr. Weaver; Judge Hodson; Judge James, and Judge Miller. All of these members except for Judge James were present, and none indicated that they wished to retire from the Council. Prof. Peterson stated that he will contact Judge James to ask whether she wishes to be reappointed.

V. Old Business (Mr. Buckle)

A. Voting on Promulgated Amendments

1. ORCP 36

a. Discussion

Mr. Bachofner explained that the amendments to ORCP 36 (Appendix C-7) allow limited discovery of insurance denial of coverage and reservation of rights information, as detailed in the amendments themselves. He noted that the Council had received no comments on the published amendment.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 36

Mr. Bachofner made a motion to promulgate the amendment to ORCP 36. Mr. Corson seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

2. ORCP 38

a. Discussion

Mr. Corson explained that the amendment to ORCP 38 (Appendix C-10) is Oregon's verison of adopting the current uniform laws on interstate foreign depositions and subpoenas.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 38

Mr. Corson made a motion to promulgate the amendment to ORCP 38. Mr. Bachofner seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

3. ORCP 9

a. Discussion

Judge Rees stated that the amendment to ORCP 9 (Appendix C-3) is a technical amendment relating to ORCP 54. Ms. Leonard explained that the amendment states that offers of judgment which are not accepted should not be filed with the court.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 9

Mr. Hansen made a motion to promulgate the amendment to ORCP 9. Judge Armstrong seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

4. ORCP 54

a. Discussion

Ms. Leonard stated that the amendment to ORCP 54 A (Appendix C-16) makes it clear that a party, not the court, needs to submit a form of judgment of dismissal. Prof. Peterson added that the amendment also provides the ability to dismiss one or more parties without dismissing the entire case.

Mr. Buckle noted that Nicole DeFever from his office had sent in a comment regarding the analogous federal rule (FRCP 68), which states "the number of days prior to the date set for trial," rather than "prior to trial." Mr. Buckle stated he believes the Council's amendments are adequate and did not need further revision. Ms. Leonard stated that amendments to subsection E change the timing

on offers of judgment, and that subparagraph E(2) gives more time to respond to an offer of judgment. Judge Zennaché also asked about using the language "prior to trial" rather than "prior to the date set for trial." Prof. Peterson replied that there can be an offer that an attorney disregards because it came too late but, if the trial gets re-set, that unaccepted offer would no longer be untimely and could affect a party's entitlement to court costs and attorney fees if the judgment did not exceed the offer. He noted that cases are frequently set over, but that the offer is still out there. Mr. Hansen suggested "*a* date set for trial," rather than "*the* date set for trial." Mr. Buckle pointed out that an offer is made and is either accepted or not. Mr. Bachofner noted that an attorney might ignore an offer because it is not timely. Mr. Buckle acknowledged that this could be a trap for the unwary. Mr. Bachofner stated that best practice dictates that an attorney always looks at an offer, consults with the client, and responds. Mr. Hansen remarked that if an attorney is not passing offers to the client merely because it is the day before trial, that attorney has a bigger problem. Council members agreed not to make any further changes to the rule.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 54

Ms. Leonard made a motion to promulgate the amendment to ORCP 54. Judge Hodson seconded the motion, which passed 20-0 by roll call vote, with no abstentions. (Mr. Brian joined the meeting late and therefore did not vote on the previous three amendments.)

5. ORCP 43

a. Discussion

Ms. David pointed out that Legislative Counsel had also suggested a few minor changes since the Council's published amendment, and that these are reflected in the version of ORCP 43 now before the Council (Appendix C-13). Mr. Buckle mentioned Sheila Potter's comments (Appendix F) to the Council's published changes to ORCP 43. He noted that she raised concerns that the amendment seemed to suggest that the requesting party will dictate the format of electronically stored information (ESI) and the responding party must provide the ESI in that format. Ms. David acknowledged that, in ORCP 43 E, there could still be a question about permissive vs. mandatory production and the form in which a party is required to produce information. Mr. Campf stated that FRCP 34 contains language similar to that proposed in subsection E, but that the federal rule states that a party must produce ESI in the form in which it is usually maintained. He pointed out that the Council's amendment uses the word "may."

Judge Zennaché stated that, earlier in the federal rule, it states that the requesting party may designate the form in which they would like ESI to be produced and, if it does not, the responding party must produce ESI in a form in which it is ordinarily maintained. Mr. Camp noted that the federal rule does use the word "must," and did not recall whether the committee had discussed in depth the implications of using "may" or "must." Mr. Buckle wondered how many different forms exist in which ESI can be produced. Ms. David replied that there are more than one might think. She stated that the committee talked

about the permissive nature of giving the responding party the option of producing ESI in the form in which it is usually maintained or a reasonably useful form. She noted that a concern is, if the federal rule uses "must" and the ORCP uses "may," there is the potential for litigation to make a distinction between the two words. Judge Miller asked whether the committee would recommend changing the word. Mr. Campf stated that he had not given it enough thought to make a recommendation. He noted that the first use of "may" is equivocal, so that if the word is used again, it can be construed as not being a requirement.

Judge Herndon noted that, if the word "may" in the subsection were changed to "shall," it would not significantly change what happens. He suggested that it is a distinction without difference. Mr. Hansen observed that, in the worst-case scenario, an aggressive person might say, "I *may* do it in a reasonable way, but I do not have to, so I will not." Mr. Bachofner pointed out that, if the ESI is provided in an unusable form, the parties will end up going to the court to resolve the dispute. Mr. Hansen noted that the rule does not require a person to be reasonable, and that not making this distinction could tie up a lot of court time over disputes. Justice Kistler asked whether the second word "may" is limited by either/or. Judge Rees asked if there is a downside to changing to the word "must." Judge Zennaché stated that there is none, and that this would eliminate any argument. Judge Herndon stated that, if there is a dispute, a judge would still have to hold a hearing about the reasonableness of the format whether the word "may" or "must" is used. Judge Miller stated that she believes that using the word "must" is the better idea. She noted that is does not substantively change the obligation, but that it will avoid future arguments. Judge Armstrong stated that he understands the first use of the word "may" in the subsection to mean must, and that if the requester states a format, the producer is stuck. Judge Rees pointed out that a party can seek a protective order.

Ms. David noted that the committee had over 100 responses when it first put out the changes for comment, and that people understand that if a request is too financially burdensome, they will go to the court. She pointed out that there will always be debates, but that the Council is trying to give guidance. Ms. O'Leary opined that it is a good idea to use shall or must instead of may, because there will always be one lawyer who will take a hyper-technical interpretation of the rule and say it is entirely voluntary. She stated that she would prefer consistency with the federal rule to remove any ambiguity. Mr. Bachofner agreed. Ms. David stated that many of the comments received by the committee stated, "do not do what the federal rule does." Mr. Bachofner noted that the federal rule uses the word "useable" and the Council's amendment uses "useful," and wondered if there is a difference. Ms. David stated that she interprets"useful" to mean it is useful for the case, and "useable" to mean that a party can use the data to go back and track something. Prof. Peterson observed that "useful" is a friendlier term than "usable." Mr. Corson concurred.

Ms. David stated that the amendment helps point people in the right direction, and that it will likely not be the last time Council will have to deal with ESI. Mr. Corson proposed a friendly amendment to change the second use of the word

"may" to "must" in the amendment to ORCP 43 E. Ms. David seconded the motion, which passed by voice vote.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 43

Mr. Corson made a motion to promulgate the amendment to ORCP 43, as amended. The motion was seconded and passed 20-0 by roll call vote, with no abstentions.

6. ORCP 69

a. Discussion

Prof. Peterson stated that the Council had received one comment regarding the published amendment to ORCP 69 (Appendix C-20). He noted that the comment (Appendix H) was from attorney Gil Feibelman, who was concerned that the changes would require Rule 7-type service of the notice of intent to apply for the order of default. Prof. Peterson stated that he responded to Mr. Feibelman to let him know that Rule 9 service with a first class stamp still applies. He added that Mr. Feibelman did not respond to that explanation, and that the comment stated that the Council had otherwise done a good job on the amendment.

Mr. Buckle pointed out that there are two alternate versions to consider (Appendices D & F). Prof. Peterson reminded the Council of the discussion at the last meeting regarding section D(1)(a). He recalled that there were concerns about presenting both a motion for an order of default and a motion for judgment by default at the same time, and that a lawyer cannot sign an affidavit stating that the order has been granted when it has not yet been. Prof. Peterson stated that the Council had agreed to publish the amendment as written but to discuss it further before promulgation. He stated that Version 1 (Appendix D) was suggested by Mr. Bachofner and Version 2 (Appendix E) came from multiple suggestions at the September meeting.

Ms. David observed that the problem around the state is that parties submit just a judgment without submitting an order. She noted that many courts actively tell parties to send the motion and order and judgment at the same time so that it is quick and easy, especially where attorney fees are an issue. She pointed out that, based on this "normal practice" of sending all documents together, Version 2 would really help clarify the necessity to submit the affidavit to comply with the rule. Judge Miller stated that many attorneys leave a space to write in the date that the order was entered, so there has already been contemplation that there needs to be some type of reference made. She noted that, based on her experience, version 2 is a good idea. Ms. Leonard asked why version 1 is not workable. Mr. Hansen replied that version 1 presupposes a two-step process, whereas version 2 allows it to be one step. Judge Zennaché stated that, given current staffing levels and budget cuts, he would prefer having a litigant indicate that they have gotten or are getting the order, since the process of entering orders and judgments into the Oregon Judicial Information Network (OJIN) is slow and judges cannot verify entry of the order of default by merely looking in

OJIN. Mr. Bachofner stated that his first concern is that people do not have to go back a second time, and that version 2 solves this problem. Judge Armstrong suggested changing the words “applied for” to "sought.” Prof. Peterson noted that the current language in ORCP 69 A uses "sought." Mr. Hansen stated that the word "sought" makes it seem as though a party would apply to one judge for the default order and another for the judgment. He pointed out that another part of ORCP 69 A uses the language "intent to apply for an order of default." Mr. Corson observed that ORCP 69 C(1)(b) uses “sought,” while 69 C(1)(c) uses "apply for.” Mr. Bachofner remarked that the word “sought” is used when informing another party that you are seeking an order, while “apply for” is used to specifically refer to the process of presenting the order to a judge for signature.

A motion was made to amend the published version of amendments to ORCP 69 to make the changes outlined in version 2 (Appendix E). The motion was seconded and passed by voice vote.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 69

Ms. David made a motion to promulgate the amendment to ORCP 69, as amended. Mr. Bachofner seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

7. ORCP 71

a. Discussion

Judge Zennaché stated that the amendment to ORCP 71 (Appendix C-27) eliminates the distinction between intrinsic and extrinsic fraud. He noted that no comments to the published amendment were received by the Council.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 71

Ms. Leonard made a motion to promulgate the amendment to ORCP 71. Judge Zennaché seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

8. ORCP 21

a. Discussion

Prof. Peterson stated that the amendment to ORCP 21 (Appendix C-6) removes the last line in ORCP 21 A which refers to ORCP 54 B. He noted that the court already has the power to dismiss stale cases in the UTCR and that the language in ORCP 21 A was confusing.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 21

Mr. Hansen made a motion to promulgate the amendment to ORCP 21. Mr.

Bachofner seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

B. Communication with Legislators (Ms. David)

Ms. David referred to the matrix of legislators which includes new legislators to begin serving in January, 2011. She stated that we will need to choose new contacts for legislators who were being contacted by outgoing Council members. She asked Council members to look at the matrix and see if anyone knows any of these or the new legislators and would like to begin contacting them. A few members did so, and Judge Zennaché stated that he can take over Mr. Corson's legislative contacts. Ms. David stated that we will revisit this issue in September, 2011, and make any necessary adjustments at that time. She also stated that she will draft two e-mails to send to legislators in January – one for new legislators which includes an introduction, and one update for continuing legislators.

VI. New Business (Mr. Buckle)

A. Legislative Advisory Committee (Mr. Corson)

Mr. Corson reminded the Council that, by statute, the Council must form a Legislative Advisory Committee (LAC), which by custom consists of the chair, the vice chair, the public member, and two judges. He noted that any member of the Legislature or any legislative committee has the right to ask the Council for information and input, and that the LAC would be the body to respond. Mr. Corson stated that the LAC also deals with any budget issues relating to the Council.

Mr. Buckle noted that the current judge members of the LAC are Judge Herndon and Justice Kistler. Both agreed to remain on the committee. Mr. Corson nominated Mr. Buckle, Mr. Cooper, Ms. Bird, Judge Herndon, and Justice Kistler for the LAC. The motion was seconded and passed via voice vote.

B. Annual Legislative Sessions (Judge Zennaché)

Judge Zennaché noted the recent ballot measure which requires the Legislature to meet annually, and wondered how this would affect the Council's work. Mr. Buckle wondered whether the ORS requires the Council to submit amendments before every regular session. Justice Kistler noted that the Legislature may have to amend the statute to specify what an regular session is. Mr. Nebel stated that the even-year session will not be a "regular session" since the Legislature will not usually be considering non-fiscal matters during that session. Prof. Peterson stated that the Council could ask the Attorney General's office for an opinion. Mr. Nebel asked whether the Council is required to submit amendments every regular session if it meets and decides that no changes to the ORCP are necessary. Mr. Buckle asked whether the requirement is merely to meet and decide whether any changes need to be made.

Mr. Buckle suggested that he and Prof. Peterson look at the statute and get Mr. Nebel involved if necessary to resolve the question. Mr. Corson stated that he does not believe there is a requirement that the Council has to change its rules but that, if the intention is

to make a rule change, any changes would need to be submitted to the Legislative Assembly at the start of the regular session. He noted that the Council's Rules of Procedure may need to change to reflect this.

Mr. Bachofner expressed concern that the Council does not want an unintended perception that it is not interested or working if it does not submit amendments before every annual session. Ms. David suggested explaining to the Legislature that the Council understands that it will be meeting every year, but that the Council will still work on a two-year cycle because it takes that long to evaluate potential rule changes. Mr. Bachofner stated that the explanation could further state that the Council understands that the Legislature's focus during the even-year session will be primarily on budget/fiscal issues, and that the Council does not want to burden it with ORCP changes during that time.

Judge Miller noted that the Council is supposed to be meeting around the state and wondered whether it was meeting this duty. Prof. Peterson stated that the statute had been changed and that this is now more of an aspirational standard than a requirement.

VII. Next Meeting Date/Place

The next meeting is tentatively scheduled for September 10, 2011.

VIII. Adjournment

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

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 11, 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. 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

Members Absent:

Hon. Mary Mertens James
Hon. Locke A. Williams
Hon. Charles M. Zennaché

Guests:

David Nebel, Oregon State Bar

Council Staff:

Shari C. Nilsson, Administrative Assistant
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 1 • ORCP 9 • ORCP 21 • ORCP 36 • ORCP 38 • ORCP 43 • ORCP 54 • ORCP 69 • ORCP 71 • ORCP 83	• 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 • Claim preclusion v. issue preclusion • Discord between ORCP 1 E and 83 A		• 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 • Claim preclusion v. issue preclusion • Discord between ORCP 1E and 83A

I. Call to Order (Mr. Buckle)

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

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of June 5, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft June 5, 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 website now includes all historical materials (including subcommittee work which was included in the original Council legislative history materials) for each biennium from 1993 to the present. She stated that the process of scanning documents and uploading them to the website is time-consuming but that the program to include all Council materials since the inception of the ORCP is progressing.

B. Council Timeline/Expiring Terms (Mr. Buckle)

Mr. Buckle asked whether all Council members had had an opportunity to look at the term matrix (Appendix C) which was circulated in the meeting packet. Council members indicated that they had done so and no members had any revisions. There are two members with terms expiring in August, 2011, who are not eligible for another term, and six members with terms expiring in August, 2011, who are eligible for reappointment to another four-year term.

C. ACTION ITEM: Election of Officers per ORS 1.730(2)(b) (Mr. Buckle)

Mr. Buckle noted that, although officers traditionally serve two one-year terms, they must be re-elected each September. Mr. Corson moved to nominate Mr. Buckle as chair, Mr. Cooper as vice chair, and Ms. Bird as treasurer. Judge Holland seconded the motion and it passed via voice vote with no objections.

D. Moment of Silence

At Mr. Bachofner's request, the Council spent a moment in silence in remembrance of those who lost their lives on September 11, 2001.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

Mr. Buckle reminded the Council that the purpose of the meeting was to vote on whether to publish amendments to the ORCP. He noted that the published amendments will appear on the Council's website and in the Advance Sheets and that, during the period leading up to its December meeting, the Council will accept comments from the public regarding the proposed amendments. Mr. Nebel added that he will arrange for the Bar to put a link on its website and a notice in the Bar Bulletin regarding the published amendments.

Prof. Peterson stated that Council practice has been for any member who receives feedback to report it to the entire Council so that all members see each comment. He stated that, if the comments indicate that more work needs to be done on a particular amendment, that committee can meet again to consider making additional changes prior to the December meeting. Prof. Peterson also pointed out that a simple majority of a quorum is required to publish an amendment, and that a super majority of a quorum is required to promulgate rule changes in December.

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner stated that the suggestion for the amendment of ORCP 36 originated from one of the many suggestions regarding discovery which the Council received as a result of a poll taken last biennium. He noted that the proposed change is in regard to discovery in insurance cases and is intended to prevent parties from moving forward with expensive litigation when a plaintiff does not realize that there may be a denial of coverage or a reservation of rights which would result in the unavailability of any funds from an insurance company.

Mr. Bachofner stated that the committee had looked at Washington's rule, CR 26(b)(2), which allows discovery of certain insurance company letters. He indicated that the committee had weighed the issues and, after careful deliberation, arrived at the modifications contained in Appendix D. He observed that the amendment requires disclosure if there is a reservation of rights or denial of coverage, and that this will allow the opposing party to do an independent investigation to determine whether

coverage exists and whether the litigation is worth pursuing to trial. Mr. Bachofner reported that the committee had received comments that the language in the rule resembles an interrogatory, but he noted that this exists in other aspects of discovery as well. He observed that the amendment does not say that an attorney cannot disclose or produce a coverage letter but, if there is some privilege associated with the letter, the opposing party will still receive the essential information. He observed that the committee felt that the language was a good compromise, and proposed that the Council vote on whether to publish the suggested amendment.

Mr. Cooper stated that the Council should be absolutely clear that the insurance company and its defendant insured have a privilege claim to this sort of information, and the Council is in fact making a rule that requires its provision, which is within the Council's power. Mr. Cooper emphasized that the amendment does not make anything else discoverable that is otherwise privileged. He observed that furthering settlement of cases that ought to settle sooner rather than later is a good thing, but that some who are more protective of their insurance company client and defendant insured's rights might find this change a little uncomfortable. Mr. Cooper pointed out that this tension is one we find in all of the ORCP and that the Council is balancing it appropriately. Mr. Bachofner stated that the rule change specifically preserves the privilege associated with the actual reservation of rights or denial of coverage letter, and pointed out that the opposing party has a right to know the issue exists in order to act accordingly.

Mr. Buckle expressed a technical, rather than a substantive, concern that the rule requires the production of what might be privileged information, and privileges are set out in the rules of evidence. Judge Miller noted that there would be nothing to prevent a party from making an objection based on privilege and asking the court for a protective order. Mr. Cooper stated that the committee looked specifically at the privilege issue and that the language in the amendment is the product of that research. Judge Miller pointed out that a party could provide a letter with everything redacted except for the sentence that deals with a reservation of rights or denial of coverage. Judge Herndon observed that the information that a party does not have coverage is likely not privileged. Mr. Bachofner noted that, if the denial was based on an intentional act, the insurer would not want this document produced to the other side if it is part of the defense of the underlaying case. He stated that this is similar to a case of requesting all documents identifying names of witnesses. He noted that, most of the time, attorneys send a list of names and addresses rather than the documents containing that information which could be privileged. Mr. Bachofner observed that an attorney can comply by sending the letter if he or she chooses but that, if the attorney feels the

letter contains privileged information, he or she can simply state: "There is a reservation."

Judge Miller remarked that the existing rule requires the disclosure of all insurance agreements or policies, but that those documents have no utility whatsoever if the attorney does not disclose that the policy or agreement does not apply. Mr. Buckle noted that a plaintiff's attorney would be able to perform a coverage analysis based on the facts and reach his or her own conclusions, which may or may not be the same ones as the insurance company. He stated that the rule change encourages settlement, which is good, but was concerned about technical matters. He observed that there are three elements to any case: liability, damages, and how the damages will be paid. Mr. Buckle noted that liability and damages are in the legal arena of the lawsuit, but that how the damages will be paid or if they can be paid is not part of the structure of the lawsuit, even though it is important. He stated that whether there is a denial of coverage or reservation of rights affects settlement but not the actual lawsuit. Judge Miller stated that the whole idea behind requiring disclosure of the existence and contents of an insurance policy, which was adopted long ago, was to encourage people to be realistic about whether there will be that third part, payment, after the case is over. Mr. Buckle asked whether he can respond to a request by saying "there is a denial letter, and the provisions that were relied on for the denial are paragraph 8, section 4, in the policy." Judge Miller stated that, if an attorney did not want to disclose, for example, that the insurance company based a denial on an intentional act, an attorney could apply to a judge to keep that privileged.

Mr. Brian noted that the Council has three options: 1) leave the rule in its current state; 2) craft an amendment stating that the letter should be produced (which would remove the concern about interrogatories); or 3) move forward on the compromise of the amendment which is currently before the Council. He stated that he does not like the idea of interrogatories and would prefer not to go down that path, but that he understands that, as a plaintiff's lawyer, there are times that he will not get to see the denial letter even though he may want to. He stated that he believes that the amendment before the Council is a good compromise. He observed that the amendment would require an attorney to point to the policy language on which the insurance company relied, which would allow opposing counsel to determine the reason for the denial without production of the letter. Mr. Brian stated that there can be legitimate reasons on the defense side not to produce the letter, so the compromise is an appropriate mechanism to alert the plaintiff's side that there is a coverage issue and the basis of the coverage issue.

Justice Kistler asked how the term "provision" is defined, since some insurance policies stick to the definition of occurrence. He stated that, when the rule says to identify the provision in the policy on which the denial is based, one could refer to the definition of what is covered, which would refer to occurrence, and would not refer to the definition of occurrence which might mean acts that are "neither intended nor expected." He expressed concern that litigation might arise over the definition of "provision." He noted that "clause" is narrower than "provision," and that a provision can have multiple clauses. He wondered whether there was consensus among the Council about how specific a party would need to be when identifying the "provision." Mr. Cooper observed that would be the rationale behind requiring production of the letter itself, but that this is a compromise which allows an attorney to state the specific article, even if it is an article which is 75 pages long and provides no information to the plaintiff's lawyer and requires him or her to hunt for the reason. He stated that he does not know how much litigation might result, or how many motions to compel might be filed as is done in requests for admission because the response is deemed insufficient. Justice Kistler stated that he wanted to get a sense of what people understand the word "provision" to mean and whether a party would need to identify the specific clause rather than the general provision, which could encompass a host of different grounds for a reservation or denial. Mr. Cooper stated that when an attorney is exercising his or her duty to defend the insurance company's insured, he or she will do what is in that client's best interest, which may include careful crafting which is obfuscatory, and that this is appropriate exercise of one's duty as a lawyer.

Mr. Buckle pointed out that there will be a denial or reservation of rights letter that has been issued for this to apply, and that this letter should refer specifically to the exclusionary provisions upon which the insurance company specifically relied, but that the insurance company reserves the right to rely on anything else too. He wondered whether he could include all of the exclusions in the provision, not just the ones in the letter. Justice Kistler stated that some people regard "neither intended nor expected" as an aspect of coverage, rather than as a specific exclusion, because there was no occurrence. He asked whether, in one's answer, one could respond that there was no coverage under a particular section which then incorporates the definition of occurrence, since that definition would incorporate things that are neither intended nor expected. Mr. Buckle stated that, if the insurance company deemed the event not to be an occurrence, he would respond with the provision under which the definition of occurrence is included. Judge Miller noted that the answer would likely state that there was no occurrence.

Mr. Corson stated that this has not come up often in his practice and asked what others' experience has been. Judge Rees stated that the issue arises frequently in business and construction, where there may be many reservations of rights. Judge Herndon observed that, when there is a coverage issue in a settlement conference, it is never a surprise to the other side because discussions have been taking place. He stated that it is better to know earlier in order to allow for settlement and that he believes that the proposed amendment is a good one. Mr. Bachofner noted that, even if a specific clause is not identified, the other side will be put on notice that the issue exists. He stated that disclosure is a common practice now but that the change will make it clear that the plaintiff is entitled to be put on notice if the plaintiff asks for the information. Judge Rees suggested that the word "provision" should be changed to "provisions" in the proposed amendment.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 36

Judge Herndon moved to publish the proposed amendment to ORCP 36, with Judge Rees' suggested amendment. Judge Miller seconded the motion and it passed unanimously by voice vote.

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

Mr. Corson noted that the proposal for this amendment came from the Oregon Law Commission (OLC) and the National Conference of Commissioners on Uniform State Laws. He stated that the OLC had created several drafts and forwarded its final draft to the Council. Mr. Corson stated that the committee had also refined the amendment and had gone through nine drafts before finally crafting the latest draft amendment (Appendix E), which incorporates the most recent feedback from Council members.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 38

Mr. Corson moved to publish the proposed amendment to ORCP 38. Judge Holland seconded the motion.

DISCUSSION ON THE MOTION:

Mr. Brian asked what specific problems the amendment addresses. Mr. Corson stated that using letters rogatory or commissions to get a subpoena in an out-of-state case is an antiquated method, and that the amendment makes the issuance of a subpoena for a deposition a function of the clerk

as opposed to a function of the judge. Prof. Peterson observed that this makes litigation less expensive and faster. Mr. Cooper stated that this will allow judges to spend less time on ministerial acts.

After discussion, a vote was taken on Mr. Corson's motion, which passed unanimously by voice vote.

3. Rule 54 Issues Committee (Ms. Leonard)

Rule 9

Ms. Leonard stated that the primary focus of the committee's suggested amendment of ORCP 9 (Appendix F) is related to the ORCP 54E offer of compromise. She stated that the proposed change to ORCP 9 makes it clear that offers of compromise should not be filed with the court except when they are accepted.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 9

Mr. Corson made a motion to publish the amendment to ORCP 9. Judge Miller seconded the motion, which passed unanimously by voice vote.

Rule 54

Ms. Leonard discussed the proposed amendments to ORCP 54 (Appendix G), which deal with technical changes, primarily timing on the offer of compromise. She noted that the change to ORCP 54 A(1) requires the parties to submit a form of judgment, because the court does not draft judgments. Ms. Leonard stated that the committee had changed the time to make an offer in ORCP 54E from 10 to 14 days, and recalled that some Council members wanted to increase it even more. She noted that the committee proposed to increase the time for a response to an offer of compromise from 3 to 5 days. Ms. Leonard wondered whether the "notwithstanding Rule 9" language in the amendment was still necessary. Prof. Peterson observed that the amendment to ORCP 9 should fix this problem. Prof. Peterson stated that another issue the committee looked at in ORCP 54 A(1) was the ability to dismiss individual claims. He noted that the committee thought this was too cumbersome, but that the committee agreed that parties could be dismissed, and that this change is included in the draft before the Council.

b. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 54

Ms. Leonard moved to publish the amendment to ORCP 54, with deletion of the “notwithstanding Rule 9" language. Mr. Cooper seconded the motion.

DISCUSSION ON THE MOTION:

Mr. Corson pointed out that, with regard to drafting the judgment in section A, sometimes parties will not cooperate. Ms. Leonard stated that the intention was to make clear that one or the other party needs to submit a form of judgment, not that they need to agree. Mr. Corson suggested modifying the language in ORCP 54 A(1) to require “submission of a form of judgment” rather than “the parties shall submit a form of judgment.” He alternately suggested replacing “the parties” with “a party.” Mr. Bachofner observed that, pursuant to UTCR 5.100, any party can submit a proposed judgment within three to seven days after providing the other party with a copy of the judgment and, if it is a voluntary dismissal, there would likely be cooperation from the other side. Mr. Corson stated that the idea is to make it clear that someone has to do something in order for a judgment to be entered. Judge Miller observed that, if the voice is too passive, it will not be clear that one of the parties must submit the judgment. Judge Rees agreed with Mr. Corson’s "a party" language so that it cannot be misconstrued that both parties are required to agree. Prof. Peterson suggested “any party” or “a party.” Mr. Buckle also agreed with "a party.” Judge Miller noted that the party that is most motivated will likely be the one to submit the form of judgment. The Council agreed that "a party" was a good change.

