MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 9, 2012, 9:30 a.m.
Jackson County Courthouse
Judges' Conference Room
100 South Oakdale
Medford, Oregon 97501-3127

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Michael Brian
Brian S. Campf*
Kristen S. David
Jennifer L. Gates*
Hon. Timothy C. Gerking
Hon. Robert D. Herndon
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*

Members Absent:

Jay W. Beattie
Eugene H. Buckle
Arwen Bird
Brooks F. Cooper
Hon. Jerry B. Hodson

Guests:

David Nebel, Oregon State Bar*
Hon. Susie Norby*

Council Staff:

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

*Appeared by teleconference

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 A • ORCP 27 B • ORCP 54 A • ORCP 57 F • ORCP 58 D • ORCP 59 H(1) • 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 • ORCP 54 A

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:44 a.m.

II. Introduction of Guests

Hon. Susie Norby, Clackamas County Circuit Court Judge, joined the meeting by telephone.

III. Approval of May 5, 2012, Minutes (Ms. David)

Ms. David called for a motion to approve the draft May 5, 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 briefly reviewed the Website Report (Appendix B). She pointed out that the Traffic Sources Overview page was of particular interest, as during this period more visitors reached the Council's page via referral pages than by search engine or directly.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson reported that he had sent to Council members draft language to be modified and sent to their legislator contacts. He stated that he will prepare another draft within about two weeks of the current meeting. Ms. David asked any Council members who have not yet communicated with their legislative contacts to please do so soon, as it is important to keep the legislature informed of the Council's work.

V. Old Business (Ms. David)

A. Committee Updates/Reports

1. ORCP 17 A: Original Signature on Pleadings (Prof. Peterson)

Prof. Peterson presented the latest draft of ORCP 17 A (Appendix C). He stated that the Council staff had made some punctuation and grammatical changes to the version of the draft approved at the last meeting. He noted that the committee had previously approved these changes, but that the staff felt that the full Council should have the opportunity to review them before the draft is presented at the publication meeting.

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

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

Mr. Cooper was not present at the meeting. Prof. Peterson reminded the Council that, although Council members were satisfied with the substance of the draft rule at the May meeting, this item was left on the agenda to allow Council staff to put the rule into a proper format and to allow Council members to review the rule again in the revised format. He explained that Council staff had made changes which included renumbering certain sections as well as grammatical and word choice changes, and stated that he hoped that Council members had the opportunity to review the current draft (Appendix D).

Ms. David asked about the language in section C which states, "the motion shall be supported by affidavits or declarations which provide admissible evidence sufficient to provide a preponderance of the evidence." She wondered whether the sentence should state, "which must provide admissible evidence," and noted that there is a difference between saying that the affidavit or declaration must contain admissible evidence to support the motion, and merely saying that submitting an affidavit or declaration is enough in and of itself. Judge Miller observed that the sentence does use the word "sufficient," but that it is located a little further into the sentence. She observed that moving the word further up in the sentence would just be a stylistic change. Judge Herndon suggested changing the word "provide" to "contain." Judge Armstrong agreed, and there was general agreement among Council members. Judge Armstrong made a friendly amendment to change "which provide" to "that contain." A motion was made for this friendly amendment, and the motion was seconded and passed unanimously. Prof. Peterson noted that Council staff had also added the word "affidavits" to make it clear that either an affidavit or a declaration could be used.

Judge Zennaché noted that subsection B(2) specifies that a motion must be filed within the time specified by the rule or any other rule for an appearance or an answer, and asked what would happen if a party waited more than 30 days but had not been defaulted and then filed a motion for a guardian ad litem (GAL). He stated that he is concerned about that language. Judge Armstrong observed that one might wonder why that language is needed. Judge Zennaché also asked about the list of persons and entities that need to receive notice and wondered whether this is something that is otherwise required by law or whether the Council is adding them. Judge Holland stated that the list comes from the probate statutes relating to conservatorships or guardianships. Judge Armstrong asked what purpose is served by the language regarding filing within the period of time specified in subsection B(2). Prof. Peterson stated that he believes that it is from the original language in the rule, which specifies when an adverse party may step in and do it, but noted that this does not mean that the Council should not look at it or change it. Judge Herndon observed that, often, the adverse party is applying in order to keep the case moving along. Judge Armstrong remarked that in effect the rule is designed to make clear the time that the defendant is allowed to file the motion as the actual party but, if the defendant does not, any other party can do

it. He noted that this does not preclude the actual party from filing later, and that it is theoretically possible to have competing applications. Judge Herndon stated that he could think of a few occasions where this has happened. Judge Zennaché stated that he understood the sequence now. Prof. Peterson observed that he reads the rule to provide that, if the minor is above the age of 14, there is a window of opportunity for that party to nominate someone but, if the minor is not or if nothing happens, this is the default provision.

Prof. Peterson stated that Council staff made changes to subsection 27 D(1) because the sentence that comprised the original section seemed long and convoluted and did not quite read correctly, and that he hoped that the committee had looked closely at the changes to ensure that the meaning was not changed. Judge Herndon stated that he thought the staff changes were good, and those were all required because they are required by the guardianship statute. Prof. Peterson noted that staff also changed the word "respondent" to "minor" or to "person" in several places depending on whether the party was under or above the age of 18. He hoped that this did not create any unanticipated problem. Judge Armstrong stated that he believed that the changes make sense.

