MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 7, 2012, 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
Michael Brian*
Brooks F. Cooper
Kristen S. David
Jennifer L. Gates
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Lauren S. Holland*
Robert M. Keating
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Hon. David F. Rees
Mark R. Weaver*
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Jay W. Beattie
Arwen Bird
Eugene H. Buckle
Brian S. Campf
Hon. Timothy C. Gerking

Guests:

Matt Shields, 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 7 • ORCP 9 • ORCP 10 C • ORCP 17 A • ORCP 27 B • ORCP 39 C(6) • ORCP 44 C • ORCP 47 • ORCP 55 H(2)(a) • ORCP 57 F • ORCP 59 H(1) • ORCP 68 • 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 69 A • ORCP 81-85 • ORCP 87 A		

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:33 a.m.

II. Introduction of Guests

Mr. Cooper introduced Matt Shields from the Oregon State Bar, who was filling in as Council liaison in David Nebel's absence.

III. Approval of December 3, 2011, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft December 3, 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.

Prof. Peterson mentioned an e-mail sent to the Oregon Women Lawyers listserve from Laura Orr, the librarian at the Washington County Law Library, regarding the Council's latest set of minutes attesting to the value of the Council's minutes to new and experienced practitioners. He noted that Ms. Orr also mentioned the Council's website and "interested party" listserve, and wondered if the website would receive more visitors in the coming days as a result of this e-mail. Mr. Bachofner noted that the Oregon Association of Defense Council (OADC) receives copies of Council minutes, and Mr. Cooper stated that the Oregon Trial Lawyers (OTLA) does as well. Prof. Peterson stated that the Council has been sending information to these and other groups for quite some time to keep them apprised of the Council's work. Ms. David mentioned that she had also written a short article for the OADC magazine regarding the Council's latest amendments to the ORCP.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly went over the website report (Appendix B) and described the inquiries received by the Council and the activity on the website since the last Council meeting. She noted that the statistics were comparable with those from the previous month. Judge Miller stated that she received an inquiry from an attorney regarding a Council matter and, when she referred him to the website, he was surprised and pleased to learn that one existed.

B. Legislative Contacts (Ms. David)

Ms. David reported that, while she had drafted an e-mail to send to legislators after the last Council meeting, she had neglected to send it to Council members. She stated that she will update the e-mail with the information from today's meeting and send it to Council members.

Mr. Bachofner stated that he had attended a meeting with Chief Justice Paul DeMuniz earlier in the week regarding court funding issues, and that a request was made to attorneys to send letters to legislators asking for support to restore court funding. He wondered whether some reference to this could be made in the legislator update e-mail. Mr. Cooper agreed that it is important to ask legislators to support court funding, since the ORCP are worthless without a working court system to implement them. Mr. Bachofner stated that he has information from that meeting (in the form of an e-mail from Susan Grabe of the Oregon State Bar) and would forward it to the Council listserve so that all members can take action. He asked if anyone knew which legislators might have influence regarding getting the funding restored. Mr. Brian asked if anyone knew of specific legislators in southern Oregon who might have influence. Judge Herndon stated that he and Ms. David have been meeting with legislators from Clackamas and Marion counties, and that Rep. Dennis Richardson from southern Oregon and Sen. Richard Devlin from Lake Oswego are critical contacts. Mr. Shields stated that Rep. Wally Hicks from Josephine County is on the Public Safety Subcommittee of the Ways and Means Committee. Judge Herndon also recommended contacting Phil Lemmon at the Oregon Judicial Department to get more information about who to contact and what to say.

Mr. Bachofner noted that possible reductions in court funding would have significant impact in smaller counties. Ms. Leonard asked if anyone could provide details about exactly what impact further court funding cuts might have. Judge Herndon stated that the across-the-board 3.5% cut results in an $11.5 million cut from the court system. He noted briefly that this will result in courthouse closures, layoffs, and employee furlough days. Judge Herndon stated that the fact that the court system will need to absorb these cuts in the last 13 months of the biennium makes it look more like a ten percent cut. Mr. Bachofner stated that the Chief Justice spoke of the possibility of courthouses being open only three days per week, which would significantly impact civil cases. He noted that the Chief Justice has made significant cuts already and saved a great deal of money and managed to maintain services, but that these savings are not being rewarded. Mr. Cooper asked that OADC members write e-mails to their listserves, and that he will write to the OTLA listserve, in order to encourage action on the part of both groups.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. ORCP 9 F, G: Service of Pleadings and Correspondence Via E-mail (Ms. David)

Ms. David stated that the committee is still monitoring and taking a look at this issue. She noted that the Chief Justice amended Uniform Trial Court Rule (UTCR) 21.100 at the end of 2011 to clarify that, if an attorney registers for e-filing, that attorney agrees to electronic service of documents. She stated that the committee is also monitoring through the E-Court Task Force any changes to UTCR 22 and/or any necessity to alter the ORCP in any way.

Ms. David mentioned that, at the last meeting, Prof. Peterson had talked had about creating a rule requiring any e-mail service to have specific language in the e-mail subject line. She stated that this may be something for the Council to consider, so that attorneys can set up a rule in their e-mail programs that sends any e-mails with those words in the subject line to a secretary or to the calendaring department.

2. ORCP 17 A: Original Signature on Pleadings (Ms. O'Leary) (Appendix C)

Ms. O'Leary stated that she had made inquires and discovered from the State Court Administrator that e-filing will go into effect before any Council amendment would. She noted that it seems to make little sense to make a rule change under those circumstances. She stated that another problem she foresees is that a rule change might conflict in a small or significant way with the UTCR Committee which is going to implement rules regarding electronic signatures.

Prof. Peterson noted that ORCP 17 A is not clear in what it means by "signature" but that the Council can agree as an article of faith that a UTCR cannot trump an ORCP. Ms. O'Leary recommended that, once it is clear what the language will be and how it will be implemented, the Council can change the language of ORCP 17 A to clarify that an electronic signature is acceptable, since some courts now take ORCP 17 literally to mean that a document must be physically signed and delivered to the clerk's office.

Prof. Peterson stated that it might be helpful to add a generic sentence to define that "signature" includes original ink and any other signature authorized by rule or statute. Ms. O'Leary stated that, when something is filed electronically, it is physically impossible to file an original, so courts would likely not look at an electronic document and ask if it was original. Ms. Gates asked if there will be any pleadings that will not be subject to e-filing. Judge Herndon stated that there will be scanners in the courthouse as well, so you will never be delivering a paper copy. Prof. Peterson noted that requests for production of documents are not allowed to be filed under Rule 9 but need to be signed under Rule 17. Judge Herndon suggested speaking to the vendor creating the e-court system. Mr. Cooper wondered whether it would be worth asking the committee to talk to the State Court Administrator regarding whether a change to ORCP 17 A is necessary now to ensure that it does not preclude electronic signatures later. Judge Herndon observed that what Prof. Peterson spoke of makes sense. Mr. Cooper asked whether the e-court timeline tracks with the Council's. Judge Herndon stated that e-filing will become effective in Yamhill County in June of 2012. Judge Zennaché stated that he liked Prof. Peterson's suggestion. Mr. Bachofner agreed that it is a good idea to contact both the vendor creating the e-filing system and the State Court Administrator. Ms. O'Leary stated that she will follow up on this. Mr. Cooper agreed that a small amendment this cycle might be wise to be as close in line with the e-filing timeline as possible.

Mr. Brian asked whether the Council could agree to include in the minutes that it believes that ORCP 17 in its current form permits electronic signatures, since the minutes are a form of legislative history. Judge Armstrong stated that this would not be effective because the minutes are not speaking of something the Council is promulgating or amending, and such "legislative history" cannot give content to a rule that was previously promulgated.

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

Ms. Leonard stated that the committee has not met since the last Council meeting. She noted that the Council discussed the possibility of surveying bar members at the last meeting, but did not decide whether this was a good idea. She stated that the committee will also look at legislative history.

