MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 5, 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*
Jay W. Beattie
Arwen Bird*
Michael Brian*
Brooks F. Cooper
Jennifer L. Gates
Hon. Timothy C. Gerking*
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Robert M. Keating
Hon. Rives Kistler
Hon. Eve L. Miller
Leslie W. O'Leary
Mark R. Weaver*
Hon. Locke A. Williams*

*Appeared by teleconference

Members Absent:

Eugene H. Buckle
Brian S. Campf
Kristen S. David
Hon. Robert D. Herndon
Maureen Leonard
Hon. David F. Rees
Hon. Charles M. Zennaché

Guests:

Heather Blackbird
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 17 • ORCP 27 • ORCP 54 A	• 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		• ORCP 7 • ORCP 45

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:32 a.m.

II. Introduction of Guests

Mr. Cooper introduced Heather Blackbird, who sits with him on the board of the Trillium Charter School, who was attending to observe the Council's meeting procedures.

III. Approval of April 14, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft April 14, 2012, minutes (Appendix A) which had been previously circulated to the members. A motion was made to approve the minutes, the motion was seconded, a voice vote was taken, and the minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson informed the Council that, due to continuing technical difficulties with Google Analytics, she was again unable to complete a website report.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson stated that, within two weeks of the prior Council meeting, he had sent to Council members draft language to be modified and sent to their legislator contacts. He reported that he will prepare another draft within about two weeks of the current meeting.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

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

Mr. Cooper reminded the Council that this committee gave its final report at the last Council meeting. This item will be removed from the agenda in the future.

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

Ms. O'Leary stated that the committee had Inserted the language that Council members had recommended at the last meeting (Appendix B). She observed that the language is more generic and that it appears to be harmless in terms of any negative impact on any other rule. Mr. Beattie noted, however, that he sees a similar issue to that presented in the earlier draft – namely, that the language, "the form of signature for filings may be electronic" still does not make sense to

him. He suggested language such as, “the signature may be in the form approved for electronic filing.” Mr. Bachofner stated that he likes that language. He noted that the federal district court in Washington made a recent rule change which states that any name that appears below the signature line must appear with “/s” above that line or the pleading can be rejected. He observed that the reason is to make it clear that anyone listed under the signature line is subject to sanctions if the pleading is improperly executed, and wondered whether this is something the Council should consider. Mr. Bachofner stated that he is not advocating for such an inclusion in Rule 17 but, rather, merely raising the issue.

Mr. Cooper stated that this is a good point and that, if two attorneys are co-counsel on a case, and one signs a pleading with a sanctionable item in it, it is a fair question whether the co-counsel could be sanctioned. Ms. O’Leary stated that, under the federal rules, one signer must seek permission from any other co-signer before signing, and that is the way that problem is resolved. She noted that, in Oregon, the signature denotes a swearing under Rule 17 A that the pleading passes muster. Ms. O’Leary observed that the language regarding “these rules and any other rules of court” likely already addresses the problem because it requires that all appropriate rules be followed. She also noted that this insertion is permissive, rather than mandatory, and that, if there is a problem, an attorney is not bound to do something the court does not want. Mr. Bachofner reiterated that, in Oregon, many times only one person signs the pleading, even if there are multiple names below signature line. Mr. Cooper stated that his sense is that attorneys spend a lot more time dealing with this kind of situation in federal court than in state court. He did not foresee a large problem with corollary litigation over who could be sanctioned, the “/s,” or all attorneys whose names are printed on the pleading or document.

Prof. Peterson noted that he likes the fact that Rule 17 indicates that one attorney signing binds them all, but noted that Uniform Trial Court Rule (UTCR) 2.010 does have a provision for a trial attorney to sign a pleading if that is someone different than the author, and wondered whether this is something which the Council should consider. Ms. O’Leary reminded the Council that there was a lengthy discussion at the last meeting where members were concerned about citing to specific UTCR in the ORCP, and that this is what led to the broader language. Mr. Cooper suggested the following language: "the form of signature for filings may be in the form approved for electronic filing in accordance with these rules or any other rules of court." Prof. Peterson suggested moving that sentence so that it is the next-to-last sentence in the paragraph. Mr. Bachofner suggested making those changes and putting the draft amendment on the agenda for voting at the September meeting. Ms. Nilsson stated that she will make those changes and put the draft on the agenda for September.

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

Mr. Cooper presented his committee's latest draft amendment to ORCP 27 (Appendix C). He noted that this rewrite of the rule changes the method of appointing a guardian ad litem (GAL) by presuming that notice is required; by providing a mechanism for notice and for a hearing; and by providing that the court has a means to waive or modify the notice requirement when circumstances warrant such waiver or modification. He noted that he had imported the class of persons and entities who are required to receive notice from Chapter 125 of the Oregon Revised Statutes (ORS), and wondered whether it is necessary to include this broad of a list in ORCP 27. Mr. Cooper stated that notice to entities such as the Department of Human Services and the Veterans' Administration are included in the ORS because a conservator, once appointed, will be able to control expenditures of government-supplied funds, and the government wants to have a say in the qualifications of the person being appointed. He observed that, if ORCP 27 is only dealing with a single piece of civil litigation on the plaintiff or defense side, he is not certain such a broad list is necessary for notice.

Judge Miller asked whether Mr. Cooper was only considering removing entities which have a financial interest. Mr. Cooper stated that he would consider removing Veterans' Affairs, the Department of Human Services, the Oregon Health Authority, the Department of Corrections, and the Attorney General. He stated that these appointments are limited and that, if a plaintiff is successful in his or her case, these entities will receive notice from the conservatorship. Judge Miller asked whether there is always a conservatorship involved. Mr. Cooper stated that there is not. Judge Miller asked how an entity would receive notice if there was a tort claim with the protected person receiving a judgment. Judge Herndon replied that a conservatorship would need to be created at that point in order to settle the case. Mr. Cooper noted that there are a number of practitioners who believe that a GAL in that status has the authority to settle a case and to receive settlement funds. He believes that this is clearly incorrect because, once the case is dismissed on settlement, the GAL is outside of the court's control. He observed that Section H makes explicit that a GAL cannot settle the case, and pointed out that, if funds are to be received, the ORS 126.725 procedure for a small minor settlement must be used or a conservatorship must be opened.