Prof. Peterson stated that he had received a telephone call from a practitioner who stated that his practice, when representing a minor in a personal injury case, is to file a lawsuit to appoint a GAL without filing the tort case lawsuit, have a GAL appointed, and then negotiate with the insurance company. The practitioner stated that, if the insurance company does not settle, he is annoyed with the court for not allowing him to use the same case filing to file his personal injury case. Prof. Peterson remarked that it never had occurred to him that someone would file a "shell" GAL case for something that might happen later, but that he does not practice in this area of law. He noted that the practitioner stated that his reading of the rule led him to believe that this was an acceptable practice. Judge Herndon stated that the practitioner may believe that having a GAL appointed gives him more authority to settle a case in the eyes of the insurance company but, in most cases, a conservatorship will still need to be established in order to settle. Mr. Bachofner pointed out that there is statute that allows cases below a certain claim level to settle without getting a conservatorship, and that he suspects that some insurers are saying that they want to have some kind of guardian because they want to deal with someone who has authority to resolve a claim. Prof. Peterson stated that it seems clear that the draft amendment would direct that a case cannot be settled without obtaining the appointment of a conservator, and that the committee's new language nicely encapsulates what the practitioner needs to do in order to settle a case. Prof. Peterson stated that he told the practitioner that a change in the rule was likely to occur and suggested to him that he take a look at it but, because the issue was raised, Prof. Peterson also wanted to bring this to the attention of the Council for discussion. After polling the Council, Ms. David observed that there appeared to be no overriding belief that there needs to be further changes to the draft in light of this unique practice.

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

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

Mr. Weaver briefly reiterated that the issue before the committee is that ORCP 54 A allows dismissal any time up to five days before trial without court approval. He stated that there had been discussion as to whether this procedural rule has led to abuse, in particular where parties spend a lot of money getting ready for trial and there is a dismissal virtually at the last minute. He stated that the concern is that some practitioners might be using this procedure in bad faith, but he observed that there can be legitimate reasons as well, such as dismissal pending a summary judgment. He noted that federal rule allows dismissal only with court approval, and the broad issue is whether the Council wants to change the Oregon rule to require court approval.

Mr. Weaver stated that the committee ultimately decided that not all members have enough knowledge in the various areas of practice to know how a change would impact different practices. He stated that the committee's conclusion is to come up with balanced question to send to the bench and bar in order to determine whether there are abuses, how prevalent they are, and whether the procedure of court intervention makes any sense. The committee recommends putting this item on the agenda for next biennium. Judge Herndon observed that this is not a big problem in his county, but stated there may be other courts where it is. Judge Miller stated that there was a time when people could dismiss family law cases without notice to the other side and then get the case reinstated without the other side's knowledge. Although she believes that this has been changed by statute, she still agrees that it is a good idea to get more input from the bench and bar regarding dismissals. Ms. David stated that it would be a good idea to check with the Professional Liability Fund as well. Mr. Bachofner stated that another common use of this kind of dismissal is when there is a trial date and the court refuses to move it despite the fact that both counsel agree that a set over is necessary; sometimes the only option is to dismiss the case without prejudice. He noted that this is a fairly common practice. Judge Gerking also observed that it is not unheard of for the defense to waive the statute of limitations in certain situations.

The Council agreed to put this item on the agenda for the next biennium.

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

Ms. O'Leary presented the committee's latest draft of ORCP 57 F (Appendix E) and explained that some of the changes were merely wordsmithing but that the main changes are at the end of the rule, and those changes give judges more discretion in handling alternate jurors when empanelled jurors are deliberating, in the event that an empanelled juror becomes sick or unable to participate. Judge Miller stated that Judge Zennaché has been drafting the various versions, and that she has been forwarding them to Clackamas County Circuit Court Judge Susie Norby, who originally suggested that the rule be changed. Judge Miller remarked that she has spent some time with Judge Norby to let her know how the committee's thinking evolved into the current draft. Judge Miller stated that Judge Norby had a sense that perhaps the committee had misunderstood her intent and provided her own draft (Appendix F). Judge Miller observed that she is not taking a position one way or the another. She stated that she recalled a Council discussion about *Vander Veer v. Toyota Motor Distributors* [577 P2d 1343 (1978)] being the controlling decision that came out before ORCP 57 was created. Ms. O'Leary explained that the *Vander Veer* ruling occurred before the ORCP were created, and that the statute construed in that case was later abrogated and replaced by the ORCP. She noted that, at the end of its discussion regarding the case at the last full Council meeting, there seemed to be no question that *Vander Veer* was no longer good law.

Judge Zennaché explained that the draft makes three changes: 1) to authorize the trial court to replace a juror with an alternate after deliberations have begun; 2) to allow the court discretion about how alternates and additional peremptory challenges are used; and 3) to address some language differences and grammatical corrections. He noted that, with regard to *Vander Veer*, that case interpreted a prior statute which was replaced by the ORCP. He stated that the holding is not bad law, but that it was based on the language of the statute at the time, that Rule 57 ORCP was subsequently based on that statute, and that the Council can modify the ORCP at any time; therefore, he does not believe that *Vander Veer* is a barrier that prevents the Council from making the proposed changes.

