

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
 Saturday, November 5, 2011, 9:30 a.m.
 Oregon State Bar Center
 16037 SW Upper Boones Ferry Rd.
 Tigard, OR 97224

Members Present:

John R. Bachofner
 Jay W. Beattie
 Michael Brian*
 Brian S. Campf
 Brooks F. Cooper
 Kristen S. David
 Jennifer L. Gates*
 Hon. Timothy C. Gerking
 Hon. Robert D. Herndon
 Hon. Lauren S. Holland*
 Robert M. Keating
 Hon. Rives Kistler
 Hon. Eve L. Miller
 Mark R. Weaver
 Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Hon. Rex Armstrong
 Arwen Bird
 Eugene H. Buckle
 Hon. Jerry B. Hodson
 Maureen Leonard
 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

| 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"> • ORCP 1 F • ORCP 7 • ORCP 9 • ORCP 9 F • ORCP 9 G • ORCP 17 • ORCP 18 A • ORCP 19 B • ORCP 21 • ORCP 21 G • ORCP 24 • ORCP 27 B • ORCP 36 • ORCP 39 • ORCP 39 C(6) • ORCP 43 • ORCP 44 • ORCP 46 • ORCP 47 • ORCP 54 A • ORCP 54 E • ORCP 55 H • ORCP 57 F • ORCP 59 H(1) • ORCP 68 • ORCP 69 • ORCP 81-85 | <ul style="list-style-type: none"> • ORCP 1 E • ORCP 7 • ORCP 18 A • ORCP 21 • ORCP 21 G • ORCP 46 • ORCP 47 D • ORCP 53 • ORCP 54 E • ORCP 69 • ORCP 81-85 • ORCP 87 A | | |

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:36 a.m.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of October 1, 2011, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft October 1, 2011, minutes (Appendix A) which had been previously circulated to the members. 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) (Appendix B)

Ms. Nilsson reported that the website statistics for the most recent period were consistent with the statistics for similar lengths of time in past biennia and that the website continues to receive a steady stream of visitors. She noted that materials from the current biennium are being uploaded to the site in “real time” and that past materials are being added as time permits. Ms. David pointed out that Ms. Nilsson recently made changes to the website to make the most recent amendments to the ORCP easier to find, and Ms. Nilsson added that she will include a new tab on the left side entitled “most recent ORCP changes” or something similar to provide even more readily visible access for visitors.

B. Legislator Matrix (Ms. David)

Ms. David suggested that the Council review the legislator matrix (Appendix C) and assign Council members to the legislators who did not have members assigned to them. After this process was completed, Ms. David stated that she will draft an introductory e-mail to legislators for Council members to modify and send to their assigned legislators. This e-mail will explain what the Council does and that the Council member will be sending updates throughout the biennium.

V. Old Business (Mr. Cooper)

A. Issues Requiring Further Inquiry

1. ORCP 36 and ORCP 39: whether the ORCP apply to Family Abuse Prevention Act (FAPA) and Elderly and Disabled Persons Abuse Prevention Act (EDPAPA) cases, as depositions could be used to intimidate a petitioner (Prof. Peterson)

Due to the unusual circumstances of the Council's October meeting, the Council neglected to take into consideration Judge Keith Raines' additional commentary (Appendix D) regarding this issue and therefore returned the matter to the November agenda.

Mr. Cooper stated that he has spoken with Judge Raines about this issue, and that his own first reaction is that these two matters are civil proceedings so, of course, the ORCP apply. He noted that the rules can be used in a way that is intimidating, but there are built-in safeguards that judges can use such as holding depositions in the courthouse. Judge Gerking suggested that each circuit can adopt a supplemental local rule (SLR). Prof. Peterson wondered whether a court can adopt an SLR that is contrary to the ORCP. Mr. Cooper wondered whether an SLR could be created that states that for a FAPA case one always needs permission from a judge to take a deposition. Judge Miller stated that she did not believe this was possible. Judge Herndon expressed concern over a large number of these cases going to the presiding judges and bogging down judicial resources. Judge Miller stated that she could envision an SLR being crafted to state that, at the request of a petitioner, a deposition could be held at the courthouse with security. Judge Gerking observed that this does not address the root problem. Judge Miller suggested that this may be a legislative issue.

Prof. Peterson stated that he had spoken with his colleague who does many FAPA cases, and that she believes that the issue is not a concern for practitioners, but more so for unrepresented parties. Judge Gerking stated that, in many places, the majority of parties to FAPA cases are unrepresented. Prof. Peterson stated that he is troubled by putting an exception into the ORCP for a particular type of practice, and suggested that the legislature could enact a change in the FAPA statute instead. Judge Miller agreed that the FAPA and elder abuse laws are such creatures of statute that the legislature could likely address the issue in some way. She stated that she has not had one case where someone has complained that they have been burdened by depositions or pretrial discovery.

Mr. Cooper stated that Judge Raines has made it a practice that parties to FAPA and EDPAPA proceedings need to get permission to take a deposition. Judge Herndon stated that he views this as a solution in search of a problem. He stated that he does not see this problem happening a lot in Clackamas county, but with 85 percent of domestic relations cases having one or both parties who are

self-represented, there may be a need to keep an eye on it. Mr. Weaver asked what is the basis of any ruling that the ORCP do not apply to these matters. He noted that, if one county says the ORCP do not apply and one says they do, perhaps the Council needs to look at rule language. Justice Kistler observed that judges do as they do individually. Judge Herndon noted for the record that it is clear to the Council that the ORCP apply to all civil proceedings of whatever nature. Mr. Beattie stated that the Council cannot do cutouts in every rule for different case types. Mr. Cooper noted that judges already have broad discretion in matters of discovery. Judge Herndon stated that many elder cases deal with a lot of money, and that to restrict discovery completely is not a good idea. Judge Zennaché suggested that the Council stop consideration of this issue at this time. The Council agreed that amendments to the discovery rules seem inappropriate. Prof. Peterson will send a letter to Judge Raines informing him of this decision.

B. Committee Updates/Reports

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

Ms. Leonard was not present at the meeting. Mr. Cooper reported that the committee discussed the affirmative defenses listed in ORCP 19, including res judicata and estoppel, and discussed updating the terms to claim and issue preclusion. As to compulsory counterclaims, the committee discussed the pros and cons and decided it needed more information from the full Council and, perhaps, a survey of the bar to know the impact of a rule change.

Judge Gerking stated that he is on the committee and that, during the discussions, he made the observation that the plaintiff is required to allege all claims or those claims are lost, so why should the defense not have that same burden. Ms. David noted that sometimes the defense looks at a complaint, addresses possible counterclaims, and strategically decides not to pursue them. She stated that there are times the defense identifies that there is a potential to raise counterclaims and decides not to, and that there are reasons it should not be mandatory for the defense. Ms. David pointed out that the plaintiff is the one who starts the ball rolling, and that the defense should not be forced to allege all claims because there could be unwanted repercussions. She noted that she understands the desire for judicial economy, but that there may be some need to do a survey with the Oregon Association of Defense Counsel, the Oregon Trial Lawyers Association, the litigation sections, and others to obtain feedback regarding unwanted repercussions. Mr. Bachofner stated that, in insurance defense cases, the insurance company will not provide an attorney for their insured's separate claims, and defendants may choose to save those claims for later for financial reasons, such as not being able to afford separate counsel.

Mr. Cooper stated that, if the claims are utterly unrelated, it does not seem efficient to file them in the same case. Judge Miller agreed that a survey is

needed, but noted that it seems that most cases settle and that parties are wrapping those issues up in the settlement regardless of whether they have been formally pleaded or not. She stated that sometimes the promise not to file another claim if the current one is settled is what drives settlements. She observed that she does not see this as being a big problem but wants to hear from others. Mr. Keating stated that Ms. David pointed out the dilemmas very clearly and that the reality is that, when it comes time to settle, everyone wants the whole thing over and all of the potential claims get fed into the resolution of the case. He opined that this is a solution looking for a problem. Mr. Cooper suggested e-mailing the Council members absent from today's meeting to ask for their opinion before embarking on a survey.

Ms. David noted that, during the committee's discussions, Judge Herndon had asked whether the issue was substantive or procedural. Mr. Beattie asked whether there is any history from the original adoption of the rules that could prove helpful. Ms. David stated that she will look at the history at the Clackamas County Law Library. Ms. Nilsson stated that, if she needs any assistance, the original materials are also available in the Council's office and she and Prof. Peterson would be happy to help find materials.

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

Mr. Cooper stated that the committee has not yet met. He noted that he has been exchanging e-mails with Judge Raines and working on some draft language. In some instances an elderly couple's children may be attempting to qualify one parent for Medicaid. He stated that this often involves relatively complicated divorce proceedings when the couple does not want to get divorced and may not be aware that divorce proceedings have been commenced. Judge Holland stated that she has seen these cases as well, and asked to join the committee. She noted that it may be possible to require some proof of incapacity in some cases, but not all cases. Judge Herndon observed that this issue will be arising a lot with an aging population, and that it will likely get into issues of substantive law. He stated that there may be no simple fix and that we need to make sure that any proposal is not beyond the scope of the Council.

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

Mr. Bachofner stated that the committee had met by telephone. He noted that he was charged with drafting some changes to ORCP 39 C(6), but has not yet completed that task.

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

Ms. David stated that the committee had conversed by e-mail and decided that nothing urgent needs to be done until the new ORCP take effect in January. She noted that she had spoken at the Oregon State Bar Fundamentals of Litigation seminar on e-discovery and received feedback from people who appreciated that the Council had addressed this issue and have already cited to the upcoming amendments to ORCP 43.

5. ORCP 44: Medical Examinations

It was observed that there are two cases before the Oregon Supreme Court that may impact ORCP 44: one mandamus case [*Lindell v. Kalugin and Countryside Construction, Inc.*, SC No. 059437] and one other case. Both have been argued, and both deal with whether a plaintiff is allowed access to a defendant's medical records. The Council agreed to table this issue until the Supreme Court issues a ruling which will likely be instructive to the committee regarding whether any clarification to ORCP 44 is necessary.

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

Ms. David stated that Mr. Keating was appointed chair of the committee. She noted that there are multiple issues with ORCP 47, including statements of undisputed fact, issues regarding affirmative defenses in summary judgments, and the possibility of page limits. She stated that the committee will report further next month.

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

Ms. O'Leary was absent from the meeting. Judge Miller reported that the committee had met briefly a while ago, but had not met since. Judge Gerking asked to be added to the committee.

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

Ms. Leonard was absent from the meeting. Mr. Cooper reported that the committee had not yet met and that he would work on arranging a meeting.

