MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 4, 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
Arwen Bird
Michael Brian
Eugene H. Buckle*
Brian S. Campf
Brooks F. Cooper
Kristen S. David
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Robert D. Herndon
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland
Robert M. Keating
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Jay W. Beattie
Leslie W. O'Leary
Hon. David F. Rees
Mark R. Weaver

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 19 B • ORCP 24 • ORCP 39 C(6) • ORCP 44 • ORCP 55 • ORCP 68	• ORCP 1 E • ORCP 7 • ORCP 18 A • ORCP 21 • ORCP 21 G • ORCP 24 A • 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 9:30 a.m.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of January 7, 2011, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft January 7, 2012, minutes (Appendix A) which had been previously circulated to the members. Ms. David requested that a change be made on page two to reflect that it is Mr. Cooper who is a member of the Oregon Trial Lawyers Association and not she. A motion was made to approve the minutes as corrected, the motion was seconded, a voice vote was taken, and the corrected minutes were unanimously approved.

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 slightly higher than those from the previous month.

B. Legislative Contacts (Ms. David)

Ms. David stated that, due to her busy schedule and active participation on other Council committees, she would like another Council member to take over the responsibility of drafting e-mails to legislators after each Council meeting. Judge Gerking emphasized the importance of reaching out to legislators now, while they are in session. Prof. Peterson stated that, since no other Council member was currently available to volunteer, he and Ms. Nilsson can temporarily take over this responsibility. Mr. Cooper noted that the issue can be revisited at the next Council meeting in March.

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 reviewing the issues in question in conjunction with the Uniform Trial Court Rules (UTCR) committee and the implementation of e-court in Oregon.

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

Ms. O'Leary was not present at the meeting. Judge Holland stated that the committee had not met since the last Council meeting, but that the committee members had generally felt that the issue would be dealt with by the UTCR Committee during the transition to e-court and that the Council should wait until that time to make any corresponding changes to the ORCP. She stated that the committee will report to the Council at the next meeting.

Prof. Peterson reminded the Council that he had suggested adding language to the ORCP this biennium, similar to the change made to ORCP 1 last biennium, because he feels that it is important that the ORCP and UTCR are not in conflict in any way, and that the ORCP should be flexible enough for whatever requirements the e-court may bring.

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

Ms. Leonard stated that the committee is recommending making one change to ORCP 19 B: to change the phrase *res judicata* to "claim preclusion and issue preclusion." She noted that one concern of the committee was that *res judicata* may carry a broader meaning than just those two issues. Mr. Cooper stated that there is case law from the Supreme Court that states that those terms should be used rather than "*res judicata*."

Ms. Leonard stated that the committee still wished to hear from the full Council about whether to pursue sending a survey to bench and bar regarding the compulsory counterclaim issue. She observed that the issue will likely create some excitement. Ms. David noted that a positive aspect of requiring compulsory counterclaims is that it treats plaintiffs and defendants the same in requiring that all claims be filed. Ms. David stated that some concerns the committee has are: defense coverage issues in attorney negligence (and other) claims; whether the issue is substantive v. procedural; the appearance that the Council is federalizing the ORCP.

Judge Miller asked how attorneys who are representing an insurance company handles a situation where he client wishes to bring additional claims. Mr. Bachofner clarified that the attorney is representing the client, but is being paid by the insurance company. Ms. David explained that she encourages clients to obtain their own counsel, and that she meets with them to discuss the pros and cons of bringing all claims at once. She stated that sometimes she would prefer to keep certain issues separate and that it is a strategic determination as to whether to bring them together. Judge Gerking remarked that it can be ethically hazardous to do so. Judge Miller observed that it runs counter to what she thinks is in the best interests of an individual who has an insurance policy to make them bring a claim at a later time. Ms. David emphasized that no attorney is forcing a client to make

that decision. Mr. Bachofner stated that this is why he feels that it is important to *not* have a compulsory counterclaim, because clients can either choose to bring additional claims immediately or down the line after the insurance company has incurred the cost of having the liability determined. Judge Miller stated that she can see the advantages to bringing multiple claims at once, but that the client would have to hire separate counsel. Ms. David stated that the client would have to do that anyway. She noted that she never tells a client that they cannot bring a claim, but that she does make recommendations. Ms. David raised the example of a case with a one-year statute of limitations being required to be filed concurrently with another case that has a six-year statute of limitations and wondered whether this requirement would turn the issue into a substantive rather than a procedural one by effectively shortening the longer statute of limitations.

Mr. Bachofner noted that, if liability is established in the insurance company case, a client may have an easier time finding an attorney to take their additional claim because it will be just a matter of determining what the damages are. He stated that, if the client loses, they know they do not have to pay the costs, and they have not incurred the expense to make their own claim. Mr. Bachofner explained that, in essence, the client gets the benefit of seeing how everything turns out without incurring their own costs. Judge Herndon stated that state government and courts are likely to get smaller, and there is some advantage to having issues resolved in fewer cases rather than more cases. He noted, however, that he is concerned about the notion that the issue may become substantive by perhaps shortening the statute of limitations of some claims. Ms. David addressed Judge Herndon's first concern by stating that a number of claims get resolved through settlement anyway, so whether these additional claims are filed or whether they are retained to file separately may not prove to be too much of a strain on the judicial system.

Mr. Cooper asked whether anyone had ever had the circumstance where they were willing to segregate claims and work for both the insurance company and the client on a separate claim. Ms. David stated that there are a lot of ethical considerations and that she had never done it herself. Mr. Keating expressed the opinion that making counterclaims compulsory creates many unnecessary problems, and that the client has every right the client would have had if the client had not purchased the insurance policy to bring in a private lawyer. Mr. Cooper asked Mr. Keating whether, if he had a physician-client who had the means to retain private counsel, would compulsory counterclaims put him in the position where the physician might make an abuse of civil process claim or something similar which he, as a defense lawyer, believes will muddy the picture he would like to present to the jury. Mr. Keating agreed that this could muck things up. Mr. Bachofner noted that another problem with representing a client for both cases is how to bill, since the insurance company will ask which claim applies to each charge. Ms. David stated that she has been brought in on malpractice cases where an attorney has sued a client for fees and the client has filed a malpractice counterclaim. She stated that the attorney in such cases has to be very careful and structured about co-representing the attorney-client and separating out the

attorney fees case and the malpractice claim. She stated that it can be done but that, when it is a straight malpractice case, she generally does not want to bring attorney fees or any other issue into it, but that is just her preference. Mr. Cooper noted that, with a mandatory counterclaim, in some cases we may be forcing attorneys to drop years off of a statute of limitations, or to make a tactical call that changes the facts that are relevant and admissible in front of the jury. He worried that this was substantive. Ms. David stated that this is also her concern. She also wondered what the remedy would be if an attorney failed to bring a compulsory counterclaim. Judge Gerking expressed concern that requiring compulsory counterclaims would expand attorney exposure to malpractice. Judge Herndon felt that such an amendment would be too substantive and suggested tabling the consideration of the issue. He made a motion to table the issue. The motion passed by voice vote.

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

Mr. Cooper stated that he has a draft of language for an amendment which he has given to the committee for review. He will bring the language to the Council at the March meeting.

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

Ms. Gates reiterated one concern that was brought to the committee: that some officers and directors of corporations are using the language "other persons who consent to testify" in ORCP 39 C(6) to attempt to avoid testifying by stating that no one consented. She noted that the language in the federal rule is clearer, but that the committee felt that the problem is not occurring enough to warrant a change. A brief survey of judges present at the meeting revealed that this is not a problem that occurs with any regularity on their dockets.

Ms. Gates stated that the other issue with which the committee was dealing was whether there should be a time requirement for the party to be deposed to designate which officer will testify as to what specified topics. She stated one con to this is that it is sometimes hard to know in advance who will testify on each specified topic because it is a short two week window. She stated that the other con was that the rule clearly provides for this anyway and that the insertion of a time requirement may deprive the noticing party of what they are entitled to under the rule. Mr. Bachofner noted, however, that sometimes non-parties are being subpoenaed and to force them to identify the identity of the deponent well ahead of the deposition can be onerous. He also stated that there may be situations in which an attorney may not know, for some reason, who is going to agree to do it, or that someone who has agreed to do it may become unavailable at the last moment, so the committee wanted to leave some opening for that. Ms.

Gates stated that the committee had brought proposed draft language to the Council as outlined in Appendix D. She stated that the language encourages parties to provide more than 24 hours' notice but that the floor is 24 hours. Ms. Gates observed that the committee had discussed time periods between 24 hours and 3 days.

Mr. Campf asked whether the rule change contemplates providing notice of the deponent's name, to which Ms. Gates replied yes. Mr. Campf stated that he felt that the proposed rule change is not clear that it requires disclosure of the name. He suggested making the language clearer. Mr. Campf also noted that 24 hours is probably not enough time, in his opinion, since many times attorneys are taking depositions out of town and it does not help in those cases to get the name the day before. Judge Gerking stated that he believed that the deposing attorney would already have a list of questions but it would be efficient to know who will testify to avoid needlessly repeating questions. Mr. Campf stated that, when he is deposing a witness, he sometimes learns that the witness has knowledge in areas other than the subject which is designated in the subpoena, and he will make an agreement with the opposing attorney to allow personal knowledge questions to be asked. He observed that knowing the name of the deponent in advance might be helpful in this situation, and he stated that he feels that five days is a more appropriate time frame.