Judge Miller recalled that there was not a consensus or even a lot of support to change the current way of doing business, specifically in the way that Judge Norby wanted alternate jurors to be able to be in the deliberation room during deliberations, but not to participate. Judge Armstrong observed that there was, in fact, unanimity among committee members against using this practice. Judge Norby stated that she did not believe that the Council missed anything in its draft but, rather, that there might be a tighter way to draft the changes. Judge Zennaché agreed and thought that Judge Norby's draft was a little tighter, but he wanted to emphasize that, despite her practice, Judge Norby's version still makes it clear that alternate jurors are not allowed to participate in deliberations. Judge

Norby stated that she was not trying to make a substantive change, but that there is a sentence in the committee's draft that makes it appear that alternate jurors have more power than they actually do. She stated that, because the committee's draft still says that alternate jurors have all of the same functions, powers, facilities, and privileges as regular jurors, it could be interpreted that they have the authority to sit in on deliberations when they do not. Judge Norby stated that her initial intent, which is still included in the draft, was to align ORCP 57 F with ORCP 58 D. She noted that ORCP 58 D already states that if, after the formation of the jury and before it reaches a verdict, a juror is unable to perform the duties of the juror, the court may order such juror to be discharged and replaced with an available alternate juror. Judge Norby observed that this cannot happen with ORCP 57 F as it stands because that rule currently states that alternate jurors must be discharged before deliberations. She stated that ORCP 58 D cannot be used if ORCP 57 F is followed.

Judge Armstrong remarked that he appreciates the revisions that Judge Norby has proposed and stated that they are tighter and convey the information in a cleaner way. He noted, however, that he is concerned about the language, "except the ability to deliberate and vote on the jury's verdict." Judge Armstrong expressed concern that this language could be interpreted to mean that alternate jurors could be allowed to sit in the jury room during deliberation as long as they did not participate. Judge Norby replied that she thinks of alternates as no longer being alternates once they are seated, but that this is not necessarily clear in the proposal she made. Judge Zennaché pointed out that the *Vander Veer* case specifically states that alternates cannot sit in deliberations. Judge Armstrong observed that someone might interpret the language in Judge Norby's draft to say that alternates can be present as long as they do not deliberate. He wondered why any of the language about alternates having the same functions and powers is necessary.

Judge Holland suggested eliminating the language, "except the ability to deliberate and vote on the jury's verdict," because she would argue that alternates have the same functions and powers as regular jurors, but the court directs when, even among the jurors in the box, those powers and functions come into play. As an example, Judge Holland explained that the court states that the regular jurors are not allowed to deliberate before the end of the evidence and arguments. She stated that the court would use the same authority to tell an alternate when he or she would be allowed to deliberate because the court directs when the powers can be utilized. Judge Armstrong posited that the rule does not need to specify that alternates have those powers until they become jurors. He stated that he is not sure that we need to speak in advance to what alternates do. Judge Norby suggested putting a period at the end of "to take the same oath" and deleting the rest of the sentence. Judge Armstrong agreed that the rest of the sentence is superfluous. Judge Miller observed that, if an alternate juror was aware of the

rule, it might make him or her feel like a second class citizen. Judge Armstrong replied that the rule would not say anything regarding alternates. Judge Miller remarked that this change would give the judge the discretion to pick 13 or 14 jurors and not disclose who the alternates are until the jury retires to deliberate, and that this procedure is designed to give everyone the feeling of equal standing. Mr. Bachofner agreed that this encourages equal engagement.

Judge Armstrong noted that the way the judge conducts the entire process is entirely at the judge's discretion, and that this rule does not need to state that alternates have the same powers because jurors will not be reading the rule, and the judge can say anything he or she feels is necessary. He noted that the language in the draft has the potential to be mischievous and serves no purpose that he can identify. Judge Miller agreed. Judge Holland stated that was she solely talking about deleting from the amendment the language "except the ability to deliberate and vote on the jury's verdict." She expressed concern about deleting anything further, stating that the existing rule has language that states that alternates "have the same functions" and that to delete it now would remove language from the existing rule that could potentially stir up questions about the abilities of an alternate juror. She stated that she does not want the Council's deletion to raise that question. Judge Armstrong replied that he does not believe it raises a question regarding an alternate's role but, rather, leaving the language as it is runs the risk of allowing alternates an unintended role. He stated that, if the Council does not change the language at issue and the *Vander Veer* case stands and the Council does not say that its amendment affects the import of that decision, that would presumably be the answer anyway. He stated that he does not believe that deleting the language has any detrimental effect on the role of an alternate juror.

Judge Gerking wondered whether a judge or a lawyer could question whether an alternate would have the power to ask a witness questions as the other jurors do. Judge Armstrong stated that part of his concern is that, if alternates are specifically listed as having the same privileges and powers as regular jurors, an alternate could insist on being in the jury room during deliberations because all of the other jurors are there. Judge Zennaché pointed out that the language is already in the rule and alternates are not allowed in deliberations. Judge Norby stated that the concern about alternates asking questions of witnesses would not be an issue because alternates are being set up with the anticipation that they may have to be seated and to deliberate. Mr. Bachofner noted that this is Judge Norby's enlightened view, which may not be shared by all. Judge Miller observed that there are new judges who have never conducted a jury trial, and that we should read the rule as if we were such a judge.

Mr. Bachofner stated that a change was made to section C to state that "each shall be examined as to his or her qualifications." He stated that, to someone without

experience, this may mean that the examination should be directed to each juror, one by one. Judge Zennaché observed that this was a Council staff change, not a committee change. Prof. Peterson explained that the pronoun "they" is not very clear and that staff was attempting to use the more correct grammar. Mr. Bachofner expressed concern that we do not want to imply that each juror has to be examined individually. He suggested using the language, "the panel shall be examined." Judge Zennaché suggested leaving the language as it was, despite the grammatical issue. A motion was made to this effect. The motion was seconded and passed unanimously.