Judge Miller asked whether Mr. Cooper was considering just taking out notice to government agencies, or also to people who have been giving financial support to the protected person. Mr. Cooper stated that he would like to discuss this further. He noted that, if a plaintiff brings a successful tort claim, there will be a conservatorship established, even if these entities do not receive notice but, if a plaintiff loses, the protected person is subject at least to the defendant's costs and, possibly, attorney fees. Mr. Cooper posited that it might be helpful for these entities to receive notice in the latter case, so that one or more could express concern that the protected person does not have enough funds to risk filing a court case. He also stated that, if the protected party is a defendant, the source of

the funds that would go to pay a judgment if the case were lost would likely want to have a hand in knowing who is representing the protected person's interests and which lawyer has been retained. Judge Miller stated that she has had cases where Medicare has come in at the last minute, during the settlement process, sometimes taking a long time to decide about releasing a lien and making the case very difficult to settle. She noted that she was uncertain whether these agencies would act more quickly if they received notice at the front end of the case. Mr. Keating stated that, from the defense perspective, the participation of Medicare is hugely functioning as an impediment. He stated that he routinely sends requests for production asking for all of the necessary information because the Medicare Secondary Payer Act now requires him to give notice and to access these entities' information, which informs him how much money has already been paid out. He stated that he has experienced a great deal of reluctance from his colleagues on the plaintiffs' side to do anything along that line and that, if Medicare were aware of the case earlier, it may not take as long to reach settlement. Mr. Beattie pointed out that this is not a Rule 27 problem but, rather, is inherent in any case where the Medicare system is involved.

Mr. Cooper observed that, if the movant were required to notify these agencies on the front end, and if the defense were to send a request for production seeking the lien data, those two things should prod the less proactive practitioners on the plaintiff's side to hopefully involve the agencies earlier, so time is not being wasted in settlement conference. He stated that, on balance, leaving these agencies in seems to be a small burden for the movant and potentially produces a benefit. Mr. Keating agreed. Judge Miller stated that it seems like the only burden being placed on the moving party is to duplicate some paperwork and put postage on it. Judge Herndon observed that he is not certain that giving notice will fix the problem and settle these cases, because the problem is dealing with bureaucracies. He raised the scenario where a plaintiff's lawyer did not properly notify someone and a GAL gets appointed anyway, and stated that he can imagine the defense bar coming in after the statute of limitations has run, even if the case is dismissed, because the GAL did not have authority to bring the action. As a probate judge, Judge Herndon was concerned at having another can of worms to deal with but noted that, if the rule is made too complicated, it may cause other problems.

Mr. Keating observed that the rule basically allows those problems to be fixed later and protects against the statute. Mr. Cooper stated that the language in Section G does not restrain the discretion of the bench, and that a judge may have latitude to say that forgetting to give notice to one entity is not a problem. Judge Miller stated that she appreciates that judges have discretion and noted that, with the "relation back" statute, there are ways to fix problems without creating a statute of limitations bar. Mr. Cooper stated that the substantive right belongs to the protected person and, if the only defect is in the appointment of a nominated

fiduciary, he would hope that the bench would not use that procedural lapse to deny a substantive right. He stated that the problem sometimes occurs in conservatorships where someone is appointed and notice is not perfect, but that such cases are always able to be dealt with. Judge Miller wondered about how much more litigation it may cause when notice is given to that many people and entities and there are contested hearings. Mr. Cooper stated that he has tried cases under the existing rule where there is a fractured family, and that this is a fight that will get fought anyway. Judge Holland stated that there are times where motions are made to allow the procedure without giving notice, and that it is warranted in extreme cases. She stated that there is a way to deal with this type of situation, in regard to governmental agencies, and that this has not caused more litigation in her experience. Mr. Cooper pointed out that this procedure is built into Section G and is at the court's discretion.

Judge Herndon observed that the amendment would create a little more work for court clerks who already have more work to do now than hours in which to do it, but stated that he believes that it is a change which needs to be made. He anticipated that there may be many representatives from the plaintiff's bar at the December Council meeting. Ms. O'Leary stated that she does not see why early notice is a bad thing, if the judge's intervention is needed. Judges Herndon, Holland, and Miller stated that they were in favor of presenting this rule, as written, for vote at the September meeting. Prof. Peterson stated that the rule as amended is not overly long, and that it is a good idea to tell the practitioner the procedure in the rule. He stated that the rule needed to be formatted correctly, and suggested having it put into proper format and brought back for review at the June meeting. Mr. Keating asked whether the intent was to eliminate the entities discussed earlier from the draft, or to leave them in. Mr. Cooper stated that he had brought this up as a point of discussion and, after the Council's discussion, felt comfortable leaving the draft in its present form. Mr. Keating wondered whether the Council could make it clear that, if a court-appointed GAL initiates the litigation, no subsequent challenge to that appointment would be a basis for asserting a statute of limitations defense. Judge Miller stated that she believed that this would be a substantive change. Mr. Cooper stated that he also believed that this would need to be a statutory change. He stated that this item will be left on the agenda for June so that the formatted rule can be reviewed, and asked that anyone with suggestions for changes contact him.

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

Mr. Keating reminded the Council that the committee had submitted its final draft amendments to ORCP 44, 55, and 46 for a vote at the September meeting. The committee had nothing further to report at this time.

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

Mr. Keating reminded the Council that Ms. David intended to draft a letter for Prof. Peterson to send to various associations such as the Oregon Law Institute, Oregon Association of Trial Lawyers, and the Oregon Association of Defense Counsel suggesting that they might be interested in developing seminars about best practices for summary judgment. This item will be removed from the agenda in the future.

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

Prof. Peterson stated that he, Mr. Weaver, and Justice Kistler had a teleconference. Mr. Campf and Judge Gerking were unable to participate. Prof. Peterson noted that ORCP 54 A allows a plaintiff to dismiss a claim one time without prejudice. He stated that there have been instances where, on the day of summary judgment arguments, the plaintiff dismissed the case without prejudice, the trial judge said "that is not fair" and ultimately dismissed the case with prejudice, and the trial judge was later reversed. Prof. Peterson observed that Rule 54 reflects an opportunity for a plaintiff to abort a case once without prejudice, even after the judge rules in favor of summary judgment but before an order or judgment of dismissal is actually entered. He stated that this is also true under Rule 21 motions to dismiss. He noted that it was apparently very contentious when the original Council adopted Rule 54 but that, when it came down to the final decision, it was passed unanimously. He stated that the *Guerin* opinion says that it was a policy choice by the Council, and noted that Mr. Weaver had remarked that it was a policy choice that had also been made by the legislature earlier. Prof. Peterson stated that Mr. Weaver's research showed that California allows plaintiffs to dismiss at any time before they rest, even during trial, and Washington allows dismissal right up until the trial begins. He noted that dismissal up until the trial was historically the Oregon legislative rule, but that the legislature amended the previous statute to change it to five days before trial.