Mr. Keating stated that his problem with requiring designation of the name is that every time he has done a deposition he ends up fighting with the lawyer taking the deposition over what questions can be asked and that, from a defense point of view, this is important so that the witness can be prepared. He stated that it is his practice to give the name of the person who will testify, but that often that person is then served with a general subpoena a few days before the corporate deposition. Mr. Keating reiterated that he does not feel that it is necessary to require that the name be revealed. Mr. Bachofner stated that the attorney is taking the deposition of the corporate entity, and that the identity of the person who is doing the talking is irrelevant, because the attorney would prepare the Rule 39 C(6) questions the same way regardless of the identity of the deponent. He noted that he has no problem giving the opposing attorney some notice so that they know beforehand, but that knowing the name should not change the questions asked. Mr. Brian stated that knowing who is being deposed always helps, since it is helpful to know the background of the person in the context of the questions. He noted that, by agreement between counsel, at the end of the corporate deposition personal knowledge questions can be asked. He observed that knowing who will testify may also influence how he approaches certain topics. Judge Miller stated that there is nothing to stop an attorney from re-deposing a person regarding personal knowledge subsequent to the corporate deposition. Mr. Brian stated that this can be a costly prospect and that there are often discovery deadlines to meet.

Prof. Peterson reminded the Council that this amendment was suggested by former Council member Don Corson, who thought that it was troubling that an attorney for a corporation could say, "I do not have to tell you who will testify, even though I know." He stated that there are steps an attorney can take, including Googling and looking at a company's organizational chart to get the context of where the person who is to testify fits into the company, and still limit deposition questions to the context of what the corporation knows. Ms. Gates stated that she felt that 24 hours is not enough time. She stated that, even if someone is testifying on behalf of the corporation, it is still helpful to know the context of how he or she has that knowledge. She observed that, in some cases, there may be tens of thousands of documents from corporate officers and that, rather than wade through all of those documents when dealing with tight timelines, it is more helpful to be able to go directly to the documents from the person who will testify. Mr. Keating reiterated that an ORCP 39 C(6) deposition is about what the *corporation* knows, and that personal knowledge should not be mixed with corporate knowledge. Ms. Gates pointed out that looking at a person's e-mails does not mean that questions are going to be asked about personal knowledge, but that an attorney needs to have context to know how the person who is testifying obtained his or her knowledge. She stated that it is helpful to know whether the person was just educated to provide this testimony, or whether he or she has some involvement and that is why he or she is prepared to testify on behalf of the corporation.

Mr. Cooper related his experience in a products liability case in which he is involved where the main trial lawyer noticed the 39 C(6) deposition of a corporation, the manufacturer of the product in question, about a design. He stated that, because of the existing language in ORCP 39 C(6), the deposing attorney did not receive the name of the person who was to testify but, rather, appeared at the corporate office in the Midwest and discovered the name of the person at that time. Mr. Cooper stated that the person who testified was not an engineer, did not work in the design department, and had no personal knowledge of the facts that he had specified in his notice that he wanted to talk about. He stated that this is clearly not the purpose of the rule and that, with the proposed rule change, he would have had the name and would have obtained the resume and then realized that the person worked in the IT department. He noted that this would have been an easy chance to talk to a judge about the designation and say that, if he takes the designated person's deposition, no one else from the company should be allowed to testify claiming superior knowledge regarding these matters other than the ORCP 39C(6) deponent and, if the company wants to do that, that is fine. Mr. Cooper emphasized that he does not feel we need to change the rule for bad actors, but that his case is another example of why revealing the name with enough time to prepare is often very useful and can speed and simplify the process for the bench and bar. Judge Miller asked what harm there is in being required to give the name. Mr. Keating stated that he always gives the name of

the person who will testify, but that he has had lawyers abuse the limits of ORCP 39 C(6) when he does this. He stated that he would feel more comfortable if language could be added to state that attorneys cannot take a personal deposition during an ORCP 39 C(6) deposition. Mr. Brian stated that he is not willing to say that ORCP 39 C(6) states that it is always improper for an attorney to stray into the area of personal knowledge. He suggested changing the time period to three judicial days.

Mr. Bachofner stated that he has no problem designating the name and that he agrees with Mr. Keating. He stated that, from a defense perspective, he also needs to prepare the person to be deposed and that, if the opposing attorney is going to go beyond the ORCP 39 C(6) topic, he is entitled to notice and his client is entitled to notice so that they can be properly prepared. He stated that the committee's proposal requires the minimum amount of notice, and that most lawyers worth their salt will provide the name ahead of that time, usually as soon as they know. Mr. Bachofner reiterated that there are situations where non-parties are subpoenaed and that it is unfair to put these businesses in the position of being required to give a name three to five days before the deposition. Judge Holland noted that the situation Mr. Bachofner is describing is already addressed in ORCP 39 C(6) with the "absent good cause" language. Mr. Bachofner asked whether that third party will be able to make an informed decision about whether they have good cause. Mr. Cooper stated that corporations are all subject to validly issued subpoenas by parties in litigation, that this is part of being in business, and that he feels this is not a problem significant or repetitive enough to craft a separate fix. Mr. Bachofner agreed that it should not be a separate fix and that the language should stay as proposed.

Mr. Brian suggested changing the time to 36 hours. Judge Herndon stated that, if the time is kept at 24 hours, attorneys will say that it is not enough time and it will get crammed on to the court's dockets. He suggested that 36 hours is more appropriate and allows enough time to get onto a docket if necessary. Judge Armstrong suggested the grammatical change of the phrase "less than 24 hours" to "fewer than 24 hours." Mr. Bachofner also noted that any time period less than seven days is automatically considered judicial days, so that there is no need to include the word "judicial." A straw poll was held to see which time period Council members preferred: 24 hours or three days. More members preferred three days than 24 hours, with a few members preferring five days. Mr. Cooper suggested keeping the language of the amendment the same, with the addition of Mr. Campf's and Judge Armstrong's friendly amendments, and creating two versions with two separate time periods: 24 hours and three days.

Mr. Keating asked that language be added to limit the deposition to the topic designated in the notice. Ms. Gates noted that the point of the rule already states that and, while she agrees that some lawyers do drift, intentionally or

unintentionally, she envisioned such an amendment creating huge arguments among the bench. Mr. Keating observed that he was referring to the topic, not the basis of a person's knowledge. Judge Gerking asked what happens if a witness drifts while answering a question. Mr. Campf stated that there is case law that talks about what happens at an organizational deposition when a witness talks about personal topics or things outside of the scope of the deposition that does allow the examiner to question on those topics. He stated that he would encourage the committee not to stray into that because the rule, by its terms, is fine on that point. Prof. Peterson stated that all of these rules will be used by lawyers, and that it is difficult to make people do things exactly the way you intend because lawyers are creative. However, he stated that he is sure that, if an examiner drifts over into something that is not within the scope of the deposition, the other attorney will direct his or her client not to answer the question; and that, if a client starts to stray into non-related matters, the attorney would cut him or her off. Mr. Keating agreed, but noted that it is not always that simple. He reiterated that he always gives the name in a timely fashion but that, when the opposing attorney receives the name, the temptation to negotiate their way into the personal knowledge of the deponent is there.

Ms. Nilsson stated that she will create two versions of draft language, one with 24 hours and one with three days and both including the aforementioned friendly amendments, and forward them to the committee. Prof. Peterson suggested changing the phrase "the matters" to "those specific matters" to help address Mr. Keating's concern. Mr. Keating stated that he thought this might help. Ms. Gates and Mr. Brian stated that they did not feel that it would change anything. Judge Zennaché stated that the rule already says "the responding party shall set forth for each person designated the matters on which that person will testify." He stated that he felt that this means that the corporation may designate more than one person to talk about a specific matter, and the corporation will set forth which matters to which each of those persons will testify.

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

Ms. David stated that she has not heard about any problems with regard to the changes to ORCP 43 that became effective January 1, 2012. She stated that this is either a testament to how well the rule changes were crafted, or that attorneys have not yet read the new rules.

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

Mr. Keating stated that the committee had met but that Ms. O'Leary and Mr. Cooper were unable to be present. He noted that the consensus of the committee was that ORCP 55 should be amended as outlined in Appendix E to require the party objecting to a request for medical records to respond in writing to the party issuing the subpoena, specifying in detail the grounds for each objection. Mr. Keating noted that the other issue the committee discussed was whether the objecting party should be required to seek the court's intervention by filing a motion to quash the proposed subpoena. He observed that this did not get anywhere near a consensus among committee members, and that Mr. Beattie had raised the issue that the Health Insurance Portability and Accountability Act (HIPAA) would give a good basis for a subpoenaed facility or provider to refuse to comply if the requesting attorney only has to say that the plaintiff objected but did not file a motion to quash. Under federal law there would be organizations that would be reluctant to comply with such a subpoena, demanding a court ruling or proof that the plaintiff does not object. So if the plaintiff's lawyer objects, the requesting attorney would need to file a motion for permission to serve the subpoena, but the committee generally agreed that requiring that the plaintiff's attorney respond with a specific objection would facilitate the process.

