MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 3, 2011, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Michael Brian
Eugene H. Buckle
Brian S. Campf
Kristen S. David
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Robert D. Herndon*
Hon. Lauren S. Holland*
Robert M. Keating
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Hon. David F. Rees
Mark R. Weaver*
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Arwen Bird
Brooks F. Cooper
Hon. Jerry B. Hodson
Hon. Rives Kistler

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

Oregon Rules of Civil Procedure (ORCP)/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 9 A • ORCP 9 F • ORCP 9 G • ORCP 17 A • ORCP 19 B • ORCP 24 • ORCP 27 B • ORCP 39 C(6) • ORCP 43 • ORCP 44 • ORCP 46 A(2) • ORCP 47 • ORCP 54 A • ORCP 55 • ORCP 57 F • ORCP 59 H(1) • ORCP 68 • ORCP 68 C(4)(c) • ORCP 69 A • ORCP 71	• 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 (Ms. David)

Chair Cooper was not available to attend the meeting. Vice-Chair David called the meeting to order at 9:40 a.m.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of November 5, 2011, Minutes (Ms. David)

Ms. David called for a motion to approve the draft November 5, 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. Judge Holland thanked Council staff for the comprehensive minutes.

IV. Administrative Matters

A. Website Report (Ms. Nilsson) (Appendix B)

Ms. Nilsson reported that the website statistics from the previous month show a marked increase in site traffic and page views when compared with the last website report, which encompassed a 10-month period. She noted that, now that the Council has started its biennial cycle and because of the recent survey that was sent to bar sections and the bench, more people are likely aware of its activities.

Ms. Nilsson also reported that she had added a new link on the left side of the website for the most recent ORCP amendments so that visitors can find them quickly and easily. Judge Miller stated that she had recently used the Council's website when an attorney called her asking about an amendment to ORCP 71. She noted that the attorney was previously unaware of the Council's website.

B. Legislative Contacts (Ms. David)

Ms. David stated that two of the legislators she is contacting have indicated that they have visited the Council's website. She noted that it is very important to keep in touch with legislators, and that she will draft a new message this week so that Council members can send it before the Christmas holiday. She stated that she will also re-send the initial introductory email for those who have not yet had a chance to send it. Mr. Bachofner stated that he had sent his first message as an actual letter, and wondered whether it is better to send e-mails. Ms. David replied that e-mail is probably a more effective method in today's electronic age. Ms. Nilsson noted that she had received a reply to her initial e-mail from Rep. Tina Kotek's staff.

Prof. Peterson emphasized that, when members of the Council speak before the legislature about funding, it is good to have legislators who are already aware of what the

Council is and what it does. He explained that, for two biennia, the Council has been under the umbrella of the Office of Legislative Counsel, but that it has now returned to the Judicial Department. Prof. Peterson remarked that it is now more likely that the Council will be able to reimburse all members for travel during the year that the expenses are actually incurred.

V. Old Business (Ms. David)

A. Committee Updates/Reports

1. ORCP 9 F, G: Service of pleadings and correspondence via e-mail (Ms. David)

Ms. David reported that she has talked to the E-Court Task Force and the Uniform Trial Court Rules (UTCR) Committee to ask how this issue will be dealt with during the implementation of the e-court system. She noted that service of pleadings in this system will likely not be problematic, but that service of other documents by e-mail is a different issue. She stated that she and Judge Zennaché had not had an opportunity to discuss the issue much further.

Mr. Brian asked Ms. David to explain the difference between service of pleadings and other documents with a brief analysis. Ms. David stated that, under ORCP 9 F and G, attorneys can currently serve by e-mail only if the other party consents. She noted that, in the appellate courts, once a party agrees to serve something by filing through the e-court process, that party agrees to accept service of pleadings by e-mail, but that this is different from agreeing to accept service of all documents by e-mail. Ms. David pointed out that there is a different standard that is imposed with pleadings. Mr. Buckle inquired whether, as a general rule, lawyers are agreeing to accept pleadings by e-mail. Ms. David stated that many are. Mr. Buckle observed that many offices have a process established where incoming mail and faxes go to the legal assistant and get docketed, but if an e-mail goes directly to the attorney, it would be easy to get lost since it is outside of the established process.

Mr. Beattie noted that correspondence does not need to be served. Judge Rees stated that the ORCP 69 A "10 day letter" does. Ms. David stated that, in her work with the PLF, she has had several cases recently where an attorney has used a service that turns faxes into e-mails, the e-mails got lost, and the attorneys missed deadlines as a result. She noted that, now that fewer people are using physical fax machines and technology is turning faxes into e-mails, people are inadvertently accepting service by e-mail, and this is an issue that attorneys are going to have to deal with as it gets more common. Mr. Bachofner stated that he receives many e-mails, and that a client called him a few weeks ago to relate that he had sent three e-mails which Mr. Bachofner never received, not even in his spam filter. He remarked that pleadings not reaching someone by e-mail because of technical issues is a big concern. Ms. David reminded the Council of the old rule that a letter

mailed is presumed to have been delivered unless it is returned to the sender. She stated that many large firms block return receipt requests on e-mail so the Council had decided not to make that a requirement when making changes to ORCP 9 two biennia ago. She also noted that large PDF files may get blocked by some servers, and that sometimes an "undeliverable" message is not received until several days later. Mr. Bachofner stated that, as a courtesy, he telephones people if he has not received a response to an e-mail in a few days. He stated that perhaps some type of check and balance procedure could be included in any rule change. Prof. Peterson noted that email is not yet as reliable as the United States Postal Service. He stated that service of complaints and petitions should always be different, but that one can run into problems with discovery documents you because they are not technically pleadings. He posited requiring some kind of uniform header for e-mails so that the recipient can tell the e-mail actually contains a pleading.

Ms. David stated that her office created a central e-mail address for all pleadings to go into so that one person can receive them and calendar them and route them to the appropriate attorney. Mr. Buckle noted that this would require opposing counsel to be aware of this e-mail address. Ms. O'Leary stated that, in the federal system, two addresses can be entered so that a legal assistant or secretary can also receive documents. Ms. Gates stated that, when attorneys in her firm agree to accept service by e-mail in state court, they only do so if opposing counsel agrees to include certain e-mail addresses, and one of them is a secretary. Mr. Beattie noted that this still requires some cooperation on the part of opposing counsel. Ms. David stated that UTCR 22, which is being drafted specifically for all the e-court rules, states that, when a party signs up for e-court, that party is agreeing to service by e-mail because the system is going to serve the party by e-mail automatically. She wondered whether a UTCR can trump an ORCP, and noted that the Council needs to determine what the UTCR are going to say before we can decide what the ORCP are going to say.

Mr. Beattie observed that, in the Court of Appeals system, there is no option for service on a secretary or legal assistant. Ms. David stated that, at the last E-Court Task Force meeting, she posed the question of what concerns practitioners need to think about. She noted that the information technology group is planning to answer some of those questions in the future, and to see what can be done to safeguard practitioners from some of these issues. Ms. David stated that the PLF is very concerned with this issue as well, since it can be a huge issue for malpractice. Prof. Peterson noted that ORCP 9 G allows a party to designate an administrative assistant as a person who needs to receive service. He stated that the Council should be nimble, and be ready to make any ORCP changes as soon as we know what the Task Force has in mind.