Prof. Peterson stated that the committee's consensus was that the legislature made a decision, the original Council thought about it and chose to continue it. He observed that Oregon's rule is obviously different from the federal rule, which would not allow summary judgment to be escaped. He stated that the rule does give the plaintiff the opportunity to dismiss for any reason, including not liking the judge or even not liking how the judge sounds during summary judgment, but he noted that, with the statute of limitations, there is not a huge class of plaintiffs who will be in a position to take advantage of the opportunity. Prof. Peterson stated that there is also the problem with partial summary judgments, which Mr. Weaver said had been somewhat handled at the federal level, but he was not aware of whether a partial summary judgment precludes the opportunity to dismiss the case. Prof. Peterson stated that Mr. Weaver's final thought was that a plaintiff is still subject to costs, which are substantial in this day and age, so

perhaps that is a sufficient bar to such voluntary dismissals being used frivolously. Prof. Peterson pointed out that there have only been a handful of cases where this issue has been addressed by the appellate courts, and that it does not appear that abuses are rampant. He stated that, perhaps, this is just a place where Oregon is different from the federal system. He observed that states are all over the board on this issue, with no hard and fast rule. He noted that the Council can decide not to change the rule; poll OADC and OTLA to see what their thoughts are; or poll the entire bar if the Council really wants to find out if a large problem exists.

Mr. Cooper stated that, as a plaintiff's lawyer, he has employed ORCP 54 A very close to trial. He stated that in one case he found out about a vast class of discovery that the defendant had lied about and had denied existed, and that he chose to dismiss the case in order to have the time to get the necessary documents. He suggested keeping the rule the way it is, unless it is horribly abused. Judge Miller asked whether the bad faith rule in ORS 20.105 gives the judge the opportunity to compensate someone who is harmed by this practice if the dismissal was in bad faith. Mr. Cooper read the statute aloud and observed that the statute probably would not apply in this case. Mr. Bachofner suggested that perhaps the ability to award enhanced prevailing party fees under ORS 20.190 would help prevent abuse. He observed that those fees would need to be paid before the case could be re-filed. Mr. Beattie stated that, within five days of trial it is within the court's discretion to allow a dismissal and that, the way the rule is formulated, there is no authority to award costs. He suggested leaving the rule as is but vesting the court with the authority to award costs and fees. Mr. Cooper stated that this would allow costs beyond what is allowed in Rule 68 A, but suggested that there should perhaps be a cost associated with buying your way out of a case. It was suggested that, to the extent that there has been a cost incurred that can never be recovered, that cost should be recoverable. Mr. Cooper observed that there is some fear that this rule may be used by lawyers who are not ready for trial but stated that, if we assume that the plaintiff's lawyer was getting ready like the defense was, then the plaintiff has also incurred costs and it does not feel fair to punish them for exercising a right the rule gives them. Mr. Beattie stated that he has encountered this in federal court, and that judges are pretty fair and even-handed in awarding costs. Mr. Keating noted that he once had a state court judge who ordered a plaintiff to pay additional costs when the plaintiff dismissed late.

Prof. Peterson stated that the time increment may move from five to seven days next biennium if the Council chooses to change to seven day increments. He noted that trial costs start to ramp up more than seven days before the trial, but asked where the line should be drawn. Judge Williams suggested safeguarding against abuse of the dismissal rule by adding a rule to require that re-filing a case would require leave of court. Prof. Peterson stated that the current rule requires that costs be paid and that the new case be stayed until it can be proven that

costs have been paid. Mr. Cooper asked whether the committee should draft language for the Council to look at in June. Judge Gerking stated that he wanted to participate in the last meeting but was unable to, and would like to have another meeting to try to come up with language. Mr. Cooper and Mr. Beattie agreed to join the committee at its next meeting.

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

Ms. O'Leary reported that the committee has not had a chance to meet, but that it will do so before the June Council meeting.

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

Ms. Leonard was not present at the meeting. Judge Armstrong reported that the committee did not meet, but that he has drafted additional language and that the committee will go over it before the June meeting and bring the language to the Council at that time.

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

Ms. David was not present at the meeting. Prof. Peterson reported that the committee has not met since the last Council meeting, but that it will meet before the June meeting.

VI. New Business (Mr. Cooper)

There were no items of new business raised.

VII. Adjournment

Mr. Cooper adjourned the meeting at 10:41 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 14, 2012, 9:30 a.m.
University of Oregon School of Law, Lewis Lounge, 4th Floor
1515 Agate Street • Eugene OR 97403-1221

Members Present:

John R. Bachofner*
Jay W. Beattie*
Arwen Bird*
Michael Brian*
Eugene H. Buckle*
Brian S. Campf*
Brooks F. Cooper
Kristen S. David
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland
Robert M. Keating
Hon. Rives Kistler*
Leslie W. O'Leary
Mark R. Weaver*
Hon. Locke A. Williams
Hon. Charles M. Zennaché

*Appeared by teleconference

Members Absent:

Hon. Rex Armstrong
Hon. Robert D. Herndon
Maureen Leonard
Hon. Eve L. Miller
Hon. David F. Rees

Guests:

Susan Grabe, Oregon State Bar
Matt Klein, Titanium Legal Services

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 F, G • ORCP 17 A • ORCP 39 C(6) • ORCP 44 • ORCP 47 • ORCP 55 • ORCP 57 • 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		• ORCP 7 • ORCP 45

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:35 a.m.

II. Introduction of Guests

Mr. Cooper introduced Susan Grabe, Director of Public Affairs for the Oregon State Bar. She attended the meeting in place of David Nebel, who was unable to fulfill his usual role as Bar liaison to the Council for this particular meeting. The Council also welcomed Matt Klein of Titanium Legal Services, also a past president of the Oregon Association of Process Servers. Mr. Klein indicated that he is already on the Council's interested parties listserve and plans to attend Council meetings in the future to keep himself informed of the Council's work and to provide input where helpful.

III. Approval of March 10, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft March 10, 2012, minutes (Appendix A) which had been previously circulated to the members. A motion was made to approve the minutes, the motion was seconded, a voice vote was taken, and the minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson informed the Council that, due to technical difficulties with Google Analytics, she was unable to complete a website report.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson stated that, by end of the following week, he would have an e-mail prepared for Council members to send to their legislative contacts regarding the work of the Council. Prof. Peterson also noted that there was a brief article about the Council's work in the latest edition of the Oregon State Bar Public Affairs Newsletter, *Capitol Insider*.