Ms. Leonard asked whether an attorney who received an objection would now go to court and follow the same procedure as before, but now he or she would know the reason for the objection. Mr. Keating responded that this would be the case. Prof. Peterson wondered why, if a subpoena is drafted and has been served on an attorney but not yet on the health care provider, the rule should not make it incumbent on the objecting attorney to file a motion to quash. Mr. Cooper stated that the committee had discussed this possibility but that members decided that, because of HIPAA, it was a better idea to make it incumbent on the requesting attorney to seek an order requiring a subpoena because a lot of record providers will not provide records based on an order denying a motion to quash. Judge Herndon stated that the process will facilitate discovery and will suggest to lawyers that they need to confer and not come to the court as step number one.

Prof. Peterson noted that Council staff had inserted the proposed language into the existing ORCP 55 and noted that this required some renumbering within the rule. Ms. Nilsson also noted that the staff had also reformatted some other subsections to conform with the standard ORCP format. Mr. Brian mentioned that the ORCP 46 A motion to compel does not tie in to ORCP 55 and that he feels that the language needs to be consistent. Mr. Keating agreed that the motion to compel nomenclature is strange. Mr. Cooper suggested carrying the issue over to next month and, at that time, looking at whether to make a change to ORCP 46 and looking more closely at the technical changes the staff made. Judge Miller stated that she does not feel that it should be a motion to compel but, rather,

something that has a court pronouncement of some kind. Mr. Bachofner noted that ORCP 55 H(2)(a) talks about attaching to the subpoena either a qualified protective order or the affidavit of no objection.

Mr. Keating spoke about the committee's efforts with regard to ORCP 44 C. He noted that, although Ms. O'Leary was unable to attend the committee meeting, she had made it clear through e-mail communications that she does not agree with potential changes to ORCP 44 C. Mr. Keating stated that the consensus of the members present at the meeting, with one strongly held dissent, was to add language to ORCP 44 C as set forth in Appendix E. He stated that the intent was to use language from ORCP 36. Judge Miller asked why import the language at all, since ORCP 36 already governs all discovery. Mr. Bachofner stated that some judges are not allowing this. Judge Miller stated that this would seem to be an education problem. Mr. Cooper asked whether this would be duplicating language that already exists because we think that some judges are not doing their jobs the way we think they should. Mr. Keating observed that there appears to be a growing affection for the "same body part" rule. He discussed a Court of Appeals case [*Duran v. Culver*, 88 Or App 452 (1988)] where the plaintiff claimed a back injury resulting from an automobile accident and was awarded a verdict. He noted that the Court of Appeals reversed because the trial judge had refused to admit the plaintiff's gynecological medical records which showed that she had undergone a hysterectomy three months after the accident. Mr. Keating stated that the gynecological medical records showed that the plaintiff had been suffering from endometriosis, which included back pain, for three years, and that the Court said that it was prejudicial error to not allow admission of that evidence. He stated that, if a trial court construes ORCP 44 C literally to mean the same body part, those gynecological records never would have been discovered because gynecological records would not have been seen as relating to a back injury; however, if the court construes "relating to the injury claimed" using the scope of discovery in ORCP 36, those records should be discoverable.

Mr. Bachofner noted that the committee discussed that the records need to be reasonably calculated to lead to discovery. Judge Miller stated that she would do an in camera review in such a case. Mr. Bachofner replied that a judge would not even get to that point in such a case because the defense attorney would not know such records existed. Mr. Keating reiterated that an attorney would not even know that the records existed, since the plaintiff's attorney would have already decided that they were not relevant. Judge Armstrong noted that bringing all records in to the trial court creates a lot of work. Judge Miller sated that her focus as a judge in such cases is on eliminating potential embarrassment. Ms. David observed that people tell doctors about many personal issues, and that it is probably not a good idea to put the burden on the courts to have to do an in camera review in all cases. Mr. Cooper again noted that the problem is how a defense lawyer would have known to ask for records he or she could not have

known existed. He stated that a prudent defense lawyer would have asked for the entire medical history; however, he wondered how the rule change solves the legitimate problem that has been identified. Mr. Brian stated that he does not understand how this change adds anything of substance to what lawyers are already entitled to under ORCP 36. Mr. Keating explained that 2 E 2 of the Multnomah County Civil Motion Panel Statement of Consensus has stated that the issue deals with a limited waiver of the physician/patient privilege and that, therefore, records dealing with different body parts are not available. He noted that this is a relatively new interpretation.

Judge Zennaché asked whether the answer to this problem should be to appeal the decision to the Court of Appeals. He noted that this modification will not change the decision of the panel in Multnomah County. Mr. Bachofner replied that the change clarifies that requests that are reasonably calculated to obtain records related to the claims made are discoverable. He stated that, as it is written now, it is not clear that those records are available. Judge Zennaché asked whether ORCP 36 B already does this. Judge Armstrong stated that it is a legitimate thought that we should not always depend on courts to explain things if it is possible to write them in a way that avoids the need for further thought in how it is supposed to work. Judge Gerking stated that the committee felt that this was a sufficiently contentious issue that it needed to be clarified. Mr. Keating stated that it is not a question that is easily remedied at the time that an attorney needs the information before going before a jury. He stated that his guess is that trying to obtain a writ of mandamus would be very difficult and that it would be easier to try to fix the issue if the Council thinks that trial courts are drifting away from the intent of the rule. In fact, he observed, the history of the Council shows that the rule was amended in 1986 and the Council's comment noted the following reason for the amendment: "The amendment to Rule 44 was made as a response to rulings out of the Multnomah County Circuit Court. The current language 'written reports' has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding 'or existing notations' is intended to broaden the rule to include office and chart notes." Mr. Keating noted that this Council has made amendments in the past to respond to narrow rulings that do not seem to follow the intent of the rule.

Judge Holland observed that this is the Oregon Council on Court Procedures, not the Multnomah County Council on Court Procedures, and that she feels that at times, if it is a matter of judicial education, there is a department to address that rather than modifying an ORCP to deal with a county-specific problem. She noted that it sometimes makes it difficult for the rest of the state to have to deal with problems coming out of specific counties.

Ms. David stated that ORCP 36 gives a broad spectrum of what is discoverable,

except to the extent that certain other rules may limit that spectrum. She stated that she sees ORCP 44 C being interpreted as limiting when it states "relating to injuries for which recovery is sought." She stated that she believes that it is within the Council's scope to further define that and to explain that the Council intends the rule express the broader intent statewide. Ms. David suggested that the committee work with the language a bit more and bringing it back to the Council at the next meeting. Ms. Gates suggested that the committee also consider specific ways to revise the rule as well as the broad way currently proposed. Judge Miller noted that, to the extent that it echoes ORCP 36, she is in favor of the change. Judge Gerking suggested language such as, "the phrase 'relating to injuries for which recovery is sought' shall be construed consistently with ORCP 36." Mr. Keating stated that the committee will meet again, particularly to give Ms. O'Leary the chance to participate in discussion, and will revise the language and report back to the Council.

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

Mr. Keating stated a few members of the committee had met via teleconference and that discussions had also taken place via e-mail. One issue discussed was imposing a page limit on the memoranda in support of, or in opposition to, the motion, and Mr. Keating noted that all committee members felt that such a change would not be needed. The second issue was whether to add a requirement to explicitly set forth a formal statement of undisputed facts. Mr. Keating stated that Ms. Gates was not able to attend the teleconference and that she felt strongly about this issue, so the full committee intended to have another teleconference and report back to the full Council at the next meeting.

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

Mr. Weaver was not present at the meeting. Prof. Peterson stated that he is researching some issues and that the committee will report to the Council at the next meeting.

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

Ms. O'Leary was not present at the meeting. Judge Zennaché stated that he had drafted language for the committee and that he expected the committee to report to the Council in March.

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

Ms. Leonard stated that the committee is still in the process of drafting language and will report back to the Council at a later date. (Appendix F)

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

Ms. David stated that Judge Zennaché had drafted some language in ORCP 68 C(2)(a) for the Council's review (Appendix G) which encompasses parties in domestic relations cases who do not really file a pleading but, rather, file a motion or a response to a motion. She noted that the committee is still working on how to incorporate probate proceedings and other areas of the law, and the possibility of adding specific language that ORCP 68 does not apply to probate proceedings. Ms. David stated that the committee is also considering changing the language regarding objections so that, after the party submits the request for attorney fees, the objecting party may present affidavits, declarations, and other evidence for the court to consider all the issues in whether to award or deny attorney fees. She noted that there is also language allowing a response to the objection which mirrors the objection language in terms of presenting additional affidavits, declarations, and evidence.

Ms. David stated that the committee is still grappling with the issue of amendments and whether there is a need to retain the reference to ORCP 23 in ORCP 68. She noted that the committee's proposal changes the default on hearings on objections to no hearing unless the party requests one, so as not to unduly burden the court. She stated that the committee would like to have the input of the full Council on this.