Mr. Brian stated that he believes that 14 days is too short a time period, since it is too close to the trial date, and thinks it should be changed to 28 days. He noted that, from the court's standpoint, the further from the trial date that an offer is accepted, the more quickly the court system removes that case from its docket and can move on to other cases. Mr. Brian also remarked that, from a plaintiff's standpoint, costs start escalating the closer one gets to trial, so settlement further away from the trial date saves plaintiffs money and preparation time. He observed that actually getting the case settled is not necessarily the problem, but that it takes time to deal with reimbursement claims and negotiating with those who may be entitled to some portion of the judgment. He stated that getting all of those parties to agree takes time and that five days is insufficient. Mr. Bachofner stated that the committee looked at that issue a number of

times, and that his analysis is that the change will have the greatest impact on smaller cases with fewer costs. He suggested that the overwhelming majority of attorneys have a lot of cases and that, right or wrong, they may not have looked carefully at the next case that is coming up until very shortly before the trial. He stated that, if the time is changed to 28 days, the impact of the upcoming trial is not there. He remarked that the attorney may not have talked to witnesses yet and may miss the opportunity to settle because the plaintiff would be liable for costs if the defendant beats the offer.

Mr. Bachofner pointed out that nothing in the rule prohibits lawyers from making offers to allow judgment early on but that, if you put the date too far out, a lot of people will be prejudiced. He stated that he believes that the compromise between the two views is to increase the time somewhat, but not excessively.

Mr. Weaver stated that the rule states that one can make an offer for the sum or the property, and wondered whether it would apply in FED (eviction) cases or smaller cases. Judge Miller stated that residential FED cases have such a short statutory timeline that it could not apply. Mr. Weaver asked whether, if we moved it to 35 days and it could apply in other cases where property is at issue, might we be shortening the timeline so that those people could not use the rule at all. Prof. Peterson stated that he assumed that the rule referred to property in claim and delivery cases.

Mr. Buckle observed that the reality is that busy lawyers start looking at the file late in the game, and that the Council should not craft an amendment to reward procrastination. He stated that he agrees with the five and 14 day changes. Ms. David noted that five days is effectively seven days, and asked whether the time should be changed to seven days now in anticipation of the possible change of all ORCP time increments to multiples of seven. Mr. Bachofner stated that the committee had considered this and found a unique situation in which a seven day rule could actually give less time than a five day rule if there is a three-day weekend involved. Mr. Buckle stated that documents must be filed on a court work day and that the response would be due seven days from that date, so it would never fall on a weekend. Prof. Peterson pointed out that an offer of judgment is not filed with the court. Judge Holland stated that there is currently a pilot project in certain counties that attempts to expedite civil trials and that, while it is a benefit to settle cases as quickly as possible, there is a large number of smaller cases that would be affected negatively by expanding the time and requiring settlement 35 days beforehand, especially when the courts are trying to move trials up as

quickly as possible, which changes discovery rules as well. She stated that she felt it should be left five days.

Prof. Peterson stated that, with expert witnesses, it may be too late if one waits until 14 days before trial, and that an attorney may have to spend that money and not get it back. Judge Miller noted that the committee had discussed that concern at great length, and that this is a hazard that the defense will suffer if they make their offer of compromise too late, but she would imagine that good practitioners will be having settlement discussions earlier in the game, be aware that an expert witness needs to know whether the trial will happen by a certain date, and be committed to pay, say $5,000, after that date. Judge Miller stated that her court holds settlement conferences about a month in advance of trial, and agrees with Mr. Brian that the earlier a settlement offer is made the better, because she sees a lot of plaintiffs that get so far into the hole cost-wise that they cannot afford to settle.

Ms. David recommended staying with five days for the moment, because it would be easy to change it to seven if the multiples-of-seven change is made next biennium. Mr. Buckle observed that seven days would be more advantageous to the plaintiff's side and that, if the Council intends to change to a multiples-of-seven system, it may as well make the change now. Prof. Peterson pointed out that five days sounds shorter, but that it is not necessarily shorter.

Mr. Brian made a motion to amend the proposal to change the number of days from five to 14 and from ten to 28. No Council member seconded the motion. Mr. Buckle moved to amend five days to seven days. Mr. Corson seconded the motion. The motion passed by voice vote with one dissenting vote.

Prof. Peterson pointed out for the record that another change included is amendment of ORCP 54 A(1) to allow for the dismissal of parties. A motion was made to publish the amendments to ORCP 54 with the changes outlined above. The motion was seconded and the motion passed unanimously by voice vote.

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

Ms. David noted that the committee had considered a number of different draft changes to several rules regarding electronically stored information (ESI), and that the committee addressed the fact that Oregon is one of the only states in the nation that currently has no rules in this regard. She stated that, ultimately, the committee decided to adopt the “less is better”

philosophy and amended only ORCP 43 (Appendix H). Ms. David pointed out that the committee spent a lot of time on the new Rule 43 E section, and that there was a lot of discussion on what "ordinarily maintained" and "reasonably useful" mean. She stated that the committee felt that it cannot provide for every type of example, and wanted to emphasize that, when there is a dispute, the parties need to confer and to go to the court if necessary. She stated that ESI will likely not be an issue in run-of- the-mill cases, but that it can be a significant issue in large business litigation.

Ms. David pointed out that the committee had previously provided the Council with a memo outlining all of the things the committee took into consideration in drafting the rule change. She noted that she has had about twenty requests in the last month asking for the committee's latest draft. Prof. Peterson observed that the impetus of the change were reports that some courts had ruled that ESI was not something that could be discovered under rule 43. He stated that the goal was to make it clear that ESI is a "document" that can be discovered. Mr. Buckle asked whether the committee had received feedback on how ESI is working now and whether there are a lot of disputes. Ms. David replied that she received one hundred thirty-six responses to the two drafts that were published on the website. She stated that the responses came from a wide spectrum of practitioners, some who think that there is no need for a change, and some who think that detailed rules about conferral are necessary. She pointed out that the memo to the Council gives guidance about the committee's intent. Ms. David noted that one overriding theme in the comments she received is that Oregon does not need to follow the federal rules, since attorneys here can just pick up the telephone and confer.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 43

Ms. David made a motion to publish the amendment to ORCP 43. Judge Armstrong seconded the motion, which passed unanimously by voice vote.

5. Default Judgment Committee (Ms. David)

Rule 69

Ms. David stated that the proposed changes to ORCP 69 (Appendix I) stemmed from a Council survey last biennium which asked circuit courts, among other things, whether court clerks were issuing default judgments. She noted that the survey results showed that clerks are no longer doing this. Ms. David explained that, during this review of ORCP 69, the committee decided to attempt to update and streamline the rule, since

different attorneys submit orders and judgments of default differently, and many miss the step of preparing an order of default. She stated that the committee decided to re-order the entire rule to provide a step-by-step procedure for attorneys to follow, and to make it easy for judicial assistants to read through the rule and check off that each of the elements has been met.

Ms. David stated that the committee is open to additional discussion, but that its intention was to lay out the rule in an orderly fashion so that a practitioner who does not apply for a default judgment often will have an easier time with the process. Mr. Buckle asked whether, under the amended rule, one can file a motion for an order of default and motion for judgment by default and schedule the *prima facie* hearing at the same time. Ms. David stated that one can. Mr. Corson stated that he does not read the rule that way as proposed. Ms. David stated that someone could go to *ex parte* and present a motion for an order of default with affidavit, with a proposed order, get the order signed, and then submit the motion for judgment by default. She stated that one could prepare all of the documents in one's office at the same time, but that of course the motion for an order of default has to be submitted before the motion for judgment. Mr. Corson observed that it cannot be done in one step, because an attorney cannot declare in an affidavit that the order of default has been obtained unless it has already been obtained. Mr. Cooper stated that one can take a signed declaration and not file it if one does not get the order. Judge Miller stated that her court does not get a separate affidavit with the general judgment, but a motion, affidavit, order of default, and general judgment. Mr. Corson stated that, as he reads the rule, this is not allowed.

Ms. David stated that the moving party must show that an order of default has been granted, and what the committee envisioned is similar to the language currently being used. She noted that the current practice is for an attorney to say "we are submitting the judgment at the same time as the motion and order for default, we have met all the requisites, and we believe it will be entered." She observed that the rule could possibly be more clear, but that another procedure would be that an attorney would send in the motion for default, wait and get the order signed, and then send in the rest. Ms. David pointed out that some attorneys do not obtain a separate order of default but, rather, they just go straight for a default judgment. Mr. Buckle stated that the issue concerns him because there is a different standard for setting aside a default order from setting aside a judgment by default. Judge Holland said there is definitely a different standard. Mr. Buckle stated that, as a defaulted defendant, he would like the opportunity to set aside a default order rather than a default judgment.

He observed that, if it is allowed to all be done at the same time, and he does not see why it could not be since it says "order granted" rather than "default order entered," it would be nice to have a gap. Judge Miller observed that, in Mr. Buckle's practice, there would be a gap because the court has to conduct a *prima facie* hearing. Mr. Buckle asked whether he could set up a *prima facie* hearing with Judge Miller's court at the same time. Judge Miller stated that these hearings are only set after a default order has been entered in the record, and that they cannot get them on the docket that fast.

Ms. David stated that the committee contemplated a spectrum where some cases might be simple and everything could get done at one appearance, and others would require a multi-step process. Mr. Buckle stated that the amendment is not eliminating anything in the current system. Judge Miller stated that it does not seem like there is any good reason not to enter a general judgment on a liquidated sum where the party has not appeared, and that these are done simultaneously. She noted that setting aside a judgment may be more difficult, but that it theoretically always comes down to whether a person had adequate notice or a reasonable excuse. Mr. Bachofner stated that he agrees with Mr. Corson's concerns that the draft of ORCP 69 D(1)(a) requires the affidavit to say that an order of default has been granted, and that it is not appropriate to fill it out beforehand. He proposed starting subsection D(1) with the language: "After a default order has been granted" and eliminating paragraph D(1)(a). Ms. David stated that having the declaration required when the judgment is sought is intended to deal with the relief sought, the amount, and whether costs and attorney fees are available. Judge Miller stated that her experience is that attorneys put it in the same affidavit that is used for the default order. Ms. David noted that this is why the committee wanted to separate it. She suggested leaving proposed Rule 69 D(1)(a) as it is, but adding: "has been granted or has been applied for herein." She observed that there is no need to generate more attorney fees and that, if everything is put together and sent, attorney fees are cut off. Mr. Bachofner stated that eliminating the language in paragraph D(1)(a) of the proposal and moving the language to subsection D(1) accomplishes this.

Mr. Cooper stated that he believes that the moving party needs to show in the "judgment packet" that the order has been granted, perhaps by including a copy of the order with the clerk's entered stamp or a declaration stating that the judge signed the order at *ex parte*. He noted that there have been cases where a judgment had not been docketed into OJIN although it was signed two weeks prior. Mr. Cooper pointed out that, if he wants to get a default judgment as fast as possible, it is his burden to

show that the order has been signed. Mr. Cooper stated that he likes seeing that requirement in the rule. Judge Armstrong stated that he sees no problem in preparing a declaration, not signing it before *ex parte*, then signing it when the first step has been completed, and handing the judge the rest of the documents. He observed that there is no impediment to doing everything at the same time. He stated that he does not believe that the language in subsection D(1) imposes a problem that lawyers cannot perfectly and ably address. Mr. Bachofner asked about what would happen if a different lawyer than the one who prepared the declaration is presenting it at *ex parte*. Judge Armstrong stated that anyone can sign a declaration.

Prof. Peterson stated that Mr. Corson has a good point and that he likes Mr. Bachofner's suggestion. He suggested the language: "An order of default has been granted or has been contemporaneously submitted to the court." Judge Miller stated that she likes this language, since the practice is to submit all of the documents contemporaneously. Judge Armstrong suggested "will be contemporaneously submitted." Judge Miller agreed. Mr. Bachofner suggested that, instead of stating what has been done, attaching a copy of an order of default that has been granted or submitted contemporaneously. Judge Rees stated that he feels that the way the amendment is written deals with all of the issues that have been raised. He noted that it does not say a party has to show by affidavit, only that the party must show it. Judge Rees explained that, if an attorney presents an order of default and a judgment by default simultaneously, the judge is signing both and the judge can take judicial notice that he or she has just signed the order. He acknowledged that an attorney can present an affidavit that is ready to sign, but stated that things can be proven in more ways than just by an affidavit. He wondered whether these concerns were creating more confusion than necessary.

Prof. Peterson agreed that Judge Rees made an excellent point for simple cases where the order of default and judgment are sought at the same time, that the court could take judicial notice, and that the language in the proposed amendment allows for that. Ms. David noted that the point of the revisions is to help the practitioner who does not ask for a default very often. She suggested amending paragraph D(1)(a) of the proposal to state that an order of default has been granted or is being contemporaneously submitted. She noted that it would let these practitioners know it can be placed in the declaration, and the court can take judicial notice and sign the judgment. Mr. Buckle asked whether a record would be needed if there is an appeal. Judge Miller stated that if she were to overlook a judgment and sign the order, the judgment would come back to her. She noted that she is troubled by requiring two affidavits or declarations

because it creates more work in small cases. Judge Rees asked if one affidavit would be sufficient. Prof. Peterson stated that one affidavit or declaration can be used to support both motions. Ms. David pointed out that the rule does not state that two separate declarations or affidavits are required, and that in simple cases one could reference the same declaration that would cover all of the issues. Mr. Buckle suggested voting to publish the amendment in its current form and seeing what comments are received. Mr. Corson agreed that this is a good idea.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 69

Mr. Bachofner moved to adopt Prof. Peterson's suggested language, with Judge Armstrong's change of the word "is" to "will be." Mr. Cooper seconded the motion. Judge Hodson asked whether this would mean that an order of default is not legally required. Judge Rees suggested leaving the language in its current form. Judge Miller worried that changing the language would make the rule less clear. Mr. Bachofner's motion failed by voice vote. Justice Kistler moved to vote to publish the amendment in its current form. Judge Miller seconded the motion and it passed unanimously via voice vote.

Rule 71

Ms. David stated that Judge Zennaché had worked on the changes to ORCP 71 (Appendix J). She noted that the only change is to eliminate the distinction between extrinsic and intrinsic fraud.

b. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 71

Ms. David made a motion to publish the amendment to ORCP 71. Judge Miller seconded the motion, which passed unanimously by voice vote.

6. ORCP 21 (Prof. Peterson)

Prof. Peterson explained that the only change to ORCP 21 (Appendix K) was to remove reference to subsection B(3) of ORCP 54. Mr. Corson stated that these words at the end of the section 21 A are superfluous and unnecessary.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 21

Judge Rees made a motion to publish the amendment to ORCP 21. Judge Herndon seconded the motion, which passed unanimously by voice vote.

B. Communication with Legislators (Ms. David)

Ms. David suggested sending a brief e-mail update to legislators now, then reassigning Council members once the outcome of the election is known. Mr. Corson proposed waiting until after the election to send any updates, since there is no point in sending updates to legislators who may be out of office next session. The Council agreed to wait until after the election to take any action.

VI. New Business (Mr. Buckle)

A. The Oregon Supreme Court's opinion in *English v. Multnomah County*, SC S057387 (June 17, 2010) (Ms. David)

Ms. David stated that she merely wanted to put this case (Appendix L), which deals with claim preclusion v. issue preclusion, on the Council's radar for consideration next biennium. Ms. Nilsson agreed to put it on next biennium's agenda.

B. New Proposal for Amendment of ORCP 1 (Mr. Cooper)

Mr. Cooper discussed this proposal received from Sean Currie at Greene and Markley (Appendix M). He stated that the proposal makes a good point about the discord between ORCP 1 E and 83 A, whether declarations are based on "knowledge and belief" or "knowledge, information, and belief." He noted that there may be other places in the ORCP that specify what a declarant must say and that it may be worth looking into. He proposed placing this on the agenda for next session. Ms. Nilsson agreed to place this item on the agenda for next biennium.

VII. Next Meeting Date/Place (Mr. Cooper)

Mr. Cooper noted that, traditionally, the Council holds no meetings in October or November of even-numbered years. He stated that the next meeting is scheduled for December 11, 2010, at 9:30 a.m. at the Oregon State Bar. Mr. Cooper emphasized the importance of this meeting, as the Council will be voting on which rules to promulgate and a quorum is needed, so Mr. Cooper asked if members are not available in person that they attend by telephone. Prof. Peterson stated that, if the Council needs to rethink any of its published amendments after considering

comments from the bar and bench, this work can be done by e-mail and by telephone contact.

VIII. Adjournment

Mr. Buckle adjourned the meeting at 11:28 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 9/1/10 - 11/12/10

I. Inquires

A. ORCP Amendment Path through the Legislature

An attorney sent a question to the Council via Laura Orr of the Washington County Law Library. The question was in regard to the legislature's process once the Council has promulgated its amendments. The attorney wanted to know whether the Legislature holds hearings and votes, and if those hearings are recorded.

We sent an e-mail with the following explanation: The Council submits the promulgated rules or amendments to the leadership of the Legislature (senate president, speaker, and chair and ranking minority member of the house and senate judiciary committees) at the beginning of the session. The Legislature can schedule hearings on any promulgation or not. Unless the Legislature affirmatively votes to amend any promulgation, or to reject it, the amendments become effective the following January 1. Of all of the statutes in the 16 volumes of ORS, the ORCP are the only "laws" that become effective without an affirmative vote of both the house and senate and the signature of the governor (or an override of his or her veto).

B. Material regarding amendment to ORCP 21 in 1982 and relationship between ORCP 21, 23, and 25

An attorney in Ontario with no access to a law library with Council materials asked about the materials relating to the 1982 amendment to ORCP 21 and the relationship between ORCP 21, 23, and 25. Since the materials from that biennium are not yet available on the Council's website, as a starting point we e-mailed the attorney some pages from the book *Oregon Rules of Civil Procedure: 1986 Handbook* which contained the Council's "staff comments" about the rule change to which he was referring. The attorney thanked us and we have not heard from him with other questions.

C. Effective date of changes to ORCP 69 A(1)

An attorney asked for information about the effective date of amendments to ORCP 69 A(1) that were promulgated in December of 2008. He was having a disagreement with opposing counsel who believed that written notice of intent to take default in the form required by UTCR 2.010 was required in December of 2009. We replied that the amendment to ORCP 69 A(1) was promulgated on December 13, 2008, and took effect on January 1, 2010, and that, until that date, the prior version of ORCP 69 A was the effective rule.

D. Miscellaneous Inquires

We continue to receive the occasional letter requesting legal assistance (often from inmates) and reply with the Council's standard letter stating that it does not provide legal services and referring the writer to the Lawyer Referral Service.

II. Comments to Published Amendments

We have received only two comments to the amendments published on September 11, 2010. Those comments are included in the meeting packet for this meeting and will be discussed during the meeting.

III. Website Statistics

Attached are analytical reports detailing visits made to the Council's website. The site had 365 visits from 262 unique visitors, and 1,041 page views in this period. These numbers are comparable with the last website report, which was for approximately the same period of time.

III. Website Improvements

We are continuing to scan materials and upload them to the website, biennium by biennium.

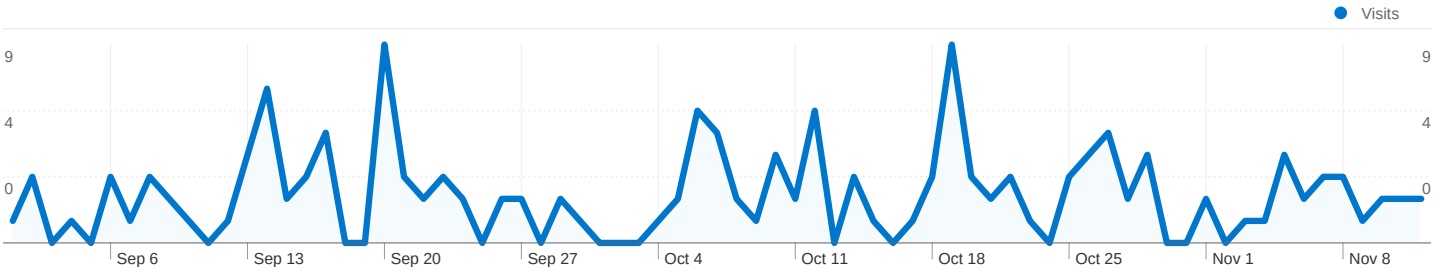
Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

www.lclark.edu/~ccp

Keywords

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



Search sent 159 total visits via 71 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
159	3.31	00:03:11	64.15%	40.25%
% of Site Total: 43.56%	Site Avg: 2.85 (15.99%)	Site Avg: 00:02:40 (19.42%)	Site Avg: 59.73% (7.41%)	Site Avg: 46.58% (-13.58%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	38	4.50	00:02:33	47.37%	13.16%
council on court procedures	25	4.96	00:05:12	36.00%	8.00%
oregon council court procedures	9	6.22	00:13:00	44.44%	0.00%
council on court procedures oregon	7	4.14	00:04:24	71.43%	0.00%
court procedure	5	1.00	00:00:00	100.00%	100.00%
"council on court procedures" oregon	3	2.33	00:02:56	33.33%	33.33%
council court procedures	2	2.50	00:00:08	50.00%	50.00%
court procedures	2	1.00	00:00:00	100.00%	100.00%
orcp	2	6.50	00:19:34	50.00%	0.00%
orcp 22	2	1.00	00:00:00	100.00%	100.00%

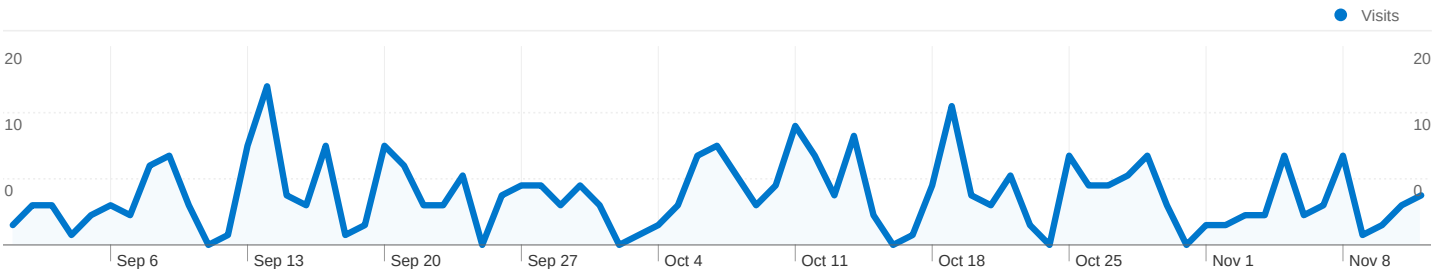
1 - 10 of 71

www.lclark.edu/~ccp

Dashboard

Sep 1, 2010 - Nov 12, 2010

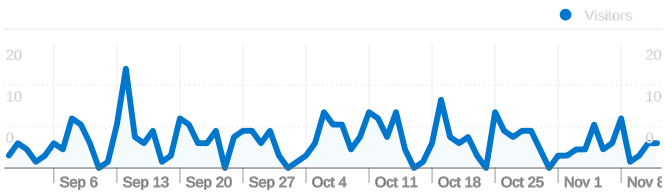
Comparing to: Site



Site Usage

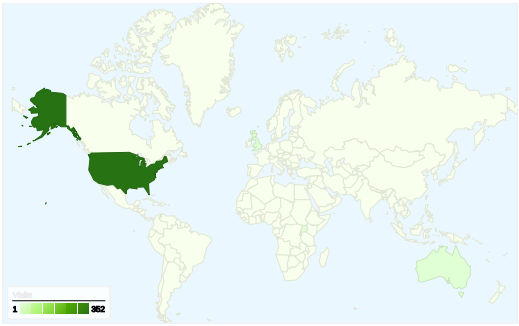
365 Visits	46.58% Bounce Rate
1,041 Pageviews	00:02:40 Avg. Time on Site
2.85 Pages/Visit	59.73% % New Visits

Visitors Overview



Visitors
262

Map Overlay



Traffic Sources Overview

- Search Engines
  159.00 (43.56%)
- Direct Traffic
  138.00 (37.81%)
- Referring Sites
  68.00 (18.63%)

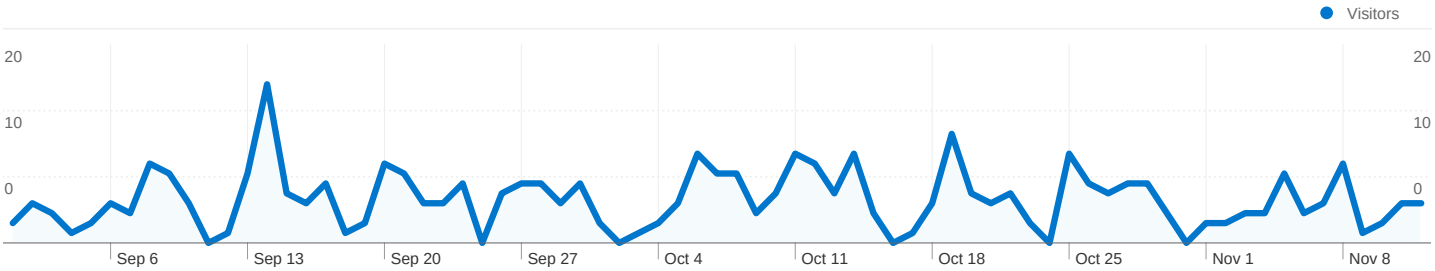
Content Overview

Pages	Pageviews	% Pageviews
/~ccp/index.htm	364	34.97%
/~ccp/Past_Biennia.htm	172	16.52%
/~ccp/Current_Biennium.htm	128	12.30%
/~ccp/LegislativeHistoryofRules	124	11.91%
/~ccp/resources.htm	57	5.48%

www.lclark.edu/~ccp

Visitors Overview

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



262 people visited this site

365 Visits

262 Absolute Unique Visitors

1,041 Pageviews

2.85 Average Pageviews

00:02:40 Time on Site

46.58% Bounce Rate

59.73% New Visits

Technical Profile

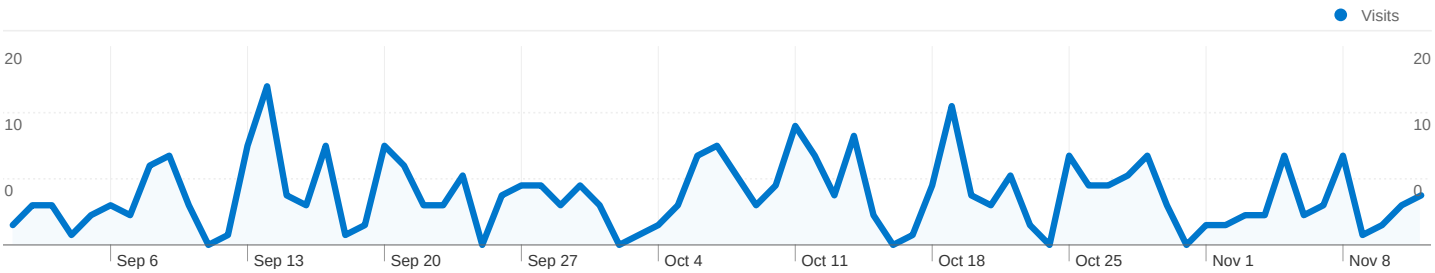
Browser	Visits	% visits
Internet Explorer	230	63.01%
Firefox	87	23.84%
Safari	26	7.12%
Chrome	18	4.93%
Mozilla Compatible Agent	2	0.55%