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

Ms. Leonard noted that she was not at the previous Council meeting, but that she had read the minutes and that they accurately represented the work that the committee had done thus far. Prof. Peterson mentioned that the Council wanted to have another opportunity to think about whether the issue warranted sending out a survey to the bar. Ms. David stated that she has not yet looked into the legislative history of this issue. She suggested that she do this and send out an e-mail to the Council prior to next meeting to let Council members think about it.

Judge Rees spoke of a recent case where compulsory counterclaims may have been helpful. He stated that case 1 was filed and settled, the plaintiff received his judgment, and then the defendant became the plaintiff in case 2. He noted that this led to all sorts of evidentiary questions and that it would have been nice if there were compulsory counterclaims. Judge Miller stated that she often sees attorneys forget to put a mutual release of any and all claims into settlements. She stated that it appeared that, if counterclaims were compulsory, insurance companies would be required to defend the claims. Mr. Beattie noted that it is policy language that determines the insurance company's duty to defend. Mr. Bachofner stated that the insured would be forced to make a decision immediately as to whether to retain counsel and make their own claim, then they would have to decide who is their counsel because he would not be able to represent them in their affirmative claim.

Judge Miller noted that there would not be a lot of prejudice, since at some time within that two-year statute of limitations they must make an election, in this case sooner rather than later. Ms. David spoke of legal malpractice cases where her aim is to keep the potential negligence issue very clean and structured and not cloud that issue with a potential $50,000 in outstanding fees so the jury does not start playing back and forth with those two totally separate issues, even though they arise out of the same representation. Ms. David stated that she can see where, in certain cases, there would be benefits to requiring the parties to deal with all issues, but that procedurally stating that it applies in every case may cause potential and inadvertent substantive changes. Judge Rees observed that compulsory counterclaims are the rule in federal court and in several states.

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

Judge Miller reported that the committee had not yet met, but that she will attempt to schedule a meeting for the following week.

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

Ms. Gates reported that the committee had met and started to draft language for an amendment, but that the act of drafting language for the amendment raised new questions. She stated that the committee will continue deliberating and report back to the Council. Mr. Bachofner stated that the committee's discussions also brought up a question about existing language in the rule. He asked whether Prof. Peterson was aware of the history of the consent language in the rule. Prof. Peterson stated that he was not. Mr. Bachofner noted that the language of the rule states, "the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf," and that some attorneys are interpreting this to mean that, if nobody consents, there is no requirement for that deposition to occur, rather than applying the "who consent to testify" language only to the "other persons" named in the rule. Prof. Peterson noted that, under ORCP 46 A(2), you can ask for sanctions if nobody agrees to testify. Mr. Bachofner noted that the Council has the opportunity to create legislative history on this issue with its committee reports and meeting minutes.

Mr. Keating stated that, as a courtesy, he has advised lawyers who have served him with such notices who he intends to respond to the notice. He noted that an ORCP 39 C(6) deposition is, by definition, limited to that which was set out in the notice, and that the problem with giving a name is that the opposing counsel may decide not to limit his or her questions to the notice but, rather, may ask unrelated questions. Mr. Keating observed that an attorney prepares the deponent to testify only about what the corporation knew and that if, in fact, the deponent will be a witnesses over and above what it is in the notice, that is a "sandbag" situation.

Mr. Bachofner pointed out that the identity of the deponent is really irrelevant, since the attorney is preparing for the issues identified in the notice, not for that person's individual testimony. He stated that, once the original deposition has been taken, an attorney may choose to depose the person again separately. Ms. Gates noted that she often has had the witness forget that they are not testifying as an individual, and that she has needed to prepare the witness so she could keep them on the right track. Mr. Keating remarked that this is the responsibility of the corporation's attorney. Mr. Buckle observed that an attorney could take a second deposition if they determine afterward that it is necessary but that, in terms of efficiency of the process, if an attorney knows the identify of the deponent in advance, everything could be accomplished in one deposition. Mr. Keating pointed out that, theoretically, this would be true, but when you mix the corporation's testimony with a deponent's personal testimony the issues can get very murky. He noted that the purpose of ORCP 39 C(6) is to find out what the corporation thinks and to find the person best able to speak to that. Mr.

Bachofner stated that there is very little case law on this matter in Oregon, and much more in federal court.

Prof. Peterson suggested to all committees that, when they have draft amendment language ready to present to the Council, they forward it to Ms. Nilsson for formatting so that all iterations of proposed amendments follow uniform rules and are kept in sequence.

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

Ms. David reported that the committee is waiting for the first of the year when the new amendments go into effect to get comments from the bench and bar on how the changes are working.

6. ORCP 44/55: Medical Examinations/Medical Records (Mr. Keating)

Mr. Keating asked whether it would be practical to combine the ORCP 44 and ORCP 55 committees since the issues with which they are dealing are similar. Ms. David noted that combining the committees would result in an imbalance of plaintiff and defense attorneys, and asked for another plaintiff's attorney to join. Ms. O'Leary agreed to join the committee.

Mr. Keating reported that the committee has not met since the last Council meeting. He stated that he has e-mailed some of his thoughts to the committee and that he will set up a meeting.

Mr. Keating stated that he feels that a "mother may I" rule has been set up as a result of the Health Insurance Portability and Accountability Act (HIPAA) laws. He observed that there is no obligation on the part of the patient's lawyer to raise the issue with the court if they object to release of medical records so, by definition, the defense attorney is required to do it every time. Mr. Keating opined that this leads to an inappropriate use of judicial time, and stated that the burden should be put on the patient's lawyer to state the specific items in the medical records that should be protected.

Mr. Keating stated that he has had the experience of lawyers for patients refusing to provide to one defendant copies of records that have been produced to another defendant. Mr. Bachofner observed that he has encountered a situation where a co-defendant wanted to get copies of records, but needed to get consent from the plaintiff because of privacy rules. Prof. Peterson noted that ORCP 9 A appears to state that every document needs to be served on every party. Mr. Beattie wondered why one defendant would be able to get documents and not the other defendant. Mr. Keating noted that he believes that HIPAA has been overblown from its original purpose and gets used strategically to try to position a case

favorably. Judge Miller stated that she would sign a protective order to allow anyone who needs to see the records to see them, but perhaps just allow the lawyers and not the clients to see them. Mr. Keating stated that this is the appropriate way to handle an objection when someone subpoenas medical records, and that HIPAA clearly contemplates that, if there is an objection, there will be a court order solving it. Judge Miller noted that she does a lot of *in camera* reviews in criminal cases with psychiatric records and school records, and that it is a lot of work. She noted that she does not want to second-guess the lawyers as to why it is necessary, and that the court has an obligation to get involved if there is a controversy as to why it is needed.

7. ORCP 47: Summary Judgment - Multiple Issues (Mr. Keating)

Ms. David reported that Mr. Keating is now chair of the committee, and that the committee is researching some issues and will report back to the Council at a later date.