9. ORCP 68: Cost Bills & Attorney Fees - Multiple Issues (Ms. David)

Ms. David stated that the committee needs a plaintiff's attorney to substitute for Mr. Cooper, who will step down from the committee, as well as a second plaintiff's attorney to keep the committee balanced. Brian Campf and Jennifer Gates were added to the committee. Ms. David stated that the committee is ultimately looking at clarifying the language in ORCP 68, since there is confusion about what is required to be submitted and what information needs to be laid out for judges.

She noted that the committee will attempt to change the language on whether a hearing following an objection to a request for fees is mandated, and create a better process for requesting a hearing if one is necessary, but to otherwise allow judges to make that determination. Judge Holland asked whether the committee is looking at how ORCP 68 applies in probate and protective proceeding cases. Ms. David confirmed that the committee will speak to Mr. Cooper about whether the rule works in those cases, and that the committee will also speak with Judge Zennaché about how fees in family law proceedings are handled so that the rule adequately meets the litigants' needs in those cases. Ms. David stated that she may call Judge Holland to get her feedback as well. Ms. David mentioned that she is also looking at the legislative history of the rule. Prof. Peterson noted that replies are not permitted under ORCP 68, but that there may be some instances where allowing a reply would obviate the need for a hearing. Mr. Weaver observed that many attorneys file replies despite the fact that they are not allowed under ORCP 68.

VI. New Business (Mr. Cooper)

A. Potential Amendments Submitted Since December 11, 2010, Meeting II - The OSB Survey Attorney Suggestions (carried over from October 1, 2011, agenda) (Appendix E)

1. ORCP 7: Service of Summons Rules Unduly Difficult

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

2. ORCP 7: Clarification of Service of Process (when to use 1st class mail, certified mail, personal service)

After careful consideration, and an observation that the rule is clear in its present form, the Council declined to form a committee to examine this proposal.

3. ORCP 7: Service by other means clarified

Mr. Cooper stated that this suggestion came from Washington County Circuit Judge Keith Raines. He stated that Judge Raines suggested clarifying that, when no other better means of service is available, the parties may, upon Court approval, serve by e-mail or social networking sites. Mr. Cooper also pointed out that Judge Raines suggested requiring that, in the event of service by mail, posting, or by other means, a copy of the order needs to be served with the summons and complaint/petition in order to provide notice to the recipient that service by the means used has been authorized and completed.

The Council believed that Rule 7 D(6) adequately authorizes service by whatever method is most reasonably calculated to give notice to the defendant and trial judges should have discretion to approve alternative service, or not. The Council declined to form a committee to examine this proposal.

4. ORCP 7: Inadequate service by pro se litigants who then get a TRO

Mr. Cooper noted that, if a party has violated the rules, the process will work itself out eventually. Judge Miller and Mr. Cooper expressed reluctance to carving out separate rules for self-represented litigants. The Council declined to form a committee to examine this proposal.

5. ORCP 7: Provide for service as with FRCP 4(d)

Mr. Cooper observed that this change was considered two biennia ago but that, because of the statute on when an action in Oregon is commenced [ORS 12.020], the service rules cannot be changed without changing the statute. As statutory changes are outside the Council's purview, the Council declined to form a committee to examine this proposal.

6. ORCP 7: Motor vehicle service confusing

Prof. Peterson observed that ORCP 7 has been rewritten twice in recent biennia for clarity. He also noted that he has contacted the Professional Liability Fund to ask whether problems with motor vehicle service is an issue that arises frequently and that it is not. The Council declined to form a committee to examine this proposal.

7. ORCP 9: Clarification for service of amended complaints

After careful consideration, the Council determined that the existing rules are clear and declined to form a committee to examine this proposal.

8. ORCP 9 F, G: Service of pleadings and correspondence via e-mail

9. ORCP 9 F, G: Electronic service of pleadings automatically acceptable

Mr. Cooper noted that these proposals are asking to change e-mail service by agreement to mandatory, and that the bar is not ready for this yet. He suggested waiting for the full roll-out of e-court to even consider this. Mr. Keating observed that, with the advent of e-court, the issue will be moot anyway because the court will serve the parties automatically.

Judge Zennaché expressed concern about the service by e-mail rule in ORCP 9G and how it might interact with the new electronic filing system. He was concerned

that a Uniform Trial Court Rule (UTCR) can trump an ORCP, noting that the ORCP says service by e-mail is prohibited unless the attorneys agree. Mr. Cooper stated that last biennium the Council enacted ORCP 1F to clear the way for the Chief Justice to enact an e-filing system. Ms. David posited that a new e-filing system would likely be similar to the current Court of Appeals system: that when a case enters the portal, it shows all other attorneys in the case and whether they have consented to be served by e-mail. She presumed that the new e-court system would have this built in so that the ORCP would not have to deal with it. Judge Zennaché observed that the federal system started out that way too, but then, after about two years, it changed and attorneys were required to accept service by e-mail. Mr. Cooper stated that the e-court task force is envisioning a mandatory system. It was observed that some attorneys are old school and do not use e-mail. Judge Zennaché stated that the Council might therefore consider amending the rule to state that it is mandatory so that attorneys cannot argue against it. Judge Herndon noted that the discussion is premature because e-filing is coming, but that Judge Zennaché's point is well taken that eventually the Council will need to deal with the issue because it will be required by the system. Ms. David suggested that she and Judge Zennaché form a small committee to monitor the situation so that, if the e-court task force is ready for the Council to make a change this spring, the Council can act quickly.

10. ORCP 9 F, G: Faxes and e-mails not treated as same-day service

Ms. David suggested tabling this issue and revisiting it at a time when the Council may decide to move 7-day time increments in the ORCP. Prof. Peterson pointed out that the U.S. Postal Service may decide to change to 5-day delivery as well. The Council declined to form a committee to examine this proposal at this time.

11. ORCP 18 A: Notice pleading

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

12. ORCP 21: Remove requirement to confer on Rule 21 motions

Mr. Cooper pointed out that this is a UTCR-level issue [UTCR 5.010(1)], and the Council declined to form a committee to examine this proposal.

13. ORCP 21: Make true conferral mandatory, describing efforts in an affidavit

Mr. Cooper pointed out that this is a UTCR-level issue [UTCR 5.010(3)], and the Council declined to form a committee to examine this proposal.

14. ORCP 21: Tougher sanctions for serial Rule 21 motions

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

15. ORCP 21 G: Statute of limitations waived if not pleaded, but good cause allowance in later pleadings confusing

After careful consideration, including a discussion regarding the importance of judicial discretion, the Council declined to form a committee to examine this proposal.

16. ORCP 43: Mandatory early disclosure of discoverable information analogous to FRCP

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

17. ORCP 43: Clarify forms of request and proper objections

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

18. ORCP 43: Closer supervision by judges (mandatory discovery conferences)

Judge Miller noted that, in a perfect world, this might be a nice idea but that, as things stand now, she does not think that judges have the time. Judge Herndon remarked that, if a party needs help with discovery, they can get it from the court, but that it does not need to be done in every case. Judge Holland noted that, in complex cases, there is usually a judge assigned early, but that in most cases it is not needed. The Council declined to form a committee to examine this proposal.

19. ORCP 43: Mandatory production of documents like federal court

Mr. Cooper noted that this item was a duplicate of item VI(A)(16).

20. ORCP 43: Verifications on discovery responses

Judge Miller stated that this is a problem that is fixed very easily by judges. Prof. Peterson pointed out that ORCP 17 applies to “pleadings, motions, and other documents...which shall be signed.” The Council declined to form a committee to examine this proposal.

21. ORCP 43: Excessive costs in small cases, e.g. detailed responses to requests for production

Mr. Cooper observed that it is difficult to decide what is a small case and tailor the ORCP to cases by the size of the case. Judge Herndon stated that there is no fix unless you had a special rule for cases asking for certain amounts of money. The Council declined to form a committee to examine this proposal.

22. ORCP 43: Clarify formal appearance not required to respond to a RFP

Mr. Cooper stated that he has heard of this issue, where a plaintiff's lawyer states that a defendant cannot send him/her a request for production of documents until the defendant has formally appeared in the case (i.e., filed an answer). Judge Miller observed that getting the case at issue is important, and that the motion or answer should be filed first. Mr. Weaver observed that the plaintiff has no authority to take that position. After careful consideration, the Council declined to form a committee to examine this proposal.

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

Mr. Bachofner observed that he does not want to take discretion away from judges. Mr. Cooper stated that this is a gray zone. Judge Miller stated that, in domestic relations cases, a lot of discretion is exercised. Judge Herndon noted that there are many self-represented litigants in domestic relations cases also, which makes the issue difficult. After careful consideration, the Council declined to form a committee to examine this proposal.

24. ORCP 53: Streamlining consolidation practice

Judge Miller stated that, when she is aware that there is a second file, parties do not need to do anything very formal, but that she will consolidate on her own motion when she feels it is appropriate. Judge Herndon stated that he sees many motions to consolidate in domestic relations cases and that they are fairly simple and he does not see a big problem with them. After careful consideration, the Council declined to form a committee to examine this proposal.

Mr. Cooper asked whether, the next time the Council sends its survey to bar and bench, a question can be added which asks "can we contact you if we have questions about your proposal?" Ms. Nilsson stated that this should not be a problem.

25. ORCP 54 E: make rule bilateral

Prof. Peterson pointed out that this proposal is from attorneys also licensed or formerly licensed in California which, by its offer of judgment statute, allows expert witness fees to be imposed on a party which does not improve its position by rejecting the offer of judgment. Expert witness fees are not recoverable in Oregon and, last biennium when the Rule 54 committee considered making Rule 54 E bilateral, the committee could not identify any benefit over the existing rule. Mr. Bachofner noted that he would like to be able to amend ORCP 54 E in order to be able to cut off attorney fees in other types of cases, namely ORS 20.080 (small tort) and ORS 20.082 (small contract cases). It was observed that this was discussed last biennium and the Council determined that it is a substantive issue. After careful consideration, the Council declined to form a committee to examine this proposal.