Connection Speed	Visits	% visits
Cable	108	29.59%
T1	103	28.22%
Unknown	92	25.21%
DSL	49	13.42%
Dialup	10	2.74%

www.lclark.edu/~ccp

Traffic Sources Overview

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



All traffic sources sent a total of 365 visits

37.81% Direct Traffic

18.63% Referring Sites

43.56% Search Engines

- Search Engines: 159.00 (43.56%)
- Direct Traffic: 138.00 (37.81%)
- Referring Sites: 68.00 (18.63%)

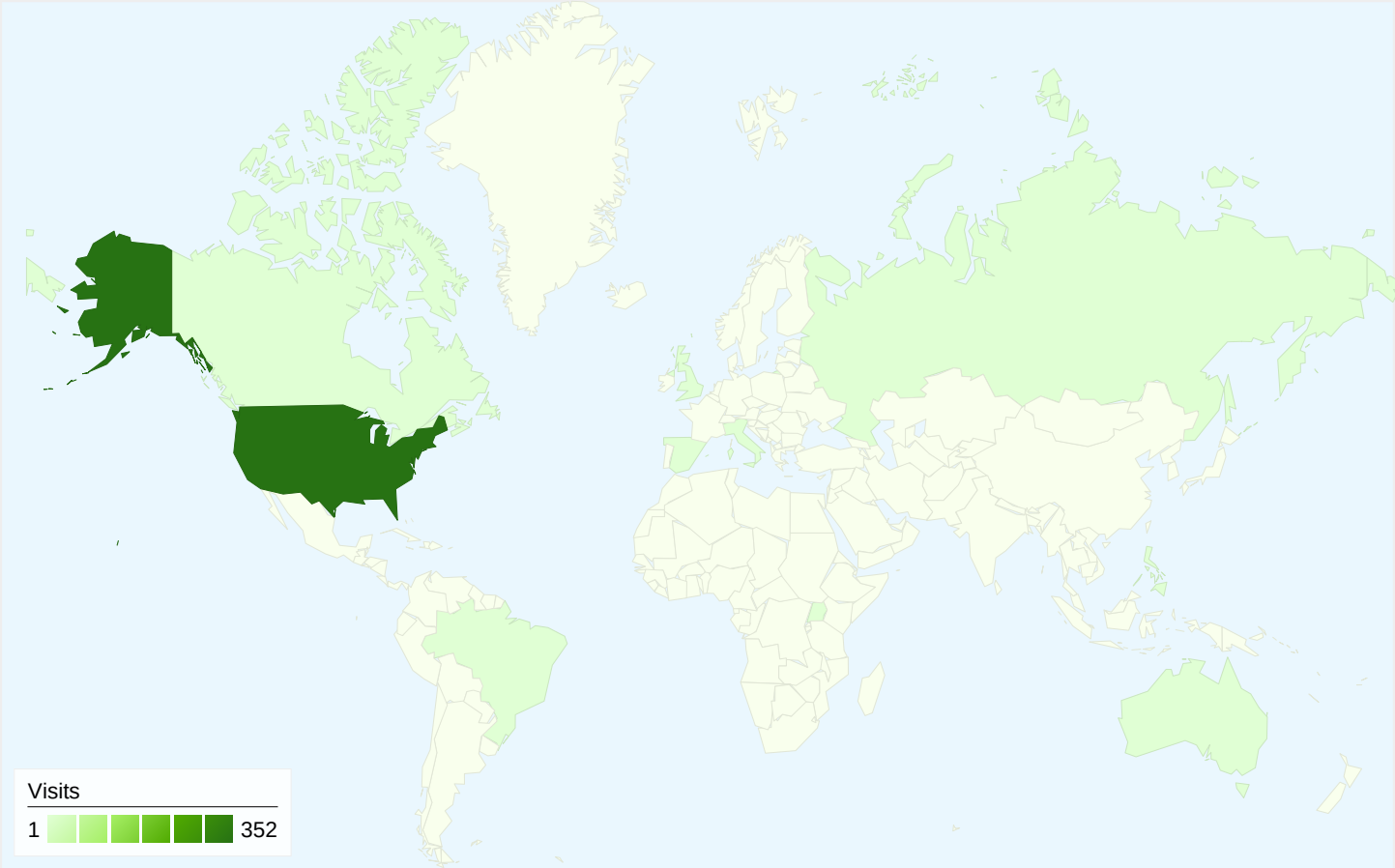
Top Traffic Sources

Sources	Visits	% visits
google (organic)	141	38.63%
(direct) ((none))	138	37.81%
courts.oregon.gov (referral)	36	9.86%
bing (organic)	10	2.74%
councilonccourtprocedures.org	7	1.92%

Keywords	Visits	% visits
oregon council on court	38	23.90%
council on court procedures	25	15.72%
oregon council court	9	5.66%
council on court procedures	7	4.40%
court procedure	5	3.14%

Map Overlay

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



365 visits came from 11 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
365	2.85	00:02:40	59.73%	46.58%
% of Site Total: 100.00%	Site Avg: 2.85 (0.00%)	Site Avg: 00:02:40 (0.00%)	Site Avg: 59.73% (0.00%)	Site Avg: 46.58% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	352	2.91	00:02:45	59.09%	45.17%
Hong Kong	2	1.00	00:00:00	100.00%	100.00%
Australia	2	1.00	00:00:00	100.00%	100.00%
United Kingdom	2	1.00	00:00:00	100.00%	100.00%
Russia	1	1.00	00:00:00	100.00%	100.00%
Canada	1	2.00	00:00:00	0.00%	0.00%
Uganda	1	1.00	00:00:00	0.00%	100.00%
Brazil	1	2.00	00:00:00	0.00%	0.00%
Spain	1	1.00	00:00:00	100.00%	100.00%

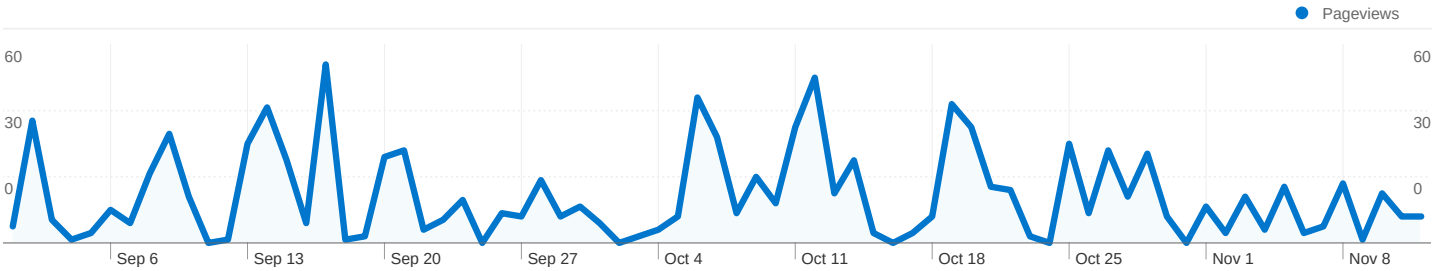
Philippines	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 10 of 11

www.lclark.edu/~ccp

Content Overview

Sep 1, 2010 - Nov 12, 2010

Comparing to: Site



Pages on this site were viewed a total of 1,041 times

1,041 Pageviews

725 Unique Views

46.58% Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	364	34.97%
/~ccp/Past_Biennia.htm	172	16.52%
/~ccp/Current_Biennium.htm	128	12.30%
/~ccp/LegislativeHistoryofRules.htm	124	11.91%
/~ccp/resources.htm	57	5.48%

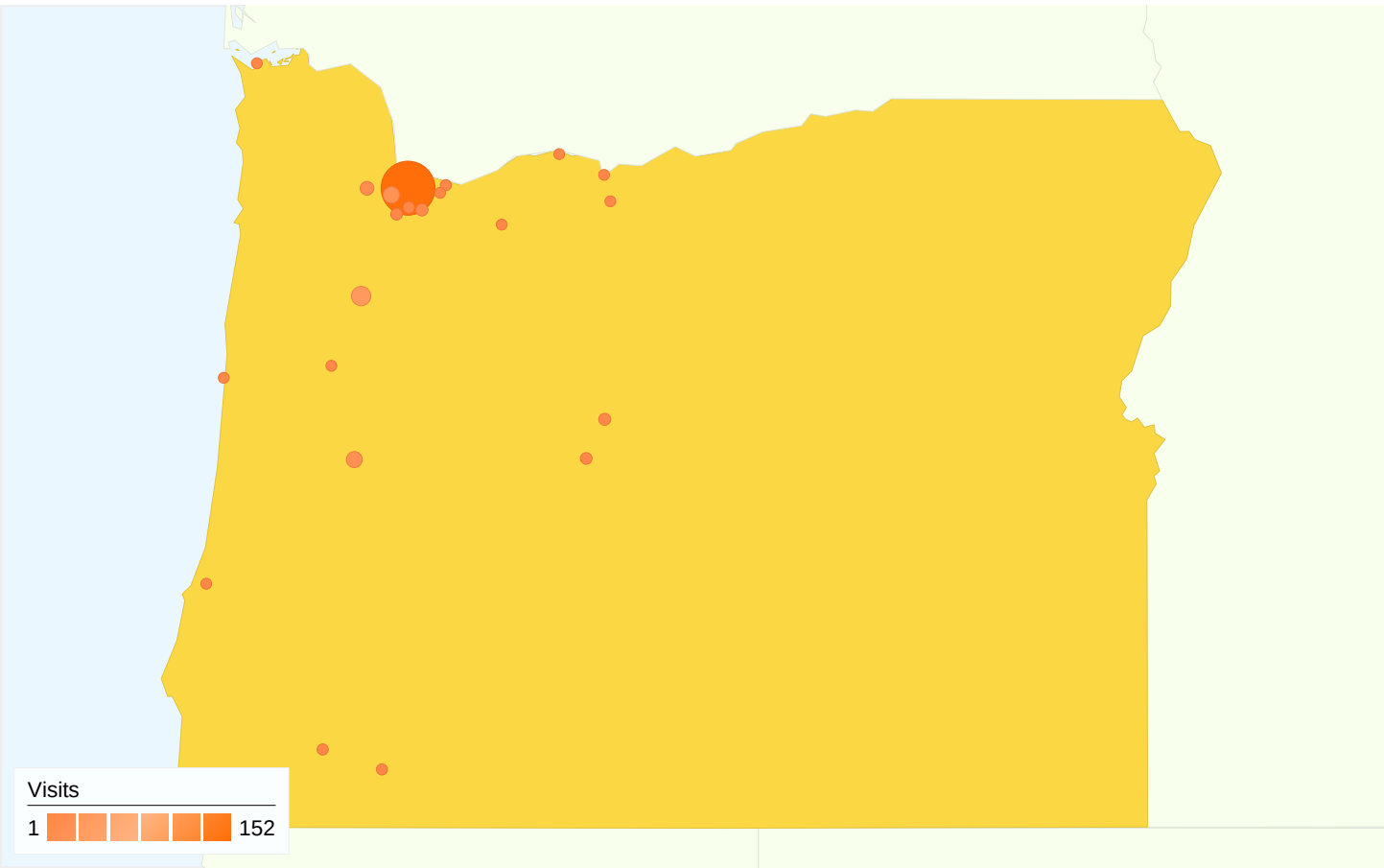
www.lclark.edu/~ccp

State Detail:

Oregon

Sep 1, 2010 - Nov 12, 2010

Comparing to: Site



This state sent 272 visits via 22 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
272 % of Site Total: 74.11%	3.17 Site Avg: 2.85 (11.19%)	00:02:59 Site Avg: 00:02:39 (12.57%)	54.41% Site Avg: 59.67% (-8.82%)	41.54% Site Avg: 46.59% (-10.84%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	152	3.23	00:03:09	46.71%	40.79%
Salem	31	3.65	00:03:25	48.39%	35.48%
Beaverton	21	2.52	00:01:20	52.38%	52.38%
Eugene	19	3.00	00:01:55	84.21%	36.84%
Hillsboro	11	4.27	00:10:45	63.64%	27.27%
Clackamas	6	2.33	00:01:20	33.33%	16.67%
Redmond	5	2.20	00:00:33	60.00%	60.00%
Bend	4	3.75	00:01:50	75.00%	25.00%
Lake Oswego	4	2.75	00:00:28	75.00%	50.00%

Tualatin	**4**	2.25	00:00:53	100.00%	50.00%
Troutdale	**2**	1.50	00:00:02	50.00%	50.00%
Grants Pass	**2**	1.00	00:00:00	100.00%	100.00%
Medford	**2**	9.50	00:02:56	100.00%	50.00%
Hood River	**1**	1.00	00:00:00	100.00%	100.00%
Dufur	**1**	1.00	00:00:00	100.00%	100.00%
Gresham	**1**	2.00	00:11:09	100.00%	0.00%
Corvallis	**1**	5.00	00:02:00	100.00%	0.00%
Welches	**1**	4.00	00:02:52	100.00%	0.00%
Astoria	**1**	1.00	00:00:00	0.00%	100.00%
The Dalles	**1**	1.00	00:00:00	100.00%	100.00%
Coos Bay	**1**	1.00	00:00:00	100.00%	100.00%
Seal Rock	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 22 of 22

PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail, by e-mail, or through the form available on the Council's website:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Administrative Assistant

Council on Court Procedures
310 SW 4th Avenue, Suite 1018
Portland, OR 97204
ccp@lclark.edu
www.counciloncourtprocedures.org

or by mail to:

Eugene Buckle
Chair, Council on Court Procedures
Cosgrave, Vergeer & Kester
805 SW Broadway, 8th Floor
Portland, OR 97205

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 11, 2010 — Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 11, 2010, meeting.

PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

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 54 E shall not be filed with the court except as provided in Rule 54 E(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.

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*].

* * * * *

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 provisions in any insurance agreement or policy upon which such 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.

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

RULE 38

A Within Oregon.

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

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

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

the United States under these rules.

C Foreign depositions and subpoenas.

[*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 ~~S~~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.

~~###~~

C(2)(c) A subpoena under this subsection ~~(2)~~ shall:

(i) conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule ~~55A~~55 A but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; 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 ~~S~~subpoena. A subpoena issued by a clerk of court under subsection (2) of this rule shall be served in compliance with ~~ORCP~~Rule 55.

C(4) Effects of ~~R~~request for ~~S~~subpoena. A request for issuance of a subpoena under this rule does not constitute an appearance in the court. A request does allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) Motions. 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 ~~A~~application and ~~C~~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.

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

RULE 43

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 ~~there- on~~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 ~~S~~stored ~~I~~information.

A request for electronically stored information may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party may produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

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, **a party 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.

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. The 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*] **seven** 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.

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 motions and affidavits or declarations 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 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 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 applying for 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~~(~~, or any shortened period of time ordered by the court~~)~~, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or 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; and

C(1)(e) whether the party against whom the order is sought 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.

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

~~(~~C~~)~~(2)(a) is 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, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27;

~~(~~C~~)~~(2)(b) is a person in the military service, an order of default may be entered against the party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears the motion and affidavit or declaration have 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. Specifically, the moving party must show:

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

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

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be 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);

E(2) whether 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; and

E(3) if the identity of the defendant's insurance carrier is known, 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. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.

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.

Subject: Comment on ORCP 54 proposed changes
From: DeFever Nicole <nicole.defever@doj.state.or.us>
Date: Wed, 13 Oct 2010 13:55:36 -0700
To: ccp@lclark.edu

Dear Council,

The text of the analogous federal rule, FRCP 68, was amended to say the number of days "prior to the date set for trial" instead of prior to trial. See 12 Fed. Prac. & Proc. section 3004 (2d Ed.) This prevents the following scenario: the offer is served late; served party ignores it because it will have no impact on the attorney fee issue; trial is reset; now offering party uses this against other party when attorney fees and costs are considered. Adding the "date set" language is a reasonable clarification of the rule which prevents an unfair situation if the trial date is reset. Further, it appears that the proposed changes in ORCP 54 from 10 to 14 days mirrors the federal changes in FRAP 68 back in 2009, so it makes sense to consider incorporating this federal clarification as well.

I hope this comment is helpful.

Sincerely,

Nicole

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. The 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.

J. Nicole DeFever, Assistant Attorney General
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United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Amendments received to 7-15-2010.

END OF DOCUMENT

Subject: ORCP Comment
From: Gil <Gil@feiblemancase.com>
Date: Mon, 08 Nov 2010 14:39:13 -0800
To: ccp@lclark.edu
CC: rlipetzky@qwestoffice.net

Website not working so I am sending this email.
I have a comment and suggestion on the amendments

Re: changes to ORCP 69B

I am concerned that we have to “serve” the petition but then have to “serve” the notice of intent to take a default which seems a wrongheaded expense.
We already “served the pleading”.
We don’t have to “serve” the motion for default, so why “serve” the notice?
One “service” is enough.

We should say the notice of intent to take default should be by mail (certified or not).

Other than that, good job.

Gilbert B. Feibleman
Complex Asset, Custody and Support Cases
Fellow - International Academy of Matrimonial Lawyers
Fellow - American Academy of Matrimonial Lawyers

1815 Commercial St. SE
Salem, Oregon 97302
503.399.9218 (phone)
503.589.0159 (fax)

Subject: Comments to published draft of ORCP 69 amendments
From: Mark Peterson <mpeterso@lclark.edu>
Date: Wed, 24 Nov 2010 18:26:31 -0800
To: Gil@feiblemancase.com, Shari Nilsson <nilsson@lclark.edu>, cocp-list@lclark.edu

Gill Feibleman,

Thank you for your comment of November 8, 2010, regarding the published amendments to ORCP 69. As you noted, the amendment is intended to reorganize Rule 69 and to make it more user friendly in terms of identifying the requirements of obtaining a default and making it easier for court staff to check off whether those requirements have been met. It also makes clear that obtaining the order of default and the judgment by default are two separate steps, although in many cases they may be accomplished concurrently.

Your concern is what you read as a second notice requirement, serving the notice of intent to take default. The service of the notice of intent to take default in Rule 69 B(2) must be served in the Rule 9 sense, not the Rule 7 sense. This is current practice, which was formalized in the last biennium's amendment to ORCP 69 A. The non movant is already subject to the jurisdiction of the court (or else the order of default will not be granted). Note that Rule 69 B(2)'s requirement of serving the notice of intent to take default applies when the non movant has filed an entry of appearance with the court, and would be served as provided in Rule 9, as well as to non movants who have only given written notice of an intent to file an entry of appearance.

Does this response satisfy your concern? Please respond to me rather than "reply all" and I will make certain that Council members are apprised of any continuing concerns that you have.

Mark Peterson

--
Mark A. Peterson

Clinical Professor
Lewis and Clark Legal Clinic

Executive Director
Council on Court Procedures

503-768-6500

Submit via E-Mail | Print Form

Oregon Council on Court Procedures

Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date: November 24, 2010

Name: Sheila H. Potter

Firm (if applicable):

E-Mail: sheila,potter@doj.state.or.us

Phone: 971-673-5026

Proposed amendment(s) for which you are making comments

ORCP 43 E

Please provide your comments in this space

The proposed change provides that, "A request for electronically stored information may specify the form in which the information is to be produced by the responding party...," which seems to suggest that the requesting party gets to dictate the format that the responding party has to use. I wonder whether the rule should give a little more flexibility on that point, since the producing party may not be in a position to produce the data in precisely the requester's preferred format.

I'd rather see something more like: "The party requesting electronically stored information may ask for the information to be produced in a specific format. If no such specification is made, the responding party may produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form." Then, if a dispute arises over the format, the court clearly has the power to order the production in either the requester's or the producer's preferred format, depending on which is more reasonable under the specific circumstances in that case.

Thank you!

DEFAULT ORDERS AND JUDGMENTS

RULE 69

D Motion for judgment by default.

D(1) After an order of default has been granted, a party ~~must~~ may seek a judgment by default by filing a motion, supported by affidavit or declaration. Specifically, the moving party must show:

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

D(1)(~~b~~a) ~~the~~ what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(~~c~~b) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be 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.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for contemporaneously;

D(1)(b) ~~the~~ what relief is sought, including any amounts due as claimed in the pleadings;

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

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Submit via E-Mail | Print Form

Oregon Council on Court Procedures

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Date: November 24, 2010

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Firm (if applicable):

E-Mail: sheila,potter@doj.state.or.us

Phone: 971-673-5026

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Thank you!

Subject: Comment on ORCP 54 proposed changes
From: DeFever Nicole <nicole.defever@doj.state.or.us>
Date: Wed, 13 Oct 2010 13:55:36 -0700
To: ccp@lclark.edu

Dear Council,

The text of the analogous federal rule, FRCP 68, was amended to say the number of days "prior to the date set for trial" instead of prior to trial. See 12 Fed. Prac. & Proc. section 3004 (2d Ed.) This prevents the following scenario: the offer is served late; served party ignores it because it will have no impact on the attorney fee issue; trial is reset; now offering party uses this against other party when attorney fees and costs are considered. Adding the "date set" language is a reasonable clarification of the rule which prevents an unfair situation if the trial date is reset. Further, it appears that the proposed changes in ORCP 54 from 10 to 14 days mirrors the federal changes in FRAP 68 back in 2009, so it makes sense to consider incorporating this federal clarification as well.

I hope this comment is helpful.

Sincerely,

Nicole

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. The 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.

J. Nicole DeFever, Assistant Attorney General
Oregon Department of Justice, Trial Division
Commercial, Condemnation & Environmental Law Section
1515 SW Fifth Ave., Ste 410, Portland, Oregon 97201
Tel (971) 673-1880 Fax (971) 673-5000

addressed to you in error, please immediately alert the sender by reply e-mail or notify us by telephone at 503-947-4700 and then delete this message and any attachments. If you are not the intended recipient, you are notified that any use, dissemination, distribution, copying, or storage of this message or any attachment is strictly prohibited.

*****CONFIDENTIALITY NOTICE*****

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

****

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COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at such time and place fixed by the Chair after any appropriate consultation with the Executive Committee. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of such meeting shall be given personally by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a period of one year at the first meeting of the Council following September 1 of each year. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the

absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as maybe assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Committees. The Chair may appoint such committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. Such committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee selected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. The Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. The LAC, after a request by a legislative committee, has presented any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be

rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the Council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the Legislative Committee that such member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of required notice of meetings of the Council; preparation and disbursement of Council agenda; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the Office of Legislative Counsel and/or the Oregon State Bar and shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept in such office under the supervision of

the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed amendments, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, together with explanatory comment, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repleas, the Executive Director will publish or distribute notification of the change to all

members of the bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this _____ day of _____, 2009.

_____

Chair, Council on Court Procedures

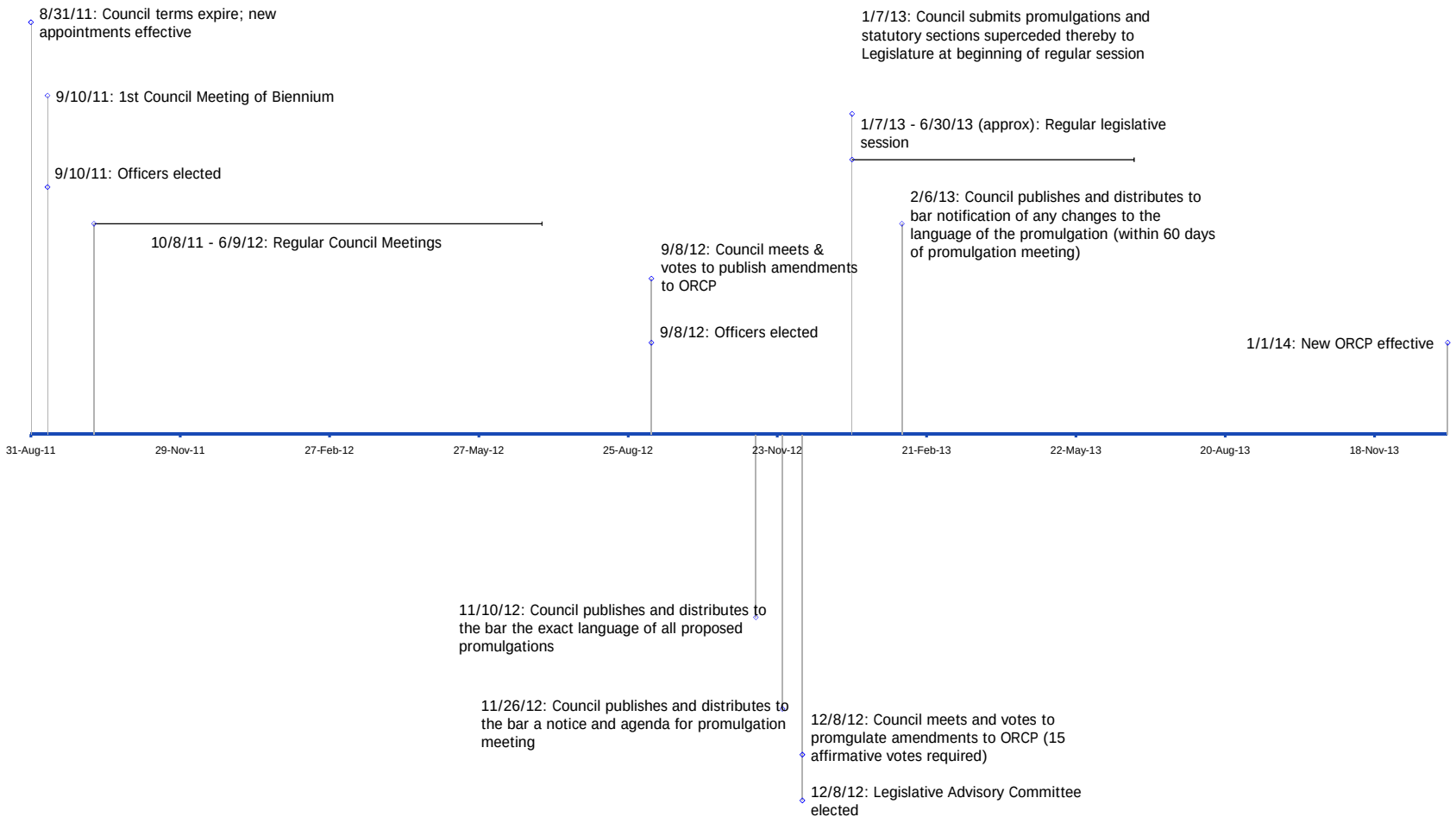
_____

Vice Chair, Council on Court Procedures

_____

Treasurer, Council on Court Procedures

Council on Court Procedures: 2011-2013 Biennium Timeline (dates approximate)



2010 AMENDMENTS

TO THE

OREGON RULES OF CIVIL PROCEDURE

promulgated by the

COUNCIL ON COURT PROCEDURES

including additional amendments
by the 76th Oregon Legislative Assembly

all amendments effective January 1, 2012
except amendments to ORCP 7 effective June 17, 2011

Council on Court Procedures
September 10, 2011, Meeting
Appendix E-1

COUNCIL ON COURT PROCEDURES

Judge Members

- Hon. Rives Kistler, Justice, Oregon Supreme Court, Salem
- Hon. Rex Armstrong, Judge, Oregon Court of Appeals, Salem
- Hon. Robert D. Herndon, Circuit Court Judge, Clackamas Co.
- Hon. Jerry B. Hodson, Circuit Court Judge, Multnomah Co.
- Hon. Lauren S. Holland, Circuit Court Judge, Lane Co.
- Hon. Mary Mertens James, Circuit Court Judge, Marion Co.
- Hon. Eve L. Miller, Circuit Court Judge, Clackamas Co.
- Hon. David F. Rees, Circuit Court Judge, Multnomah Co.
- Hon. Locke A. Williams, Circuit Court Judge, Benton Co.
- Hon. Charles Zennaché, Circuit Court Judge, Lane Co.