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

Mr. Weaver reported that the ORCP 54 A committee had met and had discussed concerns that the rule may be being abused in some situations, the most egregious example being one where the where a summary judgment had been granted to a defendant, the court had signed the order granting summary judgment, and the plaintiff had then voluntarily dismissed the case so it would be a dismissal without prejudice. He noted that federal rules provide that, after an answer or summary judgment motion has been filed, a party is not allowed to voluntarily dismiss. He stated that, during the committee's research, it found that this issue had been debated and that a consensus amongst bar members had been reached when the rule was initially adopted. Mr. Weaver noted that Prof. Peterson had agreed to look at the legislative history of the rule and report back at next meeting. Mr. Weaver stated that Justice Kistler had written an opinion on the issue and that opinion recalled that this was a sensitive issue amongst most of the members of the bar, in that most did not want the rule to mirror FRCP 41 A. Prof. Peterson observed that this was a controversial issue at the time the rule was authored. He also noted that Washington and California allow dismissal right up to the day of trial, but that Oregon is more restrictive in requiring dismissal five days before trial. Judge Miller stated that there can be a great deal of cost and expense with the five-day rule, including getting out from under the cost of expert witness fees at such a late stage of the trial. Mr. Beattie noted that there is a lot of room for shenanigans, including having a case set for retrial after a mistrial. He opined that, if a party is going to get out of a case that late in the game, there should be some penalty. Judge Rees stated that he would entertain an enhanced prevailing party award in some cases. Prof. Peterson stated that, in many cases, attorney fees will attach but, otherwise, only costs will attach along with a prevailing party fee and,

possibly, an enhanced prevailing party fee under ORS 20.190. However, because of the statute of limitations, some parties will not be in a position to dismiss their cases if they are unhappy, as they will not be in a position to re-file.

Ms. David asked that the committee report back at the next Council meeting and let the Council know its chair at that time.

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

Ms. O'Leary stated that the committee had submitted a report to the Council (Appendix C). She noted that the committee had devised three potential proposals regarding this issue. One proposal is to allow alternate jurors to be present during deliberations, but not to participate. This was the original suggestion which came to the Council from Judge Susie Norby of Clackamas County. Judge Zennaché was concerned about potential case law that might prohibit jurors from being present, but was not sure of the case citations. Ms. O'Leary stated that she will research the case law. Judge Armstrong observed that the problem is enforcing the prohibition on alternate jurors becoming involved in deliberations when there is no oversight in the jury room. He also expressed concern over an alternate juror being able to disregard deliberations which have taken place in their presence in the jury room prior to them being substituted as a deliberating juror, and stated that there is likely no way for the prior deliberations not to play some role in the former alternate juror's participation. Judge Armstrong stated that another concern with this method is that, when an alternate is appointed to the jury, they are supposed to deliberate and there is the danger that, if the former alternate has been sitting there the entire time, the other members of the jury will ask, "Do you agree with everything we have said and the decisions that we have made so far?" He observed that this is not deliberation or participation but, rather, just agreeing with what the other jurors have already discussed.

Ms. O'Leary stated that the second proposal, put forth by Judge Zennaché, is to give judges the discretion to not excuse alternate jurors until after the deliberations are over so that they can be brought back if needed. Judge Miller stated that this is her practice. She noted that she has needed to use alternate jurors more during the course of a trial than during actual deliberations.

Ms. O'Leary stated that the third proposal is that jurors need not be identified as alternates until they begin deliberation. Judge Miller noted that she does not think that jurors identified as alternates are any less dedicated when they know that they are alternates. Ms. O'Leary pointed out that when jurors sit through an entire trial and then find out at the last minute that they will not participate, they may get upset. Judge Rees stated that, in every case, he does not identify the alternate jurors and merely draws a number at the end of the trial to choose them.

He noted that, this way, the jurors feel that they are all in it together and they already know the procedure beforehand. Ms. O'Leary noted that she, as an attorney, would want to know who the alternate is because that alternate was not anyone's first choice. Judge Rees observed that it seems better to him to have one class of jurors because, when you have a second class of jurors, even if everybody intends to do their best, you get a different dynamic.

Ms. David suggested setting up a survey of the bench and/or bar if necessary after the committee does some more research.

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

Ms. Leonard stated that the committee has not yet met, but will do so soon and will report back to the Council. She reminded the Council that the proposal from Judge Karsten Rasmussen in Lane County was to amend ORCP 59 H to change the requirement for taking an immediate exception to a jury instruction at the time the instruction is made to, "at any time reasonably calculated to provide the court with an opportunity to correct any error." Ms. Leonard stated that she wanted to review the Council's history about why that provision was drafted as it was. Mr. Keating noted that the provision has been included since the inception of the rule.

Ms. Leonard stated that the practice may have changed, but that the rule has not. She noted that, in her experience, there is usually a charging conference at which all of these issues are hashed out and parties present their proposed instructions and objections. Judge Miller observed that she does not have the luxury of spending that kind of time, but that jury instructions are usually worked out during the half hour after the lunch recess or at the end of the day. She stated that it is her opinion that, if the lawyers do not take an exception during that time, it does not matter what they may have said earlier or during the trial. She stated that, during this procedure, when instructions are being typed and amended, she wants to know what changes need to be made so that, when the jurors go in to deliberate, she can fix any problems and bring the jury back out to explain. Judge Armstrong stated that an attorney may have made exceptions during the trial that they do not really think are that important, that they will not necessarily be making an issue of on appeal, and that there is a more limited group of exceptions that really matter and those are the ones that will be brought up during the writing of jury instructions. Mr. Beattie asked whether Judge Armstrong was aware of any cases where the Court of Appeals has held that an objection to a jury instruction was not preserved where an attorney stood up after a jury has been instructed and said "I incorporate all of the objections I raised during the charging conference?" Judge Armstrong replied that he was not aware of such a case.

Judge Zennaché mentioned that there is a recent Court of Appeals case where the Court stated that it might suffice if a party incorporates by reference its prior

objection to a jury instruction but, in that particular case, the trial judge told the parties after an extensive number of drafts of jury instructions that they did not need to raise objections that they had previously raised, and that he was going to incorporate them by reference. The Court of Appeals held that instruction from the trial court did not preserve the issue on appeal for the trial lawyers.

Judge Miller noted that she frequently does things in chambers because there is a free-flow of information, but that she always goes out and puts those discussions on the record. Judge Zennaché stated that, in the Court of Appeals case, there had been an extensive discussion on the record before instructions were given. Judge Armstrong stated that the reality is that, if the extensive discussion is had off the record, the judge comes back out and says "we have had this extensive discussion on the record and here is what I recall, is there anything that I have forgotten," and there may be things that are not recalled by any of the parties, and the reality is that it is not good practice. The only way to make certain if a party wants to make an issue of it later is to have the entire discussion on the record. Judge Miller stated that, if an attorney did not want to have the discussion in chambers, she wound not. Judge Rees noted that the issue here is whether you need to have the discussion on the record and then raise it again at the time of jury instruction. He observed that, if a discussion is not on the record, it does not exist.

Mr. Beattie observed that, with the current ORCP 59 H, there is a procedural trap out of line with ordinary preservation law. He stated that raising an objection on the record so that the judge has an opportunity to consider it is generally the rule for preserving an issue on appeal. He stated that the rule being proposed here would capture that general rule: if there is a problem, you have to raise it at an appropriate time with the court; if you do not, then you have waived that objection as the basis of an appeal. Mr. Beattie noted that the amendment would preserve the existing ORCP 59 H, but not add the trap for those things that have been previously raised and presented to the judge for consideration.