26. ORCP 55 H: Change rule to protect privilege; documents produced to non-requesting attorney to create privilege log

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

27. ORCP 55 H: Require production of medical and other related records to cut down on gamesmanship

Mr. Cooper stated that, under current rules, a party must serve a subpoena for medical records, and the other party has a right and obligation to object if they feel the records are privileged. He noted that, in this case, a judge gets involved and you get a decision such as the records are subpoenaed to the judge's chambers so that inappropriate information can be redacted. Mr. Keating stated that there is tremendous gamesmanship involved with the production of a plaintiff's medical records. He noted that there are all sorts of restrictions put on the defendant – shields hoisted, hurdles to leap – when all the defendant needs is medical records. Mr. Keating stated that he feels that the Council should form a committee to address the issue. He stated that he is in favor of rules governing how the material is used, but that the opponent should be given the opportunity to screen the material, and that to be required to go to the trial judge and ask the judge to read it first is burdensome. Mr. Bachofner stated that there are attorneys out there who will prevent opposing counsel from getting a lot of records that are clearly relevant. Judge Miller observed that there are some records that should be private, but that there is a fine line. Mr. Beattie noted that ORCP 55 works as a procedural rule, but that plaintiffs have the upper hand because of the physician-patient privilege. Mr. Keating stated that it has always been the rule in personal injury cases that an attorney gets access to medical records. Mr. Beattie agreed that a committee is needed to look at the issue, and that he has never

understood the difference hospital records in ORCP 55 and medical records in ORCP 44. Judge Zennaché observed that a recent trend among self-represented litigants is to use ORCP 55 to subpoena the records of third parties, and that there is no similar requirement in ORCP 55 that, if you are seeking the records of someone else, you have to notify them. A committee was formed consisting of Mr. Beattie, Mr. Brian, Mr. Cooper, Judge Herndon, and Mr. Keating (chair).

28. ORCP 69: Require formal notice rather than simple letter before seeking default

It was observed that ORCP 69 A already requires this. The Council declined to form a committee to examine this proposal.

29. ORCP 69: Preclusion of default in less time than otherwise allowed to respond

The Council could not see how this could occur. After careful consideration, the Council declined to form a committee to examine this proposal.

30. ORCP 81-85: Extraordinary Remedies - detail in rules does not prevent extraordinary relief from being regularly allowed; it should

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

31. ORCP 81-85: TROs, injunctions, receiverships should be more uniform and clear

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

32. Rule to protect unrepresented litigants from lawyers overreaching, e.g. presenting inadmissible evidence

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

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

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

34. Clarify rules on ex parte contact, e.g. submitting orders without advising opponent

It was observed that this is a UTCR issue (UTCR 5.100), not an ORCP issue. The Council declined to form a committee to examine this proposal.

35. Court-annexed arbitration adds expense; parties use arbitration as discovery and to increase costs

It was observed that this is a statutory issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

36. More unified rules, differences between counties are confusing and costly

It was observed that this is an SLR issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

37. Assign all cases randomly to a judge at the time of filing

It was observed that this is within the purview of each district's presiding judge, not an ORCP issue. The Council declined to form a committee to examine this proposal.

38. Clarify interaction of ORCP and UPC (UTCR?)

There was some uncertainty as to the nature of the proposal. The Council declined to form a committee to examine this proposal.

39. Assign trial dates within 30 days of answer, and no trial dates beyond 14 months

It was observed that this is a judicial resource issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

40. Swift procedure for responding to defenses that do not meet specific pleading standards (e.g. boilerplate)

It was observed that ORCP 21 is the swift procedure for such responses. The Council declined to form a committee to examine this proposal.

41. Encourage more settlement conferences

It was observed that this is an SLR issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

42. Require notice of filing of the record on appeal, including docket entries and identify trial court exhibits

It was observed that this is an Oregon Rules of Appellate Procedure (ORAP) issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

43. Allow post-jury interviews; concern of misconduct

Mr. Brian stated that he believes this would be a bad idea unless the judge and lawyers agree that whatever they learn cannot be used as a basis for a motion for a new trial. Judge Gerking noted that, after a recent capital murder trial in Jackson County, the press had interviewed several jurors, who were not aware they were free to choose not to talk to the press if they did not want to. He stated that the jurors had told the press about the novel theory they had used for why the defendant was guilty, one that was not argued in the case.

Mr. Weaver noted that post-trial interviews with the jury are held in Jackson County but that he does not know where the authority comes from. Mr. Beattie stated that he does not see the process as engendering endless new trials. Judge Zennaché stated that it is up to the discretion of judge and the juror asked. He noted that many jurors do not want to talk about their experience and just want to leave when the trial is over. Judge Herndon observed that making the process routine could have a chilling effect of the willingness of jurors to serve, and that it runs contrary to what jury trials are all about. He stated that having lawyers in the jury room would not be good for the system. Mr. Bachofner stated that he has had several occasions where jurors have approached him after a case and that it was extremely helpful, but that the other side does not get the benefit of the jurors' insight as well. He noted that it is also a practical matter and that there are budget constraints to consider. Judge Herndon stated that he routinely tells jurors that they may get contacted by the press and that they are free to talk, but that they need to respect the confidences of their fellow jurors. Mr. Keating observed that he enjoys leaving the courtroom after winning a trial with the thought that he won because of his performance, and that he would prefer not to destroy that illusion with post-trial juror interviews. The Council declined to form a committee to examine this proposal.

44. Clarify probate/trust litigation

After careful consideration, it was determined that this is a substantive rather than a procedural issue. The Council declined to form a committee to examine this proposal.

45. Adopt federal court formatting

It was observed that this is a UTCR issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

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

It was observed that this is a statutory issue, not an ORCP issue. The Council declined to form a committee to examine this proposal.

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

1. ORCP 54 A: amend to conform with FRCP 41(a) (carried over from October 1, 2011, agenda)

Prof. Peterson stated that attorney Jonathan Hoffman had submitted a proposal (Appendix F) to amend ORCP 54 A to conform with FRCP 41(a) to avoid the potential for abuse when an attorney voluntarily dismisses a case for reasons such as not liking the judge to whom the case (or motion) has been assigned or evading responding to discovery. Judge Gerking agreed that Mr. Hoffman raises good points. The Council agreed to form a committee consisting of Mr. Campf, Judge Gerking, Justice Kistler, Prof. Peterson, and Mr. Weaver. Prof. Peterson will e-mail Mr. Hoffman to let him know the status of his proposal.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:36 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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"> • ORCP 1 E • ORCP 19 B • ORCP 24 • ORCP 27 B • ORCP 36 • ORCP 39 • ORCP 39 C(6) • ORCP 43 • ORCP 44 • ORCP 47 • ORCP 55 F(2) • ORCP 55 F(3) • ORCP 57 F • ORCP 59 H(1) • ORCP 68 • ORCP 87 | <ul style="list-style-type: none"> • ORCP 1 E • ORCP 47 D • ORCP 87 A | | |

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 1st 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

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 |
|--|--|---|--|
| <ul style="list-style-type: none"> • 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

COUNCIL ON COURT PROCEDURE
October 1, 2011
Proposals from Keith R. Raines

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.

Keith R. Raines

Keith.R.Raines@ojd.state.or.us

(503) 846-3457 office

(503) 846-4801 fax

**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

**Council on Court Procedures
Website/Inquiries Update
Reporting Period: 9/2/11 - 10/20/11**

I. Inquires

The Council received no inquires regarding court procedures or civil trial practice; however, it did receive one telephone call from a member of the general public with an esoteric question regarding the philosophy of criminal justice.

II. Website Statistics

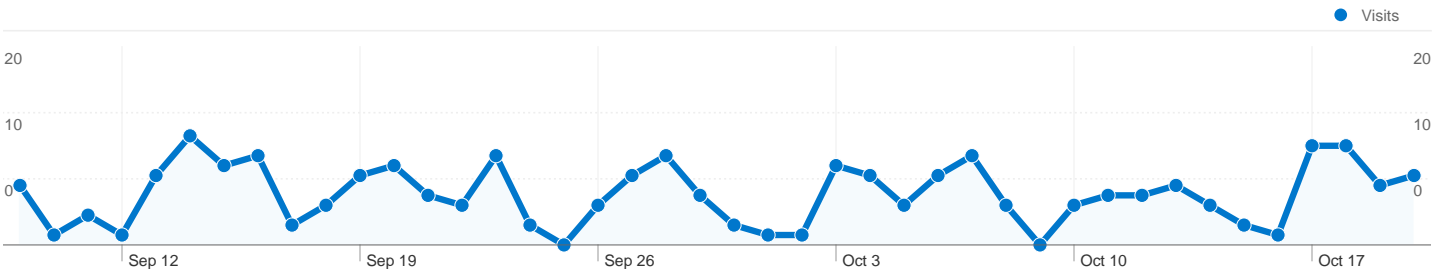
Attached are analytical reports detailing website visitors, geographical information, page views, keywords from search engines, and traffic sources for the Council's website during the 10 month period since the Council last met. The site had 215 visits from 144 unique visitors, and 563 page views in this period. 55% of visits to the site were from new visitors; the average number of pages viewed per visit was 2.62; and the average time spent on the site was just over two minutes. Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. These statistics remain consistent with previous periods of similar length during the Council's last biennium.

III. Website Improvements

With the Council's meeting schedule in full progress there has not been a great deal of time available for the scanning and uploading of past documents to the website; however, this process will continue as time permits. Documents from the current biennium are added on an ongoing basis.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant



Site Usage

215 Visits

51.16% Bounce Rate

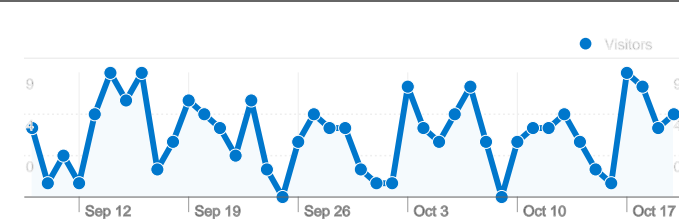
563 Pageviews

00:02:11 Avg. Time on Site

2.62 Pages/Visit

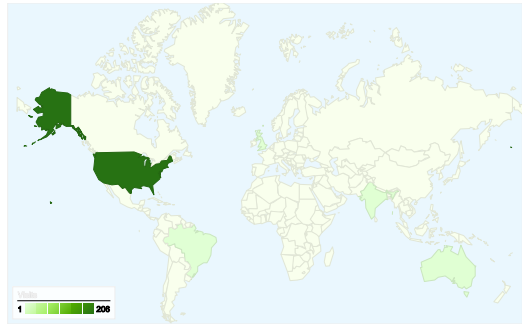
55.35% % New Visits

Visitors Overview

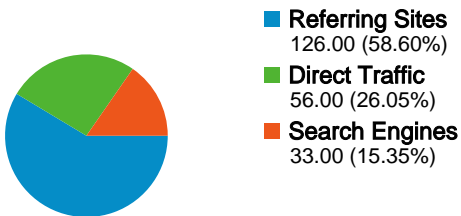


Visitors
144

Map Overlay

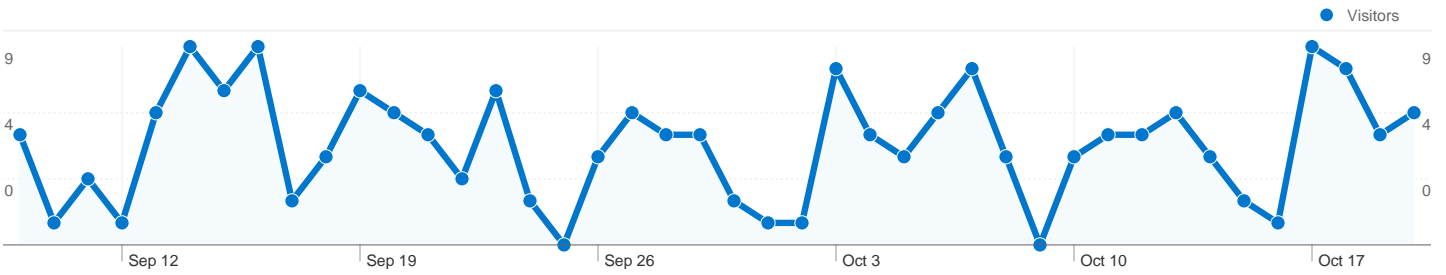


Traffic Sources Overview



Content Overview

| Pages | Pageviews | % Pageviews |
|---------------------------------|-----------|-------------|
| /~ccp/index.htm | 183 | 32.50% |
| /~ccp/Past_Biennia.htm | 113 | 20.07% |
| /~ccp/LegislativeHistoryofRules | 99 | 17.58% |
| /~ccp/Current_Biennium.htm | 71 | 12.61% |
| /~ccp/Council_Membership.htm | 28 | 4.97% |