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

Mr. Cooper stated that the committee has met twice, and that judges Claudia Burton, Rita Cobb, Keith Raines, and Katherine Tennyson have been involved in discussions on the matter. He noted that the committee is working on a second draft of proposed language for a rule change and expects to bring it to the Council in February.

Mr. Cooper reminded the Council that the committee is looking at problems that arise when a person is appointed as guardian ad litem (GAL) without notice to anyone, including the person whose rights are supposedly being protected. He noted that the bench is seeing problems such as: 1) a child seeking a divorce of elderly parents for medicaid planning purposes without the knowledge of the parents; or 2) one child who is upset that the other child is a fiduciary for elderly parents by virtue of a power of attorney or a trusteeship and getting appointed as a GAL and obtaining a restraining order for the purpose of accessing the parents' funds.

Mr. Cooper stated that the committee is proposing a sea change, starting with the presumption that no GAL will be appointed without a notice and an opportunity to object. He noted that there will be a mandatory list of persons to whom to give notice which is created from ORS Chapter 125, but that the bench will be given discretion to modify, waive, or eliminate notice. He gave the example of a personal injury attorney being retained for a matter for which the statute of limitations runs the next day, and stated that the court will have the authority to appoint a GAL in that case, but that this will be the exception rather than the rule. Mr. Cooper noted that the rule will require actual provision of admissible evidence that the person alleged to be incompetent is incompetent, whereas the current rule only requires the movant to allege that the person is incompetent and to

request appointment as the GAL. In the case of a minor, appointment would still be simple, since stating that the party is under age of majority would be the only requirement. He stated that every member of the bench with whom the committee has spoken sees routine abuse of the existing rule by both pro se litigants and by attorneys.

Judge Holland stated that she sees this often in the probate context. One of the biggest concerns is that ORCP 27 allows a person, by virtue of an affidavit stating that someone is incompetent, to circumvent all of the protections under the protected proceedings act where a guardian or conservator is appointed. She noted that it comes up often enough with warring siblings or children from former marriages against new spouses where orders can be issued without notice, something that would not occur in a protected proceeding. She stated that notice can be waived on an emergency basis, and that there are ways to achieve quickly that which needs to be done as well.

Mr. Brian asked how often these abuses are happening. Judge Holland stated that it seems to go in waves, but that she often sees such abuses once a month or more. She stated that she recently had a husband attempt to become GAL for his wife so that he could then divorce her. Judge Herndon confirmed that these occurrences are not rare, and that area is misunderstood by the bar as a whole. He stated that he is concerned that this is not an easy fix because some changes will run into ORS Chapter 125, and noted that any changes will require careful thought so that they remain procedural and not substantive.

Prof. Peterson asked whether the primary change is intended to be to ORCP 27 B or whether there will be changes with regard to notice. He noted that, for minors, service under ORCP 7D(3)(a)(ii) requires handing the summons to both an infant and a parent. Mr. Cooper stated that the committee has not yet met to consider his most recent draft but, as drafted, the rule no longer separates minors. He stated that everyone is treated the same and gets notice by first class mail; for a minor, the notice would go to the minor, the person with whom the minor has resided for the last 60 days, both parents, and any person having legal custody. Prof. Peterson asked whether the notice would be mailed to the minor, even if he or she were six months old. Mr. Cooper replied that the rule would apply to minors 14 and older; he made the amendment mirror the protective proceedings statute which provides that a minor under 14 does not receive notice but his or her parents or expected fiduciary do. Mr. Cooper noted that he tried to use that section of ORS 125 because lawyers are familiar with it and it already works.

Prof. Peterson asked the committee to send its draft to Ms. Nilsson for formatting when it is ready so that she can put it into proper format. Judge Miller asked that the committee use a format that is easy to read and differentiates new language from old. Mr. Cooper asked if redline would be acceptable. Ms. Nilsson reiterated

that she can put drafts into the legislatively accepted format so that they are consistent and easy to follow.

Judge Herndon stated that Mr. Cooper has made a good start with this rule change and that it is a quantum leap forward. He cautioned that the Council needs to be wary of whether it is such a quantum leap forward that it starts to get into substantive law and overlap with ORS Chapter 125. Judge Holland asked that, if Council members are aware of anyone else who might provide insight regarding this potential rule change, to please let the committee know.

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

Ms. Gates stated that her scheduled committee meeting had fallen through due to scheduling conflicts. She noted that she had researched the issue of consent where an officer from the corporation takes the position that he or she can refuse to testify as the designee if the corporation chooses not to designate an officer, but did not find anything. She stated that she has some draft language requiring the party to give notice three days in advance. The committee will report more at the next meeting.

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

Ms. David reported that the Council's amendment from last biennium took effect January 1, 2012, and that the committee is waiting to see any effects or comments from the bar.

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

Mr. Keating stated that the committee had met and that he had drafted an amendment to ORCP 55 H (2)(a) to require a patient who objects to a subpoena to file a motion to quash the proposed subpoena. He noted that, under the current system, an attorney sends a subpoena, and gives the other party 14 days to object. If the other party objects, the subpoena cannot be served because the rule says the subpoena must be served with a declaration that either there is no objection or that the objection has been resolved. He stated that the subpoena cannot be served if the plaintiff's lawyer does nothing; therefore, the only option is to go to court and present the issue, but the defense side still does not understand the nature of the objection. Mr. Keating observed that his amendment would provide for more judicial efficiency. Mr. Cooper asked if the theory is that the defense must specify the reason for wanting to quash so that the judge and the plaintiff will know what the problem is. Mr. Keating replied that this is the theory, that it is most important for the bench to know, and that this builds in the opportunity to submit material for the court for in camera review. He stated that one of the

issues that was raised in the committee was how big of a problem this is. He noted that he experiences the problem with some regularity, and as recently as last week. He stated that the committee is still meeting and discussing the issue and making progress with draft language.

Prof. Peterson asked whether the draft language would give 14 days from the date the subpoena was received to let the other party know a motion will be filed, or in which to file the motion to quash. Mr. Keating replied that he envisioned it being to file the motion to quash. Ms. David remarked that she has filed five of those motions in the last year where the other side objected to a draft subpoena without a reason and she had to file a motion stating the reason that she wanted the records and that she had no idea why the other side objected. She agreed that the process is inefficient, and that it would help all parties to resolve the issue if the burden were shifted so that the other side had to say why they were objecting. Mr. Bachofner stated that he is hesitant to say that the response required would be a motion for a protective order. He stated that he would rather see a requirement that says that a basis for objection must be specified and, if it is not resolved within so many days, in order to stop the subpoena, a motion for a protective order must be filed. He noted that attorneys have a duty to confer on discovery motions anyway, but some do not observe it, so why not require it in the rule? Ms. O'Leary stated that, from a plaintiff's perspective, she would propose the same thing. She stated that it often does not need to be litigated as long as the party opposing it states the grounds upon which they oppose it. Mr. Keating stated that the vast majority of attorneys do that but, when it becomes an obstructionist tactic, the burden has to be on the one who does not want to provide the records. He stated that he has no problem with using the 14 days to confer.

Mr. Brian stated that he is a plaintiff's lawyer and feels that a plaintiff's lawyer, in response to a notice of intent to send a subpoena, has an obligation – which should be outlined in the ORCP – to state the basis of the objection. He stated that, if the defense does not accept the objection, it is the defense's job to go to court. Judge Miller noted that, when language such as, "needs to state the reason for the objection" is used, she can imagine an attorney answering, "Because it is privileged." She suggested using less generic language. Mr. Cooper observed that it is difficult to try to craft a rule directed at practitioners who use the rules for reasons other than getting the case resolved. He noted that, the more detailed the Council makes the rules to try to capture the less efficient practitioners, the more onerous it becomes for the vast majority. He stated that he is not sure that shifting the burden of who the movant has to be is what he will ultimately agree with, but that he looks forward to seeing the committee's proposal.

