

**MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**  
 Saturday, October 1, 2011, 9:30 a.m.  
 Oregon Coast Community College  
 400 SE College Way  
 Newport, OR 97366

**ATTENDANCE**

Members Present:

Arwen Bird  
 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. Robert D. Herndon\*  
 Hon. Jerry B. Hodson\*  
 Hon. Lauren S. Holland\*  
 Robert M. Keating  
 Hon. Rives Kistler\*  
 Maureen Leonard  
 Hon. Eve L. Miller\*  
 Leslie W. O'Leary\*  
 Hon. Locke A. Williams

Members Absent:

Hon. David F. Rees  
 Mark R. Weaver  
 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
<ul style="list-style-type: none"> <li>• ORCP 1 E</li> <li>• ORCP 19 B</li> <li>• ORCP 24</li> <li>• ORCP 27 B</li> <li>• ORCP 36</li> <li>• ORCP 39</li> <li>• ORCP 39 C(6)</li> <li>• ORCP 43</li> <li>• ORCP 44</li> <li>• ORCP 47</li> <li>• ORCP 55 F(2)</li> <li>• ORCP 55 F(3)</li> <li>• ORCP 57 F</li> <li>• ORCP 59 H(1)</li> <li>• ORCP 68</li> <li>• ORCP 87</li> </ul>	<ul style="list-style-type: none"> <li>• ORCP 1 E</li> <li>• ORCP 47 D</li> <li>• ORCP 87 A</li> </ul>		

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at approximately 9:45 a.m. Due to an apparent misunderstanding on the part of the Oregon Coast Community College, a meeting room was not available for Council members who appeared in person in Newport. An abbreviated meeting was therefore held, with those members who appeared in person gathering outside the locked college gates and using a cell phone in speaker mode to teleconference with the Council members participating by telephone.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of September 10, 2011, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft September 10, 2011, minutes (Appendix A) which had been previously circulated to the members. Mr. Bachofner inquired whether the roster which had been handed out during the September 10 meeting had been changed to reflect changes in members' contact information. Ms. Nilsson stated that, even though a copy of the updated roster was not attached to the draft minutes, the roster had indeed been updated and the current copy would be included as an attachment to the final September 10, 2011, minutes. A motion was made to approve the minutes, the motion was seconded, a voice vote was taken, and the minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson stated that, since such a short time had elapsed since the September 10, 2011, meeting, and because of the unusual meeting circumstances, she would forego presenting a website report at the present time.

V. Old Business (Mr. Cooper)

A. Issues Requiring Further Inquiry

1. 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

Mr. Cooper reminded the Council that this issue was discussed at the September 10, 2011, meeting and carried over to the next meeting's agenda for further analysis. After a brief discussion, the Council declined to form a committee to examine this issue.

2. ORCP 55 F(3): Subpoenas for Inmates

Prof. Peterson reported that he had spoken to Judge J. Burdette Pratt to further clarify his concerns regarding this issue. He noted that Judge Pratt stated that this is a concern in his county and that he has attempted to exercise some control over the process. He stated that Judge Pratt noted two specific problems that are occurring: 1) inmates asking

for an unlimited number of subpoenas in blank; and 2) inmates subpoenaing crime victims and police officers and sharing those documents produced with others within the correctional institution. Prof. Peterson observed that these inmates are likely not sending the required witness fee with the subpoenas, but noted that most people who receive a subpoena may not realize that the witness fee is required and would be likely to comply with the subpoena, even if they do not receive the fee. He suggested the possibility of requiring more prominent language regarding witness fees to be displayed on subpoenas. Mr. Cooper observed that this is not a problem for counties without prisons, and stated that he believes that judges have the authority to deal with this problem on their own under ORCP 46. Judge Holland expressed concern over using the ORCP rather than a Supplemental Local Rule for such an issue. The Council declined to form a committee to examine this issue. Prof. Peterson will communicate this decision to Judge Pratt.

3. 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

Judge Miller reminded the Council that Judge Keith Raines of Washington County had brought this issue to the attention of the Council (Appendix B). Mr. Cooper stated that the question is whether ORCP 36 and 39 apply necessarily to all civil cases so that depositions are proper, or are depositions improper and should the rule be amended to make that clear. Prof. Peterson asked whether the victim could ask for a protective order. Mr. Cooper remarked that, in his practice, he would tell the victim that they could not avoid the deposition but that they would require that it take place in the courthouse so that the abuser would go through a metal detector and there would be security present. He stated that he never had a problem in these cases. The Council declined to form a committee to examine this issue. Mr. Cooper will communicate this decision to Judge Raines.