144 people visited this site

215 Visits

144 Absolute Unique Visitors

563 Pageviews

2.62 Average Pageviews

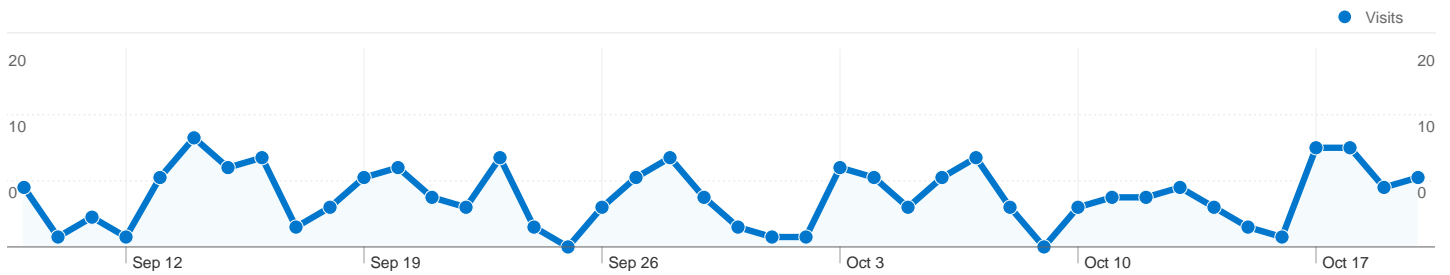
00:02:11 Time on Site

51.16% Bounce Rate

55.35% New Visits

Technical Profile

| Browser | Visits | % visits |
|--------------------------|--------|----------|
| Internet Explorer | 96 | 44.65% |
| Firefox | 78 | 36.28% |
| Chrome | 23 | 10.70% |
| Mozilla Compatible Agent | 9 | 4.19% |
| Safari | 8 | 3.72% |



All traffic sources sent a total of 215 visits

26.05% Direct Traffic

58.60% Referring Sites

15.35% Search Engines

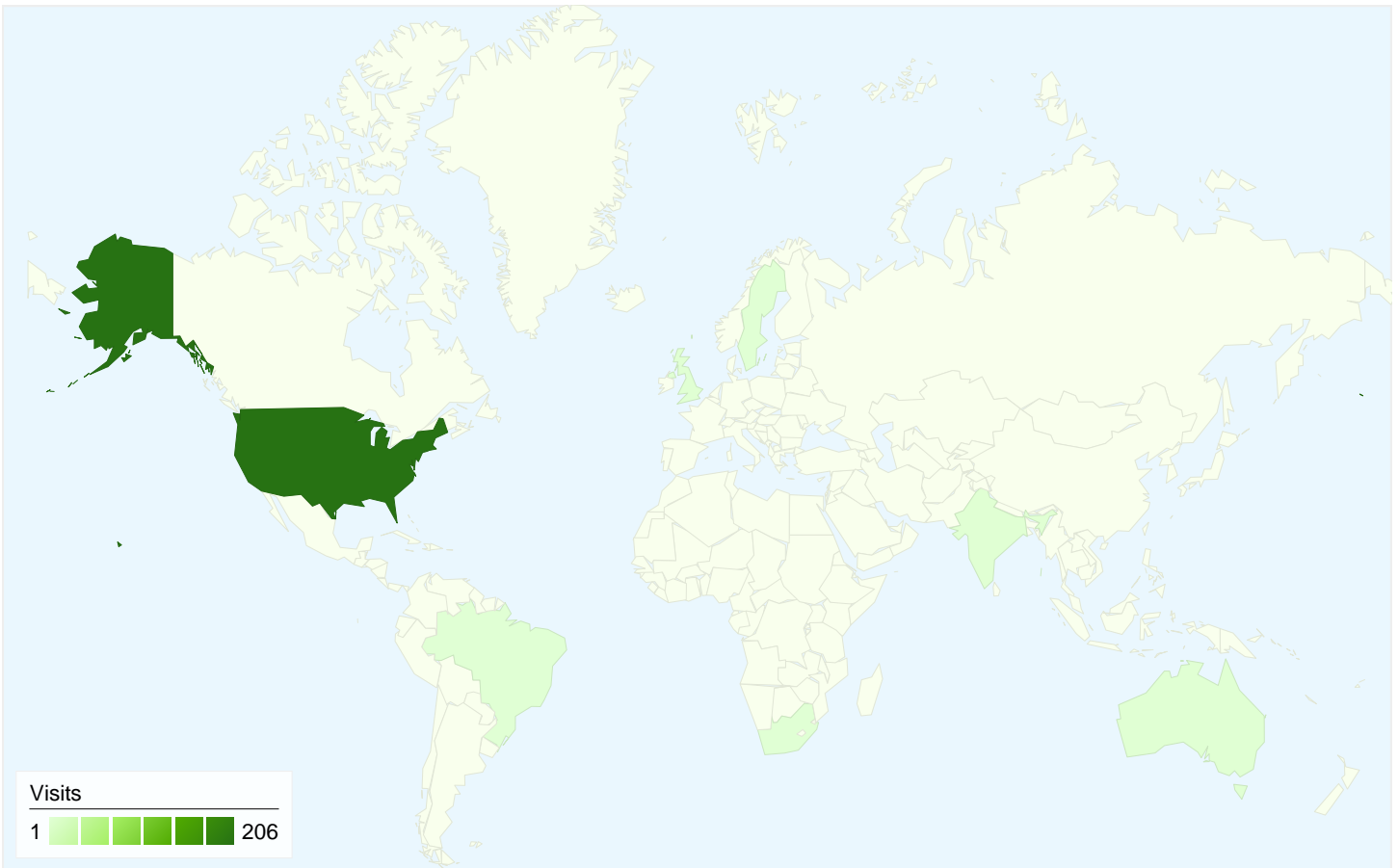


- **Referring Sites**
126.00 (58.60%)
- **Direct Traffic**
56.00 (26.05%)
- **Search Engines**
33.00 (15.35%)

Top Traffic Sources

| Sources | Visits | % visits |
|------------------------------|--------|----------|
| counciloncourtprocedures.org | 64 | 29.77% |
| (direct) ((none)) | 56 | 26.05% |
| courts.oregon.gov (referral) | 23 | 10.70% |
| google (organic) | 21 | 9.77% |
| osbar.org (referral) | 15 | 6.98% |

| Keywords | Visits | % visits |
|-----------------------------------|--------|----------|
| legislative history research orcp | 4 | 12.12% |
| council on court procedures | 3 | 9.09% |
| orcp 9 | 2 | 6.06% |
| oregon rules of civil procedure | 2 | 6.06% |
| oregon rules of civil procedure | 2 | 6.06% |

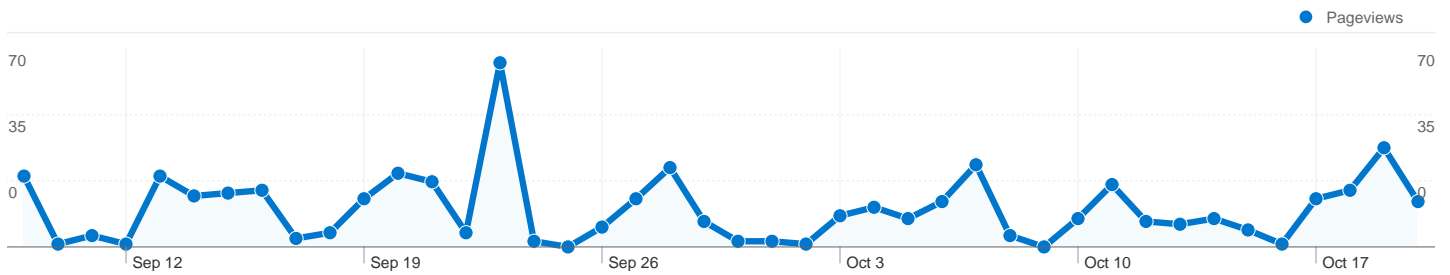


215 visits came from 7 countries/territories

Site Usage

| Visits 215 % of Site Total: 100.00% | Pages/Visit 2.62 Site Avg: 2.62 (0.00%) | Avg. Time on Site 00:02:11 Site Avg: 00:02:11 (0.00%) | % New Visits 55.35% Site Avg: 55.35% (0.00%) | Bounce Rate 51.16% Site Avg: 51.16% (0.00%) | |
|--|--|--|---|--|-------------|
| Country/Territory | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
| United States | 206 | 2.67 | 00:02:17 | 53.88% | 50.49% |
| Australia | 2 | 2.50 | 00:00:09 | 100.00% | 0.00% |
| United Kingdom | 2 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| India | 2 | 1.50 | 00:01:05 | 100.00% | 50.00% |
| Brazil | 1 | 1.00 | 00:00:00 | 0.00% | 100.00% |
| Sweden | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| South Africa | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |

1 - 7 of 7



Pages on this site were viewed a total of 563 times

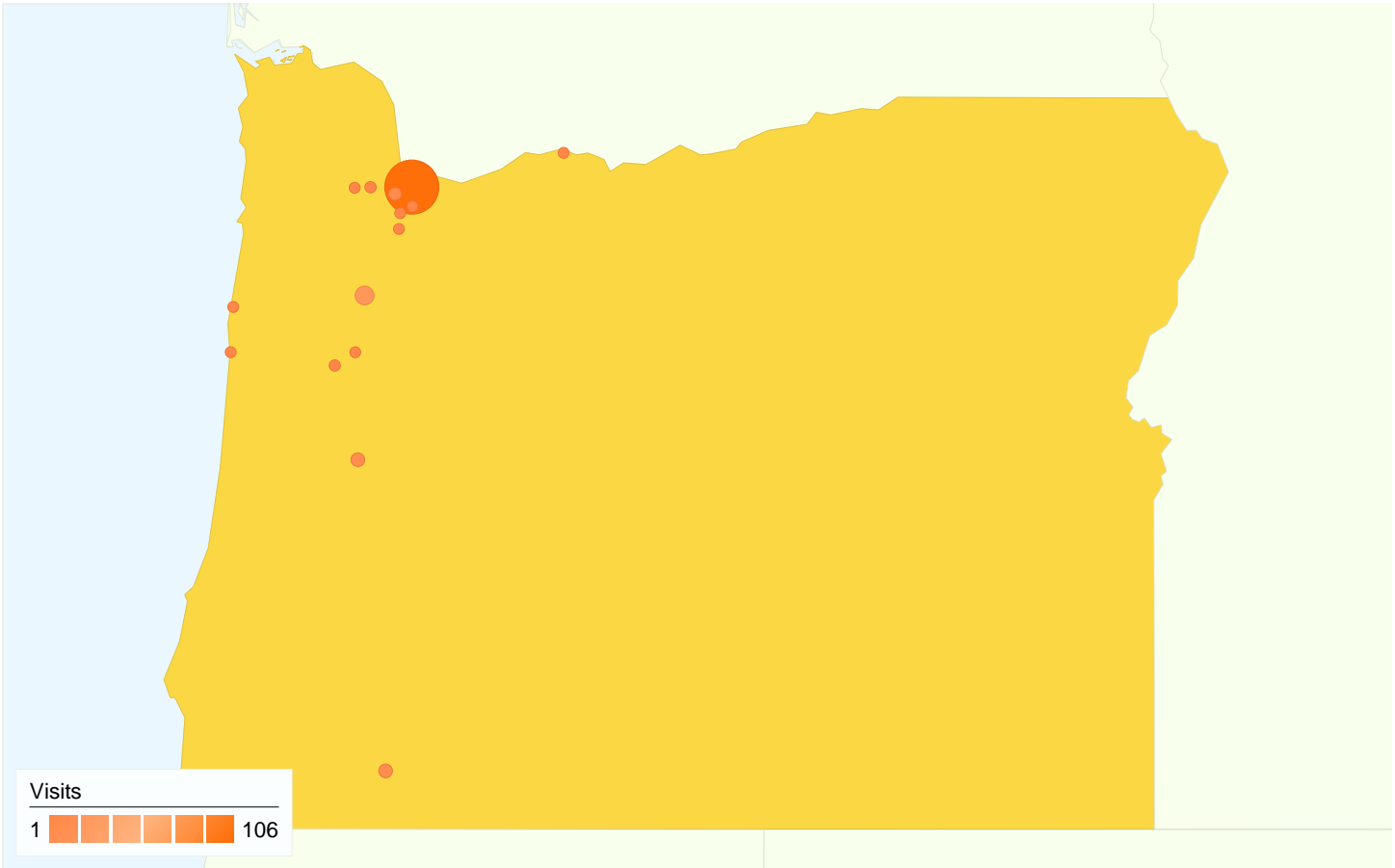
563 Pageviews

375 Unique Views

51.16% Bounce Rate

Top Content

| Pages | Pageviews | % Pageviews |
|-------------------------------------|-----------|-------------|
| /~ccp/index.htm | 183 | 32.50% |
| /~ccp/Past_Biennia.htm | 113 | 20.07% |
| /~ccp/LegislativeHistoryofRules.htm | 99 | 17.58% |
| /~ccp/Current_Biennium.htm | 71 | 12.61% |
| /~ccp/Council_Membership.htm | 28 | 4.97% |



This state sent 160 visits via 15 cities

| Site Usage | | | | | | |
|--|--|--|-------------------|--|--|--|
| Visits | Pages/Visit | Avg. Time on Site | | % New Visits | Bounce Rate | |
| 160 % of Site Total: 74.42% | 2.84 Site Avg: 2.62 (8.36%) | 00:02:18 Site Avg: 00:02:11 (4.75%) | | 46.88% Site Avg: 55.35% (-15.31%) | 45.00% Site Avg: 51.16% (-12.05%) | |
| City | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate | |
| Portland | 106 | 3.10 | 00:02:50 | 37.74% | 40.57% | |
| Salem | 20 | 3.00 | 00:01:35 | 50.00% | 45.00% | |
| Eugene | 8 | 1.25 | 00:00:21 | 87.50% | 75.00% | |
| Medford | 8 | 1.38 | 00:03:03 | 75.00% | 62.50% | |
| Beaverton | 6 | 1.67 | 00:00:05 | 33.33% | 33.33% | |
| Hillsboro | 2 | 1.00 | 00:00:00 | 50.00% | 100.00% | |
| Corvallis | 2 | 1.00 | 00:00:00 | 100.00% | 100.00% | |
| Wilsonville | 1 | 14.00 | 00:02:46 | 0.00% | 0.00% | |
| Tualatin | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% | |

| | | | | | |
|----------------|---|------|----------|---------|--------------|
| Lake Oswego | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Newport | 1 | 2.00 | 00:00:05 | 100.00% | 0.00% |
| Gleneden Beach | 1 | 5.00 | 00:02:02 | 100.00% | 0.00% |
| Albany | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| Hood River | 1 | 3.00 | 00:01:40 | 100.00% | 0.00% |
| Forest Grove | 1 | 3.00 | 00:00:38 | 100.00% | 0.00% |
| | | | | | 1 - 15 of 15 |



Search sent 33 total visits via 26 keywords

Site Usage

| Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate | |
|---|---|---|---|--|-------------|
| 33 % of Site Total: 15.35% | 2.48 Site Avg: 2.62 (-5.11%) | 00:03:41 Site Avg: 00:02:11 (68.13%) | 66.67% Site Avg: 55.35% (20.45%) | 51.52% Site Avg: 51.16% (0.69%) | |
| Keyword | Visits | Pages/Visit | Avg. Time on Site | % New Visits | Bounce Rate |
| legislative history research orcp ccp | 4 | 5.75 | 00:14:20 | 25.00% | 25.00% |
| council on court procedures | 3 | 2.67 | 00:01:07 | 33.33% | 0.00% |
| orcp 9 | 2 | 2.00 | 00:00:42 | 100.00% | 50.00% |
| oregon rules of civil procedure "class actions" | 2 | 2.50 | 00:11:51 | 50.00% | 0.00% |
| oregon rules of civil procedure rule 4 legislative history | 2 | 1.50 | 00:01:25 | 50.00% | 0.00% |
| "council on court procedures" | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| "maureen leonard" attorney | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| 2011-2013 biennium ends when | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| cache:rzaqltyno74j:legacy.lclark.edu/~ccp/council_membership.htm "maureen leonard" attorney | 1 | 2.00 | 00:00:04 | 100.00% | 0.00% |
| council on court procedures portland | 1 | 2.00 | 00:00:04 | 0.00% | 0.00% |
| history of the amendments | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| judge jerry hodson term | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| maureen leonard atty at law oregon | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp 21 | 1 | 1.00 | 00:00:00 | 0.00% | 100.00% |
| orcp 4 history | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp 59a | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp findings of fact | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp history | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| orcp legislative | 1 | 11.00 | 00:31:19 | 100.00% | 0.00% |
| oregon council on court procedures | 1 | 6.00 | 00:00:49 | 0.00% | 0.00% |

| | | | | | |
|---|---|------|----------|---------|--------------|
| oregon court procedures | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| oregon rules of appellate procedure legislative history | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| oregon rules of civil 71 | 1 | 2.00 | 00:00:44 | 100.00% | 0.00% |
| rules and procedures in oregon civil court | 1 | 1.00 | 00:00:00 | 100.00% | 100.00% |
| www.counciloncourtprocedures.org | 1 | 1.00 | 00:00:00 | 0.00% | 100.00% |
| oregon rules of civil procedure rule 4 history | 0 | 0.00 | 00:00:00 | 0.00% | 0.00% |
| | | | | | 1 - 26 of 26 |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| | |
|-----|-------------------------------|
| KEY | Lawyer or legally trained |
| | Needs Council member assigned |