Mr. Keating stated that ORCP 44 C has been construed as a limited waiver of the doctor/patient privilege when a patient claims an injury. He stated that E2 of the

Multnomah County Civil Motion Panel Statement of Consensus narrowly defines what "related" means in terms of receiving medical records, and that his opinion is that it should be defined more broadly. He stated that he proposes inserting language such as the following into ORCP 44: "the term 'relating to injury for which recovery is sought' should be broadly construed to take into account the context of an injury claim." He noted that this met with vigorous discussion amongst committee members. Mr. Keating remarked that, when dealing with the issue of life expectancy during an injury claim case, the patient's general health and medical history can also be important, so limiting discovery to only the injury itself can be problematic. He agreed that there can be utterly unrelated matters that could potentially be embarrassing, but noted that those can be dealt with in camera treatment or informally with the opposing attorney.

Judge Miller wondered whether this would lead to a plaintiff's whole health history being up for debate any time a plaintiff asked for permanent damages. She stated that, if the language is too general, it can also be problematic. She noted that it is up to the judge to decide but that it can be difficult to resolve with less obvious issues. Mr. Keating stated that, with the rule as it exists today, it has been construed that a patient's cardiac history was not relevant to his life expectancy because the heart is a different body part. Judge Herndon expressed the opinion that Rule 44 should be left alone because the rules should remain neutral. Judge Armstrong noted that the Supreme Court issued a ruling on December 30, 2011, [*A.G. v. Guitron*, SC 5059166] regarding ORCP 44 C that ran through the whole history of the rule, and that this could be helpful as background. Mr. Keating pointed out that the intent of the Council was determinative to the central finding in that case. He noted that the same body part rule has not been the way that rule has been interpreted since it was adopted, that this is a relatively new way of interpreting the rule, and that it is not universal around the state. Mr. Keating observed that the Council has a legitimate interest in addressing what "relating to injuries for which recovery is sought" means.

Ms. O'Leary stated that her experience is that an attorney receives records relating to the same body part for which injury is claimed, and the attorney takes a deposition and discovers that other issues may be at issue, so the defense attorney files a motion to compel or in some other way attempts to get the other documents. She noted that the defense attorney must show a need and show that the documents are relevant, and that this is a legal process that already exists. She wondered if the Council needs to make a rule change to do what lawyers would normally do in court anyway. Ms. David stated that the Council exists to develop procedures, and the new procedure would be for all parties to obtain the records, then have the plaintiff's attorney object to relevance. She noted that the defense attorney cannot know what records exist until he or she sees them. Mr. Cooper stated that in personal injury cases the plaintiff has a very legitimate interest in keeping private spheres of their life private, which needs to be balanced with the

defense's need to vigorously defend but, given discovery of these records, whether or not they will be admissible in trial, oftentimes chills the plaintiff's willingness to even go forward to trial. He is sensitive to rules causing litigants to make decisions to pursue, settle, drop, or try cases that are extrinsic to the value of the merits of the case. There is a balance on the discovery side which is separate from the admissibility side. Mr. Keating wondered why this issue is not adequately balanced and controlled by the judges. Mr. Cooper noted that, while Mr. Keating may not agree with this particular Multnomah County Motion Panel Consensus ruling, the rule currently gives the court the discretion to deal with the issue.

Mr. Keating stated that he suspects that the committee will not produce a unanimous version of a rule change. Mr. Cooper stated that this happens often. Mr. Bachofner stated that there may be a middle ground such as clarifying in the rule that production is required of anything relating to the claims that are being asserted. For instance, if there is an emotional distress claim, the defense would have access to psychiatric records. Judge Herndon noted that there has been mutual discovery in criminal cases for about 50 years now and the system works better than on the civil side where it is more trial by ambush. Judge Miller noted that in criminal cases, where the state is trying to take away someone's liberty, the stakes are greater, more information is given to the defendant, and judges are relied on to be the gatekeepers of anything that could be potentially embarrassing or sensitive. Mr. Brian stated that he does not agree with Mr. Keating's proposal to change ORCP 44 C and that, given the *Guitron* ruling that relied heavily on the Council's legislative history in its conclusion, he felt strongly about having his voice heard in the minutes about this issue. He stated that, in his opinion, the potential amendment would do away with the doctor/patient privilege, and that, if he were a judge, he would read the proposed rule to say that all records are discoverable.

Judge Zennaché asked about the Council's process for discussion and use of committees. He wondered whether the Council should be having such substantive discussions now or whether this is the role of the committees. Mr. Cooper stated that committees do the bulk of the legwork and bring reports back to the full Council but, when there are strongly held views among the bar in cases such as this, it is helpful to hear the opinions of the entire Council during the process so that the committees can receive further guidance. Judge Holland noted that, historically, the Council uses a combination of both committee work and discussion from the entire Council to be sure to get a sense from all of the players. She stated that it is not uncommon to have two or three proposals from a committee and to have amendments made to these proposals during full Council discussions. Judge Holland pointed out that committee reports are used to update the Council as well as to obtain input from Council members. Judge Zennaché asked whether, if Council minutes are legislative history, every Council member needs to weigh in on every issue during meetings to make a record on his or her

position. Mr. Cooper pointed out that the majority of Council meetings are preliminary discussions, before any proposed amendments are brought to the table. Justice Kistler added that he suspects that what matters is what happens when actual words for proposed amendments get chosen. He noted that, to promulgate an amendment, a supermajority vote is required.

Judge Rees pointed out that the case on which the Multnomah County Consensus Panel ruled had to do with a medical malpractice suit following a prostate surgery. He stated that ORCP 44 C requires that the medical records sought be related to the injury, and that prostate surgery does not relate to a prior cardiac history. He noted that the physician/patient privilege is not waived by filing a lawsuit, and that the only avenue toward obtaining records in this case was whether they were related to the prostate surgery. He stated that he was interpreting the law as it should have been interpreted. Judge Rees also expressed concern about running into substantive law in making such changes to ORCP 44 when the Council is charged with only making procedural changes.

Mr. Bachofner stated that this is perhaps where there should be a clarification of the rule, because it is his understanding that, if there is any capacity claim affecting life expectancy, a defense attorney should be entitled to medical records of conditions that may affect life expectancy that may not necessarily relate to the body part that was injured. Judge Rees stated that the doctor who performed the prostate surgery knew of the cardiac history, and that the question was whether a finder of fact could, knowing of this prior cardiac history, capably address the injury that was caused by an allegedly negligent prostate surgery. He noted that this was not raised until trial and that he did not have to answer it because he was dealing with the discovery phase where it is clear that the only way to obtain those records is through ORCP 44 C and there was no relationship between the claimed injury and the cardiac history. Mr. Keating stated that he holds the Multnomah County bench in high regard; he just has a disagreement over the appropriate interpretation of "relating to injuries for which recovery is sought." He noted that, since it is the Council that drafted the rule and put it in place, he is suggesting that the Council take a broader view of what "relating" means. Mr. Keating stated that he believes that the rule needs to be closely looked at because he thinks it has due process implications for how a party can defend himself or herself. He stated that the committee will bring one or more proposals to the Council at the next meeting.

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

Mr. Keating reported that the committee had met and discussed three different issues. The first issue was whether affirmative defenses are subject to motions for summary judgment. He stated that affirmative defenses are subject to summary judgment and the committee had decided that this was more of an issue of

educating the bar, not an issue requiring a rule change. The second issue was whether to require a statement of undisputed facts in a motion for summary judgment. Mr. Keating noted that this suggestion had met with favor amongst members of the committee, but that members were still discussing where in the rule such a requirement could be inserted and whether there should be a requirement for documentation to support the statement of undisputed facts with admissible evidence.

The third issue was whether to put page limits on motions for summary judgment, and whether such limits would be on just the memoranda, or the memoranda, declarations, and all exhibits. The judges and attorneys had a brief discussion on what they felt would be reasonable page limits, with the judges generally expressing a desire for somewhat shorter motions and the attorneys for somewhat longer. Mr. Bachofner stated that he felt that page limits are unnecessary and that natural selection tends to take effect in such cases, in that lawyers who are too verbose will suffer adverse consequences, since judges have limited time in which to read motions.