B. Committee Updates/Reports (Committee Roster: Appendix C)

1. ORCP 1 E: Language of Declarations (Mr. Bachofner)

Mr. Bachofner reported that the committee consisting of himself, Mr. Campf, and Justice Kistler, had met, discussed the issue, and was ready to issue its final report to the Council.

Mr. Bachofner reminded the Council that the proposal from attorney Paul Merrell was to modify ORCP 1 E to include the more specific requirement of “personal knowledge” which is required by ORCP 47 D. Mr. Bachofner stated that the committee had decided that the more general language in ORCP 1 E was designed purposefully to be more general and that, if a change were made to ORCP 1 E, it may have a detrimental effect on other rules. Mr. Bachofner noted that he had contacted Mr. Merrell to discuss the issue, and that Mr. Merrell’s focus was on summary judgment and his concern was that ORCP 1 E was in conflict with ORCP 47 D because the two rules use different standards. It was noted that declarations under ORCP 47 D establish the facts necessary to support a summary judgment.

A concern had also been raised by Mr. Merrell about undated declarations. Mr.

Bachofner observed that declarations are required to be dated, since UTCR 2.010(6) requires all signatures to be dated.

Prof. Peterson noted that there may be a broader requirement in the difference between ORCP 1 E and ORCP 87 A, and that may be why there is a difference in the language required for declarations in those two rules. He stated that provisional process has other protections within it which will protect the other party. Mr. Bachofner stated that, in provisional process or claim and delivery, a lawyer may not have personal knowledge because a staff person may have obtained the information and provided it to the attorney, but that a prompt remedy is necessary before assets are hidden or removed from the jurisdiction.

The committee recommends to the Council that no changes to ORCP 1 E, 47 D, or 87 A are necessary.

2. ORCP 19 B, 24: Affirmative Defenses and Compulsory Counterclaims (Ms. Leonard)

Ms. David reported that the committee has met once by telephone and will be meeting again and reporting to the Council at a later date.

3. ORCP 44: Medical Examinations

Mr. Brian reported that no action has yet been taken with regard to this committee.

4. ORCP 57 F: Alternate Jurors (Ms. O'Leary)

Mr. Buckle reported that the committee has had e-mail contact and will provide a report to the Council at a later date. Ms. O'Leary agreed to be the committee chair.

5. ORCP 68: Cost Bills - Multiple Issues (Ms. David)

Ms. David reported that the committee has met once by telephone and will be meeting again and reporting to the Council at a later date.

6. ORCP 27 B: Guardians Ad Litem (Mr. Cooper)

Mr. Cooper reported that the committee has not yet met, but that he will circulate some draft language for its review the following week and set up a meeting. Judge Herndon asked to join the committee.

7. ORCP 39 C(6): Require Designations of the Deponent in Advance of the Deposition (Ms. Gates)

Ms. Gates reported that the first meeting of the committee had been scheduled, and that it will report to the Council at a later date.

8. ORCP 43: Electronic Discovery (Ms. David)

Ms. David reported that the committee has had discussions via e-mail and is waiting for the new ORCP to be implemented on January 1, 2012, to see what impact last biennium's changes will have before setting up a meeting.

9. ORCP 47: Summary Judgment - Multiple Issues (Ms. David)

Ms. David reported that some members of the committee have met once by telephone and that the entire committee will be scheduling a meeting and reporting to the Council at a later date.

10. ORCP 59 H(1): Exceptions to Jury Instructions (Ms. Leonard)

Ms. Leonard stated that the committee would meet the following week and provide the Council with a report at a later date.

VI. New Business (Mr. Cooper)

Due to the unusual circumstances of the meeting, and so that Council members attending the meeting *en plein air* would not have to do so for longer than necessary, Mr. Cooper suggested that he categorize the potential amendments in subsections A and B in an easier format for Council members and send them via e-mail so that they can be more easily discussed at the next meeting. Council members agreed.