Mr. Cooper stated that there are times when an oral argument would be useful and he would like to preserve the right to a hearing and make sure that the court has discretion to hold a hearing if it has questions. Ms. David observed that there is also a question among committee members about whether ORCP 68 C(4)(b) and C(4)(c) need to be clarified to explain when affidavits, declarations, and other such evidence can be filed and when live testimony can be presented. Judge Miller raised concerns about the volume of attorney fee and cost evidence that is sometimes presented at the end of long family law cases and observed that judges need to know in a nutshell that, for example, an attorney's last settlement proposal was more fair than the result of trial and that he or she should be rewarded for that. Mr. Cooper stated that it should be made clear what the evidence at the hearing needs to look like. He also noted that he would like it absolutely clear that, if there is a statement of attorney fees and there is no objection, the court retains authority to independently evaluate the reasonableness of the fee request. He stated that some of his probate colleagues take the position that if the heirs, whose money will be used to pay the attorney fees, do not object, the judge cannot evaluate the request for attorney fees. Judge Zennaché stated that this language already exists, and the Court of Appeals has made it clear to the trial courts that, when the courts are making a discretionary award of attorney fees, they have to make some findings, even if they are just general findings, of what factors in ORS 20.075 they are relying on in

making that award. He stated that, in all cases, the court has to make an independent finding and the language says the court "may" award fees or costs, not that it has to. Judge Zennaché noted that he has refused to award attorney fees even when no one has objected.

Judge Williams stated that the court only has to make findings if requested by the parties, and would like the committee to consider an addition to the rule that requires that, if the party is requesting that the court make findings, they also must file their proposed findings. Judge Zennaché stated that this issue is being discussed by the committee and that it is doing further research. Judge Gerking suggested incorporating language from the draft amendment of ORCP 68 C(4)(b), "shall be controverted without further pleading," to ORCP 68 C(4)(c) to read: "objections shall be deemed controverted without further pleading; however, parties seeking an award may file a response to the objection." Prof. Peterson stated that the committee was discussing where that language should be located. Judge Holland stated that, in the probate arena, there are two types of proceedings: 1) estate proceedings where people are seeking attorney fees and the court is required to make reasonable findings; and 2) protective proceedings, which are unique because there may be a number of attorneys involved all of whom are attempting to obtain fees from the protected person's estate. She noted that no party objects because they all want their attorney fees to be awarded from the protected person's estate and it is to their benefit not to object to each other. Judge Holland stated that she often will require a hearing because the attorney fees represent such a large portion of the estate of a person who has a limited amount of funds to live on for the rest of his or her lifetime, and that she will then have attorneys object to her requiring a hearing. She noted that it would be nice to clarify that the court may require a hearing. Mr. Cooper observed that, as drafted, the rule states that, without an objection, a hearing may not be held. He suggested adding language to state that the court may hold a hearing at its discretion.

Ms. Leonard asked for clarification regarding the Rule 23 process, as she was not familiar with this. Judge Zennaché stated that the current Rule 68 incorporates the Rule 23 process and that the amendment preserves this. He noted that the committee was concerned that eliminating the process would have unintended consequences. Prof. Peterson observed that no one on the committee is an expert on probate, but that probate and protected persons are covered by statutes and the committee felt that ORCP 1 A and ORCP 69 C(1)(b) may apply to say that Rule 68 applies unless a different procedure is specified by statute or rule. He stated that the committee needed input from people familiar with the probate arena regarding this issue. Mr. Cooper and Judge Holland offered to speak to the committee regarding this issue. Prof. Peterson returned to the question regarding whether fees need to be awarded when no objection is filed. He noted the language of the current ORCP 68 C(4)(c)(ii): "The court shall deny or award in

whole or in part the amounts sought as attorney fees or costs and disbursements." He pointed out the language difference in the current ORCP 68 C(4)(d): "If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement." Prof. Peterson stated that the earliest iteration of ORCP 68 did not leave this to the discretion of the court, so there was already a Council change early in the history of Rule 68 to make it clear that the court has discretion as to whether to award any fees at all, and there are appellate court opinions that confirm that. He observed that the "may" language had already been added by the Council many years ago and he believes that this is understood. Ms. David noted that the committee is still working and that they anticipate many more changes, including clarifying for practitioners the areas of costs vs. disbursements and general vs. special findings.

VI. New Business (Mr. Cooper)

A. June Council Meeting

Mr. Cooper noted that the Council meeting currently scheduled for June 2, 2012, will be held in Medford, and asked Council members to think about potential extracurricular activities that they would like our Southern Oregon members to arrange during our visit. Prof. Peterson noted that Ms. Nilsson has a scheduling conflict with the June 2 date and asked whether anyone would object to changing the meeting date to June 9. No objections were raised, but Mr. Cooper suggested sending an e-mail to the listerve to check with members who were not present at the meeting.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:45 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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 Ms. David 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 OTLA 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)

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 ___) 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 ___) 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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 1/5/12 - 2/2/12

I. Inquires

The Council received the following inquiries:

- An inquiry from a Hillsboro attorney regarding legislative history materials on the 1998 amendment of ORCP 71. The attorney was referred to the hard copy Council history materials in the Washington County Law Library.

- Two requests for legal assistance via e-mail. The inquirers were sent the Council's standard reply e-mail directing them to the Oregon State Bar Lawyer Referral telephone number and website and advising them that certain cases have statutes of limitation and that they should seek legal advice.

- A telephone inquiry from an attorney writing an article for the Oregon Trial Lawyers Association and inquiring as to why the ORCP do not provide for interrogatories. The caller was directed to the minutes of the September and October, 2011, Council meetings, and further directed to the website, a resource of which he was previously unaware. He seemed pleased, and it turned out he did not personally favor the use of interrogatories.

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 225 visits from 174 unique visitors, and 507 page views in this period. 62% of visits to the site were from new visitors; the average number of pages viewed per visit was 2.25; and the average time spent on the site was 2.28 minutes. Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. These number of visits and number of visitors are slightly increased from last month.

Respectfully submitted,

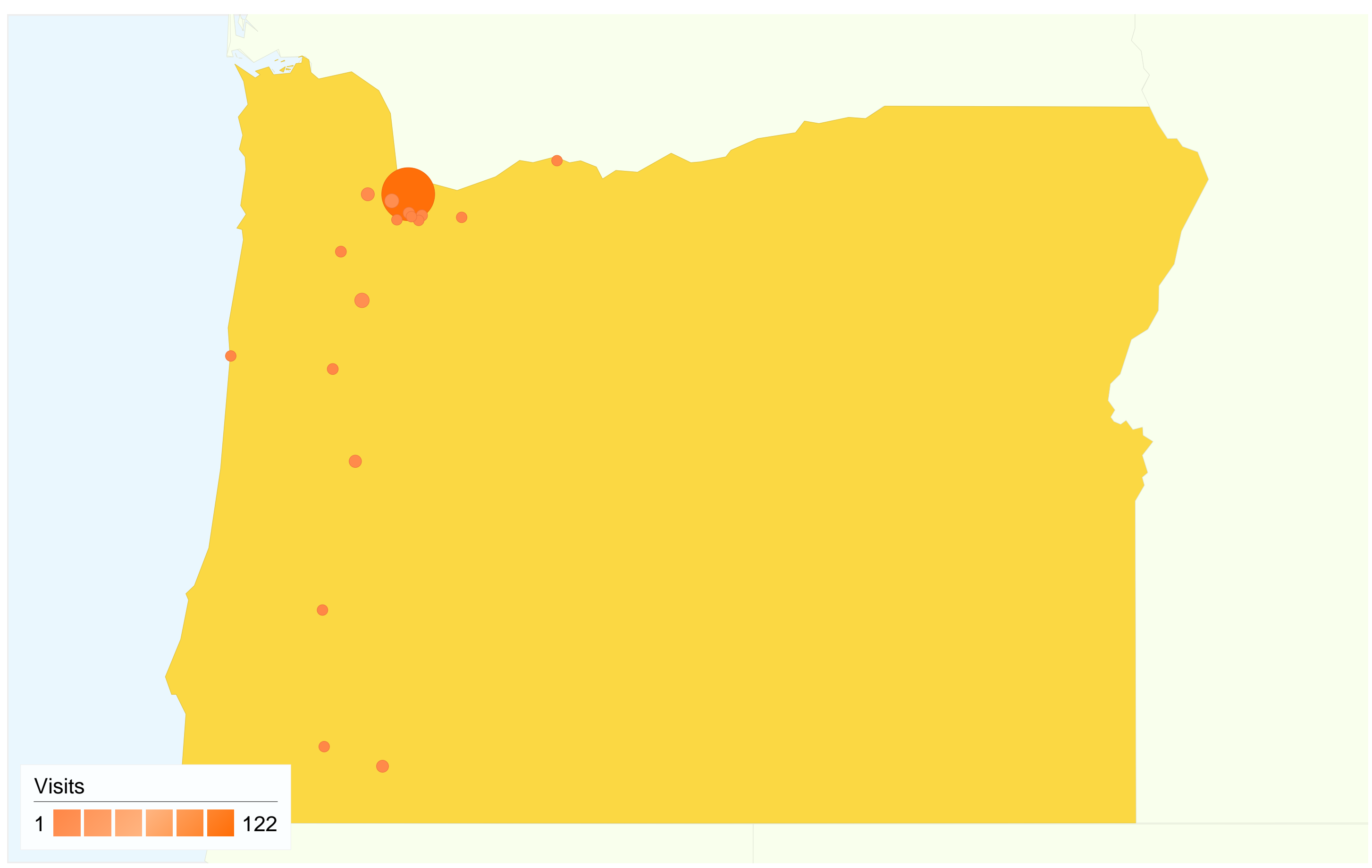
Shari Nilsson
Council Administrative Assistant