Ms. O'Leary noted that the federal court rule has done away with the requirement to file a separate statement of facts, and that she agrees with this because that requirement is duplicative and wastes paper. Ms. Gates stated that the committee was not contemplating requiring a separate statement of facts but, rather, requiring that they set forth what facts are contended to be undisputed. Ms. O'Leary noted that, if a statement of undisputed facts is required but page limits are also imposed, this could be problematic. Ms. Gates stated that many attorneys are merely writing memoranda which include what they consider to be the facts, whether undisputed or not, without including any evidence that supports those facts, and that it is very difficult to respond to such motions. Judge Rees noted that, in such a case, the attorney should just lose the motion.

Mr. Cooper asked the committee to bring proposed language to the Council at the February meeting.

9. ORCP 54 A: Amend to Conform with FRCP 41(a) (Mr. Weaver)

Mr. Weaver stated that the committee has met. He noted that the question of whether to conform ORCP 54 with FRCP 41 was considered by the Council when the rule was initially adopted. He stated that he and Prof. Peterson are looking into the history of why the Council decided not to do so. The committee will report back to the Council at the next meeting.

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

Ms. O'Leary stated that her committee has communicated via e-mail. She noted that the she found a Supreme Court case [*Vander Veer v. Toyota Motor Distributors*, 282 Or 135, 577 P2d 1343 (1978)] which held that it is a violation of certain ORS chapters to allow an alternate to participate in jury deliberations, and that the committee initially felt that this case settled the question before it. Ms. O'Leary stated, however, that Judge Zennaché pointed out that ORS 17.105, 17.190, and 17.305 were repealed by the legislature in 1979, so the committee decided that further research and discussion was warranted. She stated that she found that holding in the *Vander Veer* case should be re-evaluated in light of the repeal of the statutes. Ms. O'Leary told the Council that her schedule will not allow her to do much legislative history research during the next month, so the committee will likely not have much to report at the next meeting.

Judge Miller noted that the committee decided not to pursue the issue of deciding who the alternate juror is at the beginning of trial, as they decided that the court has the discretion to do that and that it is a decision best left to the various circuits and/or individual judges. Judge Zennaché stated that another component of the issue was whether to allow the court to retain rather than discharge the alternate at the time the jury begins deliberations, and that the committee will look at this issue as well. He observed that the ORCP were adopted in 1979, and that this may have been the reason that the statutes in question were repealed. Mr. Cooper suggested that Ms. O'Leary ask Mr. Buckle to undertake some of the legislative research.

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

Ms. Leonard reported that the committee has three concerns regarding this rule:

A. The rule is so particular about timing. It this practical, since judges and lawyers do their instructions and arguments and schedule the trial in different ways?
B. The question of what is a notation of exception, and what kind of specificity is required. This assumes that there has already been a thorough discussion of instructions at a charging conference or throughout the course of the trial. Is it enough, at the end of the trial, to state "I would like to incorporate all the reasons I have already put forward," or does the language need more specificity?
C. Judges may instruct at other times during the trial. What, if anything, does this rule have to do with early instructions or special limiting instructions that may occur at any time during the trial?

Ms. Leonard discussed the draft language from the committee (Appendix D) and

stated that the committee felt that there was a need to have timing specified in the rules to let litigators know what they have to do and when they have to do it, but to add the idea that the trial judge shall have discretion to move that timing as the judge directs and as the trial may require. She stated that the second part of the draft language is about the specificity of the exception, and states that the notation of exception may incorporate by reference prior objections made on the record. Ms. Leonard observed that the entire committee was unanimous with the idea of giving the trial court discretion on the timing of the exception process, but that there was some disagreement as to how specific or non-specific the second notation regarding incorporation by reference needs to be. She stated that the committee should have one or more proposed drafts by the next meeting.

Justice Kistler noted that he is of two minds regarding this issue. He stated that sometimes it seems silly, when the parties have laid out their objections for 20 pages and the judge rejects them, to be required to formally take an exception as each instruction is read. He noted, however, that sometimes the judge will change his or her instructions in response to a party's objections or recommendations and the judge wants to know whether that changed instruction is sufficient to meet the party's needs or whether the party still objects to it and why. He observed that, in such a case, he could see why a judge would want the party to take an exception, and he did not know how you would capture such a dichotomy in a rule change. Judge Armstrong stated that, in his opinion, this is the fundamental challenge when trying to rethink the premises to this rule. He stated he believes that the idea of notation of exception was designed, in theory, to say that the point of jury instruction is the relevant legal act, and this is the time to make clear what the attorney feels is the legal error that is part of that instruction. He stated that he sees that as different from admission of evidence and directed verdict motions where the ruling basically coincides with the discussion, whereas with jury instructions the discussion can evolve over a long period of time and the meaningful act could be said to occur at the end when the actual instruction occurs. Prof. Peterson noted that the new language says "as the trial court shall direct" and the current rule does not require the trial court to ask whether anyone has an exception. He wondered what would happen if a judge forgets to ask this question. Judge Armstrong replied that this is why the language was phrased this way so that, absent direction, the rule already says what an attorney has to do and when he or she has to do it. Prof. Peterson clarified that the default rule is that exceptions must be made at the end of the trial. Judge Armstrong agreed.

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

Ms. David stated that the committee will report at the next meeting. Judge Holland noted that there is a committee headed by attorney Mike Schmidt which is seeking some legislative changes under ORS Chapter 125 related to the process for seeking as well as the reasonableness of attorney fees in protective

proceedings cases. She stated that she will talk to Ms. David about this.

13. ORCP 69 A: 10 Day Rule (Prof. Peterson)

Prof. Peterson reminded the Council that it did not reconvene the ORCP 69 committee from last biennium but, rather, that he, as a member of that committee, had done some research on the issue. He noted that the current rule requires that a party must serve a 10 day notice of intent to take default in pleading format. He stated that, because a default judgment may not stick anyway if the other side can say that there was a mistake or inadvertence, many attorneys send a 10 day notice in all cases whether they have received a notice of intent to file an appearance or not. Prof. Peterson observed that the Council could decide to require that the 10 day notice always be sent; require that the 10 day notice be sent if the other side has in any way indicated that it is contesting anything requested in the claim for relief; or leave the rule the way it is now. He stated that he is concerned that defaults are taken against a wide range of parties, sometimes because there was no good way to serve them and that, in that case, there would still be no good address available to which the 10 day notice could be sent.

Ms. David pointed out that Judge Rees raised a legitimate concern, and that this is why ORCP 71 exists to set aside such judgments. Prof. Peterson pointed out that, in the case Judge Rees had raised, too much time had passed to use ORCP 71. Judge Rees noted the rise of pro se litigants, particularly in consumer debt cases. He stated that, if an attorney has had some communication with a defendant, presumably that attorney can communicate to the defendant the intent to take a default. He stated that he is not certain how big a problem this is, but that he believes that 60% of these cases are resolved by default. Ms. David noted that ORCP 69 C(1)(b) may be able to be clarified to require somehow acknowledging to the judge that there is a live body on the other end who is contesting the issue. Judge Rees stated that the Council needs to keep in mind that there are firms that are mills processing consumer debt collection cases, that have thousands of files which may be mostly processed by paralegals or staff who may not be carefully considering the rule. Judge Miller stated that she would like to see a requirement that the mail be required to be sent certified, return receipt requested. Prof. Peterson pointed out that the person has already been served by certified mail as well as by first class mail under Rule 7, and this would require another document to be served and another expense. Judge Zennaché stated that Rule 7 already requires written notice and expressed concern about enacting another rule which entitles a party to another 10 day written notice simply because that party made a telephone call. He noted that the Council cannot make rules that only apply to pro se litigants, so the rule would have to apply to lawyers too.