Judge Armstrong stated that during the procedure of creating jury instructions there is a lot of give and take: a piece may have been left out, it may have been rephrased, it may not be embodied in a way that exactly coincides with the original request, but it is still trying to approximate it. He noted that the court is finally responsible for coming up with what the court believes truly needs to be said, and there is a point where an attorney may still disagree and can still say that one instruction still does not convey the right idea. Judge Armstrong observed that the likely reason for the rule was that, whatever went on earlier, now it can be crystallized. He agreed that it can be a trap, but felt that there was some thought behind it. Judge Zennaché wondered how much of an issue this is for the bar. Mr. Beattie replied that there have been enough reported opinions on it that it is a concern. Judge Gerking noted that the process of jury instruction is changing, so the instructions are front loaded. Judge Armstrong opined that

experienced, capable lawyers will not be trapped. Ms. Gates noted that the rule elevates form over substance and requires a duplication of efforts, requiring lawyers and judges to go through the exact same exercise they have just been through. She stated that, for this reason alone, a change should be considered.

Judge Armstrong asked whether any Council member was aware of any instance where a court had revised an instruction after the point where the instruction seemed to be in final format and was typed, but a lawyer spoke up and stated that the court still did not seem to have written the instruction in the way that the lawyer felt was appropriate. Several members recalled changes at that point for adding instructions that were omitted, but none could recall changes being made at that point after a lawyer reiterated an exception.

Judge Miller stated that there is sometimes a compromise, when one attorney wants a particular word or phrase, the other is opposed, and they meet in the middle. Ms. Gates stated that she felt that the Council was talking about two different circumstances. She stated that some are talking about a conference with a set of instructions, where the only objection would be that the judge misread the instructions or made up a new instruction without consulting the parties. Ms. Gates noted that, in most cases, there is a stack of papers that will be read word for word, and so the only objection afterward would be that the judge omitted an instruction or read an instruction incorrectly. Judge Rees stated that, if there is a particular instruction that is controversial, his practice is to have attorneys submit competing versions for him to review and he may use one or the other, he may take portions from both, or he may redraft the instruction. He noted that he will then give the revised draft to the attorneys, let them know that he has already heard their arguments and not to reiterate them, state that this is the draft he is going with, and ask whether they have any last minute input. Judge Rees stated that there is a clear record that there has been extensive discussion and that, if the attorneys do not take an exception at that point, they clearly have waived it.

Judge Armstrong observed that the reality is that there is a lot of fluidity as to how final jury instructions are prepared on a case by case basis. He noted that there may appear to be a perfectly sensible system in a court, but that is not necessarily the way it plays out: for example, judges ask for instructions in advance, but do not necessarily get them and may end up having to write them during the trial. Mr. Bachofner stated that, in this day and age of budgetary constraints, it seems to make no sense to have to go through the trial process, provide all objections on the record, and have to make them all again at the end. He opined that attorneys should be able to incorporate prior objections if they are already on the record and have been preserved. Judge Rees agreed in part, but stated that lawyers should have to identify at the end of the process what issues they still have with the instructions, even if that means stating something such as, “we take exception to this instruction, we think ours is better, as we argued earlier.” Mr. Beattie

noted that he would be satisfied if one could say "we incorporate our prior exception" and not have to completely reiterate the argument. Mr. Buckle observed that the whole idea of preservation is to give the trial judge the opportunity to have the information to make a correct decision. He noted that, if the attorney provided that information to the trial judge before, and the record shows that the attorney clearly provided that information during the process, that should be enough to preserve the issue. Judge Armstrong asked whether, other than the failure to include an instruction, if anyone knew of an instance where a jury has been brought back because a judge agreed that an instruction was not clear. No Council member could recall such an instance.

Judge Gerking asked whether all members were in agreement that, at some point during the trial, either before or after the jury is charged, an attorney must formalize objections on the record. Judge Armstrong noted that, as a simplified way of framing it, it may be that the rule was written with the view that, if objections are raised at that end point, they will capture everything. He stated that there may be a way to draw a distinction and then to articulate that distinction between things that have been vetted during trial and things that have not.

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

Ms. David stated that Prof. Peterson is drafting some language on parts of the rule, that Judge Zennaché is drafting other portions, and that she is doing some research. She noted that she is fairly certain that some changes will be made, but that it is a big rule and that it will be a complicated redraft. Judge Miller observed that Judge Deanne Darling from Clackamas County had suggested a change to ORCP 68 C(4)(c) to make no oral argument the default unless a party requests oral argument. Ms. David stated that this is definitely on the list of issues that the committee is considering, and that Judge Zennaché is looking at a way to modify some of the language to create a mechanism where a party could: 1) submit a statement of attorney fees and costs and not ask for oral argument at first but, if there is an objection, the party can file a reply and ask for a hearing; or 2) state in the statement of attorney fees that the party requests a hearing only if the other side files an objection raising new matter. Ms. David noted that the idea is to streamline and to make the process more efficient.

Judge Holland asked whether Ms. David would be contacting her to discuss ORCP 68 and probate cases. Ms. David apologized that she had not had the opportunity to call yet, but stated that she would be getting in touch soon.

VI. New Business (Ms. David)

A. ORCP 17 A (Ms. O'Leary)

Ms. O'Leary brought up a new issue: that ORCP 17 A appears to require original signatures on pleadings that are filed with the court. She noted that, for small firms such as hers where all attorneys might be out of the office traveling for cases or taking depositions, when there is a deadline for filing a pleading it is sometimes impossible to get something filed. She stated that she would like the Council to consider a change to the rule to allow an electronic signature. Judge Zennaché stated that he is opposed to this in principle, except for in cases of electronic filing, because lawyers need to have accountability for what they file with the court, and he does not like the idea of lawyers being able to duck that accountability by saying, "I didn't sign this, my staff did. I'm sorry, it was a mistake, don't hold me accountable." Mr. Bachofner stated that there will be offices where a paralegal will prepare everything and wondered where is the accountability in such cases. He stated that he feared that some lawyers will play fast and loose if such a change is made. Ms. O'Leary observed that ORCP 17 states that by affixing a signature an attorney is assuming responsibility, and that Oregon is the only court she is aware of where somebody has to actually sign with a pen instead of putting an electronic copy on the signature line. Ms. David noted that any changes made now will not become effective until January 1, 2014, and that e-court will be in effect in many jurisdictions by 2014, so it may not be necessary to make a change that will be obsolete shortly after it is made. Mr. Buckle wondered whether, if the issue is accountability, what the difference is between a signature in ink and an electronically printed signature. Mr. Beattie observed that an attorney has an obligation to authorize affixing the electronic signature in advance; otherwise a paralegal would be forging a document. Prof. Peterson noted that Rule 17 A states "signed" but it does not say "signed in original ink in your hand only," and that, if an attorney authorizes someone to use a signature stamp, the attorney is responsible for the fact that he or she authorized the use of it. Judge Zennaché pointed out that judges in Lane County will not accept pleadings with signature stamps.

The Council agreed to form a committee regarding this issue. Ms. O'Leary will chair, with Mr. Buckle, Judge Holland, and Judge Miller as additional members.