Attorney Members

- John A. Bachnofer, Attorney at Law, Vancouver WA
- Michael Brian, Attorney at Law, Medford
- Eugene H. Buckle, Attorney at Law, Portland (Chair)
- Brian Campf, Attorney at Law, Portland
- Brooks F. Cooper, Attorney at Law, Portland (Vice Chair)
- Don Corson, Attorney at Law, Eugene
- Kristen S. David, Attorney at Law, Oregon City
- Jennifer Gates, Attorney at Law, Portland
- Martin E. Hansen, Attorney at Law, Bend
- Maureen Leonard, Attorney at Law, Portland
- Leslie O'Leary, Attorney at Law, Portland
- Mark R. Weaver, Attorney at Law, Medford

Public Member

- Arwen Bird

Staff

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

1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, OR 97204-2305

Telephone: (503) 768-6500
FAX: (503) 768-6540
E-Mail: mpeterso@lclark.edu
nilsson@lclark.edu

INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure include amendments which have been promulgated by the Council on Court Procedures for submission to the 76th Legislative Assembly. Pursuant to ORS 1.735, these amendments will become effective January 1, 2012. The amended rules are set out with both the current and amended language. New language is shown in boldface with underlining, and language to be deleted is italicized and bracketed.

The 76th Legislative Assembly also made amendments to the Rules. The Legislative Assembly's new language is shown in boldface (without underlining) and language to be deleted is bracketed (without italicizing). The amendments to ORCP 7 were passed by the Legislative Assembly and include an emergency clause. The Legislative Assembly's amendments to ORCP 7 became effective on June 17, 2011.

2010 AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

*Amended by Legislative Assembly

SUMMONS

RULE 7

* * * * *

C(1) Contents. The summons shall contain:

C(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) Subscription; post office address. A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C(3) Notice to party served.

C(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

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 document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may [call] **contact** the Oregon State Bar's Lawyer Referral Service [at] **online at www.oregonstatebar.org or by calling** (503) 684-3763 **(in the Portland metropolitan area)** or toll-free **elsewhere** in Oregon at (800) 452-7636.

C(3)(b) Service for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may [call] **contact** the Oregon State Bar's Lawyer Referral Service [at] **online at www.oregonstatebar.org or by calling** (503) 684-3763 **(in the Portland metropolitan area)** or toll-free **elsewhere** in Oregon at (800) 452-7636.

C(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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* * * * *

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 54 E shall not be filed with the court except as provided in Rule 54 E(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.

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*].

* * * * *

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 provisions in any insurance agreement or policy upon which such 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.

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

RULE 38

A Within Oregon.

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

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

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

depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

[*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.

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

(i) conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55 A but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; 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 Rule 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 allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) Motions. 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.

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

RULE 43

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.

A request for electronically stored information may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

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, **a party 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.

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. The 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*] **seven** 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.

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 motions and affidavits or declarations in compliance with this rule**.

A(2) 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 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 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 applying for 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, or any shortened period of time ordered by the court, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or 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; and

C(1)(e) whether the party against whom the order is sought 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.

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

C(2)(a) is 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, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27;

C(2)(b) is a person in the military service, an order of default may be entered against the party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears the motion and affidavit or declaration have been filed in good faith and good cause is shown that entry of such an order is proper.

[*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.]

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for

contemporaneously;

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

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be 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.

[*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);

E(2) whether 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; and

E(3) if the identity of the defendant's insurance carrier is known, 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. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.

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.

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Proposal for Amendment to Oregon Rules of Civil Procedure

Date:	July 29, 2010
Name:	Sean C. Currie
Firm:	Greene & Markley, P.C.
Address:	1515 SW 5th Avenue, Suite 600
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Phone:	(503) 295-2668

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

ORCP 1 E appears to ignore requirements of some declarations required under the ORCPs, particularly ORCP 83 A.

A declaration under ORCP 1 E requires that a declarant state: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." Meanwhile, ORCP 83 A requires that any declaration for provisional process requires a declarant to make a declaration to the best of the declarant's "knowledge, INFORMATION, and belief."

Thus, perhaps ORCP 1 E should reflect the additional requirements of declarations under ORCP 83 A.

FILED: June 17, 2010

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE ex rel DOROTHY ENGLISH,
Deceased,
by and through DOUGLAS JAMES SELLERS,
Personal Representative of the
Estate of Dorothy English, Deceased,

Respondent on Review,

v.

MULTNOMAH COUNTY,
a public corporation incorporated in the State of Oregon;
CAROL FORD,
in her capacity as Director of the Department of County Management for Multnomah County;
and MINDY HARRIS,
in her capacity as Finance Officer for Multnomah County,

Petitioners on Review.

(CC 070708042; CA A137217; SC S057387)

On review from the Court of Appeals.*

Argued and submitted January 6, 2010.

Stephen L. Madkour, Assistant County Attorney, Office of Multnomah County Attorney, Portland, argued the cause and filed the brief for petitioner on review. With him on the brief was Agnes Sowle, County Attorney for Multnomah County.

D. Joe Willis, Schwabe, Williamson & Wyatt, P.C., Portland, argued the cause for respondent on review. With him on the brief were Michael T. Garone and Andrew J. Lee.

Stephanie L. Striffler, Senior Assistant Attorney General, Salem, filed a brief for *amicus curiae* State of Oregon. With her on the brief were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Barton C. Bobbitt, Sisters, and Jeannette L. Moore, The Gilroy Law Firm, PC, Tigard, filed a brief for *amici curiae* Virginia Louise Bleeg, Darrin Black, Roger J. Miracle, Ann M. Miracle, Harold MacLaughlan, and Rebeca MacLaughlan.

Before De Muniz, Chief Justice, and Durham, Balmer, Kistler, and Linder, Justices.**

BALMER, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court with instructions to issue a peremptory writ of mandamus directing the county to pay the judgment for $1,150,000.

*Appeal from Multnomah County Circuit Court, Jerry B. Hodson, Judge. 227 Or App 419, 206 P3d 224 (2009).

**Gillette, J., did not participate in decision of this case. Walters, J., did not participate in the consideration or decision of this case.

BALMER, J.

This mandamus action requires us to determine the effect of a final judgment, containing a "money award," that was entered "pursuant to" Measure 37, a land use statute that applies here but that has now been substantially superseded by later legislation. Dorothy English, an owner of land in Multnomah County, filed a cause of action under Measure 37 against the county, ultimately obtaining a judgment "against [the county] for just compensation pursuant to the provisions of [Measure 37] in the sum of $1,150,000." Although the county initially appealed that judgment, it later dismissed its appeal. English requested payment of the trial court judgment, and, when the county failed to pay the $1,150,000, she sought mandamus to compel payment.(1) The mandamus court dismissed the alternative writ of mandamus, concluding that the trial court judgment was payable only at the county's discretion. English appealed, and the Court of Appeals reversed and remanded with instructions to issue a peremptory writ of mandamus directing the county to pay the judgment for $1,150,000. *State ex rel English v. Multnomah County*, 227 Or App 419, 206 P3d 224 (2009). We allowed the county's petition for review and, for the reasons that follow, now affirm the decision of the Court of Appeals.

I. MEASURE 37

In 2004, the voters approved Ballot Measure 37 (2004), *codified at* ORS 197.352 (2005), *renumbered as* ORS 195.305 (2007) (Measure 37(2)), which authorized awards of "just compensation" to landowners if a government entity enforced land use regulations that reduced the fair market value of the landowners' property. In particular, ORS 197.352(1) provided:

> "If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation."

Certain land use regulations were exempt from the compensation provision, including those "[r]estricting or prohibiting activities for the protection of public health and safety." ORS 197.352(3)(B).(3) The statute authorized a landowner whose property had been affected by a nonexempt regulation to submit a "written demand for compensation * * * to the public entity enacting or enforcing the land use regulation." ORS 197.352(4), (5). If the public entity continued to apply the regulation to the property more than 180 days after the landowner made that written demand, the landowner was permitted to file an action in the circuit court:

> "If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation."

ORS 197.352(6).

Measure 37 also contained a provision that permitted the public entity to waive the relevant land use regulation or land use regulations instead of paying just compensation:

> "Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

ORS 197.352(8). Finally, the statute contained a provision addressing both payment of claims and waiver of regulations:

> "Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section [providing landowner with a cause of action for compensation]. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property."

ORS 197.352(10). The government's option, based on those sections of Measure 37, to pay compensation or to waive applicable land use regulations, is sometimes referred to as "pay or waive."

II. FACTUAL BACKGROUND AND TRIAL COURT PROCEEDING

On December 2, 2004, the day that Measure 37 became effective, English filed a written demand for compensation with Multnomah County in the amount of $1,150,000. She argued that, when she purchased her property in 1953, she lawfully could have used the property by partitioning it to create two separate parcels per year and constructing single-family homes on those parcels. Ultimately, she argued, she could have created at least eight separate parcels. She listed various regulations that were being enforced against her property that she claimed prevented or restricted that originally permissible use. In response, the Board of County Commissioners issued an order (the 2005 order), in which it waived some of the 61 regulations listed in English's written demand. It refused to waive the other listed regulations, asserting that those regulations either were exempt from Measure 37 or did not prevent English from partitioning her land into two parcels per year for a total of eight parcels, the intended use that she had described in her written demand.

English was unsatisfied with the board's order, and, on May 16, 2006, she filed an action for just compensation in the Multnomah County Circuit Court. The complaint alleged that various land use regulations restricted English's intended use of the property -- "partitioning it into two parcels per year and then selling the partitioned parcels for construction of single family homes and appropriate amenities" -- and that, as a result, she was entitled to just compensation "in the amount of $1,150,000 (and probably an even higher figure based on information learned after submitting the written demand for Just Compensation)." The complaint alleged that that figure

"represents the amount equal to the reduction in value of the fair market value of the Property on or about December 2, 2004, resulting from enactment or enforcement of the land use regulations complained of."

Two days after English filed her complaint, the board issued another order (the 2006 order), in which it waived additional regulations. The county then filed an answer to English's complaint, asserting, as an affirmative defense, that it had waived all regulations affecting the proposed development of English's property, except "1) regulations restricting or prohibiting activities for protection of public health and safety, and 2) regulations which provide for the procedure for land divisions and development of real property in Multnomah County." The county explained that health and safety regulations are expressly exempt from Measure 37 and argued that the procedural regulations "are not within the purview of Measure 37 because they do not restrict the use of private real property."

On August 2, 2006, English moved for summary judgment, arguing that she had demonstrated that she was entitled to just compensation as a matter of law in the amount of $1,150,000 and that there was no genuine dispute as to any fact material to her claim. In the alternative, she argued that, if any factual dispute existed as to the amount of compensation due, she was entitled at least to summary judgment "on all liability issues." Again, the county responded that it had waived all nonexempt regulations and that English was therefore not entitled to any compensation. On September 22, 2006, the trial court held a hearing on English's motion for summary judgment. English argued that the waivers in the 2006 order were irrelevant because they came too late. According to English, the county was required to waive the regulations within 180 days of her written demand. Because it had failed to do so, she asserted that the county had an absolute obligation to pay her just compensation and no longer had the option to "pay or waive." In any event, she argued, the 2006 order did not waive all the relevant regulations; specifically, she argued (1) that Measure 37 did not provide the exemption that the county claimed for procedural regulations and (2) that at least some of the regulations that the county had labeled as "health and safety regulations" did not qualify for that exempt status.

The trial court granted English's motion for summary judgment as to liability. The court reasoned that, although health and safety regulations were exempt from Measure 37, the county had refused to waive "quite a few" regulations "that have nothing to do with health and safety." The court also rejected the county's position that various procedural regulations were not within the purview of Measure 37. Because "the County did fail to modify, remove or not apply various land use ordinances, including a land division ordinance[,] in its March 17, 2005 order, or in its May 18, 2006 order," the court granted English's motion for summary judgment "as to liability." However, the court refused to grant summary judgment as to the amount of just compensation, because English had presented no evidence proving the amount of the reduction in her property value that had been caused by the county's continued enforcement of the nonexempt regulations.

After the court entered an order granting English's motion for summary judgment, the county moved to bifurcate trial on the two remaining issues in the case: (1) which regulations were exempt as health and safety regulations under Measure 37 and (2) how much English's property value had been decreased by the continued enforcement of each nonexempt regulation. The court acknowledged that "there's more to the case than just trying the amount of damages," but nonetheless denied the county's motion, reasoning that "liability and damages are commonly combined in one trial."

The court then set a trial date of December 11, 2006, and the parties submitted trial memoranda. However, before trial, the county stipulated that "just compensation for the claim set forth in [English's] Complaint is $1,150,000." As a result, the court never decided which regulations

were exempt as health and safety regulations[(4)] or how much the enforcement of each individual regulation decreased the value of English's property.

The parties then submitted proposed forms of judgment. Each party's proposed judgment stated that English would "have judgment against [the county] for just compensation pursuant to the provisions of ORS 197.352 in the sum of $1,150,000." Each party's proposed judgment also included a separate section labeled "Money Judgment," including information such as the judgment creditor's name and address, the judgment debtor's name and address, and the amount of the award.[(5)] The county's proposed judgment included an additional paragraph, stating that "pursuant to ORS 197[.]352(10)[,] the judgment for $1,150,000 shall be payable only from funds, if any, specifically allocated by [the county] for payment of claims under ORS 197.352." The only other significant difference between the two judgments was that English's proposed judgment included interest in the "Money Judgment" section, and the county's did not.

At the hearing on the form of judgment, the trial court first concluded that English was not entitled to interest. When English offered to "type * * * up" a new judgment that did not include interest, the court noted that the county had submitted a proposed judgment that did not include interest. The court was concerned, however, about the additional paragraph providing that the judgment would be payable only from specifically allocated funds, stating that it "would sign a judgment exactly like this one that was submitted without that paragraph. Because the actual statute has other provisions that allow the County to use its discretion to pay it from other available funds and so forth." The court reasoned, "The law is what it is, and I don't think it's necessary to be included in the general judgment." The county argued that it was important to include the statutory wording regarding the specifically allocated funds so as to limit English's ability to enforce the judgment, but the court stated, "My preference would be to just say that the judgment shall be payable pursuant to [ORS] 197.352(10)."

Several days after the hearing, the court entered a judgment. That judgment was entitled "General Judgment" and provided, in part:

> "Based on the stipulation of the parties as to just compensation,
>
> "IT IS HEREBY ORDERED AND ADJUDGED:
>
> "1. That [English] have judgment against [the county] for just compensation pursuant to the provisions of ORS 197.352 in the sum of $1,150,000.
>
> "2. That [English] have judgment for her reasonable attorney fees, expenses, costs and other disbursements reasonably incurred pursuant to 197.352, ORCP 68 and Supplemental Judgment.
>
> "MONEY JUDGMENT
>
> | | |
> |---|---|
> | "Judgment Creditors:
"* * * * * | Dorothy English |
> | "Judgment Debtors:
"* * * * * | Multnomah County, Oregon |
> | "Amount of Money Judgment: | $1,150,000 |
> | "Pre-Judgment Interest: | None. |
> | "Post-Judgment Interest: | None. |
> | "Attorney Fees, Expenses, Costs, and Other Disbursements: | To Be Determined Pursuant to ORS 197.352, ORCP 68 and Supplemental Judgment" |

The court later entered a corrected judgment, in which it crossed out the word "Judgment" in the section heading "MONEY JUDGMENT" and replaced it with the word "Award," to track the wording of ORS 18.042, which describes the information that must be included in a judgment in order to create a judgment lien.[(6)] The county appealed.

On February 15, 2007, a little over a month after the trial court had entered the trial court judgment, the board issued a third order, in which it waived the procedural rules, provided a process for English to request approval of her new parcels, and listed several regulations that would continue to be enforced as "health and safety" regulations. On that same day, the county moved to dismiss its appeal of the trial court judgment. The Court of Appeals granted the motion, and the appellate judgment issued on February 23, 2007. On May 24, 2007, the board issued a fourth order, in which it waived another "health and safety" regulation and modified the process for English to request approval of her parcels. English maintains that even the fourth order did not waive all necessary regulations.

III. MANDAMUS PROCEEDING

On June 6, 2007, English sent the county a certified copy of the trial court judgment and requested that the county pay the $1,150,000 money award. *See* ORS 30.390 (describing process for obtaining satisfaction of judgment against a public corporation). The county failed to pay, and English initiated this mandamus action. The mandamus court issued an alternative writ of mandamus, directing the county to pay the award or show cause why it had not done so. The county moved to dismiss the alternative writ, arguing that, even after English's claim was reduced to a final judgment, the county retained the discretion to determine whether it would pay the award of just compensation or waive the applicable regulations. The county argued that it had exercised its discretion to waive the applicable regulations, and it therefore was not required to pay the $1,150,000 award. The trial court granted the county's motion, concluding that "a judgment entered pursuant to [Measure 37] is payable only at the discretion of the government[] and that [English] cannot compel the payment of the judgment."

English appealed, arguing that, because the county had dismissed its original appeal and allowed the trial court judgment to become final, it was prohibited from raising any defenses that it may have had under Measure 37 to the judgment requiring it to pay just compensation. The county responded that English's claim was moot in light of the passage of Ballot Measure 49 (2007), Oregon Laws 2007, chapter 424 (Measure 49), which fundamentally altered the claims and remedies that previously had been available to landowners under Measure 37. The county also contended that claim preclusion did not prohibit its defenses to English's attempt to collect the judgment and that, under Measure 37, the county had complete discretion as to whether to pay the judgment.

The Court of Appeals reversed and remanded with instructions to the trial court to issue a peremptory writ of mandamus directing the county to pay the $1,150,000 judgment. The court first concluded that Measure 49 did not deprive final *judgments* that had been issued pursuant to Measure 37 of continuing viability. Thus, because English's Measure 37 claim had been reduced to a final judgment, Measure 49 did not prevent her from seeking enforcement of that judgment. *English*, 227 Or App at 428. Next, the court held that the county was prohibited from raising defenses that it could have raised in the underlying trial court proceeding -- in particular, its defenses (1) that it was not required to pay English just compensation because it had not specifically allocated funds for that purpose; (2) that it was not required to pay just compensation because it had waived all land use regulations that restricted English's intended use of her property; and (3) that, two years after English's cause of action accrued, the land use regulations

were automatically waived under Measure 37, and the county therefore was not required to pay just compensation. *Id.* at 430-33. Finally, the court held that Measure 37 did not make payment of the final, unconditional judgment contingent upon the county's exercise of discretion. *Id.* at 433. The county then filed a petition for review, which we allowed.

IV. ANALYSIS

A. *Effect of Measure 49*

On review, the county first renews its argument that English's claim for just compensation is controlled by Measure 49 and that the judgment that she received pursuant to Measure 37 therefore has no continuing legal effect. In November 2007, more than eight months after English's trial court judgment became final, Oregon voters approved Measure 49, which altered the remedies and procedures that had been available under Measure 37. As we explained in *Corey v. DLCD*, 344 Or 457, 465, 184 P3d 1109 (2008), Measure 49 "extinguish[ed] and replace[d] the benefits and procedures that Measure 37 granted to landowners." Further, "Measure 49 pertains to *all* Measure 37 claims, successful or not, and regardless of where they are in the Measure 37 process." *Id.* (emphasis in original). As a result, the county argues, Measure 49 applies to English's claim, despite the fact that she was successful in obtaining a final judgment against the county pursuant to Measure 37. According to the county, English must pursue her claim under Measure 49, rather than requesting that the court enforce her final judgment by writ of mandamus. In short, the county argues that the passage of Measure 49 renders English's Measure 37 judgment unenforceable.

We disagree. As the Court of Appeals correctly reasoned, when a claim is reduced to a final judgment, the underlying claim is extinguished, "merging" into the judgment; as a result, the "rights upon the judgment are substituted for the former claim." *Barrett and Barrett*, 320 Or 372, 378, 886 P2d 1 (1994). For example, if a trial court incorporates a contract, such as a settlement agreement in a dissolution case, into its final judgment, then the parties' contract claims are extinguished, and the parties' rights to enforce the judgment are substituted for the previously held rights on the contract. *See Webber v. Olsen*, 330 Or 189, 196, 998 P2d 666 (2000) (noting that once settlement agreement is incorporated into judgment, contractual remedies are no longer available); *see also Rigdon v. Rigdon*, 219 Or 271, 276-79, 347 P2d 43 (1959) (concluding that settlement agreement merged with judgment).

That rule applies equally in this context: English's Measure 37 claim was extinguished once her claim was reduced to a final judgment. When the county dismissed its appeal and the Court of Appeals issued the appellate judgment, English's rights under Measure 37 were replaced with her rights -- if any -- under the trial court judgment. The issue in this mandamus proceeding, therefore, is the interpretation and enforceability of English's final judgment against the county in the amount of $1,150,000, not the propriety of her claim under Measure 37. Although, as we discuss below, the proper interpretation of Measure 37 might become relevant in interpreting the trial court judgment, it is the judgment that controls. Our interpretation of the judgment and our determination as to whether that judgment is enforceable are not controlled by Measure 49, as Measure 49 supersedes only those proceedings that are governed by Measure 37. *See Corey*, 344 Or at 466-67 (Measure 49 applies to Measure 37 claims and nullifies "orders disposing of Measure 37 claims"). The Court of Appeals correctly determined that the final judgment in this case was not voided by Measure 49.[(7)]

B. *Claim Preclusion*

Having determined that Measure 49 did not void the trial court judgment, we turn to whether the

county is prohibited by principles of claim preclusion from asserting certain defenses in this mandamus proceeding. We begin with a brief overview of the principles concerning the preclusive effect of a final judgment. As this court noted in *Drews v. EBI Companies*, 310 Or 134, 139, 795 P2d 531 (1990), the overarching principle of preclusion "comprises two doctrines: claim preclusion, also known as *res judicata*, and issue preclusion, also known as collateral estoppel."[(8)] (Footnotes omitted.) Further, the doctrine of claim preclusion can be separated into two concepts: the rule of merger and the rule of bar. *See Restatement (Second) of Judgments* § 17 (1982) (describing merger, bar, and issue preclusion); *see also Ira v. Columbia Food Co. et al*, 226 Or 566, 570, 360 P2d 622 (1961) ("The term *res judicata* is frequently used in a broad sense as including merger, bar, [and issue preclusion].").

Issue preclusion prevents parties from relitigating issues that were actually litigated and determined in a prior action. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103-04, 862 P2d 1293 (1993). *See also Restatement* at § 27 (describing issue preclusion). Claim preclusion is broader than issue preclusion in that it may bar litigation of an issue that could have been raised, even if that issue was not actually raised, in an earlier proceeding. *Drews*, 310 Or at 140. As noted, claim preclusion can be separated into two concepts: the rule of merger and the rule of bar.

We turn first to the rule of merger.[(9)] As discussed above, once a plaintiff obtains a valid, final judgment, the plaintiff's underlying claim merges into the final judgment and is extinguished. For that reason, the plaintiff can no longer maintain an action on the underlying claim. *See Barrett*, 320 Or at 378 (describing principles). The plaintiff may, however, be able to maintain an action to enforce and effectuate the judgment, and, in that action, "the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." *Restatement* at § 18; *see also Security Inv. Co. v. Miller*, 189 Or 246, 251, 218 P2d 966 (1950) (describing merger and conclusive effect of judgment). In other words, when a plaintiff seeks to enforce a valid judgment, the defendant may not collaterally attack the judgment as being erroneously issued.

The second aspect of claim preclusion, known at common law as the rule of bar, is the principle most often described by the term "claim preclusion." That rule prohibits parties from splitting claims by requiring plaintiffs to "bring all claims arising from the same factual transaction or circumstances in a single action." *Peterson v. Temple*, 323 Or 322, 327, 918 P2d 413 (1996). Thus, a plaintiff who has brought an action against a defendant and obtained a final judgment in that action is prohibited from later bringing an action against the same defendant based on the same factual transaction or circumstances.

In past cases, this court has referred to the foregoing concepts collectively as claim preclusion, often without distinguishing between merger and bar. In *Drews*, for example, after describing the rule of bar, the court noted that "[c]laim preclusion applies equally to a defendant's defense."[(10)]> 310 Or at 140. For that proposition, the court cited section 18 of the *Restatement*, the section dealing with the rule of merger. *Id.* It is true, as discussed above, that the rule of *merger* applies to a defendant's defense: a defendant cannot raise defenses in an action to enforce a judgment that he or she did raise or could have raised in the action in which the judgment was entered. However, the statement from *Drews* can create confusion, because, in Oregon, the rule of *bar* does not apply in the same way; instead, under the rule of bar, if, in one action, certain facts create both a defense and a counterclaim, "failure to assert such facts, either as a defense or as a counterclaim, does not preclude [the] defendant from thereafter bringing a separate action based upon those facts." *Buck v. Mueller*, 221 Or 271, 277, 351 P2d 61 (1960).[(11)] That is because, in Oregon, unlike in the federal courts, there are no compulsory

counterclaims. *Compare* FRCP 13(a) (pleading "must state" certain claims as counterclaims) *with* ORCP 22 A (defendant "may set forth" counterclaims). We therefore refer to the rule at issue in this case as the rule of merger, rather than the more generic term of "claim preclusion."

With the foregoing framework in mind, we return to the parties' arguments in this case. English argues that the county is prohibited, by the principles of claim preclusion discussed above, from raising its Measure 37 defenses in this mandamus action and that the county is bound by the trial court's valid, final judgment. Although English uses the more general term "claim preclusion," the substance of her argument is correct, and the county is prohibited, by the rule of merger, from raising any defenses in this mandamus proceeding that it could have raised, or that it raised and lost, in the original trial court proceeding.

The county argues, however, that it is not prohibited from "asserting its defenses to the collectability of the [trial court] judgment based on the plain language of [Measure 37]," because it could not have raised those defenses in the trial court proceeding. The county contends that the only issue in the trial court proceeding was the amount of compensation, not the county's obligation to pay compensation. The county reasons that the sole purpose of the cause of action provision of Measure 37 was to provide a procedure for liquidating Measure 37 claims, after which the governing body (here, the county), could decide whether to pay the liquidated amount or to waive the regulation. In the county's view, the trial court judgment determined only that the value of English's claim was $1,150,000, and not that the county was required to pay that amount. Thus, the county argues, it would have been premature for the county to raise any defense during the trial court proceeding concerning the county's obligation to pay.

We view the county as arguing, at least in part, that the trial court judgment potentially created no remedy at all for English. In other words, the county appears to argue that, after the trial court entered the judgment, the county retained the following options: (1) to pay English $1,150,000, but only if it specifically allocated funds for that purpose as described in ORS 197.352(10); (2) to affirmatively waive all relevant land use regulations; or (3) to do nothing, in which case all relevant regulations would be automatically waived two years after English's cause of action accrued, by operation of ORS 197.352(10). Under the third circumstance, applying the county's reasoning, English would have no remedy under the judgment; instead, her only remedy would be the automatic waiver already contained in Measure 37.

To the extent that the county argues that the trial court judgment creates *no* remedy for English -- and imposes no obligation on the county -- we disagree. As noted, the trial court granted English's motion for summary judgment "as to liability" after determining that the county had continued to enforce nonexempt land use regulations that decreased the value of English's property. Although we agree with the county that the trial court did not necessarily conclude, in granting English's motion for summary judgment, that English was entitled to *payment*, the trial court did conclude that English was entitled to *some* remedy -- either payment or waiver of the land use regulations. Thus, we cannot agree with the county that the judgment determined only the amount of compensation and granted English no remedy at all.

C. *Interpretation of Trial Court Judgment*

We also read the county's brief as raising an additional, slightly more nuanced argument than the one just described -- an argument based on its interpretation of the judgment itself. At times, the county appears to concede that the trial court judgment grants *some* remedy to English; the county nonetheless argues that it retained discretion to elect whether that remedy would be payment or waiver of the regulations. In other words, the trial court judgment, although creating an obligation to pay, *conditioned* that obligation on the county's continued enforcement of the

relevant land use regulations. According to the county, that is so because the judgment expressly provides that it was entered "pursuant to the provisions of [Measure 37]," and Measure 37, in turn, provides the county with the discretion to either pay just compensation or waive the applicable land use regulations. As a result, the county appears to argue, the *judgment* provides the county with the discretion to either pay or waive the regulations.