Mr. Cooper wondered how often pro se litigants having been defaulted are

applying for relief under ORCP 71. Judge Miller stated that she sees it more when people are objecting to garnishments. Judge Herndon stated that, in his experience, the number of people claiming they were not served is very small and that this may be a solution in search of a problem. Judge Rees stated that it may be a simple solution to add a requirement to the affidavit filed by the lawyer to summarize any communications with the defendant since service was made. Judge Miller stated that she does not feel that this would be beneficial. Judge Rees stated that it would have been helpful in the case in question. Given the circumstances, Ms. David asked whether the lawyer would have necessarily been truthful. Judge Herndon made a motion to take no further action on this matter. The motion passed with 14 aye votes and 3 nay votes.

VI. New Business (Mr. Cooper)

A. ORCP 10 C: Additional Days for Mail Service Given USPS Changes (suggested by Judge Keith Raines)

Mr. Cooper stated that Judge Keith Raines of Washington County had pointed out that the United States Post Office has recently stated that, due to budgetary constraints, it can no longer guarantee the speed of mail service. He noted that ORCP 10 C carries the presumption that all mail posted in the State of Oregon to another address in Oregon is always received within three days. He stated that Judge Raines suggested (Appendix E) expanding that time frame to recognize the reality that this assumption may now be technically inaccurate. Prof. Peterson pointed out that, in his experience, mail is still being delivered throughout most of the state in one day. Mr. Bachofner noted that any rule change would not become effective until the time when e-filing was beginning to be implemented. He proposed possibly changing the rule to require accompanying mail service with either e-mail or fax service instead. Ms. David stated that she does not feel the rule needs to be changed because ORCP 10 C allows a complementary three days to account for mail, but that the receiver presumably received the document and was working on it during those three days and could pick up the phone and ask for more time if it were received on day three. She stated that she does not see this as being a major problem. She also noted that, if the Council moves to increments of seven days as electronic filing is implemented, the time will increase during that process. Mr. Cooper agreed and noted that, if this had happened five or six years ago, a rule change may have been appropriate. The Council agreed to take no action on this rule. Prof. Peterson will communicate this decision to Judge Raines.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:43 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 11/26/11 - 1/4/11

I. Inquires

The Council received the following inquiries:

- An e-mail from an attorney inquiring about the bill number that contained the legislative amendment to ORCP 7. Ms. Nilsson provided that bill number for him, as well as a link to the legislature's "TABLE OF ORS SECTIONS AMENDED, REPEALED OR 'ADDED TO'" which shows any amendments made or considered to the ORCP during the last legislative session and where those amendments originated (legislative bill or Council). The attorney was grateful for the information.
- An e-mail and letter from a litigant asking for legal advice on her civil case. Ms. Nilsson sent the Council's standard reply stating that the Council is not a law firm and does not provide legal advice, referring her to the Oregon State Bar Lawyer Referral Service, and reminding her that statutes of limitation may apply to any lawsuit.
- An e-mail that appeared to be addressed to Judge Herndon. The e-mail was forwarded to him for his consideration.
- An e-mail seeking legislative history material for the Oregon legislature from 1850 to 1879. The inquirer was referred to the Oregon State Archives.

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 period of approximately 1 month since the Council's last meeting. The site had 165 visits from 132 unique visitors, and 377 page views in this period. 64% of visits to the site were from new visitors; the average number of pages viewed per visit was 2.28; and the average time spent on the site was 2.5 minutes. Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. These statistics are comparable with those from the previous month.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

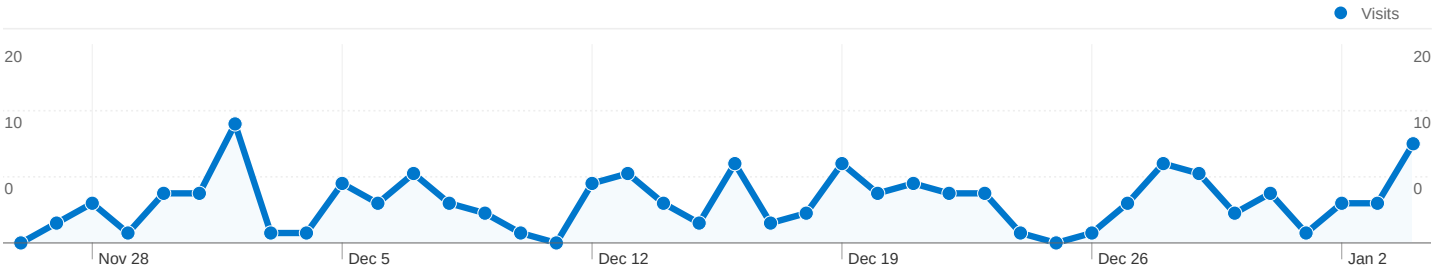
Council on Court Procedures
January 7, 2012, Meeting
Appendix B-1

www.lclark.edu/~ccp

Dashboard

Nov 26, 2011 - Jan 4, 2012

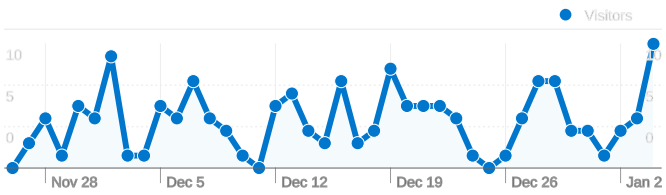
Comparing to: Site



Site Usage

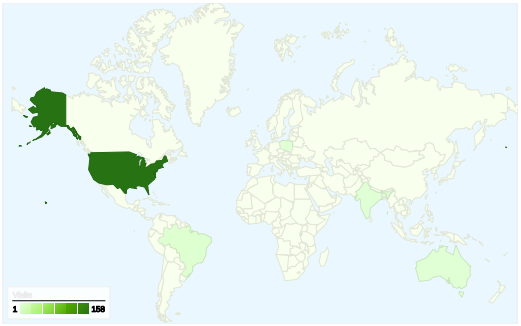
165 Visits	53.94% Bounce Rate
377 Pageviews	00:02:31 Avg. Time on Site
2.28 Pages/Visit	63.64% % New Visits

Visitors Overview

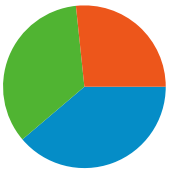


Visitors
132

Map Overlay



Traffic Sources Overview



- Referring Sites
  64.00 (38.79%)
- Direct Traffic
  57.00 (34.55%)
- Search Engines
  44.00 (26.67%)

Content Overview

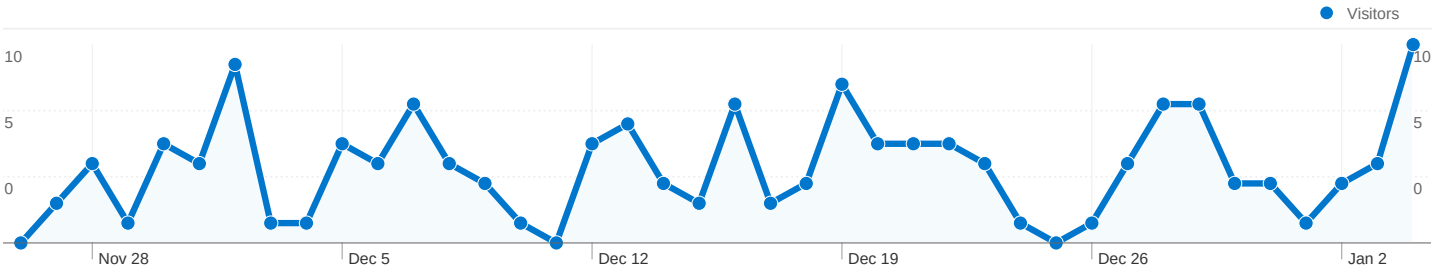
Pages	Pageviews	% Pageviews
/~ccp/index.htm	139	36.87%
/~ccp/Past_Biennia.htm	59	15.65%
/~ccp/LegislativeHistoryofRules	55	14.59%
/~ccp/Current_Biennium.htm	26	6.90%
/~ccp/Council_Membership.htm	22	5.84%

www.lclark.edu/~ccp

Visitors Overview

Nov 26, 2011 - Jan 4, 2012

Comparing to: Site



132 people visited this site

165 Visits

132 Absolute Unique Visitors

377 Pageviews

2.28 Average Pageviews

00:02:31 Time on Site

53.94% Bounce Rate

63.64% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	84	50.91%
Firefox	48	29.09%
Chrome	20	12.12%
Safari	9	5.45%
Android Browser	3	1.82%