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 reported that she had attended by telephone the most recent meeting of the E-Court Task Force and that the service provider for e-court is having some problems with setting up service, and that these technological problems are being worked through. She noted that, in November, the Chief Justice made an

emergency change to Chapter 21 of the Uniform Trial Court Rules [UTCR 21.100(1) and (2)] to address the fact that service would occur by electronic means in the e-court system, and that she suspects that another change will need to be made to this rule between now and this summer when e-court begins in Yamhill County. Ms. David stated that the Council should continue to monitor the situation and that, by the time of the September meeting, a slight change to the ORCP may be necessary.

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

Ms. O'Leary reminded the Council that she had proposed an amendment to ORCP 17 A to address the issue that some courts require an original signature on pleadings. She stated that this requirement puts a hardship on small firms when no lawyer is physically able to sign a pleading that needs to be filed that day because the attorney(s) is/are out of the office for court, depositions, etc. She noted that many courts do not require original signatures and that the requirement is not practical. Ms. O'Leary stated that it was brought to her attention during Council meetings that the e-court system will be rolled out this summer and that, by the time any rule change would take effect, e-court will be widespread. She stated that the UTCR already provide for electronic signatures, and that her committee thought that the Council could simply propose an amendment to make Rule 17 consistent with the UTCR. She noted that the language in the proposed amendment refers specifically to UTCR 21.090(2) rather than citing language from the UTCR itself. Ms. O'Leary pointed out that the committee's concern with cutting and pasting language from the UTCR was that, if the UTCR were to be amended in the future, the ORCP would need to be changed as well.

Ms. O'Leary stated that Judge Holland and Judge Miller had sought feedback from their colleagues and had not heard much objection other than the fact that the UTCR should not be cited in the ORCP. Prof. Peterson observed that Rule 17 does not specifically require an original signature, only a signature that does not need to be verified. He stated that it is his understanding that some Lane County judges have required original ink signatures. Mr. Cooper stated that the Multnomah County Probate Court also requires original ink signatures, and Ms. O'Leary stated that the Multnomah County clerks are also interpreting the rule to require original ink signatures. Ms. Grabe observed that it might be a good idea to communicate with Lisa Norris-Lampe on the Judicial Department's staff, who has been helping to craft the rules on e-court. She stated that everyone will have to have the ability to e-file and will have an e-signature and that, no matter what the current practice may be, it will ultimately have to change. Ms. O'Leary stated that she has been in contact with the State Court Administrator's office, and the feedback was that it would make more sense to refer to the UTCR instead of trying to try to make sure the language of Rule 17 tracks verbatim. Judge Gerking stated that he is reluctant to make reference to a specific UTCR because they are subject to change, and suggested using language such as, "in accordance with the UTCR," rather than

referencing a specific UTCR.

Ms. David suggested that a different way to solve the issue may be to make a broad-brush rule change in ORCP 1 to deal with the electronic issues. Judge Zennaché asked what the language "the form of signature for conventional filings can be electronic" means. Mr. Cooper stated that, in federal court, it is accepted that "s/" followed by the filer's name on the signature line constitutes an electronic signature. Judge Zennaché stated that this is not an electronic signature; an electronic signature means that the document is being filed electronically by using a password, and UTCR 21.090 also states that the use of the filer's login constitutes the signature. Mr. Cooper noted that many in federal court will not accept a document electronically filed that does not have the "s/Name" included. Judge Zennaché asked for clarification on what the amendment means by a conventional filing can have an electronic signature – whether a paper copy can be filed with no signature but, rather, "s/Name" or a signature that has been scanned in or stamped? Mr. Cooper stated that, in his experience, the Court of Appeals' electronic filing system has required that a signature be scanned in rather than using "s/Name." Ms. David stated that she has had the opposite experience. Judge Zennaché observed that the issue is trying to solve a problem for people who are not electronically filing, not for people who are logging in and filing electronically. He asked for clarification of the term "conventional filings." Ms. O'Leary stated that conventional filings are pleadings and motions.

Judge Zennaché asked whether this term applies to electronically filed documents or to documents that an attorney walks in and hands to a clerk. Justice Kistler stated that "conventional filing" is defined in the UTCR to mean a paper filing. Mr. Cooper asked whether the word "conventional" should be removed from the amendment. He noted that, since something called a signature is still required, he can envision problems arising from an attorney claiming not to have been served since the document only contained "s/Name" and not a true signature. Mr. Cooper stated that, to the extent we can avoid that confusion, we should.

Judge Holland asked whether ORCP 1 can deal with all of this in terms of an overview or whether it must be handled in ORCP 17. Mr. Cooper stated that the purpose of Rule 17 is to hold a human being accountable for the pleading. Ms. O'Leary expressed concern that, when someone is looking through the rule book to see how to get things done, they may not look at Rule 1. Judge Holland observed that attorneys should know better than to only look at one rule. Judge Williams asked whether the term "s/" is defined somewhere. No Council member thought so. Mr. Cooper stated that the way that the problem of accountability has been solved in the federal courts is that each filer has a login and password, and the filer is in control of who has that information and uses it. Mr. Campf stated that "s/" indicates that there is a signed document elsewhere and that federal court requires that an attorney sign such documents and keep them in his or her own files. Prof. Peterson asked whether "s/" indicates a conformed copy. Judge Williams confirmed this. Prof. Peterson stated that, if he is not in the office and a

pleading needs to be filed, another attorney in the office will sign his name with the other attorney's initials so that there is original ink and someone is taking responsibility. Ms. O'Leary stated that, in federal court, most attorneys do not keep original signed documents.

Mr. Cooper reiterated his concern that, apart from Ms. O'Leary's concern, the word "signature" in Rule 17 has a potential for problems with the advent of e-filing. Judge Zennaché stated that, even if this issue were fixed, it does not address the original concern about everyone in the office being on assignments and no one being available to sign a paper document. Ms. O'Leary asked whether there will even be such a thing as paper filing in the future. Prof. Peterson stated that paper filing will be here forever because there will always be unrepresented litigants who will file paper which will then be scanned by the court. Mr. Cooper stated that there is some security in requiring an ink signature on a paper pleading because, in the case of a fraudulent signature, a judge can compare the pleading to a known example of an attorney's handwriting. Prof. Peterson noted that there are three ways to affix a non-ink signature: the "s/" method; having another attorney sign the trial attorney's name and his or her initials; and using a rubber signature stamp. He observed that using a signature stamp is a bit like having a login and password, if it is kept in a safe and only certain people are authorized to use it. He wondered if clerks would accept a signature-stamped document if it is stamped with blue ink.