The county's argument might be plausible if we considered, in isolation, the wording in the judgment that states that it is a judgment against the county "for just compensation *pursuant to the provisions of [Measure 37]*." (Emphasis added.) However, the remainder of the judgment indicates that the trial court intended to enter an unconditional judgment awarding $1,150,000 to English. Initially, we note that the court included a section labeled "money award," which, like other judgments making unconditional awards of money, included information about English, identified as the "judgment creditor," and information about the county, identified as the "judgment debtor." ORS 18.042 requires that any "judgment document for a judgment in a civil action that includes a money award" contain a section, like the one included in the judgment here, that is "clearly labeled as a money award" and that provides certain information about the judgment creditor and judgment debtor. ORS 18.005(14) then defines a "money award" as "a judgment or portion of a judgment that *requires the payment of money*." (Emphasis added.) Thus, by including the section labeled "money award," along with the information required by ORS 18.042, it appears that the trial court intended for the judgment to require the payment of money.

Moreover, the trial court did not indicate -- in the trial court judgment, a letter opinion, or elsewhere -- which regulations the county would be required to waive to avoid paying just compensation. It is likely that, if the trial court had intended the judgment to require either payment of $1,150,000 or waiver of certain land use regulations, the court would have included a list of the land use regulations that the county would need to waive to satisfy the judgment. That is particularly true because it is apparent from the trial court record that the court understood that the parties disagreed as to which regulations were exempt from Measure 37 and which regulations reduced the value of English's property; indeed, that was the focus of the hearing on English's motion for summary judgment. The county's argument appears to assume that the trial court intended for that issue to be resolved in a later proceeding. That is, once the county had waived certain regulations, English would bring *another* action to determine whether she was entitled to recover some or all of the $1,150,000 award contained in the judgment. However, the trial court labeled the judgment a "general judgment," thereby indicating that the document was a "concluding decision of [the] court" and "decide[d] all requests for relief in the action." ORS 18.005(7), (8). As a result, we do not interpret the judgment as leaving open the issue of what was required to satisfy the judgment. Instead, it appears that the court included in the text of the judgment what was required to satisfy it: payment of $1,150,000.

The county argues that, despite the text of the judgment itself, the trial court's statements at the hearing on the form of judgment indicate that the court did not intend to require the payment of money when it entered the trial court judgment.[(12)] As noted, the trial court expressed concern about a paragraph in the county's proposed judgment that provided that the judgment would be payable only from specifically allocated funds, "[b]ecause the actual statute has other provisions that allow the County to use its discretion to pay it from other available funds and so forth." The court added, "The law is what it is, and I don't think it's necessary to be included in the general judgment." When the county urged the court to include the text from Measure 37 in the judgment so as to limit the county's liability, the court responded that its preference "would be to just say that the judgment shall be payable pursuant to [ORS] 197.352(10)."

Admittedly, the trial court's statements at the hearing are not crystal clear. Those statements are open to several interpretations, including that the trial court believed (1) that the judgment would require payment of $1,150,000, (2) that the judgment would require either payment of $1,150,000 or waiver of some or all complained-of land use regulations, or (3) that the court did not need to determine what the judgment would require, because a later court would sort it out. However, the court more clearly explained that it was reluctant to include the county's proposed provision because, notwithstanding the availability of specifically allocated funds, the county could "use its discretion to pay * * * from other available funds." *See* ORS 197.352(10) (so stating). Thus, although some of the court's later statements imply that the court believed that it did not need to determine whether the judgment could be satisfied by a later waiver, the record of the proceedings that resulted in the judgment, taken as a whole, suggests that the trial court intended the judgment to unconditionally require payment. In any event, the trial court judgment itself appears to unconditionally require the payment of money, and the court's statements at the hearing on the form of judgment do not convince us that the court intended otherwise. We do not read the trial court's equivocal statements at a brief, informal hearing to contradict the text of the judgment, which sets out a "money award" like any other judgment requiring the payment of money. We therefore interpret the judgment as a general judgment requiring payment of $1,150,000.

We now turn to an argument by the county that is based on the alleged similarity between the framework of ORS chapter 35, which governs condemnation proceedings, and Measure 37. In brief, the county argues that the condemnation statutes permit a condemner to litigate the amount of compensation that it would be required to pay a property owner and only *then* to decide whether to pay that amount and take the property or, instead, not to take the property; Measure 37, the county asserts, should be construed similarly.

Pursuant to the condemnation statutes, a "condemner" -- an entity with the power to exercise the right of eminent domain -- that wishes to condemn property must seek out the owner of the property and attempt to reach an agreement as to the compensation to be paid for taking the property. *See* ORS 35.215(1) (defining "condemner"); ORS 35.235 (describing agreement). If the condemner cannot locate the owner or cannot agree with the owner as to the amount of compensation, the condemner may commence an action to condemn the property. ORS 35.245(1). The parties then litigate the amount of compensation at trial. *See* ORS 35.305 (describing conduct of trial). As the county correctly points out, it may be difficult for the condemner to decide whether to condemn the property without first liquidating the amount of compensation that it will be required to pay for the property. As a result, the condemnation statutes provide ways for the condemner to elect *not* to take the property, even after the jury renders a verdict determining the property value. For example, a condemner may, within 60 days after a verdict on the compensation amount, elect not to take the property, ORS 35.335(3), and thus avoid paying compensation. And the judgment in a condemnation case is, by statute, a conditional judgment. *See* ORS 35.325 (after jury assesses compensation, court "shall give judgment appropriating the property in question to the condemner, *conditioned upon* the condemner's paying into court the compensation assessed by the jury" (emphasis added)).

The county is correct in pointing out that there are procedures in a condemnation action by which the condemner can avoid paying a compensation amount that already has been determined in a legal proceeding by electing not to take the property. The county may also be correct that similar alternatives might have been available in Measure 37 actions. For instance, the trial court in this case might have entered a judgment that explicitly conditioned the payment of $1,150,000 on the county's continued enforcement of certain land use regulations and thereby given the county the express option to "pay or waive." Alternatively, the trial court might have granted the

county a certain amount of time, before entering the judgment, to consider whether to waive the regulations or pay the compensation amount. Here, however, the court did not. As described above, the trial court instead entered an unconditional judgment awarding English $1,150,000. The county's arguments regarding the benefits of first liquidating the amount of compensation and then allowing the governmental entity to decide whether to pay should have been made before the trial court and on direct appeal of the trial court judgment. They were not. Rather, despite the county's argument that the trial court include a provision in the trial court judgment limiting English's ability to enforce the judgment, the trial court entered a judgment that required the county to pay English a specified amount. The county appealed but, for whatever reason, dismissed its appeal.

In sum, we conclude that the trial court judgment is an unconditional money award, requiring the county to pay English $1,150,000. The county had the opportunity to litigate the form of judgment and to request a judgment that either expressly was conditioned on continued enforcement of the land use regulations or expressly indicated that it determined only the amount of compensation and did not create any obligation or remedy. If the county had wanted to achieve that result in the trial court, its remedy when it did not was to file a direct appeal. English obtained a final, unconditional judgment, including a money award, and the county cannot now collaterally attack that judgment as erroneous. We therefore have no occasion to address the majority of the county's arguments concerning the proper construction of Measure 37.

D. *Validity of Trial Court Judgment*

Having concluded that the trial court judgment unconditionally requires the payment of money, the only remaining issue is whether Measure 37 itself prohibits or voids otherwise final, unconditional judgments. *See* *State v. McDonnell*, 343 Or 557, 562, 176 P3d 1236 (2007) ("[A] *void* judgment is subject to collateral attack, while a *voidable* judgment is subject only to direct attack." (Internal quotation marks omitted; emphasis in original.)). In other words, the county's only remaining argument is that, even if the trial court intended to enter an unconditional judgment requiring the payment of money, because of the framework of Measure 37, it was not permitted to do so, and the trial court judgment is therefore unenforceable.

That argument is not well taken. "[W]hen a trial court has both subject-matter and personal jurisdiction, a judgment issued in excess of the court's authority is voidable, not void." *McDonnell*, 343 Or at 563. Thus, even if the county were correct that the trial court exceeded its authority under Measure 37 by entering a judgment that unconditionally requires the payment of money, the trial court judgment would nonetheless be immune from collateral attack, because such a judgment would be only "voidable." The only issue that the county can raise in this mandamus proceeding is whether the trial court judgment is void, not whether the trial court exceeded its authority under Measure 37 by entering the trial court judgment.

The county correctly notes that certain provisions of Measure 37 indicate that the county (and other governing bodies) has discretion to decide whether to pay claims for just compensation or waive the applicable land use regulations. *See* ORS 197.352(8), (10) (so providing). However, to the extent that the county argues that those provisions also void final judgments that include unconditional money awards, we disagree. The county has pointed to nothing in the text of Measure 37 that would indicate such an intent, and we will not assume that the voters intended to create such an extraordinary result without having it clearly expressed in the measure that they approved.[(13)]

V. CONCLUSION

The Court of Appeals correctly concluded that the county's defenses to enforcement of the trial court judgment are either barred by preclusion principles or lack merit. The trial court judgment is a final, valid judgment that requires that the county pay English $1,150,000. We therefore affirm the decision of the Court of Appeals, reversing the judgment of the mandamus court.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court with instructions to issue a peremptory writ of mandamus directing the county to pay the judgment for $1,150,000.

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1. We refer to the original Measure 37 proceeding as the "trial court proceeding," to the circuit court in that proceeding as the "trial court," and to the judgment entered in that proceeding as the "trial court judgment." We refer to this case as the "mandamus proceeding" and to the circuit court in this case as the "mandamus court." The defendants in the mandamus proceeding include two county officials, acting in their official capacity, as well as the county itself. During the pendency of this proceeding, English died and her personal representative was substituted as the real party in interest. Throughout this opinion, for sake of clarity, we refer to the parties in the trial court proceeding and in the mandamus proceeding as "English" and "the county."

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2. For ease of reference, we refer to the entire statutory scheme of *former* ORS 197.352 as "Measure 37." All citations to the specific provisions of ORS 197.352 are to the 2005 version of the statute.

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3. ORS 197.352(3) provided:

> "Subsection (1) of this section [providing for just compensation] shall not apply to land use regulations:
>
> "(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. * * *;
>
> "(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
>
> "(C) To the extent the land use regulation is required to comply with federal law;
>
> "(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or
>
> "(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first."

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4. English did stipulate that some of the regulations were, in fact, health and safety regulations under Measure 37. However, English and the county continued to disagree as to other regulations.

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5. English's original proposed form of judgment labeled the section "Money Judgment Information To Comply with ORCP 70A(2)(a)." The county noted in its objection to English's proposed form of judgment that ORCP 70 A had been repealed and that the relevant statute was ORS 18.042.

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6. ORCP 70 A used the term "Money Judgment" in describing the section containing the information that must be included in a judgment to create a judgment lien. As noted, that rule had been repealed at the time of entry of judgment. It appears that the use of the term "Money Judgment" was an oversight, carried over from English's original form of judgment.

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7. The county similarly argues that "English's claim for just compensation relies on a now non-existent statutory provision" -- Measure 37 -- and that her claim must fail because "there is no present legal authority for English's claim for compensation." For the reasons discussed above, the "legal authority" for English's claim is the trial court judgment itself, not Measure 37.

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8. Before *Drews*, this court had referred to preclusion principles generally -- including both issue and claim preclusion -- as *res judicata*. We now use "the more exact terms 'claim preclusion' or 'issue preclusion' to denote the respective branches of preclusion by former adjudication." *Drews*, 310 Or at 139.

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9. The rule began as one of common law, but ORS 43.130(2) now codifies it:

"[A] judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity."

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10. Indeed, the Court of Appeals quoted that sentence from *Drews* in its claim preclusion analysis and, throughout its opinion, referred to "claim preclusion" generally, without distinguishing between the concepts of merger and bar. *State ex rel English v. Multnomah*

County, 227 Or App 419, 429-33, 206 P3d 224 (2009). Although we agree that the rule of merger prohibits the county from raising any defenses in this mandamus proceeding that it could have raised in the trial court proceeding, for the reasons discussed in the text, we refer to the relevant rule as the rule of merger rather than by the generic term "claim preclusion," which also describes the rule of bar.

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11. Of course, if the defendant actually raises a counterclaim in the first action, the rule of bar applies as though the defendant was a plaintiff in the first action. Further, the rules of issue preclusion apply so that "a party can not recover in a separate action on a cause of action which he failed to plead in a prior action by way of setoff or counterclaim but which was necessarily adjudicated by the former judgment." *Gwynn v. Wilhelm*, 226 Or 606, 610, 360 P2d 312 (1961).

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12. The county also argues that the trial court's statements indicate that the court intended the judgment to determine the amount of compensation alone, without creating any obligations or remedies. For the reasons discussed above, we reject that argument.

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13. The county also argues that English's death extinguishes her rights under the trial court judgment. We reject that argument without discussion.

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Home

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Proposal for Amendment to Oregon Rules of Civil Procedure

Oregon Council on Court Procedures

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

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

RE: Medical experts

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

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

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

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

CIVIL MOTION PANEL STATEMENT OF CONSENSUS

Current As of November 2, 2004
(Authorities Updated 02/2007)

The Civil Motions Panel of the Circuit Court is a voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the motion panel judges discuss their prior rulings and the differences and similarities in their decisions. When it appears all of the panel members have ruled similarly over time on any particular question, it is announced to the bar as a "consensus" of the members.

The current consensus of the Panel's members are set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

1. ARBITRATION

A. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause (by application to the Presiding Court) why a motion should not be decided by the arbitrator.

B. Punitive Damages - Where the actual damages alleged are less than $50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration.

2. DISCOVERY

A. Medical Examinations (ORCP 44)

1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

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

Re: A Short Survey for the Council on Court Procedures - ORCP 44

Eve MILLER to: Lyle C VELURE 06/04/2010 01:50 PM

Cc: Charles M ZENNACHE, Eugene Buckle, Karsten H RASMUSSEN

Thanks, Lyle:
I will carry your comments to the meeting tomorrow. I suspect the Council will not have enough time to take action this cycle. The survey was a means to get input from all Circuit Judges that are hearing these disputes. As usual, the Council will take an appropriate amount of time to study the feedback before any modification of Rule 44 will be considered.

For what it's worth, I have not heard, even anecdotally, that there is a problem in Lane County.

I will keep you posted on any proposed changes.

Regards.
Eve

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Lyle C VELURE Eve I would concur with Karsten's comments. I... 06/04/2010 11:43:17 AM

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
-----Eve MILLER/CLA/OJD wrote: -----

To: Karsten H RASMUSSEN/LAN/OJD@ojd
From: Eve MILLER/CLA/OJD
Date: 06/03/2010 03:18PM
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 44

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

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Karsten H RASMUSSEN---06/02/2010 09:57:08 AM---Hi Eve: I wanted to take a minute to write you an email on this issue.

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.

Eve MILLER/CLA/OJD

Eve MILLER/CLA/OJD
05/25/2010 02:17 PM

To SCA-Trial Judges
cc
Subject A Short Survey for the Council on Court Procedures - ORCP 44

Colleagues:

As you may know, the Council on Court Procedures is a committee comprised of attorneys, circuit court judges and appellate judges from across the state who promulgate changes to the Oregon Rules of Civil Procedure. The Council has received requests from practitioners to consider amending ORCP 44 to address independent medical examinations (IMEs) in more detail. As you know, ORCP 44 now permits such examinations when the mental or physical condition of a party is at issue in a case. Disputes have

arisen regarding how these examinations should be conducted over such issues as whether the examination should be recorded, who should be permitted to attend the examination and the information that may or may not be disclosed during the examination. Disputes have also arisen regarding whether the examiners should be required to disclose financial information pertaining to these examinations or regarding their overall income in general.

To consider whether a rule revision would be prudent, the Council would like your input regarding the extent to which these disputes are being resolved in your court and we would request that you complete the following survey. There are two links to survey monkey. The survey is the same but the Council is able to get free surveys if the participant group is less than 100 - thus, two links.

Multnomah, Washington and Clackamas County Judges - PLEASE USE THIS LINK:
http://www.surveymonkey.com/s/C2TH7F3

All other judges - PLEASE USE THIS LINK:
http://www.surveymonkey.com/s/CC9L9J7

On behalf of the Council, thank you for your participation.

Eve L. Miller
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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

Click to Submit via E-mail

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."

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

I have emailed this document because the Council's amendment proposal form at http://legacy.lclark.edu/~ccp/Content/Forms/submitproposal.pdf locked up on me and did not allow editing.

The information required at the top of that form is as follows:

Date: July 5, 2011
Name: Paul E. Merrell, J.D.
Firm: Retired Oregon attorney
Address: 1914 North Fifth Street, Apt. 11, Springfield, Oregon 97477
Email: marbux@gmail.com
Phone: 541-744-3950

I. PROPOSED AMENDMENT

I propose amending ORCP 1 E because of its conflict with the ORCP 47 D requirement that:

> supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein.

The proposed amendment is also warranted by the ORCP 1 E affirmation's conflict with the various Oregon Rules of Evidence embodied in ORCP 47 D, including ORE 601-603, 802, and 805.

ORCP 1 E presently provides:

> Use of declaration under penalty of perjury in lieu of affidavit; "declaration" defined. A declaration under penalty of perjury may be used in lieu of any affidavit required or allowed by these rules. A declaration under penalty of perjury may be made without notice to adverse parties, must be signed by the declarant, and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to

> the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." As used in these rules, "declaration" means a declaration under penalty of perjury.

http://www.leg.state.or.us/ors/orcpors.htm (Emphasis added.)

I propose replacing the emphasized portion (hereafter, the "affirmation") with text modeled on that provided by 28 U.S.C. § 1746:

> I declare under penalty of perjury pursuant to the laws of the State of Oregon that the foregoing is true and correct. Executed on (date). (Signature)

See id., http://www.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001746----000-.html,

Alternatively, the affirmation might instead be modeled on ORE 603 3:

> I declare under penalty of perjury pursuant to the laws of the State of Oregon that the foregoing is the truth, the whole truth and nothing but the truth. Executed on (date). (Signature)

See id., http://www.leg.state.or.us/ors/040.html.

And to remove ambiguity, I propose to add a new sentence to the end of Rule 1 E:

> This section applies only to the method of attestation and does not excuse noncompliance with any other rule or law applicable to the content or admissibility of affidavits.

II. POINTS AND AUTHORITIES

While I am supportive of the use of unsworn declarations under penalty of perjury, Rule 1 E as drafted clashes with other rules.

The primary problem with the existing affirmation is the conflict with other rules introduced by inclusion of the vague and ambiguous phrase "to the best of my knowledge and belief" and the preceding language, "may be used in lieu of any affidavit required or allowed by these rules," the latter of which can

be read as conflicting with the additional requirements for affidavits and admissible evidence established by the rules of procedure and evidence.

The existing affirmation applies to the entire foregoing declaration, thus making it a matter of guesswork as to what is: [i] admissible evidence, ORCP 47 D, ORE 402; [ii] personal knowledge, ORCP 47 D, ORE 602; [iii] hearsay, ORE 802; [iv] inadmissible hearsay within hearsay, ORE 805; or [v] competent testimony, ORCP 47 D, ORE 601.

There is a second, more minor problem with Rule 1 E in that it does not require that unsworn declarations include the date of execution. Therefore, I propose that this oversight be corrected in an amended version.

A. FEDERAL COURTS DO NOT ALLOW SUCH AFFIRMATIONS

Before my retirement I encountered in federal court on at least five occasions occasions improperly attested declarations pursuant to 28 U.S.C. § 2746 that affirmed truth "to the best of my knowledge and belief". In each such situation, the court rejected the declarations on grounds similar to that argued below, excerpted from Plaintiff's Motion to Strike Documents Supporting Federal Defendants' Summary Judgment Motion in Van Strum v. Lawn, Civil No. 85-6341-E (D. Oregon, June 1988).

I include this excerpt because it contains citations that may be of assistance in the Council's deliberations. It perhaps bears notice that several of the relevant declarations were changed in substantive and relevant regard when resubmitted with the proper attestation after Judge Burns granted the motion excerpted below. I.e., faced with the requirement to unequivocally state that their declaration was true, several of the declarants were far more careful in their statements.

B. IMPROPERLY ATTESTED AFFIDAVITS

Every affidavit and answer to interrogatories supporting Federal Defendants' motion for summary judgment is improperly attested in the following form:

> Pursuant to 28 U.S.C. sec. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

(Emphasis added.) As further explained below, "knowledge and belief" is no different from "information and belief," a form of attestation uniformly rejected by the courts.

In a bench ruling October 13, 1987, Judge Owen Panner held that declarations attested in this form are insufficient to support a summary judgment motion.[1]

The problem with affidavits executed in such a form is that they fail the "personal knowledge" standard of Rule 56(e). Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1175 (D.C. Cir. 1981) (when statements in affidavits are not based upon personal knowledge, trial court errs in not granting motion to strike); see also Camfield Tires v. Michelin Tire Corp., 719 F.2d 1361, 1367 (8th Cir. 1983) ("a summary judgment motion must be based upon the personal knowledge of the affiant; information and belief is insufficient") (citations omitted).

In fact, Plaintiffs have been unable to find a single published case decision in which "information and belief" affidavits were permitted, despite

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[1] Judge Panner's ruling came in the case of Van Strum v. EPA, Civil No. 87-6031-E (D. Oregon).

objection,[2] to form the basis for summary judgment.

1. THIS CIRCUIT DOES NOT ALLOW DEFICIENT AFFIDAVITS

The Ninth Circuit held, in Wallace v. Chappel, 661 F.2d 729, 737 (9th Cir. 1981), that assertions based solely on information or belief are insufficient to withstand a motion for summary judgment. That holding was based in part upon Automatic Radio Manufacturing Co. v. Hazeltine Research, 329 U.S. 827, 831 (1950), where the Court held that such assertions can not support a motion for summary judgment. See also Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1321 (1981) ("[c]onclusory affidavits that do not affirmatively show personal knowledge of 'specific facts' are insufficient"); Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254-55 (9th Cir. 1982) (affidavits must be based upon personal knowledge before they are entitled to any weight at all); Cermetek v. Butler Avpak, 573 F.2d 1370, 1377 (9th Cir. 1978) (facts alleged upon "understanding," upon "belief," or upon "information and belief" are insufficient).

All of Defendants' affidavits and answers to interrogatories fail this standard of personal knowledge.

2. DEFENSE DOCUMENTS ARE NOT PROPERLY ATTESTED

The form of affirmation used in Defendants' filings purports to rely upon 28 U.S.C. sec. 1746. That statute, however, does not allow unsworn declarations to be attested "to the best of my knowledge and belief." Instead, under the statute's plain language the declaration must "substantially" comply

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[2] Only where the opposing party has not objected to such affidavits may the court consider them. See e.g., Community Savings & Loan Ass'n. v. Federal Home Loan Bank Board, 443 F. Supp. 927 (D. Wis. 1978), vacated on other grounds, 600 F.2d 681.

with the form given by Congress; i.e., the declarant must state that his or her statement unequivocally "is true and correct." Nothing in Section 1746 relieves the declarant from Rule 56(e)'s requirement of personal knowledge.[3]

Because every statement (including obvious opinion and hearsay) in every defense affidavit and answer to interrogatories is ascribed only to "knowledge and belief," the affiants' use of the word "knowledge" can not be interpreted to mean only "personal" knowledge. The form attested ("knowledge and belief") applies equally to all statements made — including those obviously based on hearsay, on opinion, and on mere belief — unless the reader somehow were able to apply different definitions of the same word to different statements in the affidavits. It is thus impossible to distinguish affiants' personal knowledge from their hearsay, their opinion, their mere beliefs, or their other sources of information. For purposes of the affiants' submission to the penalty of perjury, every factual statement is qualified by the phrase, "to the best of my knowledge and belief."

This conclusion is unavoidable because the phrase "knowledge and belief" encompasses far more than "personal knowledge," which is the standard of Rule 56(e).

There are many forms of "knowledge," from "personal" to "constructive" to "hearsay." That "knowledge" and "personal knowledge" are different is evident

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[3] The sparse legislative history of Section 1746 gives no indication that Congress intended to relieve declarants from the Rule 56 requirement of personal knowledge. If anything, that history suggests that Congress intended reasonably strict compliance with the form given in the statute. See attached page from H. Rep. 94-1616, accompanying P.L. 94-549, at 2; reprinted in 1976 U.S. Code Cong. & Admin. News 5644, 5645 ("If the document is executed within the United States, it must be subscribed to as follows {then quoting statutory language]") (emphasis added).

by their joint existence, i.e., if they were the same, the law would not have created both because to do so would have been redundant. The overriding characteristic of "personal knowledge" is that it is based upon personal observation. The more generalized "knowledge" can come from a variety of sources, including hearsay or opinion of others and can even be inferred — correctly or incorrectly — from the existence of different facts.

Because Defendants' affiants base their statements upon "knowledge and belief," therefore, they may be relying upon hearsay or opinion or even basing their facts upon something as amorphous as their individual beliefs. Consequently, it is impossible to determine which of the affiants' statements are based upon personal knowledge and which are based upon impermissible belief, hearsay, or opinion.[4] Because the defense affiants' "knowledge and belief" encompasses both obvious hearsay and other information, their "affidavits" are the hopelessly vague "information and belief" type of statements that invariably have been rejected by the courts.

Sincerely yours,

Paul E. Merrell, J.D.

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[4] Plaintiffs' concurrent reply brief to Defendants' motion for summary judgment demonstrates that many statements in Defendants' affidavits are genuinely disputed. It is thus critical to know whether any given statement is based upon personal knowledge or is based only upon belief. Restated, when an affiant limits his submission to the penalty of perjury by stating that he did something "to the best of his knowledge and belief," is he saying he is positive he did it, or is he saying he believes he did it but isn't sure? Unless such vagueness is recognized and excluded, Section 1746 declarations lack the requisite solemnity and specificity to substitute for the oath made upon personal knowledge.

Council On Court Procedures Survey 2011

Please add any comments you feel are appropriate about the Council on Court Procedures or its work:

Answer Options	Response Count
	35
answered question	**35**
skipped question	**208**

Number	Response Date	Response Text
1	Jul 27, 2011 4:51 PM	no
2	Jul 11, 2011 5:15 PM	I would like to see more uniformity between counties on how the courts are run, it is confusing now with all the local rules. I would like judges to read a statement to all unrepresented litigants that gives them basic information.
3	Jul 8, 2011 11:02 PM	I made a request for consideration of amendment to ORCP 57F that was first sent to the Council on May 25, 2010. I received a kind reply that indicated I had just missed a Council term, and would be contacted later when the vetting of my proposed change could begin. It has been over a year, but I have heard nothing else. The impression I have now is that consideration of requested changes is slow as molasses.
4	Jul 8, 2011 8:36 PM	I'm not very aware of what the Council does. More "advertisement" of the Council's work would be helpful.
5	Jul 7, 2011 12:01 AM	The federal rules were significantly improved by being run through a translator and put, mostly, into pretty plain English. The Oregon rules are put to shame next to federal rules now.
6	Jul 6, 2011 11:44 PM	A huge undertaking. Thank you.
7	Jul 6, 2011 10:48 PM	I think there should be outreach with local judges to actually uphold the Oregon Rules of Civil Procedures. It is EXTREMELY common in my county for the bench to completely disregard violations of the rules or simply not enforce them.
8	Jul 5, 2011 7:48 PM	I agree with the notion that the council's work is important - I don't agree that the courts are assisting the just,speedy and inexpensive determination of civil court actions through the mandates present in the ORCP
9	Jul 5, 2011 5:55 PM	It seems that in more rural counties the rules are not nearly as strictly enforced. It makes it difficult as a practicioner to advise clients on what to expect. It would be nice to have more teeth in the rules to require the lower courts to enforce the rules.
10	Jul 5, 2011 5:39 PM	I think you should better publicize your proposed rule changes before you "adopt" them.
11	Jul 5, 2011 5:21 PM	I am hopeful that the Council will continue to not impose all of the procedures used in Multnomah County on the rest of the state.
12	Jul 5, 2011 5:02 PM	They do not spend enough time considering the impact on low income/ pro se litigants
13	Jul 5, 2011 4:54 PM	The super-majority requirements and lengthy rule cycle prevent the Council from being very responsive to the needs of the courts, lawyers and litigants, despite the hard work of the Council's members.