A. Potential Amendments Submitted Since December 11, 2010, Meeting II - The OSB Survey Attorney Suggestions

1. ORCP 7: Service of Summons Rules Unduly Difficult
2. ORCP 7: Clarification of Service of Process (when to use 1<sup>st</sup> class mail, certified mail, personal service)
3. ORCP 7: Service by other means clarified
4. ORCP 7: Inadequate service by pro se litigants who then get a TRO
5. ORCP 7: Provide for service as with FRCP 4(d)
6. ORCP 7: Motor vehicle service confusing
7. ORCP 9: Clarification for service of amended complaints
8. ORCP 9 F, G: Service of pleadings and correspondence via e-mail
9. ORCP 9 F, G: Electronic service of pleadings automatically acceptable
10. ORCP 9 F, G: Faxes and e-mails not treated as same-day service
11. ORCP 18 A: Notice pleading
12. ORCP 21: Remove requirement to confer on Rule 21 motions
13. ORCP 21: Make true conferral mandatory, describing efforts in an affidavit
14. ORCP 21: Tougher sanctions for serial Rule 21 motions
15. ORCP 21 G: Statute of limitations waived if not pleaded, but good cause allowance in later pleadings confusing
16. ORCP 43: Mandatory early disclosure of discoverable information analogous to FRCP
17. ORCP 43: Clarify forms of request and proper objections
18. ORCP 43: Closer supervision by judges (mandatory discovery conferences)

19. ORCP 43: Mandatory production of documents like federal court
20. ORCP 43: Verifications on discovery responses
21. ORCP 43: Excessive costs in small cases, e.g. detailed responses to requests for production
22. ORCP 43: Clarify formal appearance not required to respond to a RFP
23. ORCP 43 & 46: Automatic rule, if documents not produced, can't produce at trial. Motions to compel expensive and make take more time than the case allows, especially in domestic relations
24. ORCP 53: Streamlining consolidation practice
25. ORCP 54 E: make rule bilateral
26. ORCP 55 H: Change rule to protect privilege; documents produced to non-requesting attorney to create privilege log
27. ORCP 55 H: Require production of medical and other related records to cut down on gamesmanship
28. ORCP 69: Require formal notice rather than simple letter before seeking default
29. ORCP 69: Preclusion of default in less time than otherwise allowed to respond
30. ORCP 81-85: Extraordinary Remedies - detail in rules does not prevent extraordinary relief from being regularly allowed; it should
31. ORCP 81-85: TROs, injunctions, receiverships should be more uniform and clear
32. Rule to protect unrepresented litigants from lawyers overreaching, e.g. presenting inadmissible evidence
33. Adopt quality management approach for each rule; publish a Wiki for voting on rules; upon commencement or end of each case, conduct an attorney survey on rules
34. Clarify rules on ex parte contact, e.g. submitting orders without advising opponent
35. Court-annexed arbitration adds expense; parties use arbitration as discovery and to increase costs
36. More unified rules, differences between counties are confusing and costly
37. Assign all cases randomly to a judge at the time of filing
38. Clarify interaction of ORCP and UPC (UTCR?)
39. Assign trial dates within 30 days of answer, and no trial dates beyond 14 months
40. Swift procedure for responding to defenses that do not meet specific pleading standards (e.g. boilerplate)
41. Encourage more settlement conferences
42. Require notice of filing of the record on appeal, including docket entries and identify trial court exhibits
43. Allow post-jury interviews; concern of misconduct
44. Clarify probate/trust litigation
45. Adopt federal court formatting
46. Limited judgments in family law are relegated to support and temporary parenting; artificially labeled "orders"; ORS 107.095 should make clear support awards can be combined with custody and parenting time in one document

B. New Suggested Amendments Received Since September 10, 2011, Meeting

1. ORCP 54 A: amend to conform with FRCP 41(a)

C. E-Court/UTCR Changes (Ms. David)

Ms. David reported that she is a member of the the E-Court Committee. She stated that the Committee's latest goal has been to make changes to Chapter 22 of the Uniform Trial Court Rules and that she will forward a summary of this material to the Council so that we are aware of the changes being made. Mr. Nebel mentioned that there is a helpful summary of rule proposals which is available in PowerPoint format. Ms. David stated that she has this document and will forward it to Council members as well.

Mr. Cooper stated that, since Council members often need to send each other lengthy documents that do not travel well via e-mail, he will set up a Dropbox account for the Council's use and will provide Council members with details on its use and operation.

VII. Adjournment

Mr. Cooper adjourned the meeting at approximately 10:20 a.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director

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 Oregon State Bar Center  
 16037 SW Upper Boones Ferry Rd.  
 Tigard, OR 97224

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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. 76<sup>th</sup> 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 10<sup>th</sup> 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

**Agenda item V.A.2.** *Application of ORCP to FAPA and EPPDAPA proceedings.*

Some learned judges have ruled that ORCP does not apply to FAPA and EPPDAPA proceedings despite the language of ORCP which states that it applies to all civil and special proceedings.