B. ORCP 69 A (Judge Rees)

Judge Rees raised an issue that had come to his attention recently regarding the ORCP 69 A 10 day default rule. He described a case where a woman had traded in her car, and the car dealership agreed to pay the remaining debt as a part of the trade-in and, for some reason, failed to do so. The car dealership and the woman got sued, then the car dealership and credit company settled and resolved the case. The two later had a dispute and the settlement never got paid, and the credit company obtained a judgment by default against the woman, who had no idea and thought the matter was settled. The

woman never appeared in the case and, therefore, never got notice of the default. Judge Rees observed that the lawyer for the credit company knew about the woman, and he felt that somehow the 10 day rule should have been triggered so that the woman could have received notice, even though she technically had never said she was going to appear. He noted that it might be difficult to draft such a change to the rule but he felt that, if a lawyer has practical notice of an unrepresented litigant, that lawyer should provide notice.

Judge Miller asked whether this could be solved by a motion to set aside the default. Judge Rees stated that the judgment did not come to light until 8 years later. Judge Miller stated that she still felt that could be a solution, because in family law cases you can vacate a judgment after 10 years. Judge Rees stated that he was hoping to come up with a way to avoid this problem at the front end, perhaps some kind of practical notice. Ms. Gates asked about just requiring a notice of intent to take a default, whether a party has appeared or not. Ms. David stated that the problem is that the amended rule; as effective January 1, 2012; still looks to whether the party to be defaulted has filed a motion or answer or otherwise defended and, technically, that defendant did not try to defend herself. Still, when the attorney filed the motion stating that default was appropriate, he clearly knew what had been going on and he clearly knew that this woman had nothing to do with it. Nonetheless, she felt that the Council cannot protect against every situation. Judge Rees wondered whether there was some language the Council could come up with for practical notice, particularly when we have unrepresented litigants, that the defendant disputes the debt. Mr. Bachofner stated that this would be a very special rule. Judge Rees noted that any lawyer worth his or her salt would not have taken this default. Ms. O'Leary observed that this was an ORCP 17 violation of dishonesty.

Ms. Gates asked if there was a special collection rule that, even if a defendant does not appear, a debt collector still has to show that they were served with notice of default before a judgment by default can be taken. Ms. David stated that she did not believe so, as long as the defendant has full notice of the claim by service of the summons and complaint. Judge Miller opined that an ORCP 71 motion to vacate a judgment is the cure for the problem. Mr. Beattie noted that this may be something that needs to be raised within one year under Rule 71. Ms. David stated that serving a notice of intent to take default is a trigger but it is only required if the defendant has sent a letter to say that they are going to appear or otherwise defend the case. Mr. Beattie thought that this referred to a lawyer letter, not a pro se letter. Ms. David stated that she did not know if we can carve out a specific rule change for pro se litigants, and that such a change might create further problems. Mr. Beattie observed that there is a back end approach to it also – to file a motion for default and, if the defendant has not appeared in 30 days, an attorney does not even have to send the defendant a copy of the motion. Prof. Peterson noted that, in this case, the defendant would be in default. Judge Rees opined that perhaps the 10 day letter needs to be sent in all circumstances. Ms. David noted that the 10 day notice now must be in pleading format. Mr. Bachofner observed that one would have to serve it again. Prof. Peterson noted that the 10 day notice now only needs to be served

by US mail, pursuant to Rule 9, but remarked that he is a little concerned about the effect such a change on all of the factory default takers. Judge Rees suggested that perhaps a change could be drafted to say, if you have had any communication with the defendant, that triggers the 10 day rule. Mr. Bachofner acknowledged that this is how a lot of people practice. Ms. David observed that not everyone does. Judge Miller pointed out that many collection agencies are clueless about all circumstances except for the amount of the underlying debt, and that they do not know whether there has been intervening correspondence between debtor and original debt holder.

Ms. David suggested that Prof. Peterson (who was on last biennium's ORCP 69 committee) look at the rule again and see whether there may be a way to make any change that would improve such situations. She asked that he have a telephone conference with the remaining members of the committee and that they report back to the Council.

VII. Adjournment

Ms. David adjourned the meeting at 11:42 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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
• 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	• 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)

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 B) 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 C) 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)

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 inadmissable 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 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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 10/21/11 - 11/25/11

I. Inquires

The Council received an inquiry from an attorney doing legislative history research on ORCP 82 regarding how to cite to the Council's official comments for the original promulgated rule. Prof. Peterson provided the attorney with a publication containing the comments as an appropriate method of citing to the commentary. The Council also received an inquiry from an attorney doing legislative history research on its website regarding broken links to two documents from the years 2000 and 2004. Ms. Nilsson sent the documents to the attorney via e-mail and fixed the broken links.

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 1 month period since the Council's last meeting. The site had 146 visits from 105 unique visitors, and 458 page views in this period. 58% of visits to the site were from new visitors; the average number of pages viewed per visit was 3.14; and the average time spent on the site was just over three minutes. Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. These statistics from a one-month period show a marked increase in site traffic and page views when compared with the last website report, which encompassed a 10-month period.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

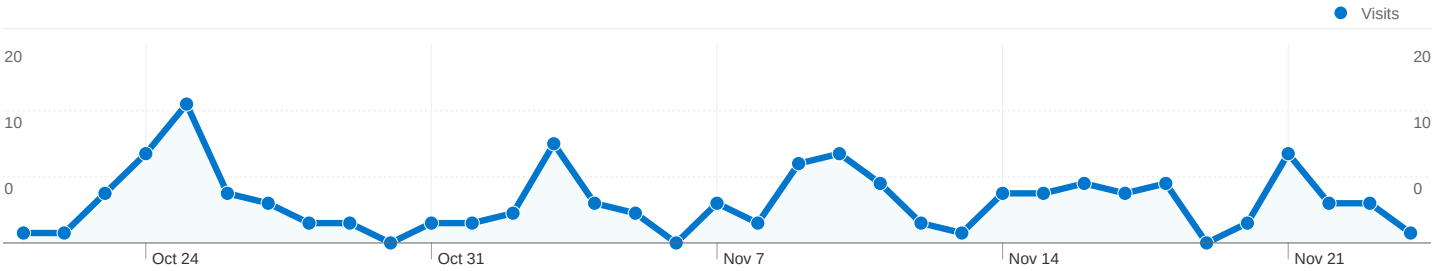
Council on Court Procedures
December 3, 2011, Meeting
Appendix B-1

www.lclark.edu/~ccp

Dashboard

Oct 21, 2011 - Nov 24, 2011

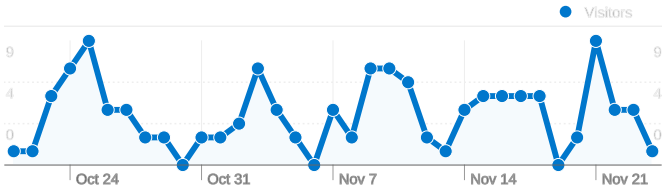
Comparing to: Site



Site Usage

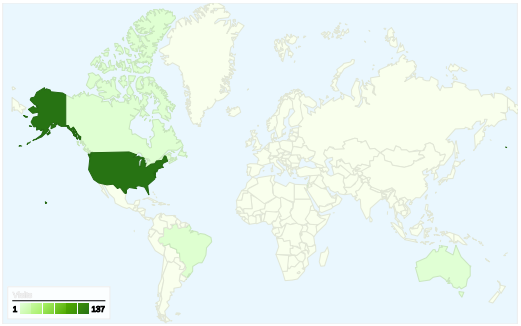
146 Visits	39.73% Bounce Rate
458 Pageviews	00:03:36 Avg. Time on Site
3.14 Pages/Visit	58.22% % New Visits