Ms. David asked whether the committee wanted to attempt to wordsmith at the current Council meeting, or have further committee meetings and bring another draft to the Council in September. Judge Zennaché expressed concern about getting the rule out for comment. Ms. David noted that we do not need to do that until after publication in September. Judge Gerking stated that he believes the language in subsection F should remain, because he envisions a scenario where an alternate is writing out questions that seem favorable to one side and a lawyer objects and says that alternates are not allowed to ask questions. Judge Armstrong wondered whether there a way to keep that language and yet to capture the idea that makes it absolutely clear that the alternates cannot get close to the process that takes place in the deliberation room. Prof. Peterson suggested the words “during trial.” Judge Zennaché suggested adding “except for the ability to deliberate, sit in on deliberations, or vote.” Judge Norby suggested using the language, “unless needed as a regular juror.”

Judge Holland stated that she dislikes the phrase “regular juror” and asked for a different suggestion. Judge Norby suggested "voting juror," because the difference between a juror and alternate is that a juror votes. Judge Miller observed that the Council frequently addresses judicial education issues, and that this may be more of an education issue than a rule change issue. Judge Zennaché pointed out that the committee’s draft excluded the term “regular jurors” because the committee was sensitive to that term. He stated that the committee could look at the draft again, but that he feels that writing language into the rule that allows alternate jurors to sit in deliberations is not allowed and is overkill since most judges are not doing it. Judge Norby stated that she does allow the practice, but only when both attorneys agree. Judge Holland stated that she has heard of judges doing it by mistake, and that she is sensitive to the education piece as opposed to having a rule take care of every contingency. Judge Norby stated that the proposed change to the rule will actually make it more difficult for her to allow this practice, but that the impetus behind her draft was to try to put into language what she thought the committee really felt strongly about.

Judge Armstrong suggested the language, “except the ability to be present or participate in any way in the deliberation or vote." Mr. Bachofner proposed,

“except participation in deliberations unless needed." Mr. Keating made a suggestion to delete the words “on how” from the last sentence of section F. Judge Zennaché stated that the committee was attempting to allow the court discretion, because some courts are picking 14 people and giving seven challenges instead of six, and that there is experimentation among the trial courts and that the committee’s changes would allow that experimentation. Mr. Keating pointed out that the clause is used twice and he was talking about the first one, before the words “additional peremptory challenges may be used.” He stated that it is the lawyers who use the challenges, and that his reading of the sentence with the first “on how” included is that the court was going to tell him how to exercise those challenges. Judge Zennaché stated that he now understood Mr. Keating’s concern.

Ms. David observed that there is enough fine-tuning that needs to happen that the committee should take another look. She suggested keeping Judge Norby in the loop and inviting her to participate in a committee meeting and/or sending her draft. She also asked the committee to send its final version to Ms. Nilsson to put it into proper format. Ms. O’Leary observed that this is a difficult committee to get together, so she asked members to work with her to get a meeting done quickly. Judge Zennaché stated that he will attempt a new draft. Ms. Nilsson stated that she will send the most recent version of the rule in Word format to Judge Zennaché. Judge Norby thanked everyone who has worked so hard on the issue for so many hours and stated her appreciation.

Prof. Peterson suggested adding the words “and during the trial” before “shall have the same powers.” Judge Herndon observed that the trial includes deliberations. Prof. Peterson then suggested adding, "until deliberations." Judge Armstrong countered with, “until the jury retires to deliberate.” Mr. Bachofner stated that he is in favor of clarifying this language somehow. Prof. Peterson stated that the question now seems to be what the alternates do once they have been told they cannot deliberate but they are not yet free. Judge Miller asked whether the Council can agree that the only item the committee will work on in terms of changes is section F, and only wordsmithing and making clear the changes that include Judge Norby's suggestions. Judge Holland stated that she does not wish to put a parameter on it, and that she wants to leave it to the committee to decide. Judge Miller stated that she was just trying to get some guidance, because it was her impression that the concept of allowing judges to have discretion was something that Council members agreed with and the amendment appears to merely require wordsmithing now.

Ms. David stated that she does not want to put specific limitations on the committee if someone raises something that really needs to be dealt with, but that she hopes that it will stick mainly with dealing with wordsmithing in section F consistent with the discussion today. She encouraged the committee not to address new issues or revisit issues that have already been dealt with, but to be

sure to look at ORCP 58 D and make sure that any changes to ORCP 57 F are accurate and consistent so that there are no unintended consequences. Judge Holland stated that she feels that there is no consensus on the concept yet and that she is still questioning it. Judge Zennaché stated that today he heard primarily concerns on wordsmithing on the alternate jurors' not being present during deliberations. Judge Norby expressed concern that she has now created a monster, and that she still plans to allow jurors to sit in the deliberation room with the specific instruction that they cannot participate in the deliberations unless and until they have been seated. She stated that she has been doing this for a couple of years, with the permission of counsel, and she does not believe there is any rule that prohibits that. Judge Armstrong replied that the Council is writing a rule now that prohibits it. Judge Norby observed that there is no specific language prohibiting it in any rule at this time. Judge Armstrong stated that there will be. Judge Norby responded that she understands that the Council's general consensus is that this is not set practice and that the Council does not believe that judges should follow this practice. Judge Norby stated that she honors and respects that people have a different opinion than she does; however, she feels that writing a prohibition into the rule very much substantively changes it. She stated that everyone agrees that jurors cannot participate in any way in the deliberations in the jury room, but that she and the Council simply disagree on whether they can be present.