State Detail:

Oregon

Jan 5, 2012 - Feb 2, 2012

Comparing to: Site



This state sent 183 visits via 18 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
183	2.42	00:02:55	61.20%	51.37%
% of Site Total: 81.33%	Site Avg: 2.25 (7.19%)	Site Avg: 00:02:28 (18.64%)	Site Avg: 62.67% (-2.34%)	Site Avg: 54.67% (-6.04%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	122	2.48	00:03:21	52.46%	47.54%
Salem	12	1.58	00:00:19	50.00%	75.00%
Beaverton	11	2.18	00:01:34	100.00%	63.64%
Hillsboro	8	4.25	00:05:25	75.00%	25.00%
Eugene	6	1.33	00:00:02	66.67%	83.33%
Medford	5	3.00	00:02:30	60.00%	40.00%
Lake Oswego	4	1.50	00:00:12	100.00%	50.00%
Clackamas	3	4.00	00:02:33	100.00%	66.67%
Mcminnville	2	1.00	00:00:00	100.00%	100.00%

Corvallis	**2**	1.00	00:00:00	50.00%	100.00%
Newport	**1**	1.00	00:00:00	100.00%	100.00%
Gladstone	**1**	4.00	00:00:35	100.00%	0.00%
Marylhurst	**1**	2.00	00:18:16	100.00%	0.00%
Grants Pass	**1**	1.00	00:00:00	100.00%	100.00%
Roseburg	**1**	1.00	00:00:00	100.00%	100.00%
Hood River	**1**	3.00	00:20:52	100.00%	0.00%
Tualatin	**1**	3.00	00:00:33	100.00%	0.00%
Sandy	**1**	2.00	00:00:18	100.00%	0.00%
					1 - 18 of 18

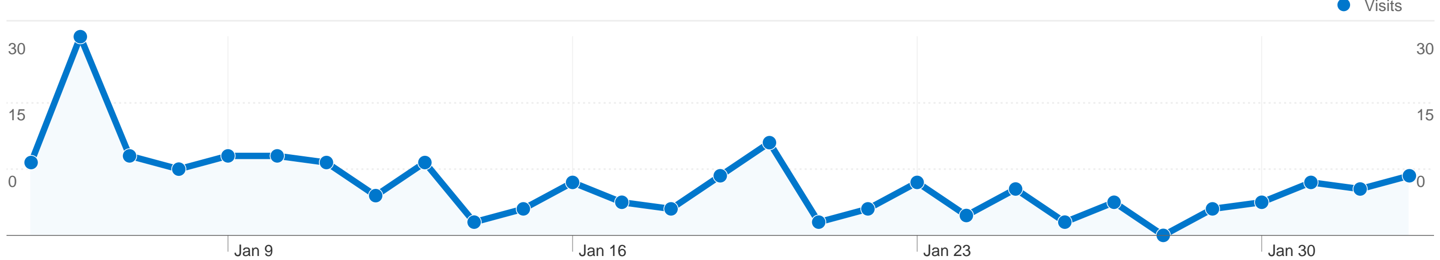
Council on Court Procedures
February 4, 2012, Meeting
Appendix B-3

www.lclark.edu/~ccp

Dashboard

Jan 5, 2012 - Feb 2, 2012

Comparing to: Site



Site Usage

225 Visits

507 Pageviews

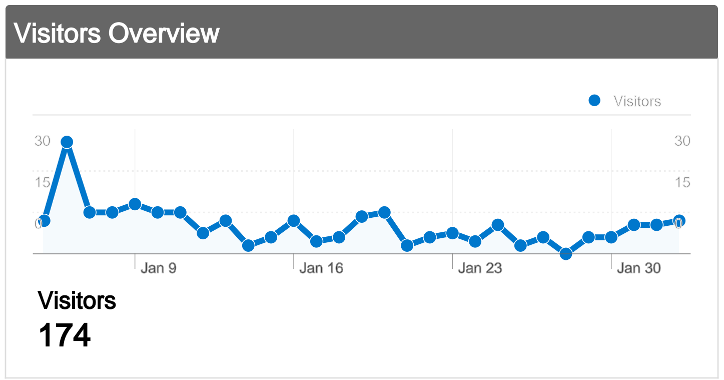
2.25 Pages/Visit

54.67% Bounce Rate

00:02:28 Avg. Time on Site

62.67% % New Visits

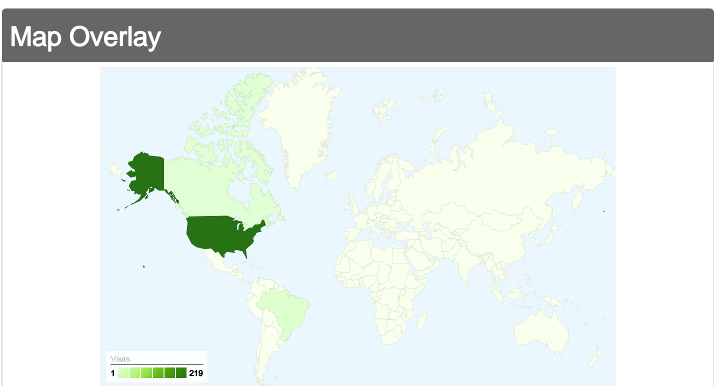
Visitors Overview



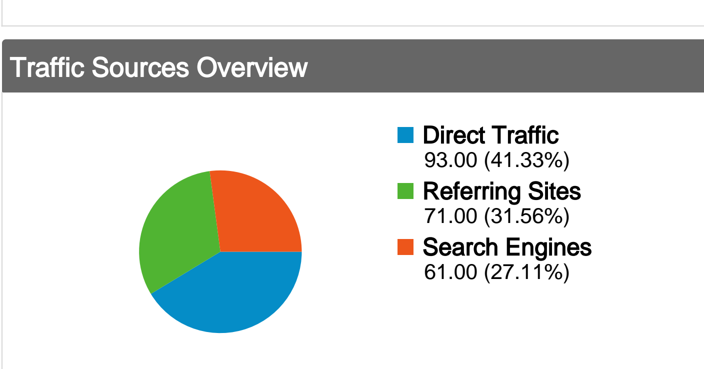
Visitors

174

Map Overlay



Traffic Sources Overview



- Direct Traffic 93.00 (41.33%)
- Referring Sites 71.00 (31.56%)
- Search Engines 61.00 (27.11%)

Content Overview

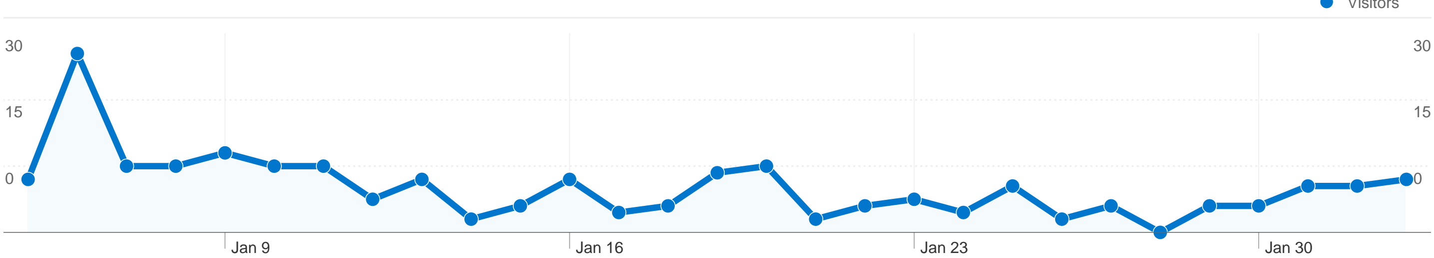
Pages	Pageviews	% Pageviews
/~ccp/index.htm	190	37.48%
/~ccp/Past_Biennia.htm	98	19.33%
/~ccp/Current_Biennium.htm	53	10.45%
/~ccp/contact.htm	52	10.26%
/~ccp/LegislativeHistoryofRules	39	7.69%

Council on Court Procedures
February 4, 2012, Meeting
Appendix B-4

www.lclark.edu/~ccp

Visitors Overview

Jan 5, 2012 - Feb 2, 2012
Comparing to: Site



174 people visited this site

225 Visits

174 Absolute Unique Visitors

507 Pageviews

2.25 Average Pageviews

00:02:28 Time on Site

54.67% Bounce Rate

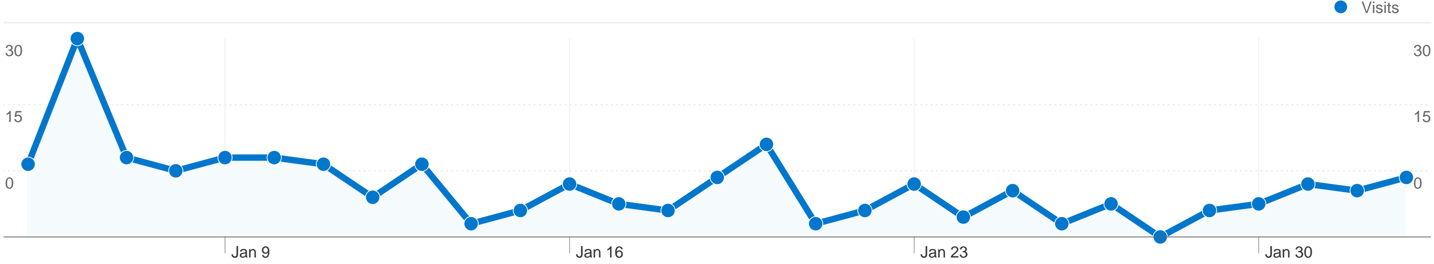
62.67% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	109	48.44%
Firefox	64	28.44%
Chrome	23	10.22%
Safari	20	8.89%
Mozilla Compatible Agent	4	1.78%