The petitioner in a FAPA or EPPDAPA proceeding completes the documents and submits them to the Court on an ex parte basis without notice to the opposing party. [Occasionally, if there is a compelling question about custody of children, the Court will set a special circumstances hearing on the face of the protective order which is served on the respondent. ] The respondent has 30 days from the date of service to request a hearing to contest the protective order. Upon the respondent's request, the Court must set a hearing date: within 5 days if child custody is involved; within 21 days otherwise. [If there is a special circumstances hearing set at the time of the issuance of the protective order, that is also the hearing date to contest the terms and issuance of the order itself.] If either party brings an attorney to the contested hearing and the other is self-represented, the self-represented party is entitled to a 5 day continuance to employ counsel.

Some respondents' counsel have noticed depositions of self-represented petitioners, without informing the petitioner that the respondent would not be in attendance. The petitioner usually does not appear for deposition and respondent's counsel asks for sanctions including but not limited to attorney fees and striking the pleadings.

When formal charges have been contemporaneously filed, criminal defense counsel has attempted to utilize the discovery process to gain an advantage in the criminal case; the prosecutor is not entitled to participation or even notice if there is a deposition in the FAPA proceeding.

The Washington County Circuit Court has ruled that the respondent may not take the petitioner's deposition without Court permission and has not granted sanctions against a non-appearing self-represented petitioner. This Court's reasoning is: there is an inherent imbalance of power between a represented respondent and a self-represented petitioner; the timelines are too short for a normalized discovery process; there is great opportunity to intimidate an already victimized petitioner to bully that person into a dismissal; there is an unfairness issue in that a self-represented respondent would not be able to depose a petitioner without violating the terms of the restraining order.

The short timelines create additional problems, including notifying parties of hearing dates. Often the notice is by telephone or voicemail followed up by a mailed notice which arrives on the same day or after the hearing. We need an ORCP 71 process to address those sorts of issues.

Lawyers request attorney fees, so we need an ORCP 68 process to address those issues.

Therefore, the suggestion is that ORCP 36 through 46 not apply to FAPA and EPPDAPA proceedings.

**Agenda item V.B.6.** *Guardian ad Litem in FAPA, EPPDAPA and Adult Party Domestic Relations Cases*

The SFLAC has promulgated suggested procedures and forms to the individual judges to utilize as they see fit. The judges on your committee have already received them with the supporting memorandum explaining that COCP considered this unnecessary and that SFLAC opined differently. Feel free to use any or part of those materials for your committee's work if they are helpful.

**Agenda item VI.A.3.** *Service by other means.*

While I believe that it is inherent in the already existing rule, it would be helpful to clarify that, when no other better means of service is available, that the parties may, upon Court approval, serve by e-mail or social networking sites.

I would suggest a requirement that, in the event of service by mail, posting, or by other means (except posting) that a copy of the order needs to be served with the summons and complaint/petition. That will provide notice to the recipient that service has been authorized and completed.

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**Council on Court Procedures  
Committee List  
2011-2013 Biennium**

*As of 10-21-11*

ORCP 1 E: Language of Declarations

John Bachofner (Chair)  
Brian Campf  
Hon. Rives Kistler

ORCP 19 B, 24: Affirmative Defenses and  
Compulsory Counterclaims

Kristen David  
Hon. Jerry Hodson  
Hon. Tim Gerking  
Maureen Leonard (Chair)

ORCP 43: Electronic Discovery

Brian Campf  
Kristen David (Chair)  
Hon. Jerry Hodson  
Hon. Charles Zennaché

ORCP 47: Summary Judgment - Multiple  
Issues

Brooks Cooper  
Kristen David (Chair)  
Hon. Robert Herndon  
Jennifer Gates  
Bob Keating  
Hon. David Rees

ORCP 59 H(1): Exceptions to Jury Instructions

Hon. Rex Armstrong  
Jay Beattie  
Maureen Leonard (Chair)  
Hon. Charles Zennaché

ORCP 27 B: Guardians Ad Litem

Brooks Cooper (Chair)  
Hon. Robert Herndon  
Hon. Eve Miller

ORCP 39 C(6): Require Designations of the  
Deponent in Advance of the Deposition

John Bachofner  
Jennifer Gates (Chair)  
Hon. Tim Gerking

ORCP 44: Medical Examinations

John Bachofner  
Michael Brian  
Brooks Cooper  
Hon. Tim Gerking  
Bob Keating

ORCP 57 F: Alternate Jurors

Hon. Rex Armstrong  
Gene Buckle  
Hon. Eve Miller  
Leslie O'Leary (Chair)  
Hon. Charles Zennaché

ORCP 68: Cost Bills - Multiple Issues

Hon. Rex Armstrong  
John Bachofner  
Brooks Cooper  
Kristen David (Chair)  
Mark Peterson  
Hon. Charles Zennaché