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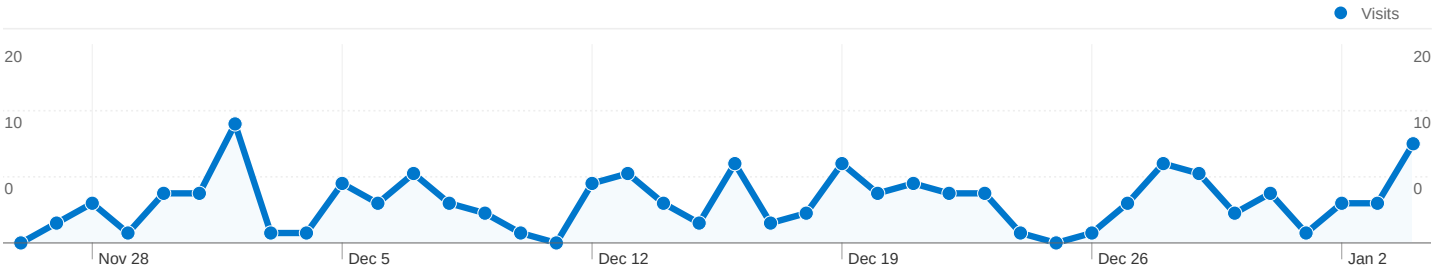
Traffic Sources Overview

Nov 26, 2011 - Jan 4, 2012

Comparing to: Site

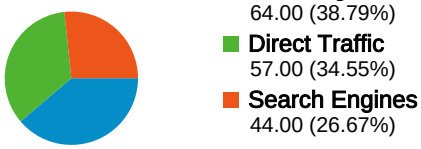


All traffic sources sent a total of 165 visits

34.55% Direct Traffic

38.79% Referring Sites

26.67% Search Engines



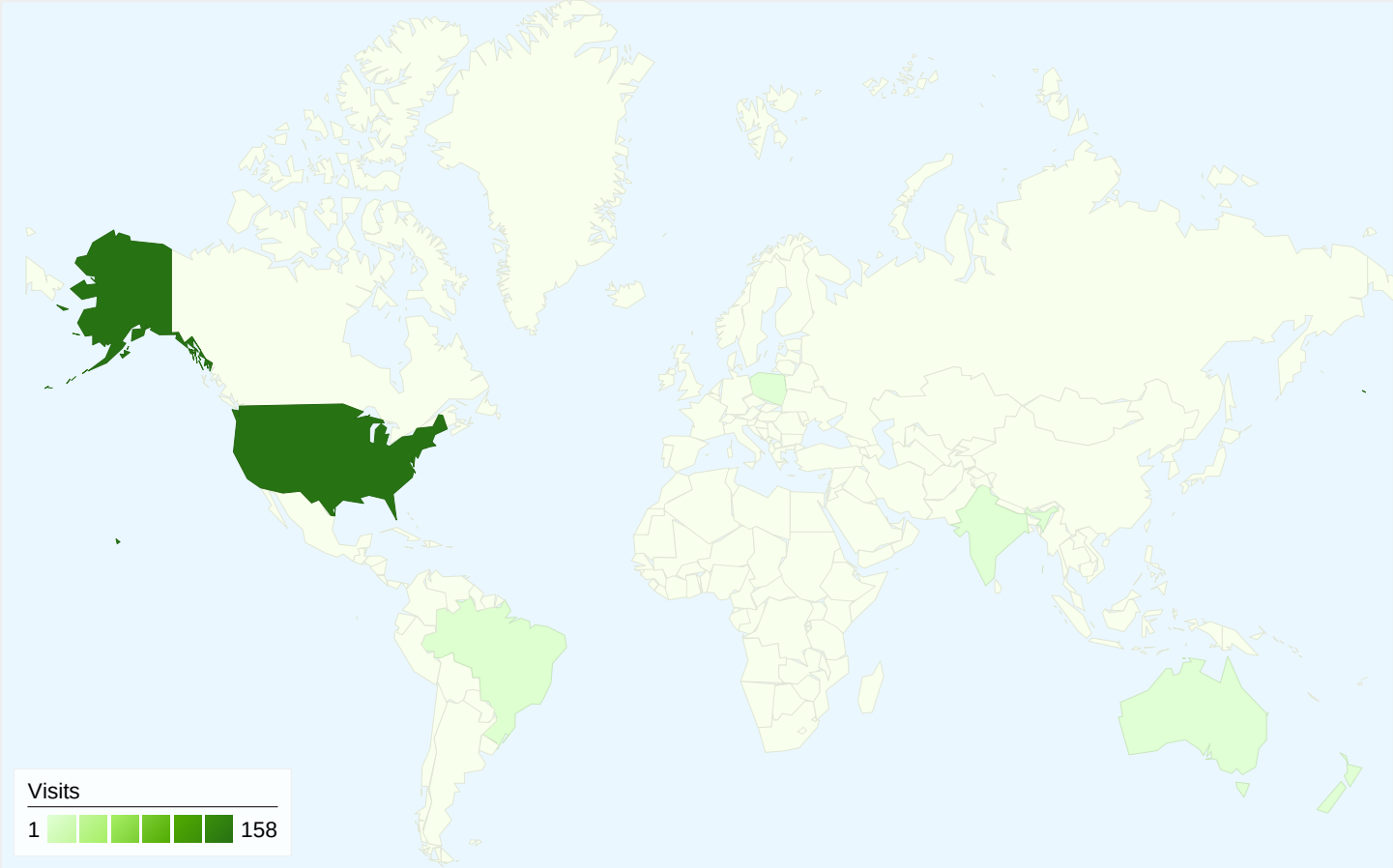
Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	57	34.55%
google (organic)	40	24.24%
courts.oregon.gov (referral)	26	15.76%
mbabar.org (referral)	11	6.67%
oregonlegalresearch.blogspot.c	8	4.85%

Keywords	Visits	% visits
(not set)	17	38.64%
council on court procedures	10	22.73%
oregon council on court	9	20.45%
oregon council on court	2	4.55%
council on court pricedures	1	2.27%

Map Overlay

Nov 26, 2011 - Jan 4, 2012
Comparing to: Site



165 visits came from 6 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
165 % of Site Total: 100.00%	2.28 Site Avg: 2.28 (0.00%)	00:02:31 Site Avg: 00:02:31 (0.00%)	63.64% Site Avg: 63.64% (0.00%)	53.94% Site Avg: 53.94% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	158	2.33	00:02:37	63.92%	52.53%
Brazil	3	1.00	00:00:00	0.00%	100.00%
India	1	3.00	00:00:35	100.00%	0.00%
Australia	1	1.00	00:00:00	100.00%	100.00%
Poland	1	1.00	00:00:00	100.00%	100.00%
New Zealand	1	1.00	00:00:00	100.00%	100.00%