Ms. David observed that good suggestions will often result in a number of people looking at and analyzing a rule, and it may or may not come to be that there is a change that prevents Judge Norby's practice. She stated that she will leave it to the discretion of the committee to decide on the changes to bring before the Council, and that they will send Judge Norby a copy of their updated draft. Ms. David noted that It may end up being the consensus of the Council that this is not the procedure by which it wants to see the courts handle alternate jurors. She remarked that Council members bring a variety of perspectives to the process. Judge Herndon explained to Judge Norby that the Council votes to publish drafts, the drafts are published, there is an opportunity for comment, and the Council does not actually vote to promulgate and send the rules to the Legislature until December.

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

Ms. Leonard presented the committee's most recent draft (Appendix G). She explained that the purpose of the committee was to: 1) address the timing of the exception, modernize it, and give the trial court more discretion; 2) give guidance to practitioners about what is a sufficient exception; 3) discuss the value of even retaining an exception requirement; and 4) discuss the preservation section, unique to the ORCP, since the Court of Appeals has a particular interest in standards for reviewability and preservation. She stated that the committee made

a revision to subsection H(1) that allows discretion regarding the timing of exceptions. Ms. Leonard pointed out that the rule, as it exists, requires exceptions to be made immediately after the court instructs the jury and that there are many times when that timing is inconvenient or disruptive. She stated that the committee wanted to make clear that the trial court has the discretion to choose another time for the exception process. Ms. Leonard described the next sentence in subsection H(1) as stating that, even if a party fails to make an exception, the Court of Appeals may be able to engage in plain error review. Ms. Leonard observed that she is not entirely sold on this idea herself, since there are already Court of Appeals decisions about limitations on the Court of Appeals' existing plain error review in this area. She stated that subsection H(2) attempts to explain the specificity requirements for exceptions, and approves the practice that many people have of incorporating prior exceptions that have already been made. Ms. Leonard noted that this change would allow a party to incorporate by reference the prior exceptions, but that the party would need to be careful to be particular enough under the usual rules of preservation that the trial judge understands their criticism of the proposed instruction or refusal to include a proposed instruction and that they have otherwise preserved their exception.

Mr. Bachofner asked whether, in the final sentence of subsection H(2), the meaning was only for points that were previously made with particularity to the trial judge on the record, or whether it was the committee's intent that points that were made off the record could be incorporated by reference. Judge Zennaché clarified that the intent was to allow the practice of incorporating prior exceptions, but only for points made on the record, because otherwise they would not be known to the Court of Appeals. Mr. Bachofner asked whether this means that previous discussions in chambers cannot be incorporated. Mr. Brian observed that this may mean an end to meetings in the judge's chambers. Judge Miller remarked that this will just mean that, after the conference in chambers, the parties will go back on the record and the judge will state that there was a discussion in chambers and ask the lawyer if he or she wishes to explain the reason for the exception to the judge's ruling. She noted that the burden is on the attorneys to encapsulate whatever their appellate review point is and to preserve their record. She explained that she sometimes finds it helpful to go into chambers and sort through the issues. Mr. Bachofner suggested clarifying by adding "but do so on the record" after "trial judge." He stated that there is a reading that suggests that a party is incorporating by reference the points that the party previously made, which could mean all points. Ms. David suggesting removing the words "to the trial judge" and replacing them with "on the record." Mr. Bachofner expressed that the language should be as clear as possible. Prof. Peterson asked whether Mr. Bachofner thought that merely removing the words "to the trial judge" would be sufficient. Mr. Bachofner stated that including the words "but do so on the record" is a little stronger. Judge Zennaché suggested the alternate language, "a party may incorporate by reference points that the party previously made on the

record with particularity."

Judge Miller observed that the Council began with the idea that it would like judges to have a heads-up while there is still time for a problem to be cured. She stated that, if she forgot to give an instruction that the parties had agreed she would give, she would not want a party waiting until appellate review to raise the omission. Judge Armstrong noted that this change does not undo that problem. Judge Miller stated that the timing is important to the judges so they have an opportunity to fix a problem before the jury gets too far into deliberations. Judge Armstrong remarked that, while the committee was working on this rule, he worried about the potential scenario of a judge failing to give an instruction, the party failing to take an exception, and the party later maintaining that the judge had stated that the party was required to take the exception before the jury was instructed. In such a case, that party could claim it was not required to do anything at the point when the judge later failed to give an instruction because it was told that exceptions had to be done earlier. Judge Miller asked whether it makes a difference, since her practice is to ask for exceptions as soon as the jury door closes. Judge Gerking noted that the rule currently requires an exception after the instructions have been given to the jury. He wondered whether that practice should remain. Judge Armstrong stated that the rule, as amended, still says that. He noted that he is sensitive to the point Judge Miller raised and how this rule affects it, but stated that the fact is that, if the timing of instructions changes and no one expects it, the requirement to make an exception still exists. Mr. Bachofner asked how someone could make an exception to not giving an instruction before the instruction was not given. Judge Miller stated that it is up to the judge to make it clear that exceptions have to be made at a certain point, and that they may not be made after that point.