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|---------------------------------|-----------------------|--|-----------------------|---|
| House of Representatives | | | | |
| HD 1 | Wayne Krieger (R) | Curry and portions of Coos and Douglas counties (includes Gold Beach, Coquille) | John Bachofner | Co-chair, Judiciary Committee |
| HD 2 | Tim Freeman (R) | Portions of Douglas, Jackson, and Josephine counties (includes Roseburg) | John Bachofner | Rules Committee Ways & Means Committee |
| HD 3 | Wally Hicks (R) | Portion of Josephine county (includes Grants Pass) | Kristen David | Attorney Judiciary Committee Vice Co-Chair |
| HD 4 | Dennis Richardson (R) | Portions of Jackson and Josephine counties (includes Medford) | Mark Weaver | Attorney Legislative Counsel Committee Ways & Means Committee |
| HD 5 | Peter Buckley (D) | Portion of Jackson county | Mark Weaver | Co-chair, Ways & Means Committee |
| HD 6 | Sal Esquivel (R) | Portion of Jackson county | Mark Weaver | Rules Committee |
| HD 7 | Bruce Hanna (R) | Portion of Douglas and Lane counties | | Co-Speaker Legislative Counsel Committee Ways & Means Committee |
| HD 8 | Paul Holvey (D) | Portion of Lane county | | Co-Vice Chair, Rules Committee |
| HD 9 | Arnie Roblan (D) | Portions of Coos, Douglas, and Lane counties | Eugene Buckle | Co-Speaker Legislative Counsel Committee Ways & Means Committee |
| HD 10 | Jean Cowan (D) | Lincoln and portions of Lane, Polk, Tillamook, and Yamhill counties (includes Newport, Lincoln City) | Arwen Bird | Ways & Means Committee |
| HD 11 | Phil Barnhart (D) | Portions of Lane and Linn counties | Hon. Lauren Holland | Non-practicing OSB member Rules Committee |
| HD 12 | Terry Beyer (D) | Portion of Lane county (includes Springfield) | | Rules Committee Ways & Means Committee |
| HD 13 | Nancy Nathanson (D) | Portion of Lane county | Hon. Charles Zennaché | Co-Vice Chair, Ways & Means Committee |
| HD 14 | Val Hoyle (D) | Portion of Lane county (includes Eugene) | | Ways & Means Committee |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|-----------------|-----------------------|--|---------------------|--|
| HD 15 | Andy Olson (R) | Portions of Benton and Linn counties (includes Albany) | Hon. Locke Williams | Co-Speaker Pro Tempore Judiciary Committee Co-chair, Rules Committee |
| HD 16 | Sara Gelser (D) | Portion of Benton county (includes Corvallis) | Brian Campf | |
| HD 17 | Sherrie Sprenger (R) | Portions of Linn and Marion counties (includes Sweet Home, Lebanon) | Eugene Buckle | Ways & Means Committee |
| HD 18 | Vic Gilliam (R) | Portions of Clackamas and Marion counties (includes Mollala, Aurora) | Brooks Cooper | |
| HD 19 | Kevin Cameron (R) | Portion of Marion county | | House Republican Leader |
| HD 20 | Vicki Berger (R) | Portion of Marion and Polk counties (includes Monmouth and Independence) | | Rules Committee |
| HD 21 | Brian Clem (D) | Portion of Marion county (includes Woodburn, part of Salem) | | |
| HD 22 | Betty Komp (D) | Portion of Marion county (includes part of Salem) | | Ways & Means Committee |
| HD 23 | Jim Thompson (R) | Portions of Benton, Linn, Marion, Polk and Yamhill counties | Hon. Robert Herndon | |
| HD 24 | Jim Weidner (R) | Portions of Polk and Yamhill counties (includes McMinnville) | Hon. Jerry Hodson | |
| HD 25 | Kim Thatcher (R) | Portion of Marion and Yamhill counties (includes Newberg, Kaiser) | | Ways & Means Committee |
| HD 26 | Matt Wingard (R) | Portions of Clackamas and Washington counties (includes Sherwood, Wilsonville) | Hon. Lauren Holland | Rules Committee |
| HD 27 | Tobias Read (D) | Portions of Multnomah and Washington counties (includes Tigard) | Maureen Leonard | Ways & Means Committee |
| HD 28 | Jeff Barker (D) | Portion of Washington county (includes Beaverton) | Maureen Leonard | Judiciary Committee Co-chair, Ways & Means Committee |
| HD 29 | Katie Eyre Brewer (R) | Portion of Washington county (includes Forest Grove) | Eugene Buckle | Ways & Means Committee |
| HD 30 | Shawn Lindsay (R) | Portion of Washington county (includes Hillsboro) | Eugene Buckle | Attorney |
| HD 31 | Brad Witt (D) | Portions of Clatsop, Columbia and Multnomah counties (includes Scappoose) | Eugene Buckle | Ways & Means Committee |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|-----------------|------------------------|---|-----------------------|--|
| HD 32 | Deborah Boone (D) | Portions of Clatsop, Columbia, Tillamook and Washington counties (includes Banks) | Kristen David | |
| HD 33 | Mitch Greenlick (D) | Portions of Multnomah and Washington counties (includes Sauvie Island) | Leslie O'Leary | |
| HD 34 | Chris Harker (D) | Portion of Washington county | Hon. Jerry Hodson | |
| HD 35 | Margaret Doherty (D) | Portions of Multnomah and Washington counties | Brooks Cooper | |
| HD 36 | Mary Nolan (D) | Portion of Multnomah county | Leslie O'Leary | Judiciary Committee Ways & Means Committee |
| HD 37 | Julie Parrish (R) | Portions of Clackamas and Washington counties (includes West Linn) | Hon. Eve Miller | |
| HD 38 | Chris Garrett (D) | Portions of Clackamas, Multnomah and Washington Counties (includes Lake Oswego) | Hon. David Rees | Attorney Co-vice Chair, Judiciary Committee Legislative Counsel Committee Rules Committee |
| HD 39 | Bill Kennemer (R) | Portion of Clackamas county (includes Oregon City, Canby) | Kristen David | |
| HD 40 | Dave Hunt (D) | Portion of Clackamas county | Kristen David | Democratic Leader |
| HD 41 | Carolyn Tomei (D) | Portions of Clackamas and Multnomah counties (includes Milwaukie) | Brian Campf | Judiciary Committee |
| HD 42 | Jules Kopel-Bailey (D) | Portion of Multnomah county | Maureen Leonard | Ways & Means Committee |
| HD 43 | Lew Frederick (D) | Portion of Multnomah county | Hon. Charles Zennaché | |
| HD 44 | Tina Kotek (D) | Portion of Multnomah county | Shari Nilsson | Co-speaker Pro Tempore House Leader Co-chair, Rules Committee |
| HD 45 | Michael Dembrow (D) | Portion of Multnomah county | Hon. Charles Zennaché | Ways & Means Committee |
| HD 46 | Ben Cannon (D) | Portion of Multnomah county | Hon. David Rees | |
| HD 47 | Jefferson Smith (D) | Portion of Multnomah county | Mark Peterson | Attorney Legislative Counsel Committee Ways & Means Committee |
| HD 48 | Mike Schaufler (D) | Portions of Clackamas and Multnomah counties | Eugene Buckle | Judiciary Committee |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|-----------------|---------------------|---|---------------------|--|
| HD 49 | Matt Wand (R) | Portion of Multnomah county (includes Gresham) | John Bachofner | Attorney Judiciary Committee |
| HD 50 | Greg Mathews (D) | Portion of Multnomah county | Michael Brian | |
| HD 51 | Patrick Sheehan (R) | Portions of Clackamas and Multnomah counties (includes Estacada) | Kristen David | |
| HD 52 | Mark Johnson (R) | Hood River and portions of Clackamas and Multnomah counties (includes Sandy) | Hon. Robert Herndon | |
| HD 53 | Gene Whisnant (R) | Portion of Deschutes county | | Judiciary Committee Ways & Means Committee |
| HD 54 | Jason Conger (R) | Portion of Deschutes county | Hon. Eve Miller | Attorney Legislative Counsel Committee |
| HD 55 | Mike McLane (R) | Crook, Lake and portions of Deschutes, Jackson and Klamath counties (includes Prineville, Lakeview) | Leslie O'Leary | Attorney Ways & Means Committee |
| HD 56 | Bill Garrard (R) | Portion of Klamath county (includes Klamath Falls) | Michael Brian | Co-vice Chair, Ways & Means Committee |
| HD 57 | Greg Smith (R) | Morrow, Wallowa and portions of Umatilla and Union counties (includes LaGrande, Enterprise) | Leslie O'Leary | Ways & Means Committee |
| HD 58 | Bob Jenson (R) | Portions of Umatilla and Union (includes Pendleton) | Leslie O'Leary | Ways & Means Committee |
| HD 59 | John Huffman (R) | Gilliam, Jefferson, Sherman, Wasco, Wheeler and portions of Clackamas, Deschutes, Grant and Marion counties (includes The Dalles, Madras) | Leslie O'Leary | Ways & Means Committee |
| HD 60 | Cliff Bentz (R) | Baker, Harney, Malheur and portion of Grant county (includes Burns, Baker City) | Leslie O'Leary | Attorney Legislative Counsel Committee |
| Senate | | | | |
| SD 1 | Jeff Kruse (R) | Curry and portions of Coos, Douglas, Jackson and Josephine counties (includes Roseburg, Gold Beach, Coquille) | Eugene Buckle | Vice-chair, Judiciary Committee |
| SD 2 | Jason Atkinson (R) | Portions of Jackson and Josephine counties (includes Grants Pass) | Kristen David | Rules Committee |
| SD 3 | Alan Bates (D) | Portion of Jackson county (includes Medford) | Mark Weaver | Ways & Means Committee |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|-----------------|----------------------|--|-----------------------|--|
| SD 4 | Floyd Prozanski (D) | Portions of Douglas and Lane counties | Hon. Charles Zennaché | Attorney Chair, Judiciary Committee Legislative Counsel Committee |
| SD 5 | Joanne Verger (D) | Lincoln and portions of Coos, Douglas, Lane, Polk, Tillamook and Yamhill (includes Newport, Lincoln City) | John Bachofner | Ways & Means Committee |
| SD 6 | Lee Beyer (D) | Portions of Lane and Linn counties (includes part of Eugene) | Hon. Lauren Holland | Rules Committee |
| SD 7 | Chris Edwards (D) | Portion of Lane county (includes part of Eugene) | | Ways & Means Committee |
| SD 8 | Frank Morse (R) | Portions of Benton and Linn counties (includes Albany, Corvallis) | Hon. Locke Williams | |
| SD 9 | Fred Girod (R) | Portions of Clackamas, Linn and Marion counties | Eugene Buckle | Ways & Means Committee |
| SD 10 | Jackie Winters (R) | Portions of Marion and Polk counties (includes area around Salem) | | Legislative Counsel Committee Ways & Means Committee |
| SD 11 | Peter Courtney (D) | Portion of Marion county (includes area around Salem) | | Attorney Senate President Legislative Counsel Committee |
| SD 12 | Brian Boquist (R) | Portions of Benton, Linn, Marion, Polk and Yamhill counties (includes McMinnville, Dallas) | Michael Brian | |
| SD 13 | Larry George (R) | Portions of Clackamas, Marion, Washington and Yamhill (includes area around Salem) | Brian Campf | |
| SD 14 | Mark Hass (D) | Portions of Multnomah and Washington counties (includes part of Beaverton, Garden Home) | Hon. David Rees | |
| SD 15 | Bruce Starr (R) | Portion of Washington county (includes Hillsboro) | Leslie O'Leary | Ways & Means Committee |
| SD 16 | Betsy Johnson (D) | Clastop, Columbia and portions of Multnomah, Tillamook and Washington counties (includes Astoria, St. Helens, Tillamook) | | Legally trained Co-vice Chair, Ways & Means Committee |
| SD 17 | Suzanne Bonamici (D) | Portions of Multnomah and Washington counties | Hon. Jerry Hodson | Attorney Judiciary Committee Legislative Counsel Committee |
| SD 18 | Ginny Burdick (D) | Portions of Multnomah and Washington counties (includes Tigard) | Hon. David Rees | Senate President Pro Tempore Legislative Counsel Committee Rules Committee |