Traffic Sources Overview

Jan 5, 2012 - Feb 2, 2012
Comparing to: Site



All traffic sources sent a total of 225 visits

41.33% Direct Traffic

31.56% Referring Sites

27.11% Search Engines

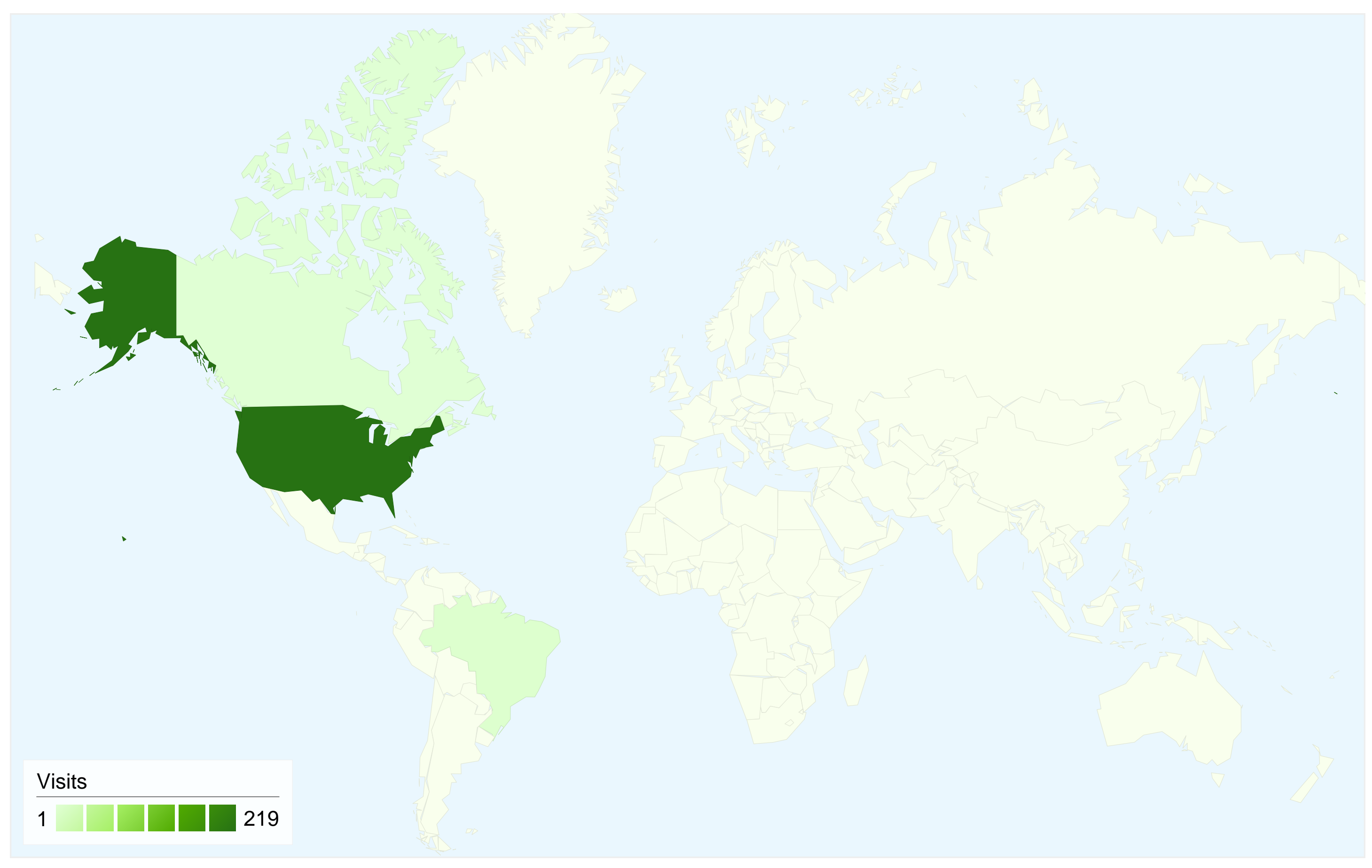
Direct Traffic
93.00 (41.33%)
Referring Sites
71.00 (31.56%)
Search Engines
61.00 (27.11%)

Top Traffic Sources

Sources	Visits	% visits
(direct) ((none))	93	41.33%
google (organic)	55	24.44%
courts.oregon.gov (referral)	25	11.11%
oregonlegalresearch.blogspot.c	19	8.44%
counciloncourtprocedures.org	6	2.67%

Keywords	Visits	% visits
(not set)	19	31.15%
oregon council on court	16	26.23%
council on court procedures	9	14.75%
council court procedures	3	4.92%
council on court procedures	3	4.92%

Map Overlay



225 visits came from 3 countries/territories

Site Usage

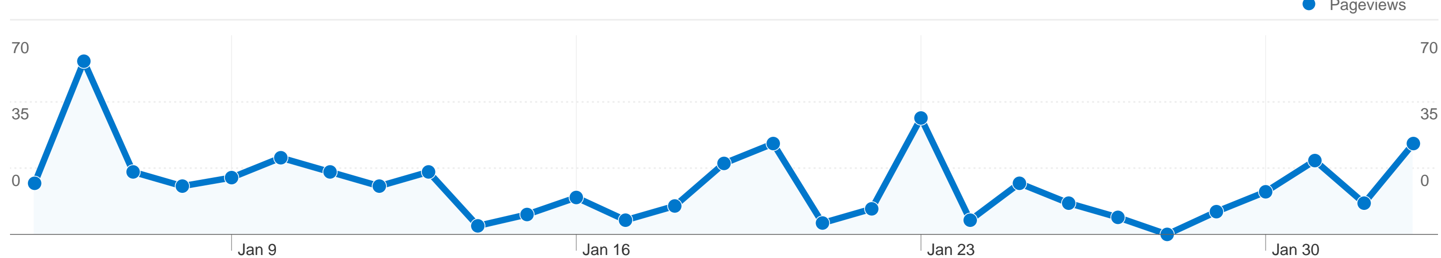
Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
225	2.25	00:02:28	62.67%	54.67%
% of Site Total: 100.00%	Site Avg: 2.25 (0.00%)	Site Avg: 00:02:28 (0.00%)	Site Avg: 62.67% (0.00%)	Site Avg: 54.67% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	219	2.29	00:02:32	63.93%	53.42%
Brazil	5	1.00	00:00:00	0.00%	100.00%
Canada	1	1.00	00:00:00	100.00%	100.00%

1 - 3 of 3

Content Overview

Jan 5, 2012 - Feb 2, 2012
Comparing to: Site



Pages on this site were viewed a total of 507 times

507 Pageviews

372 Unique Views

54.67% Bounce Rate

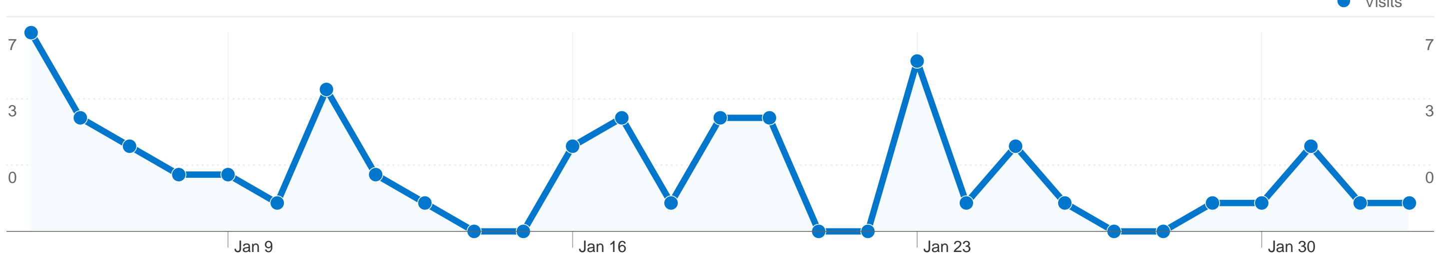
Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	190	37.48%
/~ccp/Past_Biennia.htm	98	19.33%
/~ccp/Current_Biennium.htm	53	10.45%
/~ccp/contact.htm	52	10.26%
/~ccp/LegislativeHistoryofRules.htm	39	7.69%

www.lclark.edu/~ccp

Keywords

Jan 5, 2012 - Feb 2, 2012
Comparing to: Site



Search sent 61 total visits via 14 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
61 % of Site Total: 27.11%	3.31 Site Avg: 2.25 (46.96%)	00:04:57 Site Avg: 00:02:28 (101.19%)	37.70% Site Avg: 62.67% (-39.83%)	31.15% Site Avg: 54.67% (-43.02%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
(not set)	19	2.68	00:03:43	26.32%	31.58%
oregon council on court procedures	16	4.88	00:11:15	37.50%	18.75%
council on court procedures	9	3.00	00:02:02	33.33%	33.33%
council court procedures	3	5.67	00:02:24	33.33%	0.00%
council on court procedures oregon	3	2.00	00:00:22	0.00%	66.67%
oregon council court procedures	3	2.67	00:04:58	66.67%	33.33%
council for court procedures	1	2.00	00:00:03	0.00%	0.00%
council of court procedures oregon	1	3.00	00:00:33	100.00%	0.00%
history of court procedures	1	1.00	00:00:00	100.00%	100.00%
legislative history research orcp ccp	1	1.00	00:00:00	0.00%	100.00%
lewis and clark counsel on court procedures	1	1.00	00:00:00	100.00%	100.00%
lewis and clark orcp	1	1.00	00:00:00	100.00%	100.00%
oregon council on court procedure	1	2.00	00:00:08	100.00%	0.00%
oregon council on court proceedures	1	4.00	00:08:53	100.00%	0.00%