Judge Gerking recommended changing, on line 11, the word “or” to “and” or “as well as.” Judge Armstrong noted that the risk with this is that someone would say that it needs to be done twice. Judge Zennaché stated that the idea was to allow for a situation where it is inconvenient for someone to take an exception after the jury has been instructed. He stated that he often gives preliminary instructions early in the case and that he will have discussed the preliminary instructions with the lawyers before he gives them, which is immediately prior to opening statements. He remarked that he does not want to be required to ask for exceptions by taking a break and sending the jury out immediately after giving the preliminary instructions, but would rather take any exceptions at the next normal break. Judge Zennaché observed that the Council’s goal was to give the court the power to set a different time for taking exceptions, rather than requiring lawyers to immediately jump up and make the court take a break. Judge Armstrong stated that this clause was designed to do just that. Ms. Leonard stated that these are the identical considerations for the instructions given at the close of the case. Judge Armstrong stated that he was concerned about the potential argument that

the time specified for exceptions had passed and the party had not been able to make them, but that the party was still required to state their exceptions. Judge Gerking asked whether there should there still be a requirement that exceptions be made at the close of the instructions, because that would be helpful to the Court of Appeals and appellate counsel to be able to find them quickly. Judge Armstrong observed that this would indeed be helpful, but that the effort was to recognize that, at the trial level, it is valuable to have a level of flexibility that began with the question from Judge Karsten Rasmussen to the effect that he was not certain that insisting that exceptions be taken at that exact moment was essential. Judge Armstrong noted that he and other members of the Court of Appeals were aware that the change would add some imprecision and potential greater difficulty for them, but that they decided that they could live with it.

Judge Miller stated that she read the final sentence to mean that the attorney is saying "I am still objecting to this instruction and I refer back to the arguments I have already made." Judge Armstrong agreed that the attorney would be incorporating arguments already made on the record, and observed that the required particularity had better already be on the record. He stated that, as long as the prior arguments fulfill the particularity requirement on the record, the attorney does not need to argue further. Judge Armstrong noted that this conforms with existing practice, which is not to burden everyone with the need to go back and do it all over again. Mr. Weaver asked whether writings previously submitted are also incorporated by reference. He observed that, earlier in the rule, a distinction is made and that writings are part of the record if they have been submitted. Judge Armstrong stated that he thought the answer should be yes, but that he is not certain.

Justice Kistler asked whether the plain error rule refers to plain error that excuses the failure to file an exception, or plain error that fails to make any objection whatsoever. Judge Armstrong stated that it encompasses both. Justice Kistler observed that it appears in the section dealing with exceptions but that it is actually broader. Judge Armstrong stated that it is broader because the rule itself earlier speaks of the need both to assert the objection to the trial court and to include an exception. He stated that there is a twin feature that the point has been made in the charging process and an exception has been taken. Justice Kistler remarked that sometimes an error apparent on the face of the record simply means that the instruction is legally incorrect, but plain error also encompasses a discretionary feature on the part of the Court of Appeals in order to reach the error. He asked whether the intention, by using the phrase "error apparent on the face of the record" was to preclude discretion on the part of the Court of Appeals. Judge Armstrong replied that this was not the intention. Justice Kistler stated that exceptions incorporated by reference make perfect sense when the nature of the exception has been constant throughout the discussion with the trial court. He presented a scenario where multiple discussions about an

instruction have been had and the trial court has modified the instruction during the course of those discussions. He asked whether, when the trial court gave its instruction and counsel took exception and incorporated by reference all the things said with particularity on the record, would counsel need to specify particular grounds or could counsel rely on all of the grounds previously mentioned, even though they had shifted over the course of the trial? Judge Armstrong stated that the committee thought about this issue and that he had discussed it with his colleagues on the Court of Appeals a number of times, but that there was no consensus. He stated that the language in the draft represents a judgment that he ultimately made, which recognizes that counsel may be in a position where the exception with particularity need not actually encompass the particular point counsel is going to stand on at the end of the process. He noted that this will make the task more difficult for the Court of Appeals, but not for the Supreme Court or the trial court. He stated that there may be less clarity at the end point but that the Court of Appeals is willing to work with this change to be accommodating , to allow some flexibility in handling exceptions in the trial courts. Justice Kistler stated that he was thinking of the trial court because, at times, the trial court may believe it solved the problem counsel was raising, and would have fixed the problem had it realized that the problem still existed. He observed that this is one of the thoughts behind the generic "everything I said before is still good, I am still objecting on that ground," because it puts the trial court on notice that counsel still believes the trial court has not fixed the problem even though, in the trial court's mind, it had.

Judge Gerking observed that there must be a time in the trial when the judge officially takes exceptions because, if one of the lawyers constantly objects to a particular instruction, there still has to be a time when the judge invites the lawyers to take exceptions to instructions. Judge Zennaché stated that this is still required by the rule change, and that the trial court has discretion as to the time when exceptions are made; the trial court is still required to set a time for counsel to make exceptions on the record. He also noted that the incorporation is by incorporation of direct points, not by incorporation of exceptions. Judge Armstrong noted that Justice Kistler's sensitivity is appropriate because, by expressly allowing the idea of incorporation, it is less clear that counsel needs to be focused to take exceptions at whatever point the judge determines is appropriate. He stated that, by allowing the phenomenon of incorporation, we are running the risk that there will be less precision or clarity for the Court of Appeals, as well as the risk that what the trial court believed was no longer alive as an issue can arise at the appellate level. Justice Kistler wondered whether we want to open up the possibility that parties can go through a trial where instructions are given and nobody objects to or raises an issue and then, for the first time on appeal, a party is able to raise that issue. He stated that the court's discretion to reach it may be there but, if it turns out to be wrong in some particular, he wondered what the grounds are for exercising the discretion not to

reach it. Justice Kistler observed that it seems to potentially subject a judgment or verdict to collateral challenges that nobody considered.