14	Jul 5, 2011 4:27 PM	generally my impression of the CCP is that it is better than nothing, and in an atmosphere of generally underfunding public entities, including the courts, and slow legislative function they are doing the best they can, but I don't get a sense of them being very effective overall
15	Jul 5, 2011 4:13 PM	I only vaguely have heard of the council and am not familiar at all about its work or procedures.
16	Jul 5, 2011 3:54 PM	I believe many common provisions of the UTCRs ought to be in ORCP to standardize practice, including statements for attorney fees (and the procedure for handling them). It's onerous to have to sort through ORCP, UTCR and SLRs on any procedural question.
17	Jul 5, 2011 2:58 PM	I don't know what it is.
18	Jul 4, 2011 4:12 PM	1. Website appears to be outdated. 2. Rulemaking with respect to discovery of electronically stored information lags far behind practice and the federal rules; while this may be in some sense preferable, it does not help when Oregon litigants actually confront ESI issues.
19	Jul 4, 2011 4:09 PM	The council should survey (Delphi method) attorneys to determine the most frequent discovery abuse by attorneys and related behavior by judges. (delay, withholding documents, outrageous costs for recovering computer records, etc, granting motions to compel that are just for harassment) The survey should focus on behavior - what do attorneys and judges do or not do that is abusive? Don;t ask for conclusions that get answers like "there is too much delay, etc". Ask people to describe the behavior that they have observed - ask that, without using names, to tell you the who, when, what and where of events that should be corrected. Another method is to ask: What should lawyers and judges: 1) do more of, (what good behavior should increase in frequency 1) do less of (what bad behavior should decrease or not occur at all; 3 stay the same (what good behavior is occuring at a reasonable rate).. Use the information to formulate rules that address the abusive behavior by attorneys and judges and encourage good behavior. Note: passive agressive behavior is still agression. Lawyers who obstruct justice by not doing something but not doing it in a nice "couretous" manner are even more destructive than openly aggressive lawyers who are openly outspoken about what they are doing or not doing. Penalties should focus on results, not manner. "George, your numerous explanations and courteous language does not excuse the failure to provide the documents, so your client pays for the costs."
20	Jul 3, 2011 6:16 PM	They acknowledged my submission, but never let me know what they decided. Also, I think that it is helpful to look ahead, by reviewing federal and other states cases to see what are the areas of litigation. These can be used to refine our rules in advance, to eliminate wasted litigation on interpretation.
21	Jul 2, 2011 7:33 PM	Thank you for all your hard work.
22	Jul 2, 2011 5:36 PM	N/A
23	Jul 2, 2011 3:55 PM	None
24	Jul 2, 2011 4:57 AM	I appreciate the council's work. Things seem to function better outside of Washington and Clackamas counties.
25	Jul 2, 2011 3:15 AM	I would like a web-based system for sending in comments or suggestions.

26	Jul 2, 2011 2:09 AM	keep it simple
27	Jul 2, 2011 12:12 AM	Print and paginate the publication differently to allow easier search and linking using Adobe, Word or some of the other standards For instance, one finds a Rule # in the Table of Contents, but the page shown is not the page # one inserts in the "jump to page --" input section. Forms should be listed, not just grouped in the table of contents
28	Jul 1, 2011 11:20 PM	I rarely see or hear anything from the Council. There may be one or possibly two communications per year. It is hard to know if they are working on anything in particular, or just reacting to comments from others.
29	Jul 1, 2011 11:19 PM	From my perspective, Oregon jurisprudence is provincially individualistic and still very much reminiscent of the proverbial Wild West, with the rule of law and the rule of individuals as indistinguishable as it ever was, and as shocking as a bully in the alley ought to be.
30	Jul 1, 2011 10:13 PM	The 2008 amendments to ORCP 43 have had a major effect on paper discovery in Oregon. When the rule went into effect, I learned about it almost by accident. I did an informal survey of litigators in other large defense firms, and none was aware of the rule change until after it went into effect. I think the CCP should increase its efforts to inform Oregon lawyers of proposed changes to the rules before they take effect. I know that it's possible to learn what the CCP is doing, but to do so, lawyers have to remember to look. The OSB constantly sends e-mails to the Bar, for eample to inform us about CLEs. When the CCP proposes a new rule, why not do the same? "Attention Oregon Lawyers! Proposed Changes to the ORCPs!" Or run a full-page ad in the bar bulletin? I think this is especially important because (as was the case with the amendments to ORCP 43), the legislature can "approve" the CCP's proposed rule changes through inaction. Lots of legal groups monitor the legislative sessions for bills affecting lawyers, but of course such monitoring would not have alerted anyone to the proposed changes to Rule 43. I think if you polled Oregon lawyers on the question "If the CCP proposes a rule change, and the Legislature fails to act on the proposal, what is the result?", most would answer that the rule remains unchanged. I don't think most are aware that their only chance to review and comment on a proposed rule change may be at the CCP level. To me, this makes it more important that the Bar be fully informed about what the CCP is doing. It isn't enough to make the information available to busy lawyers -- in my opinion, active outreach is necessary.
31	Jul 1, 2011 10:10 PM	We don't want to know about the council. We just want uniform procedural rules. Few lawyers will appreciate the efforts of the council, but all will benefit from the work!
32	Jul 1, 2011 10:07 PM	My impression is that the Council moves at glacial speed and most, if any, changes are peripheral. I would not expect any major substantive changes to take place.
33	Jul 1, 2011 9:53 PM	I think the rule making function should be done by the council under the auspices of the Supreme Court rather than the legislature. The legislature could retain the power to directly amend, repeal, or add new rules, but the general rulemaking should be reserved to the judicial branch.

34	Jul 1, 2011 9:47 PM	I'm not entirely sure I know what the Council does, so I cannot comment
35	Jul 1, 2011 9:43 PM	I don't feel I have the ability to offer meaningful input since I'm not part of an established group or organization. The Council should perhaps reach out more for individual's comments on proposed changes, or on what other changes are needed. As the process works now, I feel very removed from it.

Council On Court Procedures Survey 2011

Do you have any other feedback you would like to offer?

Answer Options	Response Count
	24
answered question	**24**
skipped question	**219**

Number	Response Date	Response Text
1	Jul 27, 2011 4:51 PM	no
2	Jul 24, 2011 4:42 PM	Thank you for your work and volunteer efforts!
3	Jul 12, 2011 8:24 PM	I'm not sure if this is anything that the Council on Court Procedures has any input on, but the current system of waiting in line to first pay a $10 fee and then getting an ex-parte document signed and then waiting in line again to file it is extremely time consuming and cumbersome.
4	Jul 8, 2011 11:02 PM	Nothing additional.
5	Jul 7, 2011 8:55 PM	The recent changes to ORCP 43 didn't make any difference.
6	Jul 7, 2011 3:57 PM	Simplify the process of preparing and filing a lawsuit to increase access to justice
7	Jul 7, 2011 12:01 AM	I am willing to volunteer to help. I have a background in Navy nuclear engineering, policies and procedures, and a Masters in Engineering Management with a focus on quality management. The ORCPs would greatly benefit from a completely fresh re-engineering perspective.
8	Jul 6, 2011 11:44 PM	I don't, but I appreciate that you have asked.
9	Jul 6, 2011 4:46 PM	Court fees are too expensive. Mandatory arbitration, while a good idea, adds another layer of costs to already smaller cases. Arb fees need to be capped.
10	Jul 5, 2011 5:45 PM	The Oregon Rules of Civil Procedure and not the local court practices should control. Often the local courts have "procedures" that are really rules that put an non-local lawyer at a disadvantage.
11	Jul 5, 2011 4:13 PM	Rules are only worthy as long as they are enforced. Changing rules doesn't provide consistency, which make some rules obsolete.
12	Jul 5, 2011 3:54 PM	Council should do all it can to encourage and support transition to electronic filing in all state courts, even though funding remains an issue.

13	Jul 5, 2011 2:58 PM	No.
14	Jul 5, 2011 12:54 AM	Most of the issues I have with court rules are local court practices, not ORCP. Practices such as waiting until the day before trial to learn your
15	Jul 4, 2011 4:09 PM	I an an experienced trial lawyer, winning and losing court and jury verdicts and appeals over the last 22 years. I am now 90% retired, but still an active advocate for a few clients. I am willing to volunteer my time to do more brainstroming, possible traiining or other tasks for the council or related groups. In my previous life before becoming an attorney, as a corrections associate superintendent, Program Director and supervisor of health and mental health professionals, (MSW U. Michigan) I developed program accountability systems using the Delphi method, environmental surveys and other methods, so that the target organizations and departments could get ongoing feedback on their performances and use that feedback to make effective changes in their practices. I also have experience in writing law/rule. I wrote the involuntary medication policy for the Washington Special Offender Center, which was approved by the USSC in Washington v. Harper, 494 US 210 (1990). I was also a law clerk in the 1989 legislative session and as a member of the employment legislation committee of OTLA. William D. Stark billaw97302@yahoo.com
16	Jul 2, 2011 7:33 PM	Keep up the good work
17	Jul 2, 2011 5:36 PM	N/A
18	Jul 2, 2011 3:55 PM	No
19	Jul 2, 2011 3:15 AM	I visited the CCP long ago, but I have to admit, I forgot about y'all. I have been bugging our PJ in Lane County to let me help rewrite our local rule on consolidation, but she and the primary circuit court judge handling juvenile matters are still discussing how the rule should look going forward.
20	Jul 1, 2011 11:19 PM	ORS 31.150 ought to be renamed for what it really is; and should expressly include pleadings in its purview, unless either the case law catches up to the rest of the country on litigation abuse or Rule 21 is beefed up to remedy the mischief the statute is supposed to address.

21	Jul 1, 2011 10:46 PM	Discovery is too damn expensive and burdensome. There has to be a better way. Civil litigants often feel almost extorted to settle because of the cost and burdensome nature of discovery.
22	Jul 1, 2011 9:48 PM	I don't think that ORCP promotes inexpensive litigation. Rather, the more well-healed party (such as an insurance company) will use it to their advantage. Also, the requirement that parties "confer" is abused by many lawyers. I have often received a letter from an attorney that sets forth demands and ultimatums, then closes with "please consider this to be my effort to confer pursuant to ORCP"
23	Jul 1, 2011 9:47 PM	For those rules where attorneys fees and costs are awarded, the ambivalance and uncertainty of what fees exactly, for what services, what qualifies as a "cost" and what doesn't -- attorneys much more experienced than I are still trying to figure these things out because the rules are so vague.
24	Jul 1, 2011 9:41 PM	Sometimes it seems that too much is left to have local SLR's that vary greatly from one county to the next.

Council on Court Procedures
September 10, 2011, Meeting
Appendix M-7

Subject: Re: 2008 ORCP Amendments
From: Blake Fry <blakers76@gmail.com>
Date: Mon, 11 Jul 2011 14:19:59 -0700
To: Don Corson <dcorson@corsonjohnsonlaw.com>
CC: mpeterso@lclark.edu, Shari Nilsson <nilsson@lclark.edu>, Barbara Fletcher <bfletcher@corsonjohnsonlaw.com>, Brooks Cooper <brooks@bcooper-law.com>

OK, thank you.

For anybody's information, I am involved in a case in which the plaintiffs had tried to serve a foreign company by serving its subsidiary, claiming (by citing cases that came from other states) that they did not have to abide by the Hague Convention because, essentially (and as discussed in my previous e-mail), the subsidiary was the "agent" of the parent. We argued that such service was void because Oregon does not allow service on a common-law agent, only a "registered agent." The court agreed with us, dismissed the case with prejudice, and the plaintiffs have appealed to the Ninth Circuit.

The plaintiffs on appeal don't renew the same argument they made to the trial court, but instead argue that, in accordance with 7D1, service on the subsidiary was "reasonably calculated" to notify the parent. Thus, it was helpful to learn why "managing agent" was dropped.

On Jul 11, 2011, at 2:12, Don Corson wrote:

> Blake,
>
> Many thanks for your thoughtful email. Unfortunately, my final term on the Council expires next month. Your copying your message to the Council's Executive Director, Mark Peterson, and staff member Shari Nilsson, should help assure that your thoughts are taken into consideration for the Council's next biennium for possible rule-making. I have also taken the liberty of copying Brooks Cooper, the incoming Council President.
>
> Best,
> Don
>
> -----Original Message-----
> From: Blake Fry [mailto:blakers76@gmail.com]
> Sent: Monday, July 11, 2011 11:46 AM
> To: Don Corson
> Cc: mpeterso@lclark.edu; Shari Nilsson; Barbara Fletcher
> Subject: Re: 2008 ORCP Amendments
>
> Thank you for your response. I found the answer I was looking for on the website you referred me to.
>
> Let me briefly explain why I was interested:
>
> For corporations, Oregon now requires service be made on a "registered agent, officer or director," "registered agent" being a reference to the

agent registered with the Secretary of State. Most other states' service statutes allow service on a corporation's "agent," or "managing agent," or "broker," or whatever. What all these have in common is that these phrases allow service on a corporation to be made on a corporation's "agent," as the phrase is construed under principles of common law agency. One result of this is that a corporation can be served through a subsidiary corporation if a plaintiff can show that the subsidiary is the common law agent of the parent. Generally, this requires a showing that the parent exercised such control over the subsidiary (allowing the corporate veil to be pierced, and principles of corporate separateness to be disregarded) that the subsidiary was really just a department of the parent, and thus its agent. (Actually, "managing agent" typically allows service on a broader range "agents" than the phrase "agent" alone.)

By Oregon requiring service on a "registered agent," it forestalls any of this analysis. Service of a corporation in Oregon cannot be made on anything like a common law agent of a corporation, including a subsidiary that may be an "agent."

This is important in at least one respect. The Hague Service Convention applies when service must be sent abroad to a Hague signatory country. When the Convention applies, it must be complied with (requiring, for instance, that service be sent to a countries designated central authority). However, the Convention does not apply when service on a foreign corporation or individual does not have to be sent abroad. Thus, if a foreign corporation can be served in some way in the United States, then it would not have to be served according to the Hague Convention. One way to serve a foreign corporation in the United States would be to serve its domestic subsidiary. But you can only do this in states that effectively allow service on a corporation's common law agent (assuming you can pierce the corporate veil, and all that). Because Oregon does not allow anything like this, it is much more difficult to bypass the Hague Convention in Oregon serving a foreign corporation's domestic subsidiary.

Thanks,

Blake Fry

On Jul 11, 2011, at 11:03, Don Corson wrote:

> Blake,
>
> I sincerely apologize for the long delay in responding. Your email arrived on my first day of a long family summer vacation, and this is my first day back.
>
> I have cc'd the Council's staff regarding your inquiry, but I believe

that the general policy is to refer inquiries to the detailed Council records which are now available online on the Council's website. These are the "legislative history" records for all rule changes that are easily accessible.

Good luck!

Regards,
Don

Don Corson
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101 East Broadway, Suite 303
Eugene, OR 97401
dcorson@corsonjohnsonlaw.com
phone: 541/484-2525; fax: 541/484-2929 www.CorsonJohnsonLaw.com

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-----Original Message-----
From: Blake Fry [mailto:blakers76@gmail.com]
Sent: Monday, June 20, 2011 11:11 AM
To: Don Corson
Subject: 2008 ORCP Amendments

Mr. Corson

You are listed as the chair of the Council on Court Procedures when it promulgated the 2008 amendments to the Oregon Rules of Civil Procedure. I was just wondering if you could provide any insight into one of the changes, or point me to someone who could. Specifically, I would like to find out why a particular change was made to Rule 7D(3)(b)(i), the primary service method on corporations. In the change, "general partner, or managing agent" was dropped from the list of those on whom personal service could be made. Now, the Rule allows only service on a "registered agent, officer, or direct."

Thank you,

Blake Fry

Council On Court Procedures Survey 2011

Please add any comments you feel are appropriate about the Council on Court Procedures or its work:

Answer Options	Response Count
	5
answered question	**5**
skipped question	**28**

Number	Response Date	Response Text
1	Jul 26, 2011 10:01 PM	It would be helpful to hear more about what is going on with COCP.
2	Jul 6, 2011 4:16 PM	I feel the Council is important to keep the ORCP's current, especially with electronic filing and other technological advances.
3	Jul 6, 2011 4:03 PM	My only current worries are (1) that it appears sometimes that the Council is looking for work, when often doing nothing is better, and (2) we still get the occasional effort to change our approach to discovery, which we ought not to do as the Oregon way is more effective, less onerous, and more just than other states or the federal way of discovery in which we litigate cases to death.
4	Jul 5, 2011 10:06 PM	The CCP always has had a dark cloud hanging over its head because (1) the Legislature does not adopt the CCP's work product and (2) the judge members are participating in the legislative function and the judicial function at the same time. Aside from those structural difficulties, it is practically impossible to move any serious civil procedural reform through the CCP. The members are very dedicated and are deeply appreciated for their efforts. However any attempt to revise civil procedural rules beyond the level of "fine tuning" likely will require involvement of the legislature.
5	Jul 5, 2011 5:48 PM	The Council members work very hard and spend an extraordinary amount of time responding to the concerns of the public, including litigants and lawyers. Even though the Council does not have the ability to address all of the issues brought to it, all comments, questions and concerns are considered and appropriate responses are given. The ability to have adiverse (geographically and from many practice areas) Council to debate and consider the issues is invaluable. The Council performs a public service that promotes a higher quality of professionalism and goodwill for the citizens of Oregon.

Council on Court Procedures
September 10, 2011, Meeting
Appendix O-1

Council On Court Procedures Survey 2011

If you have a specific suggestion for an addition or amendment to the ORCP that would improve the just, speedy, and inexpensive determination of civil court actions, please leave it below.

Answer Options	Response Count
	8
answered question	**8**
skipped question	**25**

Number	Response Date	Response Text
1	Jul 26, 2011 10:01 PM	There is some dispute about whether or not ORCP applies to FAPA and EPPDAPA proceedings, particularly as it relates to depositions which could easily be utilized to intimidate a petitioner. I would like to be involved in a discussion re this. J. Maureen McKnght should be invited as well.
2	Jul 14, 2011 5:20 PM	Although I don't have a good suggestion as to how, anything that can rein in and streamline discovery disputes would be helpful. I would like to require statements of undisputed facts in summary judgment motions as required in federal court.
3	Jul 12, 2011 6:40 PM	ORCP 57 should be modified to remove the requirement that alternate jurors be discharged when the jury retires to consider its verdict. Rather, the rule should provide that alternate jurors who are not selected to replace "regular" jurors will not participate in the delibarations but will still remain available to replace jurors who might be unable to complete the deliberations process. The rule should also provide that when a altnerate juror has been selected to replace a juror after deliberations began, the jury will be instructed to begin its deliberations a new. This change would avoid the costs of trying a case again in the not all that unusual sitaution where alternates have sat through the trial, not initially been needed, and an juror for some reason (illness, auto accident, etc), is unable to complete deliberations.
4	Jul 6, 2011 4:03 PM	We should consider adding language re porportionality in discovery to give trial judges some more flexibility to limit discovery.
5	Jul 5, 2011 10:06 PM	The Rules should provide explicitly for a right of every individual (not corporate entities) to participate, either pro se or through counsel of their choice, in every aspect of a civil proceding in which they are a party.
6	Jul 5, 2011 5:30 PM	Having just presided over a trial involving an automobile accident that resulted in two separate lawsuits, I think Oregon should adopt compulsory counterclaims.
7	Jul 5, 2011 5:22 PM	The discovery rules provide great scope for financial abuse, and the tools to rein in this abuse are awkward, timeconsuming, and inefficient, and must be wielded with little hint at consistent standards, by trial courts. A great deal of the diminished access to enforcmenet of rights in civil courts, by the middle class who pay for their own legal assistance, is due to costs which are driven by discovery.
8	Jul 5, 2011 4:40 PM	I suggest adopting the federal rule on discovery so that all objections to requests for discovery are waived if a response to the request is not provided within the 30 or 45 day response time.

Council on Court Procedures
September 10, 2011, Meeting
Appendix O-2

Subject: Re: SLFAC proposal for GAL standards
From: Brooks Cooper <brooks@bcooper-law.com>
Date: Wed, 26 Jan 2011 10:46:58 -0800
To: Keith.R.RAINES@ojd.state.or.us
CC: Matthew Whitman <mwhitman@cart-law.com>, "Eric H. Vetterlein" <evetterlein@duffykekel.com>, Eugene Buckle <Ebuckle@cvk-law.com>, Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>, Robert.HERNDON@ojd.state.or.us

Judge,

I sit on the Council on Court Procedures. Mr Whitman forwarded your email below to me.

As you probably know the Council considers rule promulgation and amendment in the years the Legislature is not in session. Thus, our next meeting to begin the next biennial rule making cycle will occur after this Legislature adjourns.

I have copied Eugene Buckle, our current chair, Mark Peterson our executive director and Shari Nilsson, his able assistant on this email.

We will put your issue on our agenda for consideration by the Council in our next cycle.

I do feel compelled to point out that in our previous cycle, in 2008, the Council appointed a task force which looked at, among other things, proposals similar to yours for considerable revision of ORCP 23. I and Judge Robert Herndon of Clackamas County were on that task force. Ultimately, the task force recommended that the Council not amend the GAL rule and the Council voted in accordance with that recommendation.

Minutes of past biennia can be found here: http://legacy.lclark.edu/~ccp/Past_Biennia.htm

I haven't the time at the moment to cull out the specific meeting minutes where these issues were discussed. Shari, Mark - any chance you have that at your fingertips?

I cannot speak for the Council as a whole but it was my feeling that the GAL's authority is so limited - prosecution or defense of a pending action, does not ever involve holding or administering property of the protected person other than the chose in action or right of defense and lacks authority to settle the claim (only a conservator may do this) that it was better to permit easy appointment of GALs upon motion or petition presented to the presiding judge than to impose procedures more akin to the rules of Chapter 125. That said, we will put this on our agenda.

Our meetings are, of course, open to the public and you are welcome to attend if you'd like.

Our schedule can be found here: http://legacy.lclark.edu/~ccp/CurrentBienniumMeetings.htm

The 2011 schedule is not yet posted but our next meeting will be in September, 2011.

Brooks Cooper, Attorney at Law
2300 SW First Avenue

Suite 101
Portland, OR 97201
v: (971) 645-4433
f: (503) 296-5704

Sara Wegner, paralegal
Direct dial: (503) 928-4872

On Jan 25, 2011, at 9:50 PM, Matthew Whitman wrote:

> As we discussed, I will be happy to do a response to Judge Raines directly while still deferring to you on the meat of it.
>
> Matthew Whitman
> Cartwright Whitman Baer PC
> 1000 SW Broadway, Suite 1750
> Portland, OR 97205
> voice: 503.226.0111
> fax: 503.226.3022
>
> -----Original Message-----
> From: Eric H. Vetterlein [mailto:evetterlein@duffykekel.com]
> Sent: Monday, January 24, 2011 6:31 PM
> To: Matthew Whitman
> Subject: FW: SLFAC proposal for GAL standards
>
> Hello Matt:
>
> I am forwarding to you the email I received regarding proposed legislation dealing with guardian ad litem standards, as we discussed in our meeting last Friday of the Estate Planning Section. I would be interested to know your thoughts or suggestions about whether our section should take a position on this proposed legislation. My reading of it is that it will not affect us much, if any. Thanks,
>
> Eric H. Vetterlein
>
> Duffy Kekel LLP
>
> 1200 Standard Plaza
>
> 1100 S.W. Sixth Avenue
>
> Portland, OR 97204
>
> Tel: (503) 226-1371

E-mail: evetterlein@duffykekel.com

From: Keith.R.RAINES@ojd.state.or.us [mailto:Keith.R.RAINES@ojd.state.or.us]
Sent: Tuesday, January 18, 2011 12:01 PM
To: bhaggerty@newportlaw.com; Eric H. Vetterlein
Subject: SLFAC proposal for GAL standards

Gentlemen: The State Family Law Assistance Committee created a workgroup to contend with the lack of standards for the appointment of a guardian at litem. A colleague in Washington was stunned that we had no standards: In Washington, GALs must be professionally qualified and trained and are required to be vetted on an annual basis. We don't expect that Oregon will be moving to the professional GAL soon and our proposal reflects that view.

Our charge is in the family law arena only but there can be spillovers for the right idea. The workgroup developed the following protocols which were reviewed by the SFLAC as a whole. Our next step is to share the proposal with your respective OSB committees for your comments and proposed changes. The SFLAC workgroup will review any substantive changes and report back a recommendation to SFLAC.

We recognize that there potential HIPAA issues and an issue with sealing the GAL application and exhibits, but see these are solvable problems.

SFLAC meets on a quarterly basis. The workgroup meets ad hoc. Thank you for taking this to your respective committees. I don't know what your process is for reviewing proposals like this and would appreciate a note back with a brief description of your process and a potential timeline.

Thanks for your time and energy. Keith Raines

(See attached file: 3rd FINAL REVISED RECOMMENDATION TO SFLAC.doc)

Subject: Item for next biennium: ORCP 36(C)(6) deposition designations
From: dcorson1@vzw.blackberry.net
Date: Sun, 31 Oct 2010 18:36:48 +0000
To: "Ebuckle@cvk-law.com" <Ebuckle@cvk-law.com>, "brooks@bcooper-law.com" <brooks@bcooper-law.com>, Mark Peterson <mpeterso@lclark.edu>
CC: Shari Nilsson <nilsson@lclark.edu>

Dear Gene, Brooks, and Mark,

Currently dealing with another defendant who refuses to do its ORCP 36(C)(6) deposition designations before the deposition. The current wording of the rule could be improved to avoid this.

Best,
Don
Sent from my Verizon Wireless BlackBerry

Subject: RE: COCP
From: Don Corson <dcorson@corsonjohnsonlaw.com>
Date: Tue, 14 Dec 2010 07:12:16 -0800
To: Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>
CC: Barbara Fletcher <bfletcher@corsonjohnsonlaw.com>

Mark,

Thanks for your consideration of this, and for your kind words. I'll miss my Council service, but I'm not technically gone yet….

I think it would be preferable to have a bright line rule as opposed to "as soon as practicable," so litigants don't end up arguing about what Is practicable. How about something more along the lines of:

"In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and *no later than five days before the deposition* shall set forth *in writing*, for each person designated, the matters on which such person will testify."

The person taking the deposition really does need to know before the deposition if person A is talking about notice areas 1,2, and 3, and person B is talking about notice areas 4, 5, and 6. Otherwise, it is a logistical problem organizing deposition questions and exhibits. It would be nice to know as far in advance who will be talking about what, but I don't want to put too much of a burden on the defending attorney to respond earlier. On the other hand, the number of days in advance of the deposition needs to be greater than three, as three days invites gamesmanship on service by mail (with its three day rule).

Further thoughts?

Season's best,

Don

From: Mark Peterson [mailto:mpeterso@lclark.edu]
Sent: Monday, December 13, 2010 5:38 PM
To: Shari Nilsson
Cc: Don Corson; Barbara Fletcher
Subject: Re: COCP

Don,

I find it hard to believe that an opponent would engage in swordplay with you regarding designating a deponent prior to the deposition. Since, my incredulity aside, this is happening, do you have a specific fix? Since Rule 39 C (1)

and (2) specifies when the deposition may be taken and the usual standard is "reasonable notice", is a specific time for making the designation of assistance to the attorney taking the deposition or even desirable? What about something like: "In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth _**as soon as practicable**_ ,for each person designated, _**the name of the person and**_ the matters on which such person will testify."?

We are going to miss you and, as you know, the Council meetings are open to the public. You can return to shepherd this, or any other change through to promulgation.

Mark

On 12/13/2010 1:35 PM, Shari Nilsson wrote:
Don,

I will be sure to put it on the agenda. I'm only sorry that you won't be there to help us deliberate on it.