**Council on Court Procedures
Legislator Matrix
September 30, 2011
(Sorted by District)**

| District | Legislator | Areas Served | COCP Member | Remarks, Leadership Roles and Committee Assignments for Interim Session |
|-----------------|----------------------------|--|-----------------------|---|
| SD 19 | Richard Devlin (D) | Portions of Clackamas, Multnomah and Washington counties (includes Lake Oswego, West Linn, Wilsonville) | Hon. Eve Miller | Co-chair, Ways & Means Committee |
| SD 20 | Alan Olsen (R) | Portion of Clackamas county (includes Oregon City) | Hon. Robert Herndon | |
| SD 21 | Diane Rosenbaum (D) | Portions of Clackamas and Multnomah counties (includes part of Milwaukie) | Hon Eve Miller | Senate Majority Leader Rules Committee |
| SD 22 | Chip Shields (D) | Portion of Multnomah county (North Portland) | Brooks Cooper | Ways & Means Committee |
| SD 23 | Jackie Dingfelder (D) | Portion of Multnomah county | Hon. David Rees | Judiciary Committee Ways & Means Committee |
| SD 24 | Rod Monroe (D) | Portions of Clackamas and Multnomah counties | Leslie O'Leary | Ways & Means Committee |
| SD 25 | Laurie Monnes Anderson (D) | Portion of Multnomah county | Mark Peterson | Ways & Means Committee |
| SD 26 | Chuck Thomsen (R) | Hood River and portions of Clackamas and Multnomah counties (includes Hood River) | Kristen David | Ways & Means Committee |
| SD 27 | Chris Telfer (R) | Portion of Deschutes county (includes Bend) | Maureen Leonard | |
| SD 28 | Doug Whitsett (R) | Crook, Klamath, Lake and portions of Deschutes and Jackson counties (includes Klamath Falls, Lakeview, Prineville) | Michael Brian | Judiciary Committee Ways & Means Committee |
| SD 29 | Dave Nelson (R) | Morrow, Umatilla, Union and Wallowa counties (includes Pendleton, LaGrande, Enterprise) | Hon. Charles Zennaché | Attorney; not licensed in Oregon Legislative Counsel Committee Ways & Means Committee |
| SD 30 | Ted Ferrioli (R) | Baker, Gilliam, Grant, Harney, Jefferson, Malheur, Sherman, Wasco, Wheeler and portions of Clackamas, Deschutes, and Marion (includes Baker City, Burns, The Dalles, Madras) | Brooks Cooper | Minority Leader Rules Committee |

COUNCIL ON COURT PROCEDURE
October 1, 2011
Proposals from Keith R. Raines

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.

Keith R. Raines

Keith.R.Raines@ojd.state.or.us

(503) 846-3457 office

(503) 846-4801 fax

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 |
|--------------------------|----------------|
| <i>answered question</i> | 49 |
| <i>skipped question</i> | 194 |

| Number | Response Date | Response Text |
|--------|----------------------|---|
| 1 | Jul 27, 2011 4:51 PM | no |
| 2 | Jul 24, 2011 4:42 PM | Family law is chaotic and fast paced. What might be timely in other areas of civil practice, the inherent delay with the ORCP can be devastating to children and families. With technology moving to quickly, the ORCP does not keep up. For substantive critique, Rule 55 is confusing, wordy, and seems to be a continued issue of dispute with litigants. 55H is also, not as clear as it could be. |
| 3 | Jul 22, 2011 6:50 PM | Give some thought to allowing interrogatories and allowing expert discovery in Oregon. I confess that we find those tools useful in other jurisdictions. |
| 4 | Jul 11, 2011 5:15 PM | I would like to see some sort of rule to protect unrepresented litigants requiring the court to uphold at least minimal standards so that they were not put at such a disadvantage with a lawyer in the courtroom, NOT to put them at disadvantage, to prevent lawyers from overreaching and e.g., putting clearly inadmissible evidence into the record, over an objection, when the unrepresented person can't articulate the basis for the objection, or sometimes there is a clear exception and they don't know what it is, or lawyers asking clearly impermissible questions. |
| 5 | Jul 10, 2011 9:00 PM | Remove requirement to confer on all Rule 21 motions. In my experience, conferring rarely results in moving the case ahead any faster and I usually end up having to file the motions anyway. |

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."

6 Jul 8, 2011 11:02 PM

7 Jul 8, 2011 8:36 PM

The rules regarding service of summons and other types of service are unduly difficult. Language could be clearer in lots of the rules.

ORCP 55H should be changed in many respects to protect the confidential communication/physician patient privilege. Too many attorneys subpoena medical records that contain privileged information and to which they are not entitled to during the discovery process. Records custodians generally send the records to defense counsel without any regard to whether some of the material sent is privileged. Unless the patients attorney raises an objection immediately upon receiving the subpoena the records are sent without regard to the content of the records. Most defense counsel, I have dealt with, are agreeable to having the records sent to my office so I can review them and withhold privileged information and keep a log of such privileged material.

8 Jul 7, 2011 10:31 PM

However, the rule should be "cleaned up to avoid problems.

9 Jul 7, 2011 3:57 PM

Notice pleading

The COCP should adopt a quality management approach to determining the utility and clarity of each rule. Every action conducted under the rules can be measured and the utility/clarity of the rule assessed thereby. Publish a wiki for each rule, giving the rule, its complete history, and all the cases discussing the rule, and then seek comments for rewrites that will do the same job but avoid the problems with the rule that caused it to need discussion in a case. Allow practitioners and "civilians" to vote on the proposed rewrites. Start a survey project with each filing, where upon filing or closing an action, the attorneys are asked to complete a survey to identify the rules they consulted during the matter, whether they were confident that the rule was clear and understandable to them (scale of 1-10), whether they had to consult someone else to understand the rule, etc. Treat all appeals involving the rules like the FAA treats plane crashes -- an instance of failure.

10 Jul 7, 2011 12:01 AM

- 11 **Jul 6, 2011 11:44 PM** I cannot think of an issue or problem I have encountered with the ORCP.
- 12 **Jul 6, 2011 10:48 PM** There should be clarification of the rules of service of Amended Complaints i.e., if amended complaints need to be personally served per ORCP 7, instead of just sent to opposing counsel like other amended pleadings.
- 13 **Jul 5, 2011 8:39 PM** Possibly clarification of "service of process" of the various actions; ie. when "first class mail"; "certified mail"; "personal service"; etc. are allowed; thus up to what level is acceptable?
- 14 **Jul 5, 2011 6:09 PM** i would like clear rules on ex parte contact. I view submitting orders without advising o.c., as a mortal sin; however i am aware that the Bar does not always view it as prohibited (ask Jeff Sapiro). i would like this tightened up. i would also like the issue of service by some other means, clarified. i have had situations where I am confident that my client has not been validly served (eg o.c. mails a copy of the summons and motion and order to show cause to modify, to my client, instead of having client personally served), but i don't want to risk a default, so i am decide to file a response. Thirdly, should we have an automatic rule, that a failure to produce documents, absent a claim that they are not relevant or not subject to discovery, means that the documents cannot be produced at trial by the non-producer? Having to file a Motion to Compel, just adds to the cost and takes more time than may remain, at least in a dom rel case where start to finish is 6 months.
- 15 **Jul 5, 2011 5:55 PM** When the local bar views potential disputes over the rules as a matter of "it could go either way," or comments that a judge may "do whatever," it would seem the ORCP needs to be revised to make the lawyers, parties, as well as the courts, enforce them.
- 16 **Jul 5, 2011 5:43 PM** Require production of medical and other related records to cut down gamesmanship especially to clarify that a formal appearance in a case is not required to respond to a request for production from the defendant. Change the IME ORCP to allow an IME without language in the ORCP that lets plaintiff play games with whether there is a reasonable dispute as to the medical and other issues raised in teh Norman (I think that is the name of the case). Defendant should have a right to IME's for each condition claimed.
- 17 **Jul 5, 2011 5:00 PM** All of the rules for prejudgment, injunctive relief are very unwieldy and arcane, and they therefore tend to obfuscate the situation for the court, who should at least occasionally remember that both prejudgment relief and injunctive relief are "extraordinary" remedies, meaning that they should be rarely allowed (not regularly allowed, as is my experience--on both plaintiff's and defendant's sides). While all the detail in those rules may be necessary, all that detail seems to distract (fascinate?) the court and parties from the central point of that detail, i.e., it is (or should be) a very high bar to justify extraordinary relief.
- 18 **Jul 5, 2011 4:56 PM** I believe that the Council needs to address issues related to electronic discovery soon.
- 19 **Jul 5, 2011 4:27 PM** mandatory early disclosure of sources of discoverable information, including but not limited to sources of electronically stored information, analogous to the federal rules.
- 20 **Jul 5, 2011 4:13 PM** If ORCP 21 G requires a statute of limitation defense to be brought in the first subsequent pleading, yet allows a court on good cause to have a defendant add that defense at any later date, what good is requiring it be in the first initial pleading if it is in the court's discretion to allow it later?

- 21 Jul 5, 2011 3:55 PM More uniformity and clarity in the following areas: Discovery rules (specifically, forms of requests and proper objections), default rules (requiring a formal NOTICE rather than a simple letter to seek default by non-appearance), and stricter adherence to the ORCP 68 rules (perhaps a reminder that the standard template is the required template, and also advising that a contested hearing may be appropriate if either party requests, but otherwise the judge shall make his or her ruling based on the pleadings submitted). With the rise in use of e-mail, at some point there needs to be a rule about proper communication and service of correspondence and pleadings via e-mail. Facsimiles are not treated as "same day service" and neither should an e-mail. Many times, attachments are left out or are unreadable and until there is a clear standard, e-mail "service" should be considered more a courtesy rather than an acceptable practice. And, of course, some practitioners still don't use e-mail that often.
- 22 Jul 5, 2011 3:54 PM Court-annexed arbitration generally adds to litigation expense and inhibits less-affluent clients from receiving justice because of well-funded insurance companies using arbitration as discovery and a strategic tool to force settlement by threatening double expenses for hearings and trials. There should be sanctions for seeking de novo review without reasonable cause. We should also move toward expert discovery to minimize trial by ambush; it's time for Oregon to join most other states and the federal courts in that regard.
- 23 Jul 5, 2011 3:21 PM First, we should have a more unified set of rules. In this era, the differences between counties in terms of administration of their courts is unnecessary, confusing, time consuming, and ultimately costly. Second, we should more closely follow the federal rules. Oregon is way out of step with the rest of the country in this regard this is not complementary. Third, all cases should be randomly assigned to a judge at the time of filing, so that one judge presides over all matters arising in a case. This promotes consistency, development of the law of a case, and is a much more efficient way of managing cases than the current ex parte call and assignment system.
- 24 Jul 5, 2011 2:58 PM Clarity on the interaction of ORCP and UPC.
- 25 Jul 5, 2011 4:18 AM The standard terms and conditions of ORCP 44 examinations vary according to county. For example, audio recording these examinations is almost always allowed in Multnomah County but not in Clackamas County. It feels sort of arbitrary.
- 26 Jul 5, 2011 12:54 AM Service of process by pro se litigants is becoming a problem. The pro se plaintiff drops a complaint off at the branch of a bank (or local office of a large corporation) headquartered across the country or mails the complaint to a payment or other inappropriate address. Often, the pro se litigant gets a TRO or preliminary injunction long before the defendant's in-house counsel or other officer learns of the complaint. It would be helpful to develop protections for defendants in those kind of circumstances.
- 27 Jul 4, 2011 5:10 PM We need interrogatories and expert disclosures.
- 28 Jul 4, 2011 4:12 PM If we must maintain ORCP 7 with its Bleakhouse-type complexity, why not at least also provide for service as with FRCP 4(d), so that those who insist on such foolishness also may pay for it?