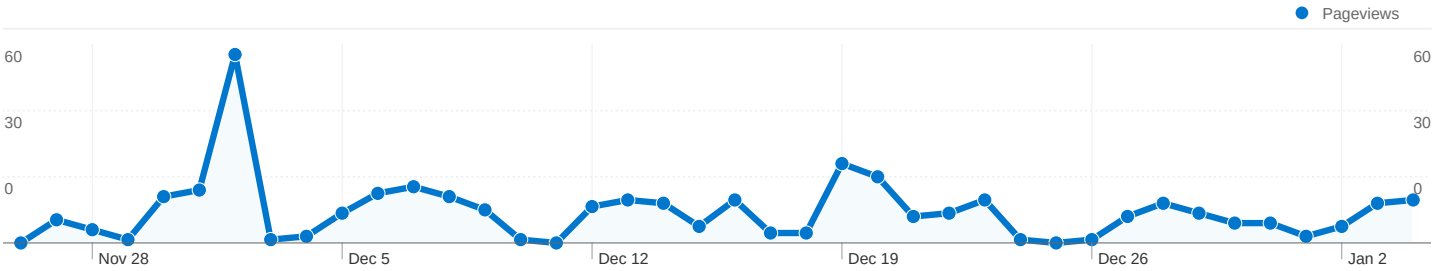
1 - 6 of 6

www.lclark.edu/~ccp

Content Overview

Nov 26, 2011 - Jan 4, 2012

Comparing to: Site



Pages on this site were viewed a total of 377 times

377 Pageviews

281 Unique Views

53.94% Bounce Rate

Top Content

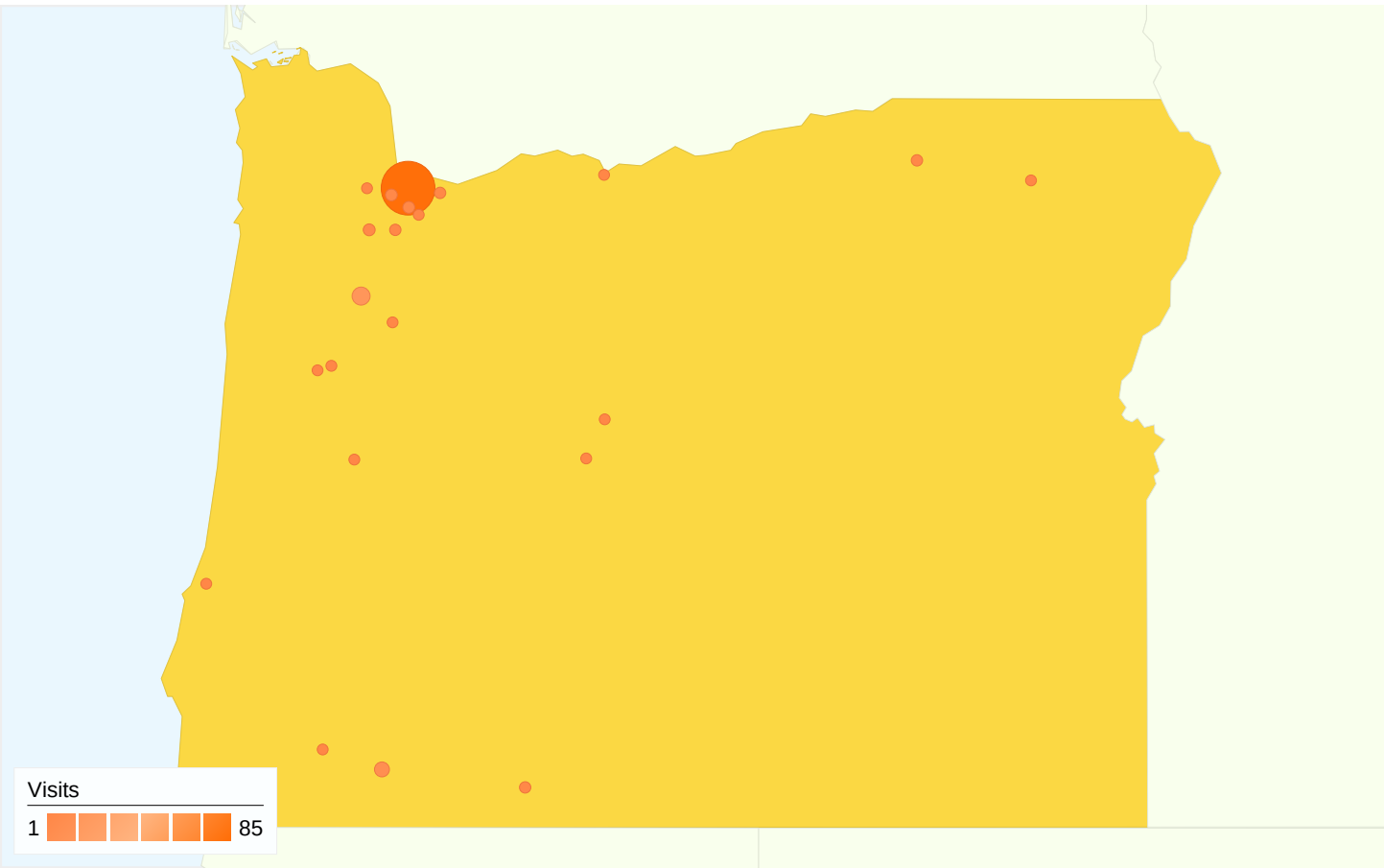
Pages	Pageviews	% Pageviews
/~ccp/index.htm	139	36.87%
/~ccp/Past_Biennia.htm	59	15.65%
/~ccp/LegislativeHistoryofRules.htm	55	14.59%
/~ccp/Current_Biennium.htm	26	6.90%
/~ccp/Council_Membership.htm	22	5.84%

State Detail:

Oregon

Nov 26, 2011 - Jan 4, 2012

Comparing to: Site



This state sent 138 visits via 22 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
138	2.43	00:02:49	62.32%	50.72%
% of Site Total: 83.64%	Site Avg: 2.28 (6.56%)	Site Avg: 00:02:31 (11.92%)	Site Avg: 63.64% (-2.07%)	Site Avg: 53.94% (-5.96%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	85	2.78	00:03:18	60.00%	44.71%
Salem	15	1.53	00:00:08	53.33%	66.67%
Medford	9	2.67	00:01:38	55.56%	55.56%
Newberg	3	2.67	00:20:50	0.00%	33.33%
Beaverton	3	1.00	00:00:00	100.00%	100.00%
Lake Oswego	3	1.00	00:00:00	33.33%	100.00%
Wilsonville	2	2.00	00:00:31	50.00%	0.00%
Gresham	2	1.50	00:00:13	100.00%	50.00%
Pendleton	2	1.00	00:00:00	100.00%	100.00%

Klamath Falls	**2**	1.00	00:00:00	50.00%	100.00%
The Dalles	**1**	1.00	00:00:00	100.00%	100.00%
Grants Pass	**1**	2.00	00:00:29	100.00%	0.00%
Bend	**1**	3.00	00:04:12	100.00%	0.00%
Elgin	**1**	3.00	00:16:50	100.00%	0.00%
Redmond	**1**	1.00	00:00:00	100.00%	100.00%
Corvallis	**1**	1.00	00:00:00	100.00%	100.00%
Coos Bay	**1**	5.00	00:01:22	100.00%	0.00%
Gladstone	**1**	3.00	00:00:32	100.00%	0.00%
Hillsboro	**1**	1.00	00:00:00	100.00%	100.00%
Philomath	**1**	2.00	00:01:24	100.00%	0.00%
Eugene	**1**	1.00	00:00:00	100.00%	100.00%
Stayton	**1**	5.00	00:01:32	100.00%	0.00%
					1 - 22 of 22

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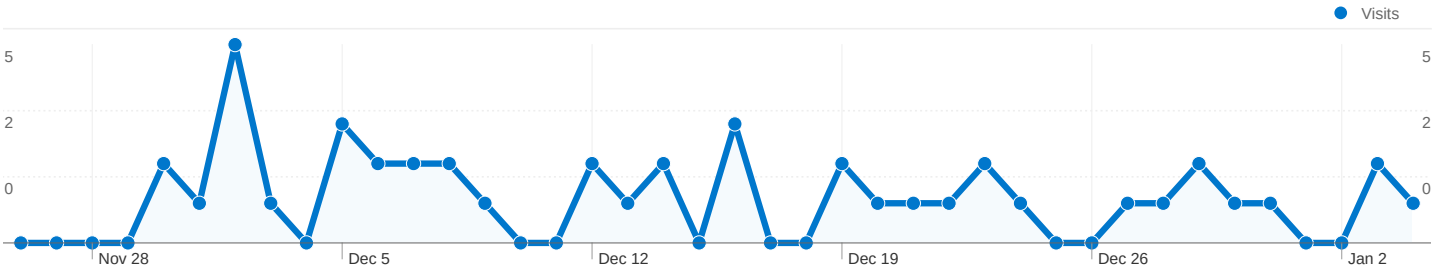
Keywords