1 - 14 of 14

Minutes
Subcommittee on Rule 19 B
Judge Jerry Hodson, Kristen David, Maureen Leonard (chair)
January 24, 2012

1. Compulsory counterclaims

The committee reviewed council discussion in November & December. The committee requests a full council discussion at the February meeting on the question:

Question: should we have compulsory counterclaims under ORCP 19B?

Some ideas have already been expressed:

Pros: treats plaintiffs and defendants the same in requirement to bring all claims

Concerns:

- defense coverage issues in attorney negligence (and other?) claims
- substantive vs procedural – implications for statutory rights, timelines?
- it looks like we are federalizing

If the council decides to pursue this change, the subcommittee recommends a survey to the bar to solicit support, interest, concerns about a change.

2. Res judicata

The subcommittee proposes a language change to modernize:

Replace “res judicata” with “claim preclusion and issue preclusion.”

Subcommittee members are checking further to see if there is some meaning of res judicata broader than claim preclusion. The intent is not to change the existing rule but simply to update language. We recommend that the legislative history reflect this intent.

RESPONSIVE PLEADINGS

RULE 19

A Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all the allegations except such designated allegations or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all of the allegations of the preceding pleading, the pleader may do so by general denial of all allegations of the preceding pleading subject to the obligations set forth in Rule 17.

B Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, [*res judicata,*] **claim preclusion and issue preclusion,** statute of frauds, statute of limitations, unconstitutionality, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

C Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

1 **DEPOSITIONS UPON ORAL EXAMINATION**

2 **RULE 39**

3 *****

4 **C Notice of examination.**

5 **C(1) General requirements.** A party desiring to take the deposition of any person upon oral
6 examination shall give reasonable notice in writing to every other party to the action. The notice
7 shall state the time and place for taking the deposition and the name and address of each person
8 to be examined, if known, and, if the name is not known, a general description sufficient to identify
9 such person or the particular class or group to which such person belongs. If a subpoena duces
10 tecum is to be served on the person to be examined, the designation of the materials to be
11 produced as set forth in the subpoena shall be attached to or included in the notice.

12 **C(2) Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if
13 the notice (a) states that the person to be examined is about to go out of the state, or is bound on a
14 voyage to sea, and will be unavailable for examination unless the deposition is taken before the
15 expiration of the period of time specified in Rule 7 to appear and answer after service of summons
16 on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall
17 sign the notice, and such signature constitutes a certification by the attorney that to the best of
18 such attorney's knowledge, information, and belief the statement and supporting facts are true.

19 If a party shows that when served with notice under this subsection, the party was unable
20 through the exercise of diligence to obtain counsel to represent such party at the taking of the
21 deposition, the deposition may not be used against such party.

22 **C(3) Shorter or longer time.** The court may for cause shown enlarge or shorten the time for
23 taking the deposition.

24 **C(4) Non-stenographic recording.** The notice of deposition required under subsection (1) of
25 this section may provide that the testimony be recorded by other than stenographic means, in
26 which event the notice shall designate the manner of recording and preserving the deposition. A

court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall <u>**provide reasonable advance notice of no less than twenty-four (24) hours before the scheduled deposition, absent good cause or agreement of the parties and the deponent,**</u> [*designate*] <u>**designating**</u> one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and [*shall set*] <u>**setting**</u> forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) Deposition by telephone. Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the

1 party taking the deposition.

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1 **PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS**

2 **RULE 44**

3 **A Order for examination.** When the mental or physical condition or the blood relationship
4 of a party, or of an agent, employee, or person in the custody or under the legal control of a party
5 (including the spouse of a party in an action to recover for injury to the spouse), is in controversy,
6 the court may order the party to submit to a physical or mental examination by a physician or a
7 mental examination by a psychologist or to produce for examination the person in such party's
8 custody or legal control. The order may be made only on motion for good cause shown and upon
9 notice to the person to be examined and to all parties and shall specify the time, place, manner,
10 conditions, and scope of the examination and the person or persons by whom it is to be made.

11 **B Report of examining physician or psychologist.** If requested by the party against whom
12 an order is made under section A of this rule or the person examined, the party causing the
13 examination to be made shall deliver to the requesting person or party a copy of a detailed report
14 of the examining physician or psychologist setting out such physician's or psychologist's findings,
15 including results of all tests made, diagnoses and conclusions, together with like reports of all
16 earlier examinations of the same condition. After delivery the party causing the examination shall
17 be entitled upon request to receive from the party against whom the order is made a like report of
18 any examination, previously or thereafter made, of the same condition, unless, in the case of a
19 report of examination of a person not a party, the party shows inability to obtain it. This section
20 applies to examinations made by agreement of the parties, unless the agreement expressly
21 provides otherwise.

22 **C Reports of examinations; claims for damages for injuries.** In a civil action where a claim is
23 made for damages for injuries to the party or to a person in the custody or under the legal control
24 of a party, upon the request of the party against whom the claim is pending, the claimant shall
25 deliver to the requesting party a copy of all written reports and existing notations of any
26 examinations relating to injuries for which recovery is sought unless the claimant shows inability to

comply. **The phrase "relating to injuries for which recovery is sought" shall be construed to include information relevant to the claims made or likely to lead to the discovery of information relevant to claims made.**

D Report; effect of failure to comply.

D(1) Preparation of written report. If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

D(2) Failure to comply or make report or request report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E Access to individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

1 **SUBPOENA**

2 **RULE 55**

3 *****

4 **H Individually identifiable health information.**

5 **H(1) Definitions.** As used in this rule, the terms "individually identifiable health
6 information" and "qualified protective order" are defined as follows:

7 H(1)(a) "Individually identifiable health information" means information which identifies an
8 individual or which could be used to identify an individual; which has been collected from an
9 individual and created or received by a health care provider, health plan, employer, or health care
10 clearinghouse; and which relates to the past, present or future physical or mental health or
11 condition of an individual; the provision of health care to an individual; or the past, present, or
12 future payment for the provision of health care to an individual.

13 H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the
14 parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually
15 identifiable health information for any purpose other than the litigation for which such information
16 was requested and which requires the return to the original custodian of such information or
17 destruction of the individually identifiable health information (including all copies made) at the end
18 of the litigation.

19 **H(2) Mode of Compliance.** Individually identifiable health information may be obtained by
20 subpoena only as provided in this section. However, if disclosure of any requested records is
21 restricted or otherwise limited by state or federal law, then the protected records shall not be
22 disclosed in response to the subpoena unless the requesting party has complied with the applicable
23 law.

24 H(2)(a) The attorney for the party issuing a subpoena requesting production of individually
25 identifiable health information must serve the custodian or other keeper of such information either
26 with a qualified protective order or with an affidavit or declaration together with attached

1 supporting documentation demonstrating that:

2 **<u>H(2)(a)</u>**(i) the party has made a good faith attempt to provide written notice to the

3 individual or the individual's attorney that the individual or the attorney had 14 days from the date

4 of the notice to object;

5 **<u>H(2)(a)</u>**(ii) the notice included the proposed subpoena and sufficient information about the

6 litigation in which the individually identifiable health information was being requested to permit

7 the individual or the individual's attorney to object; **<u>and</u>**

8 **<u>H(2)(a)</u>**(iii) the individual did not object within the 14 days or, if objections were made, they

9 were resolved and the information being sought is consistent with such resolution. The party

10 issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient

11 or the patient's representative to inspect and copy the records received.

12 **<u>H(2)(b) Within 14 days from the issuance of a notice requesting individually identifiable</u>**

13 **<u>health information, the party objecting to any such request shall respond in writing to the party</u>**

14 **<u>issuing the subpoena, specifying in detail the grounds for each objection.</u>**

15 H(2)[*(b)*]**<u>(c)</u>** Except as provided in subsection (4) of this section, when a subpoena is served

16 upon a custodian of individually identifiable health information in an action in which the entity or

17 person is not a party, and the subpoena requires the production of all or part of the records of the

18 entity or person relating to the care or treatment of an individual, it is sufficient compliance

19 therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records

20 responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by

21 an affidavit or a declaration as described in subsection (3) of this section.