Ms. Leonard expressed concern about having the opportunity to raise a whole new issue that was never in the party's mind, counsel's mind, or the court's mind just because the case is on appeal, and opening the door to disrupting judgments and verdicts. Judge Armstrong stated that plain error is already recognized in this very context in a perverse way with the case of *State v. Toth* [213 Or App 505, 509-10, 162 P3d 317 (2007)]. He noted that Judge Landau made it clear in this case that the Court of Appeals can address as plain error an instruction that was never requested if it was for a necessary legal principle that needed to be in the mix. He stated that he thinks of it as akin to the *Boots* issue [*State v. Boots*, 308 Or 371, 780 P2d 725 (1989)] in criminal law where jury unanimity is required and, even if no one had the idea that a *Boots* instruction was necessary, if it turns out that there was a need for one, it is still error and it can be fixed for the first time on appeal. Justice Kistler stated that one might question whether Judge Landau went too far in that ruling. Judge Armstrong stated that the perversity is that we now have a plain error principle that says that, if no one thought of the issue so there was never a request to have an instruction about it, this rule does not foreclose review of the omission because it only speaks to review of things that have been requested or to which objections have been made. He explained that our plain error exception in this setting is for things that never surfaced at all, and the Court of Appeals has already said that these things are subject to plain error review. He noted that, as Justice Kistler stated, this might disappear down the road after people think about what kind of plain error is possible, but that it makes some sense to confirm that this is in fact available.

In response to an inquiry from Justice Kistler, Judge Armstrong confirmed that the amendment speaks to the law we apply at the time of appeal versus at the time of trial. If the law has shifted so that the instruction given was wrong, and the issue had been debated but someone forgot to take an exception, the Court of Appeals could still reach it simply make clear that the bad instruction can still be sent back to be fixed, notwithstanding the absence of an exception.

Judge Armstrong pointed out that the amendment is designed to say that plain error review is available; however, he stated that the chance of it happening is remote, so no one should take a case up on appeal if the only issue is the jury instruction that will be fixed by plain error. He reassured Ms. Leonard that her fear that the change may open up a door that will lead to more opportunities to undo what juries have done will not happen. Judge Armstrong stated that plain error review is still a very rare opportunity, but that the rule change was designed to confirm what was already said in the *Toth* case.

Judge Miller stated that it is the judge's responsibility to tell the jury the law and, if

a lawyer fails to ask for an instruction on the burden of proof or the presumption of innocence, that is the judge's burden. She stated that there may be situation where a judge forgets to do something he or she is obliged to do, and where the lawyers are not paying attention. Judge Herndon noted that the reference to the *Boots* case is a classic example and that the court's ruling in that case makes sense. He stated that he can see why the court would give a pass on a lawyer not requesting that instruction. Judge Herndon stated that he believes that the Council should publish the draft and that he feels that it will generate a lot of discussion.

Judge Zennaché addressed the final sentence of subsection H(1) and stated that, while he knows that it is the status of the law now, he does not think it is appropriate to add this to a trial court rule. He believes that it is more a rule of appellate procedure and, whether that language is in the rule or not, he thinks the Court of Appeals will continue to have the discretion to review what it perceives as plain error. Judge Armstrong responded that this is the only rule in the ORCP that speaks to what a party must do to obtain review on appeal and it in effect tells the Court of Appeals what it is allowed to do. He stated that, if the rule does not say what the Court of Appeals can do, the Court cannot do it. Judge Armstrong noted that the *Toth* case does say that the only time the Court of Appeals can consider plain error review is when it literally does not fit within the language of the rule itself, which is a very narrow exception for an instruction no one thought to ask for or to object to, and that seems to be a funny distortion of the plain error function. He acknowledged that it is a perversity that this rule speaks to the Court of Appeals' function on review, but stated that it must also speak to when the Court can review for error when there is non-compliance with the rule. Judge Zennaché asked whether this is not the status of the rule right now. Judge Armstrong stated that, currently, the Court of Appeals can only conduct plain error review in the narrowest of circumstances, where it is not subject to the exception requirement at all. He stated that the exception piece is just the cap to that but, since this rule covers that which is otherwise subject to an objection or request, anything that did not come with an exception or request is beyond the Court's plain error review function. He noted that the rule change is designed to broaden it and to cover the very things the rule says the Court cannot do. Judge Armstrong pointed out that, without the change, the Court is unable to conduct plain error review except within the narrow exception. Judge Zennaché stated that he is all right with the change in that case.

Judge Armstrong suggested one more wordsmithing change on line 14, to change "errors of law that are apparent on the record" to "legal error that is apparent on the record." A motion was made to make this friendly amendment as well as the amendment previously suggested for the last sentence of subsection H(2) by Judge Zennaché. The motion was seconded and passed unanimously. A motion was made to vote on the draft of the proposed amendment (with the friendly

amendments) at the September meeting. The motion was seconded and passed unanimously. Ms. Nilsson agreed to make the amendments and circulate the amended draft to the Council.

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

Ms. David presented the committee's most recent draft (Appendix H). She stated that the committee had looked at clarifying the difference between costs and fees in Section A, but opted not to try to make any changes in that regard given that it might open up a can of worms. She noted that every case is different and that it would be difficult to enumerate every kind of cost versus every kind of attorney fee. She stated that the committee looked at whether there was an opportunity to clarify special versus general findings in existing paragraph C(4)(e) and determined that it appears that an attempted clarification could touch on substantive issues because there are so many areas of law. She stated that the committee ultimately decided that the difference is not an easy thing to define in a rule change, that the rule already tells practitioners that there are things called general findings and other things called special findings and, if a party thinks they have a preservation issue, they had better figure it out and make the appropriate request. Ms. David remarked that the majority of the changes were drafted by Judge Zennaché and Prof. Peterson. She stated that the draft ORCP 68 C creates a narrow exception where ORCP 68 does not apply in order to accommodate the Oregon State Bar's Elder Law Section, which is trying to make a specific change to statutes in their area of law that would mandate a different procedure.