Visitors Overview



Visitors
105

Map Overlay



Traffic Sources Overview

- Referring Sites
  51.00 (34.93%)
- Search Engines
  49.00 (33.56%)
- Direct Traffic
  46.00 (31.51%)

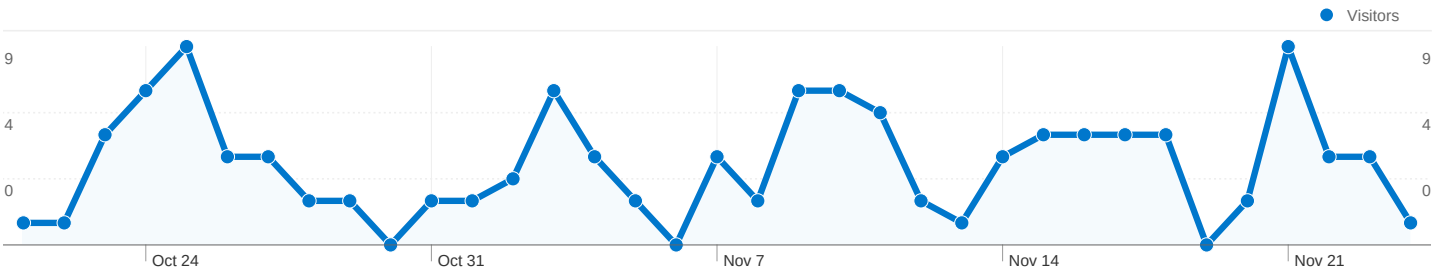
Content Overview

Pages	Pageviews	% Pageviews
/~ccp/Past_Biennia.htm	156	34.06%
/~ccp/index.htm	152	33.19%
/~ccp/LegislativeHistoryofRules	57	12.45%
/~ccp/Current_Biennium.htm	30	6.55%
/~ccp/resources.htm	22	4.80%

www.lclark.edu/~ccp

Visitors Overview

Oct 21, 2011 - Nov 24, 2011
Comparing to: Site



105 people visited this site

146 Visits

105 Absolute Unique Visitors

458 Pageviews

3.14 Average Pageviews

00:03:36 Time on Site

39.73% Bounce Rate

58.22% New Visits

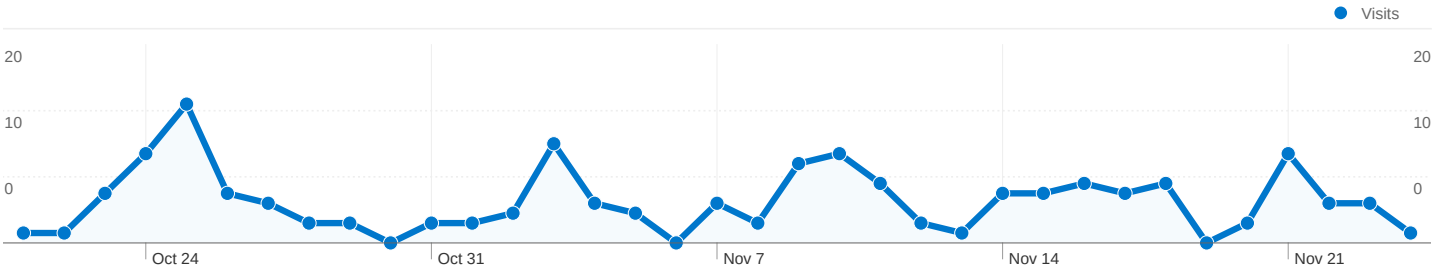
Technical Profile

Browser	Visits	% visits
Internet Explorer	78	53.42%
Firefox	41	28.08%
Chrome	17	11.64%
Safari	4	2.74%
Mozilla Compatible Agent	3	2.05%

www.lclark.edu/~ccp

Traffic Sources Overview

Oct 21, 2011 - Nov 24, 2011
Comparing to: Site



All traffic sources sent a total of 146 visits

31.51% Direct Traffic

34.93% Referring Sites

33.56% Search Engines

- **Referring Sites** 51.00 (34.93%)
- **Search Engines** 49.00 (33.56%)
- **Direct Traffic** 46.00 (31.51%)

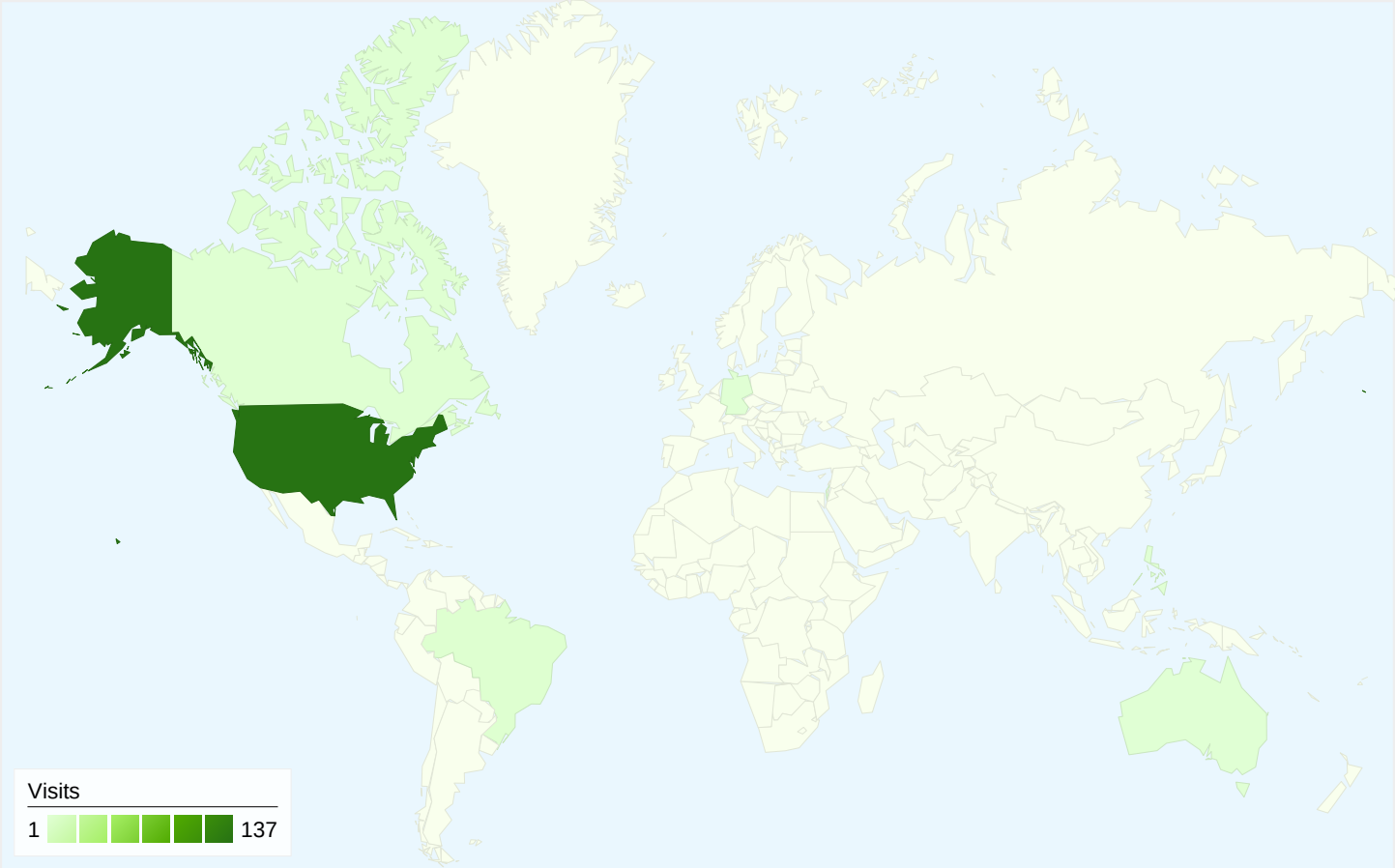
Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	46	31.51%
google (organic)	44	30.14%
councilonccourtprocedures.org	19	13.01%
courts.oregon.gov (referral)	16	10.96%
osbar.org (referral)	4	2.74%