22 H(2)[*(c)*]**<u>(d)</u>** The copy of the records shall be separately enclosed in a sealed envelope or

23 wrapper on which the title and number of the action, name of the witness, and date of the

24 subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer

25 envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: [*(i)*]

26 if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if

1 there is no clerk; [*(ii)*] if the subpoena directs attendance at a deposition or other hearing, to the
2 officer administering the oath for the deposition, at the place designated in the subpoena for the
3 taking of the deposition or at the officer's place of business; [*(iii)*] in other cases involving a hearing,
4 to the officer or body conducting the hearing at the official place of business; [*(iv)*] if no hearing is
5 scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the
6 records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed subpoena shall
7 be served on the person whose records are sought and on all other parties to the litigation, not less
8 than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding
9 may inspect the records provided and/or request a complete copy of the records. Upon request,
10 the records must be promptly provided by the party who issued the subpoena at the requesting
11 party's expense.

12 H(2)[*(d)*]**(e)** After filing and after giving reasonable notice in writing to all parties who have
13 appeared of the time and place of inspection, the copy of the records may be inspected by any
14 party or the attorney of record of a party in the presence of the custodian of the court files, but
15 otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other
16 hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall
17 be opened in the presence of all parties who have appeared in person or by counsel at the trial,
18 deposition, or hearing. Records which are not introduced in evidence or required as part of the
19 record shall be returned to the custodian of hospital records who submitted them.

20 H(2)[*(e)*]**<u>(f)</u>** For purposes of this section, the subpoena duces tecum to the custodian of the
21 records may be served by first class mail. Service of subpoena by mail under this section shall not
22 be subject to the requirements of subsection (3) of section D.

23 **H(3) Affidavit or declaration of custodian of records.**

24 H(3)(a) The records described in subsection (2) of this section shall be accompanied by the
25 affidavit or declaration of a custodian of the records, stating in substance each of the following:

26 **<u>H(3)(a)</u>**(i) that the affiant or declarant is a duly authorized custodian of the records and has

authority to certify records;

H(3)(a)(ii) that the copy is a true copy of all the records responsive to the subpoena; **and**

H(3)(a)(iii) that the records were prepared by the personnel of the entity or person acting under the control of either, in the ordinary course of the entity's or person's business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the entity or person has none of the records described in the subpoena, or only a part thereof, the affiant or declarant shall so state in the affidavit or declaration and shall send only those records of which the affiant or declarant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit or declaration, more than one affidavit or declaration may be used.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of records and the production of original records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

H(6) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

Meeting ORCP 59H subcommittee
Minutes
February 2, 2012

Present: Jay Beattie
Rex Armstrong
Maureen Leonard (chair)

The committee is still working on language for the last sentence for ORCP 59H(1). It may also rework (2) about the "notation of exception." We are still working on language to give a clear rule, not create a new trap for practitioners, and resolve the needs of the Court of Appeals and practitioners

Jay and Maureen in agreement in principle:
1-trial court should have flexibility about timing;
2-parties should be able to incorporate prior objections without more detail a second time
3-equivocal about having to re-identifying prior objections at exception stage

1 **ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS**

2 **RULE 68**

3 **A Definitions.** As used in this rule:

4 **A(1) Attorney fees.** "Attorney fees" are the reasonable value of legal services related to

5 the prosecution or defense of an action.

6 **A(2) Costs and disbursements.** "Costs and disbursements" are reasonable and

7 necessary expenses incurred in the prosecution or defense of an action other than for legal

8 services, and include the fees of officers and witnesses; the expense of publication of

9 summonses or notices, and the postage where the same are served by mail; any fee charged by

10 the Department of Transportation for providing address information concerning a party served

11 with summons pursuant to subparagraph D(4)(a)(i) of Rule 7; the compensation of referees; the

12 expense of copying of any public record, book, or document admitted into evidence at trial;

13 recordation of any document where recordation is required to give notice of the creation,

14 modification or termination of an interest in real property; a reasonable sum paid a person for

15 executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any

16 other expense specifically allowed by agreement, by these rules, or by other rule or statute.

17 The court, acting in its sole discretion, may allow as costs reasonable expenses incurred by a

18 party for interpreter services. The expense of taking depositions shall not be allowed, even

19 though the depositions are used at trial, except as otherwise provided by rule or statute.

20 **B Allowance of costs and disbursements.** In any action, costs and disbursements shall

21 be allowed to the prevailing party, unless these rules or other rule or statute direct that in the

22 particular case costs and disbursements shall not be allowed to the prevailing party or shall be

23 allowed to some other party, or unless the court otherwise directs. If, under a special provision

24 of these rules or any other rule or statute, a party has a right to recover costs, such party shall

25 also have a right to recover disbursements.

26 **C Award of and entry of judgment for attorney fees and costs and disbursements.**

1 **C(1) Application of this section to award of attorney fees.** Notwithstanding Rule 1 A
2 and the procedure provided in any rule or statute permitting recovery of attorney fees in a
3 particular case, this section governs the pleading, proof and award of attorney fees in all cases,
4 regardless of the source of the right to recovery of such fees, except when:
5 C(1)(a) Such items are claimed as damages arising prior to the action; or
6 C(1)(b) Such items are granted by order, rather than entered as part of a judgment.
7 **C(2)(a) Alleging right to attorney fees.** A party seeking attorney fees shall allege the
8 facts, statute or rule that provides a basis for the award of such fees in a pleading filed by that
9 party. Attorney fees may be sought before the substantive right to recover such fees accrues.
10 No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in
11 this subsection.
12 C(2)(b) If a party does not file a pleading [*and seeks judgment or dismissal by motion*]
13 **<u>but instead files a motion or response to a motion</u>**, a right to attorney fees shall be alleged in
14 such motion **<u>or response</u>**, in similar form to the allegations required in a pleading.
15 C(2)(c) A party shall not be required to allege a right to a specific amount of attorney
16 fees. An allegation that a party is entitled to "reasonable attorney fees" is sufficient.
17 C(2)(d) Any allegation of a right to attorney fees in a pleading or motion shall be deemed
18 denied and no responsive pleading shall be necessary. The opposing party may make a motion
19 to strike the allegation or to make the allegation more definite and certain. Any objections to
20 the form or specificity of allegation of the facts, statute or rule that provides a basis for the
21 award of fees shall be waived if not alleged prior to trial or hearing.
22 **C(3) Proof.** The items of attorney fees and costs and disbursements shall be submitted
23 in the manner provided by subsection (4) of this section, without proof being offered during the
24 trial.
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C(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections **and supporting documents, if any,** shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. [*Statements and objections may be amended in accordance with Rule 23.*] **The objecting party may present affidavits, declarations and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.**

C(4)(c) Response to Objections. The party seeking an award of attorney fees may file a response to an objection filed pursuant to ORCP C(4)(b). The response and supporting documents, if any, shall be served within 7 days after service of the objection. The response shall be specific and may address issues of law or fact. The party seeking attorney fees may present affidavits, declarations and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

1 **C(4)(d) Amendments. Statements and objections may be amended or supplemented**
2 **in accordance with Rule 23.**
3 **C(4)*[(c)]*(e) Hearing on objections. No hearing shall be held and the court may rule on**
4 **the request of attorney fees based upon the application, objection, response and any**
5 **affidavits or declarations filed therewith unless a party has requested a hearing in the caption**
6 **of the objection or response.**
7 [*C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule],*
8 **C(4)(e)(i) If a hearing is requested the** court, without a jury, shall hear and determine
9 all issues of law and fact raised by [*the statement of attorney fees or costs and disbursements*
10 *and by]* the objection*[s].* The parties shall be given a reasonable opportunity to present
11 affidavits, declarations and other evidence relevant to any factual issue, including any factors
12 that ORS 20.075 or any other statute or rule requires or permits the court to consider in
13 awarding or denying attorney fees or costs and disbursements.
14 **C(4)[*(c)*](e)(ii)** The court shall deny or award in whole or in part the amounts sought as
15 attorney fees or costs and disbursements.
16 **C(4)[*(d)*](f) No timely objections.** If objections are not timely filed the court may award
17 attorney fees or costs and disbursements sought in the statement.
18 **C(4) *[(e)]*(g) Findings and conclusions.** On the request of a party, the court shall make
19 special findings of fact and state its conclusions of law on the record regarding the issues
20 material to the award or denial of attorney fees. A party shall make a request pursuant to this
21 paragraph by including a request for findings and conclusions in the title of the statement of
22 attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of
23 this subsection. In the absence of a request under this paragraph, the court may make either
24 general or special findings of fact and may state its conclusions of law regarding attorney fees.
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26 /////

C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. If all issues regarding attorney fees or costs and disbursements are decided before entry of a judgment pursuant to Rule 67, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. If any issue regarding attorney fees or costs and disbursements is not decided before entry of a general judgment, any award or denial of attorney fees or costs and disbursements shall be made by supplemental judgment.

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) Separate judgments for separate claims. If more than one judgment is entered in an action, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in those judgments.

C(6)(b) Separate judgments for the same claim. If more than one judgment is entered for the same claim (when separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or when pursuant to Rule 67 B separate limited judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each judgment as provided in this rule, but satisfaction of one judgment bars recovery of attorney fees or costs and disbursements included in all other judgments.