Happy holidays!
Shari

On 12/13/10, **Don Corson** <dcorson@corsonjohnsonlaw.com> wrote:

August 8, 2011

Harry Auerbach

Office of City Attorney

430 City Hall, 1221 SW Fourth Avenue

Portland, OR 97204

harry.auerbach@portlandoregon.gov

503-823-4047

ORCP 47.A should be amended so that it specifies that a party who is seeking affirmative relief on a claim, counterclaim or cross-claim can move for summary judgment against an affirmative defense asserted against that claim, counterclaim or cross-claim. Particularly when the disposition of the affirmative defense requires establishment of a fact or of the absence of a fact, a motion to dismiss, motion to strike or motion for judgment on the pleadings is inapposite. It may be that a motion for partial summary judgment against an affirmative defense is already "any part" of the claim, counterclaim or cross-claim under the existing Rule, but that is unclear, and some courts have been denying MSJ's on the basis that an MSJ cannot be brought against an affirmative defense under the wording of the Rule. There is no principled reason why the legal or factual sufficiency of an affirmative defense should not be amenable to being tested by a motion for partial summary judgment.

Click to Submit via E-mail

Proposal for Amendment to Oregon Rules of Civil Procedure

Oregon Council on Court Procedures

Date:	26 April 2011
Name:	Paul G. Dodds
Firm:	Brownstein, Rask
Address:	1200 S.W. Main St.
	Portland, OR 97205.
E-mail:	pgd@brownrask.com
Phone:	503-412-6728

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

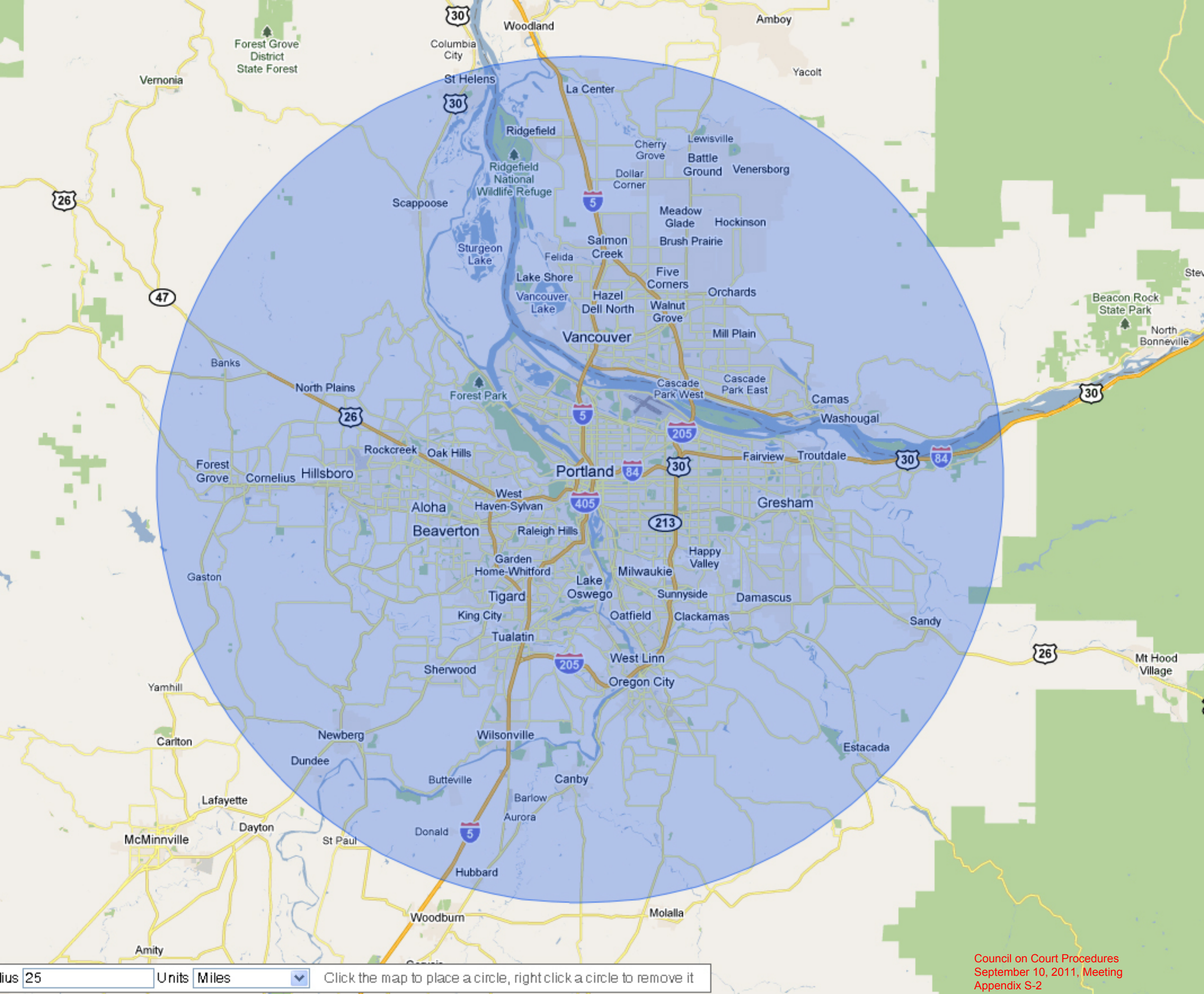
I propose to amend ORCP 55F(2) to provide that an Oregon resident who is not a party to the action may be required to produce subpoenaed documents not only within the county in which he resides, is employed, or transacts business in person, but also within 50 miles of any of the foregoing. This would address the situation in the Portland metropolitan area where the attorney subpoenaing the documents is in Multnomah County, but the subpoenaed person lives or works in Clackamas or Washington Counties or, of course, the other way around. As it stands now, if I want to subpoena documents from someone who lives and works in Washington County, I need to find a location in Washington County where the subpoenaed person is to deliver the documents. Presumably it is no more burdensome on the subpoenaed person to require him to bring documents across the county line from Beaverton to Portland than it is for a person to bring documents from, for example, Ashland to Medford, all within one county. My concern is mainly with subpoenaing documents, but the same issue would exist for deposing a non-party witness.

The amendment might read something along the following lines (with the new matter in CAPS):

"A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein such person resides, is employed or transacts business in person, OR WITHIN 50 MILES OF WHERE SUCH PERSON RESIDES, IS EMPLOYED OR TRANSACTS BUSINESS IN PERSON, or at such other convenient place as is fixed by an order of the court." [Rest of existing rule the same]

Thank you for your consideration.

Paul G. Dodds



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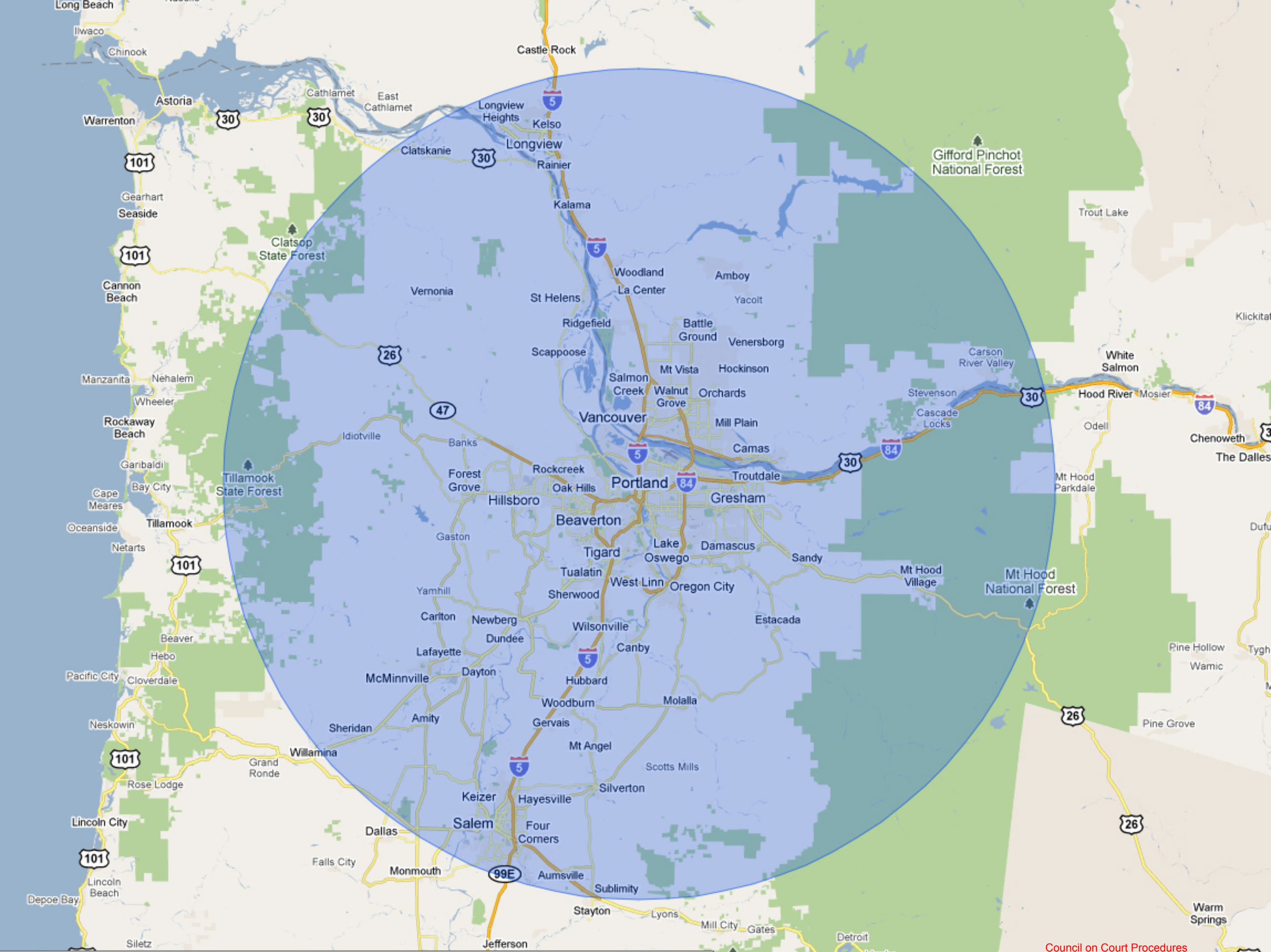

adius 50 Units Miles Click the map to place a circle, right click a circle to remove it

Subject: RE: [family-discuss] Relief In Show Cause Matters
From: Russell Lipetzky <rlipetzky@qwestoffice.net>
Date: Mon, 24 Jan 2011 16:16:05 -0800
To: 'Kevin McCarty' <mccarty.kevin.j@gmail.com>

You will find little clear authority one way or another. This is an issue I have tried, thus far without success, to get the ORCP -- via the Council on Court Procedures, which governs such things -- or the UTCR Committee to address. Practice varies from county to county. I personally don't care how it's done – whether a separate SCO is required (as in Washington County, which is silly) or whether the "new" claims for relief can be raised in a counterclaim to the initiating party's SCO (as here in Marion County, which does it properly) – but I do believe there should be statewide consistency. It seems to me that adequate notice is the key. The difference in county to county practice stems mostly from differences in how modification motions are docketed. For example, Washington County dockets matters based on the claims for relief in the motion(s), while Marion County, with assigned judge docketing, will only set a matter after input from counsel at a status conference. It may simply remain an issue on which there is no procedural consistency.

I'm just kidding – for the most part -- about Washington County being silly.

Russ L.

From: Kevin McCarty [mailto:mccarty.kevin.j@gmail.com]
Sent: Monday, January 24, 2011 3:45 PM
To: OSB Family Law Section Discussion Forum
Subject: [family-discuss] Relief In Show Cause Matters

Here's one that keep popping up in my practice from time-to-time. I file show cause matter to modify judgment. Opposing party - usually pro se, but sometimes through counsel - files affidavit in opposition that also requests affirmative relief. Seems to me that this is inappropriate, and circumvents the party's requirement to file a show cause matter (and pay the filing fee) to seek affirmative relief. Is there a case anyone is aware of that addresses this issue?

Kevin J. McCarty
Bend

2011

January

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Holidays and Observances (United States)

Jan 01	New Year's Day	Jan 17	M L King Day	Feb 14	Valentine's Day
Feb 21	Presidents' Day	Apr 24	Easter Sunday	May 08	Mother's Day
May 30	Memorial Day	Jun 19	Father's Day	Jul 04	Independence Day
Sep 05	Labor Day	Oct 10	Columbus Day	Oct 31	Halloween
Nov 11	Veterans Day	Nov 24	Thanksgiving Day	Dec 25	Christmas Day

Council on Court Procedures
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2012

January

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

February

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29			

March

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

April

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

May

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

July

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

August

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

September

Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

October

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

November

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

December

Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Holidays and Observances (United States)

Jan 01	New Year's Day	Jan 16	M L King Day	Feb 14	Valentine's Day
Feb 20	Presidents' Day	Apr 08	Easter Sunday	May 13	Mother's Day
May 28	Memorial Day	Jun 17	Father's Day	Jul 04	Independence Day
Sep 03	Labor Day	Oct 08	Columbus Day	Oct 31	Halloween
Nov 06	Election Day	Nov 11	Veterans Day	Nov 12	Veterans Day Holiday
Nov 22	Thanksgiving Day	Dec 25	Christmas Day		

Council on Court Procedures
September 10, 2011, Meeting
Appendix U-2

Subject: Re: Council on Court Procedures Meeting September 10, 2011: MEETING PACKET PART 2
From: Charles.M.ZENNACHE@ojd.state.or.us
Date: Mon, 29 Aug 2011 09:45:17 -0700
To: Shari Nilsson <nilsson@lclark.edu>

Shari:

I am sorry that I did not send this to you earlier, but I am wondering if it can be added to the agenda for this meeting. Attached is a suggestion for a change to ORCP 59(H)(1). The concern is that the rule as is requires lawyers to take exception to instructions at the close of instructions. However trial judges often take up proposed jury instructions with the parties several times during the case and the concern is that a lawyer who has argued for or against a particular instruction earlier in the case should not be penalized for failing to take an exception to the instructions as given. Below is the email I received from Judge Rasmussen and his proposed fix.

Charles M. Zennaché
Circuit Court Judge
Lane County Courthouse
125 E. 8th Ave
Eugene OR 97401
541-682-4259

Hi CMZ:

I have been frustrated by ORCP 59(H)(1) for some time. . . .. I talk about jury instructions more than once and those discussions are either on the record or are recreated later on the record. Those discussions take place long before instructions are actually given. The point of the rule **is** essential: if the jury instruction is wrong, the party objecting to it needs to except in a timely way to allow a fix or a correction, if necessary and if possible. My proposed amendments (attached) are true to the original intent of the current version of ORCP 59 (H)(1) while adapting the rule to the realities of trial. By the time instructions are given they have normally been discussed repeatedly, and I see no reason for the extremely limited timing of the current rule which could lead to a situation in which an attorney excepts earlier (and in time to fix), the judge expressly disagrees and gives the "objectionable" instruction, the attorney forgets to except "after the instruction is given" - in part because he or she has had a full, on the record discussion already - and then loses on appeal on the mere technicality of this silly rule.

I prefer option 1 of the proposed amendments and hope you will take this up with the Council.

KHR

(See attached file: ORCP 59(H)(1) amendment.docx)

ORCP 59(H)(1) amendment.docx	**Content-Type:**	application/vnd.openxmlformats-officedocument.wordprocessingml.document

Proposed Amendment to
Instructions to Jury and Deliberation
ORCP Rule 59(H)(1)

H Necessity of noting exception on error in statement of issues or instructions given or refused.

Option 1:

H(1) **Statement of issues or instructions given or refused.** A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception [*immediately*] at any time reasonably calculated to provide the court with an opportunity to correct any error *[after the court instructed the jury]*.

Option 2:

H(1) **Statement of issues or instructions given or refused.** A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception [*immediately*] at any time reasonably calculated, before or after the court instructed the jury, to provide the court an opportunity to correct any error [*after the court instructed the jury*].

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 11/13/10 - 9/1/11

I. Inquires

Council staff received several inquires regarding legislative history, Council amendments, and legal assistance, including the following:

- An inquiry regarding the Council's proposed ORCP 21 change by an attorney drafting the update section of Oregon Civil Pleading and Practice on Rule 21 motions. The attorney was directed to Council minutes to read discussions on the reason for these changes.

- A few inquiries from attorneys about whether proposed amendments were promulgated at December meeting, before the promulgated rules had been posted on the website. Council staff informed the attorneys of the status of the promulgations.

- An inquiry from a judge's clerk about the reason for the "extensive" changes to ORCP 69. The clerk was given a brief explanation by telephone and referred to the minutes online for more detailed information.

- An inquiry from an attorney looking for legislative history on ORCP 82 A(1). The attorney was referred to the Council history materials available at law libraries throughout the state, as materials from the original ORCP promulgation are not yet available on the web.

- An inquiry from an attorney about legislative history materials which would explain why interrogatories were not adopted at the time of the drafting of the ORCP, and why the number of requests for admission in ORCP 45 were limited. Council staff assisted the attorney in finding relevant documents in the 1979-81 biennium material, which is not yet posted on the website and is not clearly organized.

- An inquiry from a law student about the history of ORCP 32 M(2). The student was referred to both the website and hard copy material at the Lewis and Clark law library, which he used to find the information he needed.

- An inquiry from a member of a Washington State Bar Association task force wondering whether the Council has compiled any data on the escalating cost of civil litigation in Oregon. The attorney was told that the Council has not done so, and was referred to the 2010 study by the Institute for the Advancement of the American Legal System at the University of Denver which looked at civil case

Council on Court Procedures
September 10, 2011, Meeting
Appendix W-1

processing in the Oregon courts. (The study did not specifically study costs, but merely looked at costs as one factor of case processing.)

- Several inquiries from the general public regarding legal assistance. The inquirers were sent the Council's standard response referring them to legal aid and/or the Oregon State Bar and giving them general information about statutes of limitation.

II. Website Statistics

Attached are analytical reports detailing website visitors, geographical information, page views, keywords from search engines, and traffic sources for the Council's website during the 10 month period since the Council last met. The site had 1,393 visits from 1,041 unique visitors, and 3,272 page views in this period. 70% of visits to the site were from new visitors. Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. Given the number of visitors and the fact that Council staff received relatively few inquires via telephone or e-mail, it appears that the website is a useful resource.

III. Website Improvements

Unfortunately, the process of scanning and uploading documents from past biennia has been slower than anticipated since the state of those documents in the Council archives is frequently chaotic and the documents need to be reorganized before the scanning process can proceed.

We received a few comments regarding the website from the survey which was sent to the bench and selected bar sections and committees. We are taking those comments into consideration as we continue to maintain and build the website into the most useful tool possible.

Respectfully submitted,

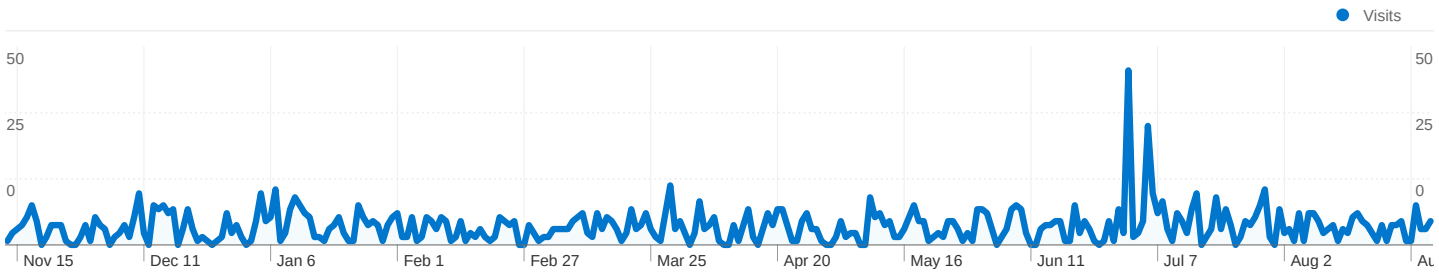
Shari Nilsson
Council Administrative Assistant

www.lclark.edu/~ccp

Dashboard

Nov 13, 2010 - Sep 1, 2011

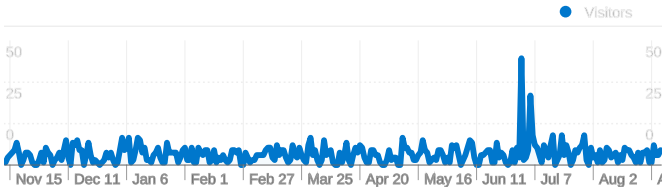
Comparing to: Site



Site Usage

1,393 Visits	54.20% Bounce Rate
3,272 Pageviews	00:02:47 Avg. Time on Site
2.35 Pages/Visit	69.99% % New Visits

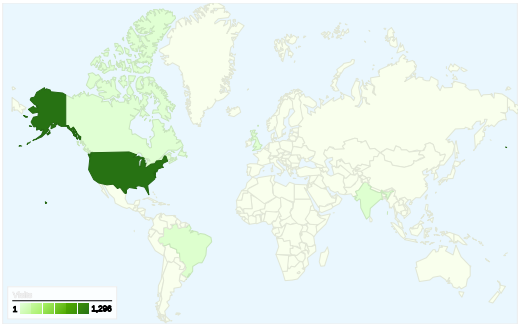
Visitors Overview



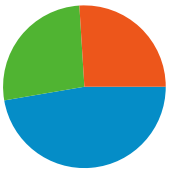
Visitors

1,041

Map Overlay



Traffic Sources Overview



- Referring Sites
  659.00 (47.31%)
- Search Engines
  372.00 (26.70%)
- Direct Traffic
  362.00 (25.99%)

Content Overview

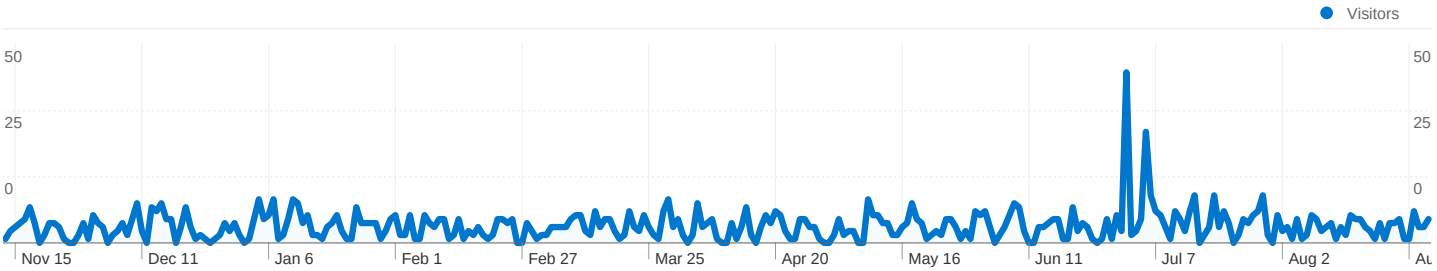
Pages	Pageviews	% Pageviews
/~ccp/index.htm	1,234	37.71%
/~ccp/Past_Biennia.htm	510	15.59%
/~ccp/LegislativeHistoryofRules	416	12.71%
/~ccp/Current_Biennium.htm	311	9.50%
/~ccp/resources.htm	213	6.51%

www.lclark.edu/~ccp

Visitors Overview

Nov 13, 2010 - Sep 1, 2011

Comparing to: Site



1,041 people visited this site

1,393 Visits

1,041 Absolute Unique Visitors

3,272 Pageviews

2.35 Average Pageviews

00:02:47 Time on Site

54.20% Bounce Rate

69.99% New Visits

Technical Profile

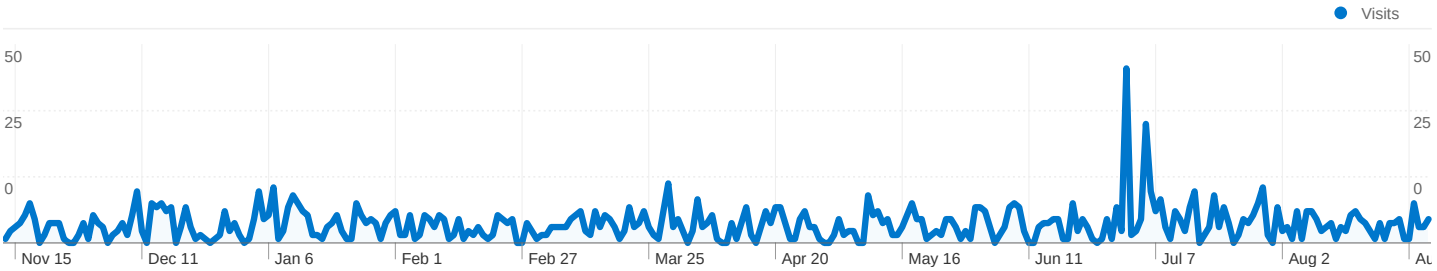
Browser	Visits	% visits
Internet Explorer	664	47.67%
Firefox	490	35.18%
Chrome	130	9.33%
Safari	79	5.67%
Opera	13	0.93%

Connection Speed	Visits	% visits
Unknown	1,048	75.23%
Cable	130	9.33%
T1	102	7.32%
DSL	79	5.67%
Dialup	33	2.37%

www.lclark.edu/~ccp

Traffic Sources Overview

Nov 13, 2010 - Sep 1, 2011
Comparing to: Site

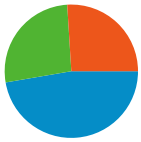


All traffic sources sent a total of 1,393 visits

25.99% Direct Traffic

47.31% Referring Sites

26.70% Search Engines

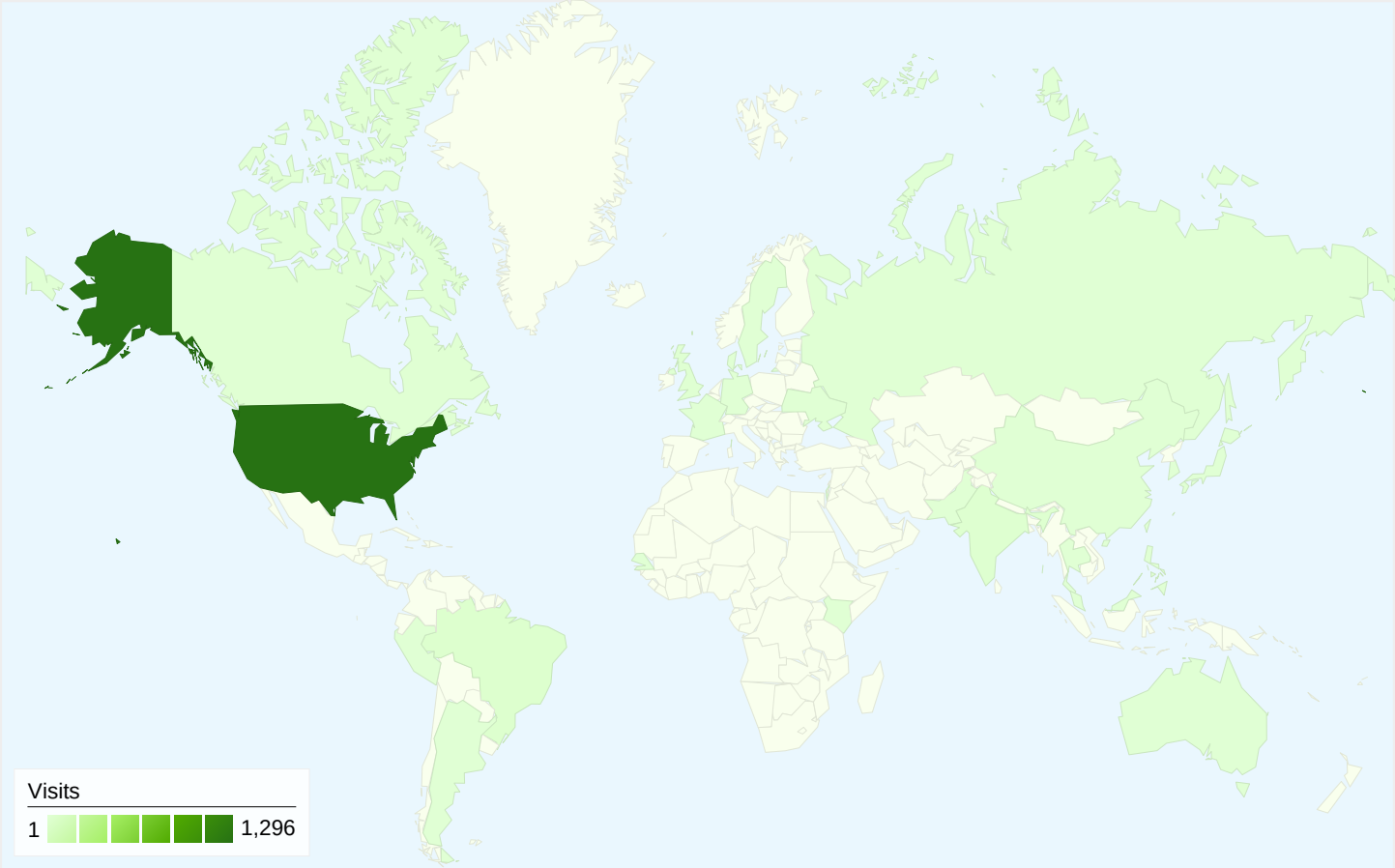


- Referring Sites
  659.00 (47.31%)
- Search Engines
  372.00 (26.70%)
- Direct Traffic
  362.00 (25.99%)

Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	362	25.99%
councilloncourtprocedures.org	305	21.90%
google (organic)	301	21.61%
courts.oregon.gov (referral)	170	12.20%
osbar.org (referral)	43	3.09%

Keywords	Visits	% visits
oregon council on court	49	13.17%
council on court procedures	44	11.83%
council on court procedures	16	4.30%
counsel on court procedures	8	2.15%
joyce ann harpole	8	2.15%



1,393 visits came from 25 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
1,393 % of Site Total: 100.00%	2.35 Site Avg: 2.35 (0.00%)	00:02:47 Site Avg: 00:02:47 (0.00%)	69.99% Site Avg: 69.99% (0.00%)	54.20% Site Avg: 54.20% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	1,296	2.43	00:02:59	70.99%	52.01%
Brazil	27	1.22	00:00:02	7.41%	77.78%
India	19	1.00	00:00:00	63.16%	100.00%
United Kingdom	9	2.00	00:00:26	88.89%	77.78%
Canada	5	1.00	00:00:00	80.00%	100.00%
(not set)	5	1.00	00:00:00	80.00%	100.00%
Germany	4	1.50	00:00:05	75.00%	50.00%
Australia	3	1.33	00:00:09	100.00%	66.67%
Russia	3	1.00	00:00:00	100.00%	100.00%

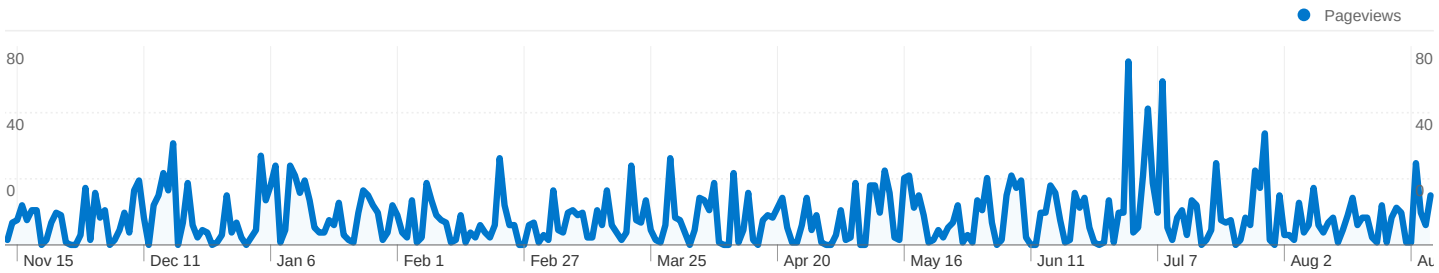
France	**3**	1.00	00:00:00	33.33%	100.00%
					1 - 10 of 25

www.lclark.edu/~ccp

Content Overview

Nov 13, 2010 - Sep 1, 2011

Comparing to: Site



Pages on this site were viewed a total of 3,272 times

3,272 **Pageviews**

2,377 **Unique Views**

54.20% **Bounce Rate**

Top Content

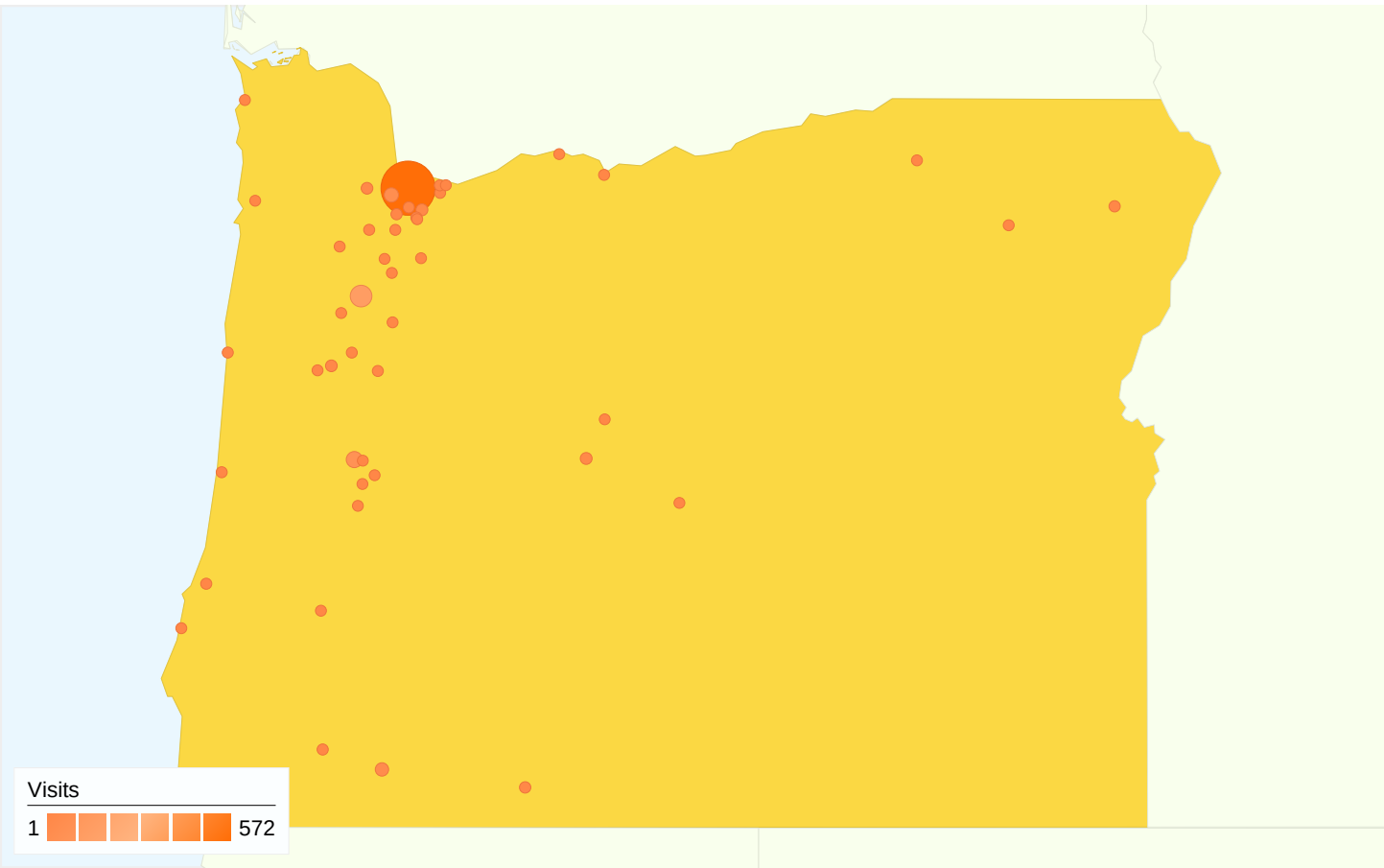
Pages	Pageviews	% Pageviews
/~ccp/index.htm	1,234	37.71%
/~ccp/Past_Biennia.htm	510	15.59%
/~ccp/LegislativeHistoryofRules.htm	416	12.71%
/~ccp/Current_Biennium.htm	311	9.50%
/~ccp/resources.htm	213	6.51%

State Detail:

Oregon

Nov 13, 2010 - Sep 1, 2011

Comparing to: Site



This state sent 1,017 visits via 49 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
1,017 % of Site Total: 73.01%	2.59 Site Avg: 2.35 (10.31%)	00:03:25 Site Avg: 00:02:47 (22.69%)	67.45% Site Avg: 69.99% (-3.63%)	47.39% Site Avg: 54.20% (-12.56%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	572	2.78	00:04:04	62.76%	44.23%
Salem	143	2.66	00:02:56	55.24%	44.76%
Eugene	71	2.62	00:03:42	78.87%	49.30%
Beaverton	46	2.72	00:03:55	82.61%	54.35%
Medford	34	1.71	00:00:26	91.18%	52.94%
Clackamas	15	1.93	00:00:45	33.33%	40.00%
Bend	14	2.50	00:01:09	92.86%	71.43%
Corvallis	12	2.25	00:04:28	83.33%	33.33%
Hillsboro	12	1.58	00:02:40	91.67%	66.67%

Klamath Falls	8	1.38	00:00:08	75.00%	75.00%
Enterprise	6	4.00	00:07:08	50.00%	16.67%
Tualatin	6	1.33	00:00:43	100.00%	66.67%
West Linn	6	1.67	00:03:42	100.00%	66.67%
Lake Oswego	5	2.20	00:01:50	100.00%	60.00%
Grants Pass	5	2.20	00:01:55	40.00%	60.00%
Coos Bay	4	1.00	00:00:00	100.00%	100.00%
Oregon City	3	2.00	00:00:28	100.00%	66.67%
Newberg	3	2.33	00:01:07	100.00%	33.33%
Lebanon	3	1.00	00:00:00	66.67%	100.00%
Gresham	3	2.00	00:00:44	100.00%	66.67%
Florence	3	1.33	00:00:53	100.00%	66.67%
The Dalles	3	2.33	00:00:25	66.67%	33.33%
Newport	3	1.00	00:00:00	66.67%	100.00%
Wilsonville	2	2.50	00:00:54	100.00%	50.00%
Philomath	2	1.00	00:00:00	100.00%	100.00%
Stayton	2	1.50	00:00:34	100.00%	50.00%
Bandon	2	2.00	00:06:12	100.00%	50.00%
Roseburg	2	1.50	00:03:39	100.00%	50.00%
Seaside	2	3.00	00:05:50	50.00%	0.00%
Mcminnville	2	1.00	00:00:00	100.00%	100.00%
La Grande	2	2.50	00:00:11	100.00%	50.00%
Fairview	2	1.50	00:01:05	100.00%	50.00%
Albany	2	3.50	00:00:56	100.00%	0.00%
Pendleton	2	2.50	00:00:37	100.00%	50.00%
Independence	1	1.00	00:00:00	100.00%	100.00%
Troutdale	1	3.00	00:01:26	100.00%	0.00%
Molalla	1	1.00	00:00:00	100.00%	100.00%
Hood River	1	2.00	00:01:34	100.00%	0.00%
Woodburn	1	2.00	00:09:21	100.00%	0.00%
Cave Junction	1	3.00	00:00:57	100.00%	0.00%
Creswell	1	1.00	00:00:00	100.00%	100.00%
Brothers	1	1.00	00:00:00	100.00%	100.00%
Cottage Grove	1	1.00	00:00:00	100.00%	100.00%
Brookings	1	1.00	00:00:00	0.00%	100.00%
Tillamook	1	3.00	00:00:33	100.00%	0.00%

Redmond	**1**	1.00	00:00:00	100.00%	100.00%
Pleasant Hill	**1**	1.00	00:00:00	0.00%	100.00%
Springfield	**1**	3.00	00:02:30	100.00%	0.00%
Mount Angel	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 49 of 49

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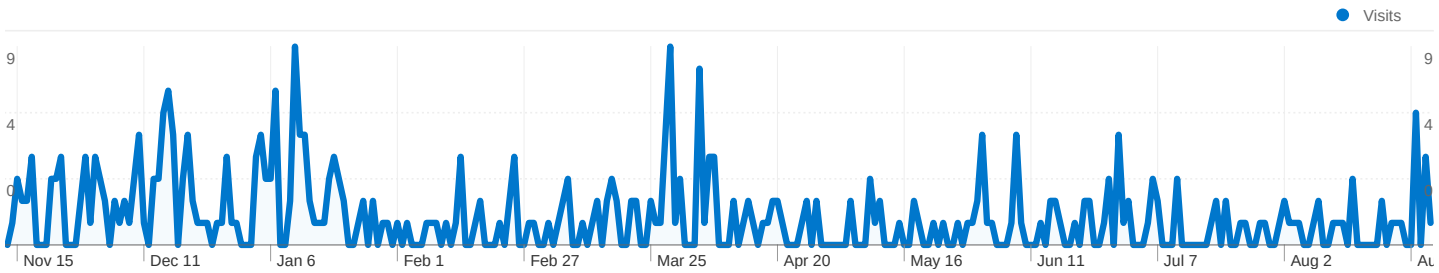
Keywords

Nov 13, 2010 - Sep 1, 2011

Comparing to: Site



Search sent 372 total visits via 181 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
372	2.34	00:02:01	68.01%	55.38%
% of Site Total: 26.70%	Site Avg: 2.35 (-0.43%)	Site Avg: 00:02:47 (-27.74%)	Site Avg: 69.99% (-2.83%)	Site Avg: 54.20% (2.17%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	49	3.57	00:03:49	67.35%	22.45%
council on court procedures	44	2.68	00:01:58	22.73%	20.45%
council on court procedures oregon	16	3.25	00:03:06	37.50%	25.00%
counsel on court procedures	8	1.50	00:00:11	12.50%	75.00%
joyce ann harpole	8	1.12	00:00:02	0.00%	87.50%
orcp 27	8	1.12	00:00:02	100.00%	87.50%
orcp 9	7	1.14	00:00:05	100.00%	85.71%
orcp 52	5	1.00	00:00:00	80.00%	100.00%
orcp 58	5	1.00	00:00:00	60.00%	100.00%
orcp 63	5	1.20	00:00:00	100.00%	100.00%
orcp 8	5	1.00	00:00:00	80.00%	100.00%
oregon council on court procedure	5	2.40	00:01:09	0.00%	60.00%
orcp 18	4	1.75	00:04:20	100.00%	50.00%
oregon rules of civil procedure	4	2.25	00:00:31	100.00%	50.00%
brooks cooper attorney	3	2.67	00:00:39	100.00%	33.33%
orcp	3	1.00	00:00:00	66.67%	100.00%
orcp 34	3	1.00	00:00:00	66.67%	100.00%
orcp 40	3	1.33	00:00:19	100.00%	66.67%
orcp 62	3	1.00	00:00:00	100.00%	100.00%
orcp 68	3	1.00	00:00:00	100.00%	100.00%
orcp 72	3	1.67	00:02:14	100.00%	33.33%
oregon council court procedure	3	5.33	00:07:10	66.67%	0.00%

oregon rules of civil procedure legislative history	3	6.33	00:03:43	66.67%	0.00%
oregon rules of court	3	3.33	00:03:44	33.33%	33.33%
council on court procedure oregon	2	5.50	00:23:29	100.00%	0.00%
council orcp	2	1.50	00:01:16	0.00%	50.00%
court procedures	2	1.00	00:00:00	100.00%	100.00%
legislative history of oregon rules of civil procedure	2	8.00	00:06:46	50.00%	50.00%
legislative history orcp	2	2.00	00:03:20	100.00%	0.00%
orcp 15	2	1.00	00:00:00	100.00%	100.00%
orcp 38	2	1.00	00:00:00	100.00%	100.00%
orcp 67	2	1.00	00:00:00	100.00%	100.00%
orcp 69	2	1.50	00:03:37	100.00%	50.00%
orcp 7 legislative history	2	3.00	00:05:46	50.00%	0.00%
orcp 71c	2	1.00	00:00:00	100.00%	100.00%
orcp 78	2	1.00	00:00:00	100.00%	100.00%
orcp legislative history	2	1.50	00:01:46	100.00%	50.00%
oregon council court procedures	2	3.00	00:01:48	0.00%	0.00%
oregon counsel on court procedures	2	3.00	00:01:01	50.00%	0.00%
oregon court procedures	2	1.00	00:00:00	100.00%	100.00%
www.legacy.lclark.edu/~ccp	2	2.00	00:00:48	50.00%	50.00%
"court procedures " site:.edu	1	1.00	00:00:00	100.00%	100.00%
"orcp 72"	1	1.00	00:00:00	100.00%	100.00%
"orcp 80"	1	1.00	00:00:00	100.00%	100.00%
+oregon +"civil procedure" and amendments	1	1.00	00:00:00	100.00%	100.00%
2011 changes in the orcp	1	1.00	00:00:00	100.00%	100.00%
amendment to rule 43 of the orcp oregon legislature	1	5.00	00:04:58	100.00%	0.00%
animal law moot court competition	1	6.00	00:14:15	0.00%	0.00%
attorney photo "brooks f. cooper"	1	1.00	00:00:00	100.00%	100.00%
brooks cooper attorney portland	1	2.00	00:00:25	0.00%	0.00%
brooks cooper oregon state bar	1	1.00	00:00:00	100.00%	100.00%
cache:89clkydrydkj:lawlib.lclark.edu/research/oregonlaw.php legislative history ors 19.335	1	3.00	00:01:23	100.00%	0.00%
ccp lewis and clark orcp	1	3.00	00:00:19	0.00%	0.00%
ccp rule 71 -77	1	2.00	00:16:07	100.00%	0.00%
changes to oregon orcp 70	1	1.00	00:00:00	100.00%	100.00%

circuit court judge vacancy "lane co"	1	1.00	00:00:00	100.00%	100.00%
civil proceedures timelines oregon	1	1.00	00:00:00	100.00%	100.00%
comments oregon rules of civil procedure	1	7.00	00:04:48	0.00%	0.00%
council and court procedures orcp 71	1	1.00	00:00:00	0.00%	100.00%
council court procedure oregon	1	3.00	00:05:34	100.00%	0.00%
council court procedures	1	8.00	00:02:44	100.00%	0.00%
council of court procedures	1	2.00	00:00:43	0.00%	0.00%
council on court procedures john bachofner	1	2.00	00:01:15	100.00%	0.00%
council on court procedures lewis and clark	1	2.00	00:09:03	100.00%	0.00%
counsel on court procedures (ccp), oregon	1	3.00	00:11:37	100.00%	0.00%
counsel on court procedures website	1	2.00	00:00:11	0.00%	0.00%
court procedures, edu	1	1.00	00:00:00	100.00%	100.00%
current and past biennium	1	1.00	00:00:00	100.00%	100.00%
current biennium	1	1.00	00:00:00	100.00%	100.00%
david rees judge oregon	1	1.00	00:00:00	100.00%	100.00%
eve miller, portland judge	1	1.00	00:00:00	100.00%	100.00%
frcp 62 and orcp 72	1	8.00	00:07:40	0.00%	0.00%
history of oregon rules of civil procedure	1	1.00	00:00:00	0.00%	100.00%
history of the oregon rules of civil procedure first enacted?	1	1.00	00:00:00	100.00%	100.00%
honorable david f. cooper	1	1.00	00:00:00	100.00%	100.00%
how long do oregon's council members serve	1	1.00	00:00:00	100.00%	100.00%
http://www.lclark.edu/~ccp/legislativehistory.htm	1	10.00	00:05:27	100.00%	0.00%
judge "lauren holland" eugene	1	2.00	00:00:41	0.00%	0.00%
judge david f. rees portland	1	1.00	00:00:00	100.00%	100.00%
judge eve l miller	1	1.00	00:00:00	100.00%	100.00%
judge jerry hodson multnomah county oregon	1	1.00	00:00:00	100.00%	100.00%
judge mary mertens james	1	1.00	00:00:00	100.00%	100.00%
judge mary mertens james salem,or	1	1.00	00:00:00	100.00%	100.00%
juidge eve l miller, oregon	1	1.00	00:00:00	100.00%	100.00%
kathryn pratt attorney portland oregon	1	1.00	00:00:00	100.00%	100.00%
kristen david attorney at law	1	1.00	00:00:00	100.00%	100.00%
kristen david lawyer oregon	1	1.00	00:00:00	100.00%	100.00%
lane miller clackamas county	1	1.00	00:00:00	100.00%	100.00%

lauren s. holland	1	1.00	00:00:00	100.00%	100.00%
legislative history of orcp 32h	1	1.00	00:00:00	100.00%	100.00%
legislative history orcp 31	1	5.00	00:10:37	100.00%	0.00%
legislative history orcp 54	1	5.00	00:06:26	100.00%	0.00%
legislative history orcp 7	1	1.00	00:00:00	100.00%	100.00%
legislative history oregon rules of civil procedure	1	6.00	00:04:41	0.00%	0.00%
mary mertens attorney oregon	1	1.00	00:00:00	100.00%	100.00%
maureen leonard attorney	1	1.00	00:00:00	100.00%	100.00%
michael brian attorney medford	1	1.00	00:00:00	100.00%	100.00%
mult co circuit court/judge hodson	1	1.00	00:00:00	100.00%	100.00%
orcp 1	1	1.00	00:00:00	0.00%	100.00%
orcp 10	1	1.00	00:00:00	100.00%	100.00%
orcp 17	1	1.00	00:00:00	100.00%	100.00%
orcp 27 forms	1	1.00	00:00:00	100.00%	100.00%
orcp 34a	1	1.00	00:00:00	100.00%	100.00%
orcp 38a	1	1.00	00:14:24	100.00%	0.00%
orcp 39 and orcp 55	1	1.00	00:00:00	100.00%	100.00%
orcp 4	1	1.00	00:00:00	100.00%	100.00%
orcp 43	1	1.00	00:00:00	100.00%	100.00%
orcp 54 a	1	1.00	00:00:00	100.00%	100.00%
orcp 54a and legilative history	1	1.00	00:16:09	100.00%	0.00%
orcp 54a dismiss specific claim	1	1.00	00:00:00	100.00%	100.00%
orcp 62 (a)	1	1.00	00:00:00	100.00%	100.00%
orcp 62 oregon	1	1.00	00:00:00	0.00%	100.00%
orcp 62a	1	1.00	00:00:00	100.00%	100.00%
orcp 7 amendment	1	1.00	00:00:00	100.00%	100.00%
orcp 7 history	1	1.00	00:00:00	100.00%	100.00%
orcp 71	1	1.00	00:00:00	100.00%	100.00%
orcp 71 history	1	1.00	00:00:00	100.00%	100.00%
orcp 80	1	1.00	00:00:00	100.00%	100.00%
orcp 9 equate service and filing	1	1.00	00:00:00	100.00%	100.00%
orcp ccp 2011	1	1.00	00:00:00	0.00%	100.00%
orcp document production costs	1	1.00	00:00:00	0.00%	100.00%
orcp filing counterclaims	1	1.00	00:00:00	100.00%	100.00%
orcp forms of pleadings	1	1.00	00:00:00	100.00%	100.00%

orcp order example	1	1.00	00:00:00	100.00%	100.00%
orcp rules	1	1.00	00:00:00	100.00%	100.00%
orcp third party	1	1.00	00:00:00	100.00%	100.00%
orcp52 oregon court	1	1.00	00:00:00	100.00%	100.00%
order materials	1	1.00	00:00:00	100.00%	100.00%
order_materials	1	1.00	00:00:00	100.00%	100.00%
oregon "council on court procedures"	1	7.00	00:03:26	100.00%	0.00%
oregon ccp	1	5.00	00:01:46	100.00%	0.00%
oregon civil court	1	1.00	00:00:00	100.00%	100.00%
oregon council civil procedure ccp	1	2.00	00:00:17	100.00%	0.00%
oregon council cort proceedures	1	7.00	00:04:44	100.00%	0.00%
oregon council of court procedure	1	2.00	00:00:04	100.00%	0.00%
oregon council of court procedures	1	7.00	00:27:42	0.00%	0.00%
oregon council on court procedures budget	1	5.00	00:00:52	0.00%	0.00%
oregon council on court procedures minutes	1	7.00	00:13:24	100.00%	0.00%
oregon council on court procedures, new rules	1	14.00	00:04:24	0.00%	0.00%
oregon counsel hon judge david rees	1	3.00	00:09:07	0.00%	0.00%
oregon counsel on court procedure orcp 68	1	3.00	00:02:08	100.00%	0.00%
oregon counsil on court procedures	1	15.00	00:02:38	100.00%	0.00%
oregon court forms oregon rules of civil procedure orcp 69 form	1	1.00	00:00:00	100.00%	100.00%
oregon court rule making	1	1.00	00:00:00	100.00%	100.00%
oregon findings of fact under orcp 62	1	1.00	00:00:00	0.00%	100.00%
oregon orcp 9	1	1.00	00:00:00	100.00%	100.00%
oregon orcp discovery of physical testing	1	1.00	00:00:00	100.00%	100.00%
oregon pro se	1	4.00	00:05:24	100.00%	0.00%
oregon rule court procedure	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure - section 80 - receiverships	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure case law	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure default	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure history	1	3.00	00:00:30	100.00%	0.00%
oregon rules of civil procedure l r 47 jury selection	1	1.00	00:00:00	100.00%	100.00%
oregon rules of civil procedure, 40c	1	1.00	00:16:37	100.00%	0.00%
oregon substitution of parties orcp 34	1	1.00	00:08:45	100.00%	0.00%

pleading amendment to party name "legislative history"	1	1.00	00:00:00	100.00%	100.00%
procedure legislative	1	1.00	00:00:00	100.00%	100.00%
procedures in the court	1	1.00	00:00:00	100.00%	100.00%
recent legislative promulgate	1	1.00	00:00:00	100.00%	100.00%
robert herndon, circuit court judge	1	1.00	00:00:00	100.00%	100.00%
robert herndon--clackamas court judge	1	1.00	00:00:00	100.00%	100.00%
rule 70 orcp order ohio	1	1.00	00:00:00	100.00%	100.00%
rules of court legislative history	1	4.00	00:02:45	100.00%	0.00%
rules of procedure oregon state court	1	1.00	00:00:00	100.00%	100.00%
settlement demand rules of discovery oregon	1	1.00	00:00:00	100.00%	100.00%
sherilyn waxler	1	3.00	00:00:45	0.00%	0.00%
site:http://*.lclark.edu/~ -ppt -pdf	1	1.00	00:00:00	100.00%	100.00%
substantial changes in oregon rules of civil procedure	1	1.00	00:00:00	100.00%	100.00%
the history of a court procedure	1	1.00	00:00:00	100.00%	100.00%
the honorable eve l. miller contact	1	3.00	00:00:24	100.00%	0.00%
what are the council in court	1	1.00	00:00:00	100.00%	100.00%
what do council do in court	1	3.00	00:00:41	100.00%	0.00%
what is council in court	1	1.00	00:00:00	100.00%	100.00%
what is legislative history rule	1	1.00	00:00:00	100.00%	100.00%
what is the current biennium	1	1.00	00:00:00	100.00%	100.00%
"orcp 43"	0	0.00	00:00:00	0.00%	0.00%
cache:crmj-4w8eggj:www.counciloncourtprocedures.org/ council on court procedures john bachonov	0	0.00	00:00:00	0.00%	0.00%
orcp 39c	0	0.00	00:00:00	0.00%	0.00%
orcp 54 a and legislative history	0	0.00	00:00:00	0.00%	0.00%
what is oregon rules of civil procedure 40c	0	0.00	00:00:00	0.00%	0.00%
					1 - 181 of 181