Mr. Cooper asked whether all Council members were in agreement that, despite any changes needed for e-filing, the rule should be kept as-is for filing pieces of paper. No one expressed disagreement. Ms. David expressed concern that, if changes were made to the rule regarding requiring original signatures for paper documents, misunderstandings could arise regarding the need for original signatures on subpoenas and other such documents. She noted that, once the e-court system is in place, which we happen by the time any rule change the Council makes would be in effect, the problem will be solved. Judge Zennaché asked whether this modification could be simplified by using language such as, "a signature consistent with UTCR 20.090 satisfies this rule." Judge Holland noted that the Council on Court Procedures is the preeminent body in terms of civil procedure and that the ORCP should not reference the UTCR. Ms. David stated that ORCP 1 F does broadly reference that any document except a summons shall be construed to include electronic images and other digital information in addition to printed versions of such documents. She noted that the Council had attempted to keep the last amendment to Rule 1 open-ended so that, if the Chief Justice makes a specific rule regarding e-court, ORCP 1 would allow that rule to work. Ms. David stated that she believes that ORCP 1 F encompasses part of this issue but that, if another change is needed in September, that can be done. Judge Gerking asked whether the word "conventional" is necessary. Mr. Cooper stated that he believes that it is confusing. Prof. Peterson suggested language such as, "the form

of the signature shall be any form of signature that is approved by these rules or any other rule of court." He stated that he feels that broadening the understanding of the definition of the word signature is good and that, when e-court is fully implemented, Rule 17 should be ready for it. Ms. David suggested, "the form of signature for filings may be electronic, consistent with the provisions of these rules or any other rules of court." Mr. Cooper and Mr. Keating liked this language. Mr. Cooper asked Ms. O'Leary to redraft the amendment and to present it to the Council at the May meeting.

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

Mr. Cooper reported that he has received some input from judges, but not as much as he would like. He stated that he will bring a redraft of the proposed amendment to the Council in May.

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

Ms. Gates reminded the Council that the problem her committee is addressing is that, in the case of organizational depositions, attorneys for corporations fail to designate who is to testify until the last minute. She stated that, after the Council's discussion at the February meeting, the committee had created two versions of a proposed amendment of ORCP 39 C(6). Those two versions, one requiring 24 hours' notice and the other requiring three days' notice, were before the Council now for its consideration.

Mr. Cooper asked whether the Council wished to have more discussion on the matter now or to move to vote on the proposals in September. Mr. Campf suggested amending the first proposal to read "three business days." Ms. Gates pointed out that, if the time period is less than seven days, weekends and non-court days are already excluded by ORCP 10 A.

Prof. Peterson brought up the issue of the phrase "consent to testify on its behalf" and the reported cases of attorneys using that phrase to object to anyone from the corporation testifying because they do not consent to do so. He suggested perhaps using the word "will" instead of the word "consent." Ms. Gates stated that the committee felt that this was such an isolated problem that the rule did not necessarily need to be changed. Mr. Keating stated that he had never read the rule that way. Judge Gerking also suggested replacing the word "consent" with the word "will" or, perhaps, the word "intend." Judge Williams stated that he felt the sentence clearly showed that the word "consent" only applies to the phrase "other persons." Judge Holland stated that this issue has never arisen in her court. Mr. Cooper stated that he presumes that a judge would deal with this interpretation of the rule if it came up.

A motion was made to vote on the two versions of the proposed amendment at the September meeting. The motion was seconded and passed unanimously.

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

Ms. David stated that, after the Council's discussion at the last meeting, the committee exchanged e-mails and determined that the rule change made last biennium does encompass metadata, so no additional rule changes should be necessary. She noted that the Oregon State Bar's civil pleading and practice book has been updated with an entire chapter devoted to e-discovery.

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

Mr. Keating stated that the committee brought a proposed draft rule change to ORCP 55 H(2)(b) for the Council's consideration. He stated that the committee had agreed to this language after several meetings, and that Mr. Cooper had also suggested that this change would likely require some amendment to ORCP 46 A(2). Ms. Nilsson noted that she had failed to include the Rule 46 amendment in the meeting materials, but read the draft amendment as follows (new language bolded and underlined): "A(2) Motion. If a party fails to furnish a report under Rule 44 B or C, **or if a party fails to comply with the requirements of Rule 55 H,** or if a deponent fails to answer a question...."

Ms. David raised a concern about the title of Rule 46 being slightly misleading. She stated that new attorneys trying to get discovery might not think about looking at a rule entitled "Failure to Make Discovery, Sanctions" because he or she is not yet at the point of a failure to make discovery but, rather, is still at the point of trying to obtain it. Judge Gerking suggested that the word "provide" could be used. Ms. David stated that she would not necessarily think to look at ORCP 46 A to get a discovery dispute before the court. Mr. Cooper noted that the titles of the rules are just titles. Ms. David observed, however, that accurate titles are helpful for those trying to find information in the rules. She asked that the committee consider a name change to something like "Compelling Discovery, Sanctions." Mr. Cooper stated that he believes that Legislative Counsel controls the names of the rules. Prof. Peterson replied that this is under the Council's control. He suggested the title "Providing Discovery, Sanctions." Mr. Cooper stated that the committee will discuss a title change. Mr. Keating asked if Council members are generally satisfied with the language proposed by the committee. There was general assent. Mr. Brian stated that he has no objections to the changes in 55 H and 46 A and feels that they are appropriate.

Mr. Keating reported that some members of the committee seemed to be moving

toward the concept of adopting language in ORCP 44 C to clarify that the rule is not to be narrowly construed, but not everyone on the committee agrees with this concept. He noted that Oregon is one of four states in the U.S. that does not waive the physician/patient privilege upon the filing of a claim putting the plaintiff's physical or mental condition at issue. Mr Keating observed that a compromise was made in the predecessor statute to the ORCP which granted a limited waiver of the physician/patient privilege upon the filing of a claim and that this limited waiver carried over to the ORCP. He stated that, in his 35 years of experience, this waiver has been construed broadly, and that a change was made to ORCP 44 in the late 1980s that was specifically adopted to address rulings by some trial courts that were narrowing the meaning of the language as it existed at the time. The change was made so that there would be no question that, if there were pre-existing notations by the doctor, those were also discoverable, along with physical examination records. Mr. Keating stated that the phrase used was "relating to the injuries for which recovery is sought," and he observed that, in the last few years, this phrase has begun to be narrowly construed to mean relating to the same body part, when in fact other medical records not relating to the same body part may be relevant in a claim for permanent injury.

Mr. Keating stated that the committee has proposed two versions, and that either version would deal with the concern about a narrow reading of the provision. He submitted that this is not so much a rule change but, rather, a clarification like the prior amendment to ORCP 44. He noted that some on the committee feel that potential plaintiffs may be discouraged from filing claims if they feel they will need to reveal certain medical information they feel is irrelevant. Mr. Keating stated that the solution to this is for the attorney to seek a protective order and to submit the records to a judge for an in camera review. Mr. Keating stated that, in his experience, when situations like this have arisen, he will not use the irrelevant and potentially embarrassing information. He reiterated that he has heard concerns about bad actors, but stated that he does not know that preventing the discovery of evidence which would be discoverable under ORCP 36 B can be justified on the basis that there may be bad people who may do bad things with it. He observed that there are tools available to seek agreement with an opponent and then to go to the court for resolution.