Keywords	Visits	% visits
oregon council on court	17	34.69%
council on court procedures	7	14.29%
(not set)	6	12.24%
council on court procedures	4	8.16%
orcp 82, legislative history	3	6.12%

Map Overlay

Oct 21, 2011 - Nov 24, 2011
Comparing to: Site



146 visits came from 7 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
146 % of Site Total: 100.00%	3.14 Site Avg: 3.14 (0.00%)	00:03:36 Site Avg: 00:03:36 (0.00%)	58.22% Site Avg: 58.22% (0.00%)	39.73% Site Avg: 39.73% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	137	3.28	00:03:50	57.66%	35.77%
Brazil	3	1.00	00:00:00	0.00%	100.00%
Canada	2	1.00	00:00:00	100.00%	100.00%
Philippines	1	1.00	00:00:00	100.00%	100.00%
Australia	1	1.00	00:00:00	100.00%	100.00%
Israel	1	1.00	00:00:00	100.00%	100.00%
Germany	1	1.00	00:00:00	100.00%	100.00%

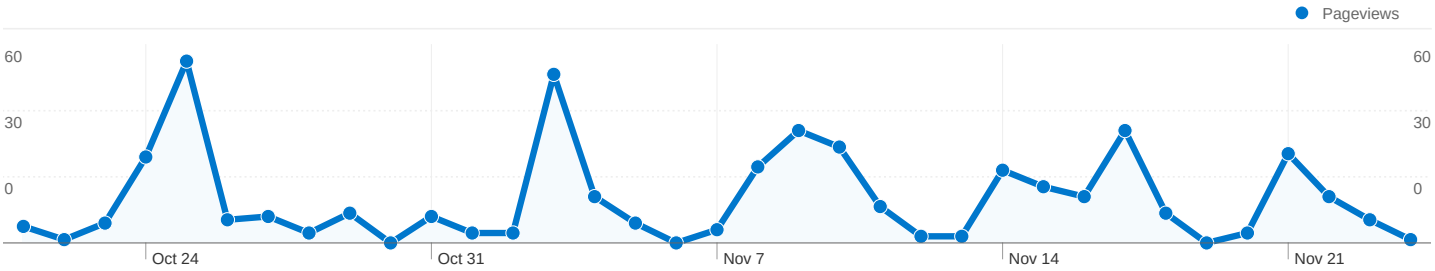
1 - 7 of 7

www.lclark.edu/~ccp

Content Overview

Oct 21, 2011 - Nov 24, 2011

Comparing to: Site



Pages on this site were viewed a total of 458 times

458 **Pageviews**

279 **Unique Views**

39.73% **Bounce Rate**

Top Content

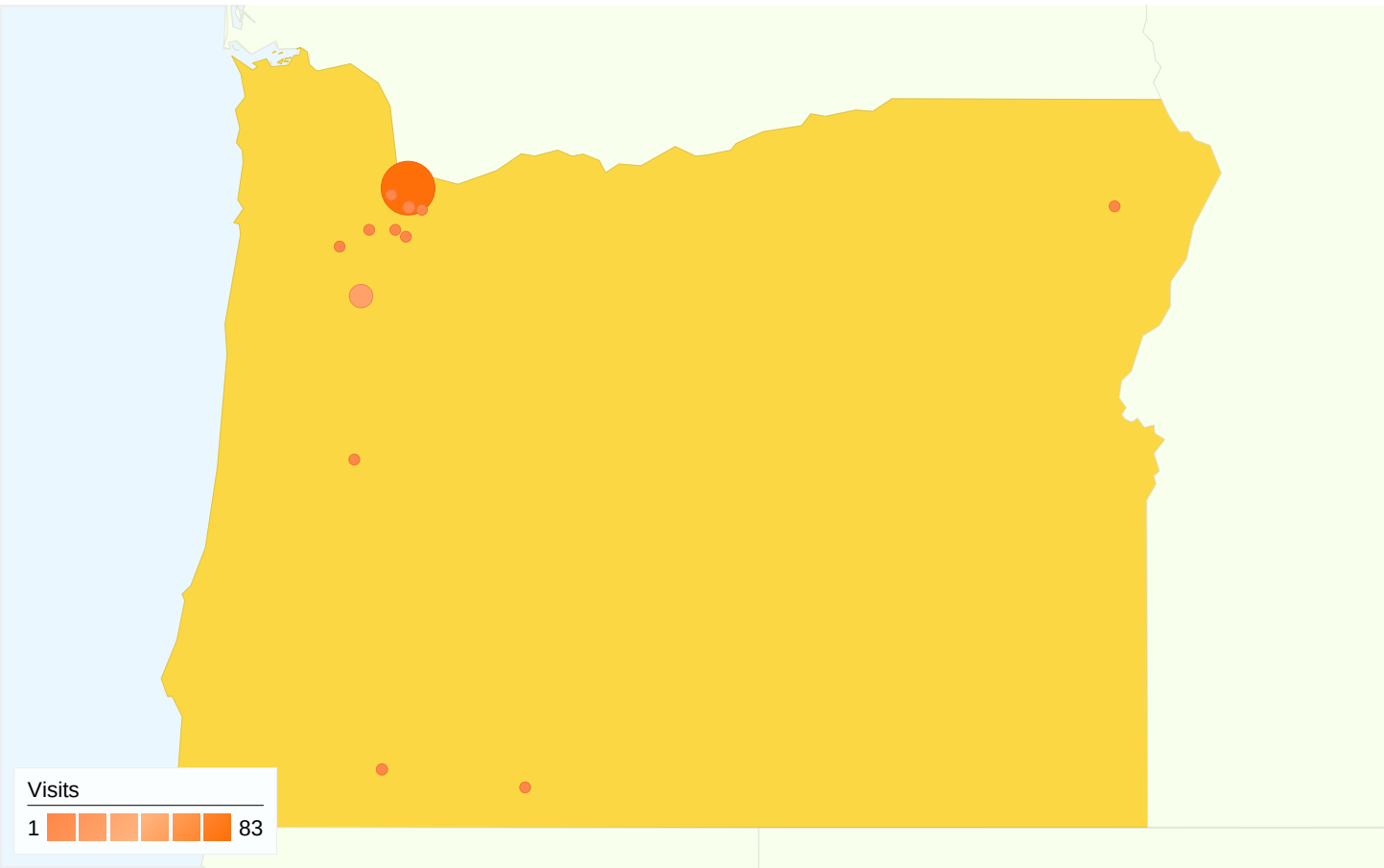
Pages	Pageviews	% Pageviews
/~ccp/Past_Biennia.htm	156	34.06%
/~ccp/index.htm	152	33.19%
/~ccp/LegislativeHistoryofRules.htm	57	12.45%
/~ccp/Current_Biennium.htm	30	6.55%
/~ccp/resources.htm	22	4.80%