A weak area is an area in which the rules do not result in the desired behaviors. Major weak areas are: 1. The rules regarding discovery of documents and the enforcement of the rules by judges. The rules should promote closer supervision by judges (mandatory discovery conferences) who would hold attorneys accountable by applying penalties if documents are withheld or depositions delayed or the objections to a request for production are vague and without foundation. The rules should also allow an option of mandatory enhanced attorney fees for a prevailing motion to compel party, if the party later prevails in the case, or money penalties, depending on the circumstances, but some kind of penalty for sure. Maybe let the winning side choose to get paid costs now or double the costs if it wins at trial???. Mandatory costs are essential! There should be mandatory costs awarded for successful motions to compel, otherwise judges will not enforce the professional standards behind the rules. Judges too often go along with defendants tactics most of the time, as if it were expected of them to do so, Defense lawyers go to CLE training sessions on how to avoid discovery. On the other hand, defendants need timely information to complete investigations, etc and otherwise assess the risks efficiently. If more strict rules are enforced, more cases would settle earlier. This delay in justice is a serious concern to most non-lawyers as it adds to the costs and gives a poor impression of lawyers and judges.

2. Trial dates should be set no less than 30 days after an answer is received - no judicial discretion to not set a date and no dates beyond 14 months without full disclosure to clients and signed consent by clients. Judges and defense attorneys particularly, regularly delay justice (and efficient resolutions) by failing to set a trial date for various reasons. UTCR rules say otherwise, but local practices differ - ie compare Lane to Marion County

3. There should be a swift procedure for responding to defenses that do not meet the specific pleading standards for complaints. The rule could go from 30 to 45 days, if the consensus was that it would result in more specificity in Answers or 30 days to file rule 21 motions and 45 days to file an answer. (The current rule allows for 45 days to respond to a RFP anyway) A vague complaint can lead to rule 21 motions if conferring does not lead to a clarified complaint. Yet, Answers always contain boilerplate defenses that are vague and do not list material facts. If conferring does not lead to an amended Answer, there should be costs awarded for any prevailing. If the rules are too strict about what is waived if not pled in the Answer, then they should be made more flexible, with a pre-trial cut-off for adding defenses or claims. The goal should be an exchange of clear allegations and defenses. Get rid of the boilerplate.

4. Make true conferring mandatory. I have gotten phone calls the day before (substantial) SJ motions (in federal court) just so the other side could meet the conferring rule. There was no conferring. Any conferring and failure to confer should have to be described in detail ie list each topic discussed and where and when it was discussed and the result, in an affidavit. Specific conferring guidelines should be published and if the so called conferring did not meet the guidelines, judges must reject any motion that requires conferring. (at least, all rule 21, motions to compel and SJ motions, should require such conferring)

If a judge does not reject a motion in which the evidence was that there was no conferring, there should be rules allowing an immediate appeal to the presiding judge, who would review only whether the evidence of conferring met the guidelines.

29 Jul 4, 2011 4:09 PM

30 Jul 2, 2011 5:36 PM N/A

31 Jul 2, 2011 3:55 PM I suggest you have one filing fee for probate matters that covers the entire probate.

32 Jul 2, 2011 5:19 AM Summary judgment deadline should be more than 60 days prior to trial, preferably 90 days or more

33 Jul 2, 2011 3:15 AM Rule 53 seems to cause many headaches. ORS 419B.806 and Chapter 107 often trip up the bench AND bar. I would like to see some streamlining of consolidation practice and suggested forms, with commentary that explains how to proceed, how to file, how to present issues, and how to draft judgments in consolidated matters.

34 Jul 2, 2011 12:25 AM I want interrogatories in Oregon! They are a tremendously helpful tool in litigation matters, and I think that many of my cases are slower to resolve because there is not an efficient written discovery mechanism for obtaining basic information.

35 Jul 2, 2011 12:12 AM Using a "history" section with each rule would help the understanding, e.g. West's system. Also, the comments have not been kept up or in any sort of order that is accessible to the bar as a whole.

- 36 Jul 2, 2011 12:07 AM more settlement conference encouragement
financial family mediation referral process
- 37 Jul 1, 2011 11:47 PM Address e-discovery comprehensively
- 38 Jul 1, 2011 11:20 PM Mandatory production of documents, much like Federal court.

39 Jul 1, 2011 11:19 PM A bilateral ORCP 54. Preclusion of default under ORCP 69 in less than the time otherwise allowed to respond. Tougher sanctions (i.e., attys fees/costs) for knee jerk serial Rule 21 motions. Put the work on the bar instead of the courts: require verifications on discovery responses; invent interrogatories. Clear up procedures for protecting "the record on appeal" so that somebody can tell what's in it who isn't in Salem; e.g., a notice of filing of the record on appeal including docket entries and at least the identification of trial court exhibits. The lack of any dealing with post-trial jury interviews precludes the entire jurisprudence of jury misconduct, which is in my view, totally ignored, and I very strongly suspect, based only on my own experience, rampant.

40 Jul 1, 2011 11:08 PM ORCP 68C(2)(a) was amended to require a party to include in their pleading the right to attorney fees even though the other party may have alleged a statute or contract that provides for attorney fees to the prevailing party. When both parties are on notice that attorney fees are an issue and shall be awarded to the prevailing party aren't we putting form over substance by absolutely requiring the other party to plead the same statute or contractual basis in order to be allowed fees?

41 Jul 1, 2011 10:57 PM Although I believe interrogatories can be a waste of time and money, there are times when they can be very helpful. I believe that Oregon should adopt a rule that permits a limited number of interrogatories, perhaps fewer than permitted in federal court, but at least some.

42 Jul 1, 2011 9:49 PM temporary restraining orders, preliminary injunctions, receivers and ex parte could all be more uniform and a lot clearer. Probate/trust litigation could also be clarified.

43 Jul 1, 2011 9:49 PM Simplify! In my 43 years of practice I have never seen a rule modification which reduced the complexity or cost of litigation.

44 Jul 1, 2011 9:48 PM Recognition that a significant cost of litigation for small cases is in the discovery process. Some of the document requirements seem to make sense for large cases, but don't in small cases. Example: detailed responses to requests for production.

45 Jul 1, 2011 9:47 PM Simplify. Simplify. Simplify. For example, take a look at the confusing mess of ORCP 7 alternative service, esp regarding motor vehicle accidents. If you TRIED to make it confusing you couldn't have done a better job.

46 Jul 1, 2011 9:43 PM Adopt federal court formatting requirements, which are simpler and impose less cost on lawyers and law firms.

47 Jul 1, 2011 9:40 PM Per ORS 107.095, Limited Judgments in family law have been relegated to the issue of support with temporary parenting plans now carrying the rather artificial label of "order." Two documents thus need to be prepared--while the ORCP may not actually define the types of judgments, if you are interested in promotion efficiency, ORS 107.095 should be changed to make clear that support awards can be combined with custodial and parenting time issues in one document.

48 Jul 1, 2011 9:40 PM Make some uniform set of rules of procedure apply to administrative proceedings before ALJs, many of which end up as civil court proceedings.

49 Jul 1, 2011 9:38 PM Make electronic service of pleadings automatically acceptable (not just upon agreement of the parties)



Proposal for Amendment to Oregon Rules of Civil Procedure

| | |
|-----------------|--|
| Date: | September 6, 2011 |
| Name: | Jonathan M. Hoffman |
| Firm: | Martin Bischoff LLP |
| Address: | 888 SW Fifth Avenue, Suite 900 Portland, OR 97204 |
| E-mail: | jhoffman@martinbischoff.com |
| Phone: | (503) 224-3113 |

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

I propose that ORCP 54A be amended to conform with Federal Rule 41(a). Two Oregon appellate cases in the past decade, decided correctly under the existing provisions of ORCP 54A, illustrate the potential for abuse under the existing rule: Maxwell v. Stebbins, 180 Or. App. 48, 42 P.3d 336 (2002), and Guerin v. Beamer, 163 Or. App. 172, 986 P.2d 1241 (1999).

Under Federal Rule 41(a)(2), "[E]xcept as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." In practice, most voluntary dismissals operate the same way in state and federal court. However, the federal rule provides a fair opportunity to prevent or at least mitigate abuses that can occur under ORCP 54A, such as:

- 1) a voluntary dismissal after a summary judgment motion is pending, filed merely because the plaintiff has no legal or factual basis to oppose the motion or has failed to file a response within the time required by the rules, and wants a second bite at the apple later.
- 2) a voluntary dismissal because the plaintiff doesn't like the judge to whom the case (or motion) has been assigned; or
- 3) a voluntary dismissal to evade responding to discovery or after the plaintiff has waived objecting to discovery by failing to respond to pending discovery requests or while a motion to compel is pending.
- 4) a voluntary dismissal to re-file in another forum with a different statute of limitations or more favorable law.

In each of these cases, it's reasonable for the opposing party to ask the court to consider imposing conditions upon a voluntary dismissal, such as requiring any dismissal to be with prejudice if the plaintiff simply plans to re-file the same case later and hope to get a different judge; or to condition a voluntary dismissal on the plaintiff paying the costs of the pending motion, or responding to the pending discovery if plaintiff plans to re-file. I'm not suggesting that a defendant would--or should-- frequently ask for such remedies, or that trial judges would--or should-- frequently grant them, but why shouldn't there be an opportunity for a hearing, if requested by the defendant, at least to determine if there is a legitimate reason for the dismissal, or if the plaintiff is gaming the system?

Such a proposed amendment would potentially have changed the outcome of the Guerin case, but not the Maxwell case (because a motion to make more definite and certain or motion to strike, filed before an answer, wouldn't qualify under FRCP 41(a), either.)

The purposes of the Federal rule, as well as the factors that have been considered in setting conditions on such dismissals in Federal court, are described more fully in 9 Wright & Miller, Fed. Prac. & Proc. 3d, sec. 2364 3d ed. 2008).