Mr. Brian stated that he does not believe that the proposed changes add anything to the current state of the law, and that these changes are being requested because defense attorneys have received rulings by judges that they do not like. His concern is that these changes will also be used in the future to further erode the privacy of plaintiffs and their medical records as it relates to medical records having nothing to do with injuries for which recovery is sought.

Mr. Buckle expressed concern regarding the inability to receive medical records about other conditions which contribute to a plaintiff's personal limitations in a

personal injury case due to the large number of recent rulings that say records are not discoverable because they do not relate to the same body part when, in fact, that information is very relevant to the claim of permanent injury.

Mr. Bachofner stated that he feels that we need to include the language from ORCP 36 B(1), rather than just referring back to ORCP 36 B(1), because ORCP 44 itself is a limited exemption to the privilege, so we end up in a loop. He maintained that simply referring to ORCP 36 B(1) in Rule 44, when Rule 36 B(1) includes the phrase "not privileged," adds nothing.

Mr. Beattie stated that Rule 44 is not dealing with the admissibility of evidence but, rather, its discoverability. He noted that he does not see a horrendous imposition on plaintiffs, and that he has never seen potentially embarrassing medical information disseminated willy-nilly in 20 years of practice.

Judge Hodson noted that this rule change has been proposed because of the "body part rule" in Multnomah County, which is not a rule but, rather, a statement about rulings made by judges in the past. He stated that, from his perspective, the current rule allows both types of rulings, and that sometimes it makes sense to allow discovery of records relating to other body parts and sometimes it does not. He stated that he does not believe that a rule change is needed because the current rule allows what is being argued for by certain committee members.

Ms. Bird observed that she can personally relate to this issue and that she has worked with people who have navigated the court system from a medical perspective. She stated that our bodies are very much connected and that an injury to one part can very much affect other parts, and that trying to find liability can be very challenging. She noted that she is not necessarily expressing an opinion one way or another, but that she is enjoying the discussion, and this is part of the reason she chose to be on the Council. Ms. Bird also stated that, if we had access to health care for everyone, we would probably have fewer issues like this, as people would be less likely to have the need to pursue legal recourse for their injuries.

Mr. Bachofner stated that he does not want to incentivize people to have to do a motion to compel in order to get records that are related to claims that are in the lawsuit. He stated that it should be a default that a plaintiff should be obligated to provide records that are related to claims in the lawsuit and that, if for some reason the defense is being too aggressive, the plaintiff can seek a protective order. He stated that he feels that, if the rule is left the way it is now, a defense attorney will never know for certain if there are additional relevant records out there, Mr. Bachofner observed that perhaps the proposed language is not the best way to solve it, but that he believes that it does address the problem and that is why he is advocating for the change.

Mr. Cooper observed that Oregon's legal system is unique in many ways, including the retention of code pleading, lack of expert discovery and interrogatories, and the fact that it does not consider the filing of an injury claim to constitute a full waiver of the physician/patient privilege. He stated that he sees Rule 44 as having been crafted to address the tension created by that uniqueness. We recognize that we cannot fully foreclose the defendant from seeing medical records, but the question is the extent. He expressed a great concern for plaintiffs being told that the cost for seeking recovery for an injury is full revelation of every private medical detail to the defendant and his or her lawyer. He stated that the amendment being proposed does not change the rule other than to give litigants in 2014 a reason to come look at the Council's minutes and search for the reason behind the rule change. Mr. Cooper noted that he is strongly in favor of not changing the rule, but stated that root of the problem is that not every trial judge agrees with every lawyer that appears before them. He agreed that the bench has broad discretion, and that it is a legitimate use of the bench's time to ask judges to spend time on these medical records disputes. He also expressed that he believes the rule works well in its current form and that, if some would like to make a wholesale change of this rule to allow a full waiver of the physician/patient privilege, that should be acknowledged.

Prof. Peterson pointed out that, if the Council does not make some kind of amendment to a rule, its discussion is only interesting but not persuasive. If, however, a rule change is made, the Council's discussion becomes legislative history.

Judge Gerking stated that the Council's discussion reflects a tension between the patient/physician privilege and liberal rules of discovery. He disagreed that the proposed change is an effort to more liberalize the existing rule but, rather, an attempt to clarify the rule in order to assist the bench and the litigants in trying to resolve this tension on a case-by-case basis. He stated that this clarification would provide assistance to the bench in trying to deal with this tension.

Judge Williams agreed with Judge Hodson that these rulings are made on a case-by-case basis and that he does not believe that the proposed change would be a change to the rule but, rather, a clarification for the bench. He expressed concern that it would just be a clarification for the members of the Multnomah County bench who follow the "same body part" rule.

Ms. O'Leary also agreed with Judge Hodson. She stated that she has practiced in state and federal court and has had the same issues arise in both jurisdictions, and in state court the judges are more mindful of the privacy issue. She stated that, when the opposing counsel wants more records, the court does a balancing act and it should remain decided on a case-by-case basis. Ms. O'Leary stated that federal court does not have that type of discretion and she believes that federal

judges would interpret the proposed clarification to mean that the sky is the limit. In her experience, when she thinks a discovery request is a fishing expedition, federal judges have allowed it, and this can be very expensive. She stated that this is not a streamlined, expeditious, economical way to deal with medical records, and she has had so many bad experiences with the federal counterpart to this rule that she would rather trust judges to have discretion.

Mr. Buckle noted that a judge can do in camera inspection of the records to see if they are relevant. Ms. O'Leary stated that the presumption is that the records should be relating to the actual claim, and that records relating to the same body part reflect the claim. She observed that, if opposing counsel thinks there are records that rebut that, the burden should be on that party. She asked why a plaintiff should be required to go to the expense of providing all records and later fight to keep them out. Mr. Keating noted that, if a plaintiff's attorney decides that the only thing truly discoverable are records relating to the same body part and those are the only records that are produced, he does not have anything else to take before the court. He stated that he cannot say he suspects there may be other records that have a bearing on life expectancy or mental health, but he does not know that. Mr. Cooper reiterated that the Council sees the "bad actor" problem in a number of these rules and, much as we might like to have one, there is no rule that just says "play fair."