Nov 26, 2011 - Jan 4, 2012

Comparing to: Site



Search sent 44 total visits via 10 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
44	2.77	00:03:19	56.82%	36.36%
% of Site Total: 26.67%	Site Avg: 2.28 (21.35%)	Site Avg: 00:02:31 (32.36%)	Site Avg: 63.64% (-10.71%)	Site Avg: 53.94% (-32.58%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
(not set)	17	3.35	00:05:21	52.94%	17.65%
council on court procedures	10	1.70	00:00:52	70.00%	50.00%
oregon council on court procedures	9	3.11	00:04:30	55.56%	44.44%
oregon council on court	2	1.50	00:00:05	0.00%	50.00%
council on court pricedures	1	6.00	00:00:54	100.00%	0.00%
council on court procedures oregon	1	1.00	00:00:00	0.00%	100.00%
council to court	1	1.00	00:00:00	100.00%	100.00%
orcp 53 legislative history	1	5.00	00:00:49	100.00%	0.00%
oregon council on court procedure	1	1.00	00:00:00	0.00%	100.00%
oregon council on court procedures orcp 69c	1	3.00	00:04:12	100.00%	0.00%

1 - 10 of 10

Subject: FW: Inquiry from Council on Court Procedures regarding ORCP 17A
From: Leslie O'Leary <LOLeary@wdolaw.com>
Date: Tue, 03 Jan 2012 17:47:46 -0800
To: Eve.MILLER@ojd.state.or.us, Lauren.S.HOLLAND@ojd.state.or.us, Eugene Buckle <ebuckle@cosgravelaw.com>
CC: Shari Nilsson <nilsson@lclark.edu>

See the response from the state court administrator on the eFiling issue. I have a couple of questions about the timing of the rollout of eFiling. Looks like the only uncertainty is if the funding gets pulled. At this point, I don't see that it makes sense to amend ORCP 17A.

From: Kingsley.W.CLICK@ojd.state.or.us [mailto:Kingsley.W.CLICK@ojd.state.or.us]
Sent: Tuesday, January 03, 2012 5:40 PM
To: Leslie O'Leary
Cc: Bruce.C.MILLER@ojd.state.or.us
Subject: Re: Inquiry from Council on Court Procedures regarding ORCP 17A

Dear Ms. O'Leary,

Our UTCR reporter/counsel Bruce Miller will be back in the office the end of this week and may want to provide more information or coordinate with your efforts. Otherwise, I have been provided the following information to share with you:

For the trial courts, in anticipation of the rollout of eFiling, **current** UTCR Chapter 21 provides for the use of electronic signatures on eFiled documents, similarly to ORAP chapter 16:

UTCR 21.040(2): "When viewed in an electronic format and when printed, a submitted document must comply with the requirements of ORCP 9 E and UTCR 2.010 except as to any requirement that a document bear a physical signature when filed." *(Compare ORAP 16.15(2), which is similar in the appellate context)*

UTCR 21.090: ELECTRONIC SIGNATURES: *(Compare ORAP 16.40, which is similar).*

(1) The use of a filer's login constitutes the signature of the filer for purposes of these rules and for any other purpose for which a signature is required.

(2) In addition to information that law or rule requires to be in the document, a document filed electronically must have a signature block that includes the typed name of the filer preceded by an "s/" in the space where the signature would otherwise appear.

Example:
s/ John Q. Attorney
JOHN Q. ATTORNEY
OSB #
Email address
Attorney for Plaintiff Smith Corporation, Inc.

(3) When more than one party joins in filing a document, the filer must show all of the parties who join by one of the following:

(a) submitting a scanned document containing the signatures of all parties joining in the document;

(b) a recitation in the document that all such parties consent or stipulate to the document; or

(c) identifying in the document the signatures that are required and submitting each such party's written confirmation no later than three (3) days after the filing.

(ORAP 16.40(4) contains an additional provision: "(4) A party electronically filing a document, such as a declaration, that must be signed by a person other than the eFiler, shall include a scanned image of the signature page showing the person's signature.")

I don't know that an amendment to the ORCPs is necessary to facilitate the implementation of the "eFiling" electronic signature provisions of UTCR 21.040(2) and UTCR 21.090. That is not to say that a complementary amendment to the ORCPs should not be pursued and that is what I thought Bruce Miller and you might further discuss. The UTCR was adopted per the Chief's electronic court rulemaking authority under ORS 1.002(2) (particularly (2)(c) -- Chief may make rules for e-aplications including rules re: use of electronic signatures).

Regarding the timing, unless the February legislative session budget outcomes limit our ability to proceed, the current plan is eFiling (for attorneys only) could go live in Yamhill Circuit Court by the end of June 2012 when the new case and document management system is installed.

I appreciate that the ORCP committee is looking into ways to help us move forward in practice and in court into the next electronic 'age'.

Kingsley W. Click
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"Leslie O'Leary" ---01/03/2012 02:54:21 PM---Dear Ms. Click:

From: "Leslie O'Leary" <LOLeary@wdolaw.com>
To: <kingsley.w.click@ojd.state.or.us>
Cc: "Leslie O'Leary" <LOLeary@wdolaw.com>
Date: 01/03/2012 02:54 PM
Subject: Inquiry from Council on Court Procedures regarding ORCP 17A

Dear Ms. Click:

I serve on the Oregon Council on Court Procedures. Our function is to consider, draft and promulgate amendments to the ORCP. We are considering an amendment to Rule 17A to allow attorneys to use their

electronic signatures on pleadings and other papers filed with the Court, rather than have to file these documents with original signatures. I am wondering whether the electronic filing system under development will provide for the use of electronic signatures in lieu of original inked signatures, as is the case in federal court. Also, do you know when the electronic filing system will go into effect? If the Council were to promulgate an amendment to ORCP, it would not take effect until 2013. I am also concerned that the language of any amendment might conflict or otherwise be inconsistent with the electronic filing provisions.

We would appreciate your feedback on this issue.

Many thanks,

Leslie O'Leary
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Subject: ORCP 10C.
From: Keith.R.RAINES@ojd.state.or.us
Date: Wed, 21 Dec 2011 14:07:26 -0800
To: Shari Nilsson <nilsson@lclark.edu>

Dear Shari: With the announcement of the US Post Office that mail service will be significantly slowed and reduced the immediate future, the COCP may wish to review ORCP 10C. which provides for 3 days added to prescribed times when service has been by mail. When coupled with the Court's own deficits, including closure days and reduced staff which leads to slow document processing, I would suggest that ORCP 10C allow for "5 additional court days" at a minimum. Thanks for your consideration. KRR

ORCP 59H(1) Subcommittee Minutes

Meeting January 6, 2012

Present:
Charles Zenache
Jay Beattie
Rex Armstrong
Maureen Leonard (chair)

Concerns raised:
•This rule is unique in the ORCP because it's about preservation for appeal, not about trial practice.
•The rule requires both identifying the asserted error (usual preservation rule) and notation of exception after the jury is instructed. Is this a trap?
•The timing for exceptions is mandatory but may be impractical given trial process
•There is no direction about what specificity is required for post-instruction exceptions
•Judges may instruct at other times during trial, not just at the end

Conceptual proposed language for ORCP 59H(1)

A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury, or at such other time as the trial court shall direct.* The notation of exception may incorporate by reference prior objections made on the record.**

*Subcommittee is in agreement about need for flexibility in timing of exceptions.
**Subcommittee is not in agreement about whether the exceptions must reiterate in substance the objections/ arguments already made to instructions, or can incorporate prior objections by reference