State Detail:

Oregon

Oct 21, 2011 - Nov 24, 2011

Comparing to: Site



This state sent 124 visits via 13 cities

Site Usage

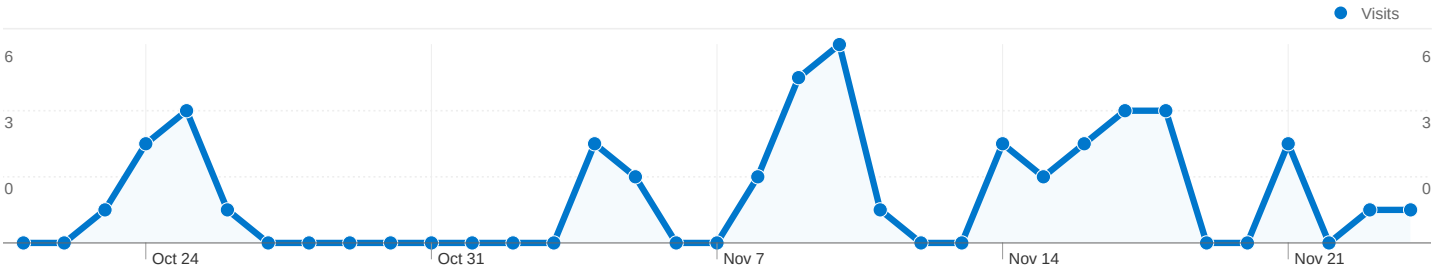
Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
124 % of Site Total: 84.93%	3.41 Site Avg: 3.14 (8.74%)	00:04:11 Site Avg: 00:03:36 (16.36%)	53.23% Site Avg: 58.22% (-8.58%)	32.26% Site Avg: 39.73% (-18.80%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	83	3.70	00:05:21	49.40%	24.10%
Salem	25	2.96	00:02:12	48.00%	52.00%
Lake Oswego	4	2.50	00:01:42	100.00%	25.00%
Beaverton	2	1.50	00:00:11	50.00%	50.00%
Medford	2	2.00	00:00:11	0.00%	50.00%
Newberg	1	10.00	00:08:40	100.00%	0.00%
Wilsonville	1	1.00	00:00:00	100.00%	100.00%
Eugene	1	1.00	00:00:00	100.00%	100.00%
Canby	1	2.00	00:00:47	100.00%	0.00%

Klamath Falls	**1**	1.00	00:00:00	100.00%	100.00%
Mcminnville	**1**	3.00	00:00:57	100.00%	0.00%
Enterprise	**1**	6.00	00:02:22	100.00%	0.00%
Clackamas	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 13 of 13

Keywords

Oct 21, 2011 - Nov 24, 2011
Comparing to: Site



Search sent 49 total visits via 16 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
49 % of Site Total: 33.56%	3.90 Site Avg: 3.14 (24.26%)	00:03:45 Site Avg: 00:03:36 (4.21%)	48.98% Site Avg: 58.22% (-15.87%)	20.41% Site Avg: 39.73% (-48.63%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	17	2.65	00:01:08	41.18%	23.53%
council on court procedures oregon	7	5.71	00:05:38	42.86%	14.29%
(not set)	6	7.67	00:14:23	83.33%	16.67%
council on court procedures	4	4.00	00:00:42	50.00%	0.00%
orcp 82, legislative history	3	3.67	00:06:06	0.00%	0.00%
council on court procedurs	2	1.50	00:00:01	50.00%	50.00%
council of the court	1	1.00	00:00:00	100.00%	100.00%
council on court proceures	1	3.00	00:00:08	0.00%	0.00%
court procedures	1	1.00	00:00:00	100.00%	100.00%
orcp 64 legislative history	1	1.00	00:00:00	100.00%	100.00%
orcp legislative history	1	3.00	00:04:14	100.00%	0.00%
oregon council for court procedures	1	2.00	00:00:03	100.00%	0.00%
oregon counicl on court procedures	1	3.00	00:02:51	0.00%	0.00%
oregon counsel on court procedures	1	8.00	00:05:02	0.00%	0.00%
oregon+council+on+court+procedures	1	6.00	00:05:23	100.00%	0.00%
www.council on court procedures.org	1	2.00	00:00:10	0.00%	0.00%

1 - 16 of 16

Subject: Council on Court Procedures - Rule 57 Committee Report
From: Leslie O'Leary <LOLeary@wdolaw.com>
Date: Tue, 29 Nov 2011 09:26:00 -0800
To: Shari Nilsson <nilsson@lclark.edu>
CC: Eve.MILLER@ojd.state.or.us, Eugene Buckle <ebuckle@cosgravelaw.com>, Charles.M.ZENNACHE@ojd.state.or.us, Rex.E.ARMSTRONG@ojd.state.or.us

Rule 57: Alternate Jurors

Our committee met by phone but did not have a "quorum." However, via email and phone, we identified three separate proposed rule changes which we believe should be presented to the Council for discussion purposes. They are summarized below:

1. *Allowing Alternate Jurors to Be Present During Jury Deliberations*.

This proposal came from Judge Norby in Clackamas County. She recommends amending ORCP 57 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."

The rationale for this amendment involves the situation that occasionally arises in long, complex trials with protracted deliberation where a juror gets sick or can no longer serve. If the alternate has not had the benefit of listening in on the deliberation, it is difficult, if not impossible for that juror to make a fully informed decision.

Judge Zennache has expressed concern that there may be case law that prohibits this process. Our committee will research the issue to see whether the proposed amendment is viable in light of judicial authority and report to the Council in January.

2. *Giving the Trial Court Discretion About When to Discharge Alternate Jurors.*

Judge Zennache suggested that the court ought to have flexibility to extend jury service for alternates, particularly in longer cases. As he points out, the wisdom of having an alternate to take the place of a juror who cannot complete his or her service does not end when deliberations begin, but rather should end when the jury has reached a verdict or has been discharged as a group.

The committee has not yet drafted language for this proposed amendment pending feedback from the Council.

3. *Jurors Need Not be Identified as Alternates Until the Jury Begins Deliberations.*

Judge Zennache has also recommended an amendment to Rule 57 to change the process of selecting alternates to clarify that they need not be identified as alternates until the jury begins deliberations. There is a belief that alternate jurors may not pay as close attention to the trial as they would if they thought they would be participating in deliberations. The committee is somewhat divided on this issue. Some feel that alternate jurors are attentive and diligent, especially when the trial judge is supportive of their role. We invite discussion and guidance from the Council.

Finally, we should be mindful that any amendments to ORCP 57 might affect criminal procedure – which, although set by statute are similar to the process in Rule 57. Judge Zennache suggests that our committee to reaching out to the OJD or OSB to consider changing the rules governing criminal procedure in a way that mirrors the changes we make to the civil rules.

Leslie O'Leary
Williams Love O'Leary & Powers, PC
9755 SW Barnes Road, Ste 450
Portland, OR 97225
503-295-2924
loleary@wdolaw.com