Judge Holland asked whether we have received input from OTLA and OADC. Mr. Cooper stated that the uniform response from OTLA is that the rule pretty much works. Ms. David stated that OADC members are in favor of the rule change. Mr. Beattie observed that he would find it likely that OADC and its members would support a rule that plaintiffs waive the physician/patient privilege and that records do not become admissible but, rather, discoverable. He stated that such a change would provide consistency from county to county.

Ms. David stated that she represents doctors and lawyers all over the state and has filed this type of motion in a dozen different counties in the last three to four years, and that this issue comes up fairly regularly throughout the state, not just in Multnomah County. She observed that the ORCP are written very broadly to allow parties to obtain any material calculated to lead to discovery and to allow parties to go to the court as the gatekeeper to determine whether it is discoverable. Ms. David pointed out that defendants would not know about other non-body-part related records unless they were provided. She stated that she feels like attorneys file a lot of unnecessary motions just to get information that ORCP 36 already says is discoverable. She stated that she is in favor of the second version and that she believes it is a clarification that the scope of discovery under Rule 44 is the same as under ORCP 36 B.

Ms. Gates observed that she has seen that the Council usually errs on the side of

restraint, especially when it is a question of: a) a substantive change; b) a philosophical issue; or c) language that is really going to change practice. She encouraged Council members to think about those issues in relation to this proposed change and noted that, for other rules, the Council has taken the step of writing to OTLA, OADC, and the Circuit Court Judges Association encouraging them to start education or discussion with their members. Ms. Gates stated that she believes that there is a better way to address this issue than the proposed language, which can create a potentially circular reading between ORCP 44 and ORCP 36. She observed that, while it might educate some judges, it might confuse the ones who understand how the rule operates now.

Mr. Cooper noted that the Council does not vote on publication until September and suggested that it might be time to table discussion unless someone believes that there are problems with the language. Judge Gerking observed that, since the committee was torn on this issue, it follows that the whole body will also be torn. Judge Holland asked whether the Council can choose a version now to vote on in September, or decide not to vote on either in September and table the issue altogether. Mr. Cooper stated that he would feel uncomfortable not having a vote on the September agenda since some members feel very strongly about the issue. A motion was made to table discussion on the issue and to vote on the proposed amendments at the September meeting. The motion was seconded and passed unanimously.

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

Mr. Keating reported that the committee had met the previous Friday. Ms. David stated that the committee will produce a memo to the Council illustrating its analysis of the various issues but that, in essence, it has determined that this seems to be a bench and bar education issue. She noted that the committee will also ask Prof. Peterson to send a friendly letter to various associations such as the Oregon Law Institute, Oregon Association of Trial Lawyers, and the Oregon Association of Defense Counsel suggesting that they might be interested in developing seminars about best practices for summary judgment.

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

Prof. Peterson reported that he had done research regarding the origins of ORCP 54 and found that then-Judge Kistler's opinion in *Guerin v Beamer*, [163 Or. App. 172, 986 P. 2d 1241 (1999)] provides a better recounting of the Council's discussion at the time of the adoption of the rule than is found in the Council's records. He stated that this issue was brought to the Council last biennium by Judge Leslie Roberts, who was troubled by a party bailing out of lawsuit at the point of summary judgment and being able to restart. Prof. Peterson stated that discussion on our rule specifically included whether summary judgment should be a point where a case could not be voluntarily dismissed without prejudice and then re-filed, and this premise was hotly debated but ultimately rejected by the Council at the inception of the ORCP. He noted that Mr. Weaver's paralegal had done some research which found that Washington is more generous about the five days, and even allows a party to withdraw a case in the midst of trial. He stated that the committee will meet and talk about all of this research. He stated that this may be an issue of fairness, and also noted that there is already a statute of limitations limitation on this kind of dismissal. If a case is filed late in the statue of limitations and a voluntary dismissal is taken, it will end up being the same as an involuntary dismissal and will be a dismissal that will finally adjudicate the case. However, if a case is filed early enough, there is the opportunity to have two bites at the apple, even if a serious mistake is made. He stated that the original Council thought that was a good idea at the time and that he does not know if the committee will think it is a good idea now.

Ms. David pointed out that the Legislature changed ORS 12.220 in 2003 to address whether a dismissal is with or without prejudice, and asked whether the committee had considered this statute in relation to ORCP 54 A. Prof. Peterson stated that the committee had not, and thanked her for bringing it to its attention. Ms. David stated that it can create an inadvertent time bar that was unanticipated when both sides agreed to a dismiss and re-file the case, they do so, and find that there is a statute that bars them from it.

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

Judge Zennaché stated that the most recent draft amendment is different from the last one submitted by the committee. He noted that the changes before the Council in the current amendment are to allow alternate jurors to be substituted at the court's discretion once deliberation has begun if a juror is not able to complete deliberation. Judge Zennaché observed that the committee has one more issue to address: whether to allow more discretion about how to allow a judge to handle peremptory challenges if the judge wants to identify alternate jurors at the end of the trial rather than during jury selection. He stated that this

would entail a modest change at the end of section F. Prof. Peterson informed the Council that Council staff and Judge Armstrong had also made numerous small technical changes to the rule and asked that Council members read through the rule carefully. Judge Zennaché stated that the committee will provide another draft at the next meeting.

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

Ms. Leonard and Judge Armstrong were not present at the meeting. Judge Zennaché stated that the committee had met briefly and that Judge Armstrong planned to draft language for a rule amendment. He stated that the committee will meet again and report in May.

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

Ms. David reported that the committee needs to meet again to wrap up loose ends. Mr. Cooper stated that Mike Schmidt of the Oregon State Bar Elderlaw Section had drafted an amendment to the probate statute to specifically say that ORCP 68 does not apply to attorney fee awards in probate cases. He stated that he will talk to Mr. Schmidt before the committee talks again. Ms. Grabe informed the Council that April 2, 2012, was the deadline for sections to submit legislative proposals to the OSB, and that there is a board meeting on scheduled for April 23, 2012, from 10:00 a.m. to 12:00 noon at the OSB Center. She stated that there is also a legislative forum where representatives will be available and where other interested groups can provide input. Ms. Grabe stated that all of the proposals are currently available on the Bar's website. She stated that she or David Nebel will let the Council know if there are any other proposals which will impact the ORCP. Mr. Cooper stated that he will try to attend the meeting on April 23, 2012.

VI. New Business (Mr. Cooper)

A. Legislative Amendments to ORCP 65 (Prof. Peterson) (Appendix F)

Prof. Peterson reported that the Legislature had made a change to ORCP 65 which will in no way will affect how the rule works but, rather, will change how referees are funded.

B. ORCP 7 (Prof. Peterson)

Prof. Peterson indicated that he had received an e-mail from Holly Rudolph, the Oregon e-court Forms Coordinator at the Oregon Judicial Department. She indicated that she is drafting instructions for the pro se forms provided by the state and had a question about whether the intent of Rule 7 D(2) is to require a process server to mail the documents or if parties may do so, and whether any proposal has been made to clarify or change this rule. Prof. Peterson noted that Ms. Rudolph had indicated that she was aware that Multnomah

County Circuit Court Judge Maureen McKnight had raised this issue with the Council early in this biennium. He stated that he informed Ms. Rudolph that ORCP 7 D(2) is silent as to who can serve, but the qualifications for servers (found in ORCP 7 E) indicate that attorneys can serve by mail and that parties cannot. The ability of attorneys to serve by mail as provided in ORCP 7 D(2) is an exception, as attorneys cannot generally serve the summons. The Council's discussion was that personal jurisdiction is a significant thing and it is not wise to allow just anyone to perform service of the summons. Prof. Peterson explained to Ms. Rudolph that the exception for mail service by an attorney for a party is one that was carefully considered. Ms. Rudolph stated that her group had done a survey which found that the courts thought that it was fine for any party to serve by mail and no one had raised an issue. Prof. Peterson noted that it is not the court's duty to affirmatively question the qualification of the server, and someday some defendant will challenge personal jurisdiction based on the qualifications of the server when service is by mail. Ms. Rudolph stated that she will change the forms based on the discussion and indicate that only attorneys can perform service by mail, since that is what the rule seems to say. However, she wondered whether the Council might want to reconsider and allow parties, or anyone, to serve by mail. Prof. Peterson told Ms. Rudolph that the Council is close to the end of its biennial cycle and might look at the issue next biennium.

C. Assigning Liaison to UTCR Committee (Ms. David)

Ms. David observed that it would be helpful for the Council to assign a liaison to the UTCR Committee. She stated that the UTCR Committee sometimes seeks changes to the ORCP, and that there are currently many out-of-cycle UTCR changes being considered due to the e-court roll-out. Ms. Grabe stated that the UTCR Committee meets twice a year for seven to eight hour sessions and that their appointments are made by the Supreme Court. She noted that the Committee will have an all-day meeting on April 20, 2012, and will consider public comments at that meeting. Mr. Keating mentioned that his partner, Lindsey Hughes, is on the UTCR committee. Mr. Cooper stated that he will call Ms. Hughes before the April 20, 2012, meeting to check in. At this point, Judge Gerking, who had been out of the room, returned and indicated that he is also a member of the UTCR Committee. Ms. David asked if he would be willing to be the Council's liaison and keep the Council informed of what is happening on the UTCR Committee. Judge Gerking agreed.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:33 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

PROPOSED REVISIONS TO ORCP 27 – DRAFT 2
MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator. When a person, who has a conservator of such person's estate or a guardian, is a party to any action, such person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule.

B Appearance of incapacitated person by conservator or guardian. When a person who is incapacitated or financially incapable, as defined in ORS 125.005, is a party to an action and does not have a guardian or conservator the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the plaintiff or petitioner is a minor, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

B(2) When the minor is defendant or respondent, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B(3) When the person who is incapacitated or financially incapable, as defined in ORS 125.005, is plaintiff or petitioner, upon application of a relative or friend of the person.

B(4) When the person is defendant or respondent, upon application of a relative or friend of the person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the person.

C. Method of Seeking Appointment of Guardian ad Litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more declarations which provide admissible evidence sufficient to prove by a preponderance of the evidence that the proposed protected person is a minor or financially incapable, as defined in ORS 125.005.

D. Notice of Motion Seeking Appointment of Guardian ad Litem. At the time the motion is filed the person filing the motion must provide notice as set forth in this section. Notice shall be given by mailing to the address of each person or entity listed below, by First Class Mail, a true copy of the motion, supporting declaration or declarations and the form of notice prescribed in Section E below.

D(1) If the party is a minor notice shall be given to the minor if the minor is 14 years of age or older and to the parents of the minor and person or persons having custody of the minor, to the person who has exercised principal responsibility for the care and custody

of the respondent during the 60-day period before the filing of the petition and if the minor has no living parents, to any person nominated to act as fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

D(2) If the party is over the age of 18 years notice shall be given to:

(a) The person;

(b) The spouse, parents and adult children of the person.

(c) If the person does not have a spouse, parent or adult child, the person or persons most closely related to the respondent.

(d) Any person who is cohabiting with the person and who is interested in the affairs or welfare of the respondent.

(e) Any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the respondent, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660 and any person acting as attorney-in-fact for the person under a power of attorney.

(f) If the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the protected person.

(g) If the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, a representative of the department.

(h) If the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, a representative of the authority.

(i) If the person is committed to the legal and physical custody of the Department of Corrections, the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined.

(j) If the person is a foreign national, the consulate for the person's country.

(k) Any other person that the court requires.

E Contents of Notice The notice shall contain:

(a) The name, address and telephone number of the petitioner or the person making the motion, and the relationship of the petitioner or person making the motion to the respondent.

(b) A statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 20 days from the date of the notice.

(c) A statement indicating that the person for whom the guardian ad litem is sought may object in writing or by telephoning the clerk of the court in which the matter is pending and stating the desire to object.

F Hearing As soon as practical after objections are filed the Court shall hold a hearing at which the Court will determine the merits of the objection and make such orders as are appropriate.

G Waiver or Modification of Notice For good cause shown the Court may waive notice entirely, permit temporary appointment of a guardian ad litem before notice is given or make such other orders regarding notice are just and proper in the circumstances.

H Settlement Where settlement of the action will result in the receipt of property, or money by the person for whom the guardian ad litem was appointed the guardian ad litem lacks the authority to settle the action or receive the funds. Such settlement must be sought and obtained by a conservator or pursuant to ORS 126.725.

MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of minor parties by guardian or conservator. When a minor, who has a conservator of such minor's estate or a guardian, is a party to any action, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the minor does not have a conservator of such minor's estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

A(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B Appearance of incapacitated person by conservator or guardian. When a person who is incapacitated or financially incapable, as defined in ORS 125.005, who has a conservator of such person's estate or a guardian, is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the person does not have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the person who is incapacitated or financially incapable, as defined in ORS

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125.005, is plaintiff, upon application of a relative or friend of the person.

B(2) When the person is defendant, upon application of a relative or friend of the person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the person.

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SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

RULE 17

A Signing by party or attorney; certificate. Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion or other document and state the address of the party. Pleadings need not be verified or accompanied by affidavit or declaration. **The form of signature for filings may be electronic, in accordance with the provisions of these rules or any other rules of court.**

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