Ms. David explained that the majority of the rest of the changes relate to having a hearing and whether a hearing must be held as a matter of law. She stated that the proposed process is as follows: the moving party files a statement for attorney fees (and it is clarified in the draft amendment that the party needs to explain the applicable factors under ORS 20.075 and any other rule); objections are allowed; a response to any objections is allowed; and a hearing is only required when a party asks for one in the objection or in the response to an objection. Ms. David noted that the last provision is contrary to the current rule, which mandates that court must hold a hearing if any objections are filed. She stated that the committee contemplated some instances where both parties file their documents and just ask the judge to make a determination without a hearing. Ms. David explained that the committee made one additional minor change in subsection C(4) so that the requirement to allege a right to attorney fees can be better incorporated in domestic relations proceedings as well, since many domestic relations cases take on a new life when post-judgment motions and responses get filed, rather than formal pleadings. Ms. David stated that the committee spent a lot of time rearranging the rule to try to give practitioners a good step-by-step guide as to what needs to be done and to assist the court in making findings that will be viable upon review.

Judge Gerking asked why the party seeking fees should be required in their statement to go through the factors enumerated in ORS 20.075. Judge Zennaché replied that the factors in ORS 20.075(1) govern the court's exercise of discretion on whether to award attorney fees and ORS 20.075(2)'s factors govern the amount of fees to be awarded so, whether an award is discretionary or mandatory, the court still has to consider those factors. He noted that the Court of Appeals has taken the position that, if the trial court awards attorney fees but does not make at least general findings on the factors, the judgment is subject to reversal because the trial court has not made a meaningful record for appellate review. Judge Zennaché stated that the committee felt that it was appropriate for a party asking for fees to address the factors in ORS 20.075. He observed that the Uniform Trial Court Rules (UTCR) form [5.080] for applying for attorney fees does state that these factors should be addressed but that, unfortunately, sometimes attorneys simply attach the statute without giving any factual basis to support any findings on those factors. Judge Gerking asked whether failure to do so would be fatal. Judge Zennaché remarked that failure to do so is already fatal under the existing rule. Prof. Peterson noted that the rule currently allows, and the amendment would still allow, amendment or supplementation, so a party could always ask the judge for leave to amend or supplement if not enough information was previously provided.

Judge Armstrong acknowledged that he initially had the same reaction as Judge Gerking, since the Court of Appeals often sees the same issue in attorney fee petitions. He observed that he is leery of laying the groundwork for that kind of response because the Court of Appeals may award fees, even if the petitioner did not go to the trouble to walk through all of the criteria, and it can become sort of predictable to see statements that say this factor does not apply for this reason, when the court on its own will realize that certain factors do not have a bearing and can figure out which ones do. Judge Armstrong explained that when he heard Judge Zennaché's response that attorneys are required to make an effort to sort through the factors, he still was not fully convinced, since a party still has the opportunity to ask for leave to amend or supplement if the other party objects. Ms. David pointed out that the language under subparagraph C(4)(a)(i) started out as "must include," in the first committee draft, was changed to "may include," and then became "which explains," because the committee wanted the practitioner to help the judge understand why and in what amount fees should be awarded. She stated that the language was wordsmithed to try to explain the request for fees, not to create a potential Professional Liability Fund issue where a party was forever barred from receiving attorney fees.

Mr. Bachofner stated that there are some practitioners who still use the "check box" method without any explanation. Judge Miller asked whether, if a practitioner does not ask for oral argument and is seeking an award of attorney fees, and an objection is filed, is the objecting party precluded from having a

witness come in and testify? Ms. David explained that paragraph C(4)(e) now lays out that the judge can still set a hearing on the court's own motion if neither party asks but that, if either party asks for a hearing, then one will be held. She stated that there can be additional information and that there is always the opportunity to bring in an expert by testimony or by use of a declaration. Judge Miller observed that sometimes attorneys do not ask for oral argument, but merely submit affidavits with one side stating that the fees are reasonable and customary and the other side saying that they are not, and stated that she will not set a hearing in that case. Ms. David stated that the court may rule based only on affidavits and that she is free to make that judgment call. Judge Zennaché noted that the party that filed the original statement may respond to objections and may submit affidavits instead of asking for oral argument as well.

Mr. Weaver asked whether a hearing means oral argument or an evidentiary hearing. He stated that, in some counties in Southern Oregon, if a party requests an evidentiary hearing it will be a different process than requesting an oral argument and will be held at different times. Judge Zennaché responded that a hearing means both and that, under the current rule, a party is allowed to put on evidence. Judge Armstrong stated that a party may tell the court it will not have evidence if it just wants oral argument, and that the judge can choose to hold the hearing however he or she wants.

Judge Armstrong proposed a friendly amendment to change the word "which" to "that" in the beginning of the new language in subparagraph C(4)(a)(i). Ms. David stated that Mr. Bachofner proposed another friendly amendment in paragraph C(4)(e) to change the language "unless a party has requested a hearing in the caption of the objection or response" to "unless the party has requested a hearing in the caption of the request, objection, or response." Judge Zennaché stated that he was trying to avoid asking for a hearing at the very beginning. Mr. Bachofner noted that this means that a hearing cannot be requested by the party filing the statement. Judge Zennaché stated that the party still has the opportunity to request a hearing in their response to an objection. He observed that the current rule states that a hearing will be held if an objection is filed but that, most of the time, the parties do not even want a hearing. He stated that the committee was attempting to avoid the practice of automatically requesting a hearing in the original application and felt that a party should make a considered decision regarding whether a hearing is needed when the response to the objection is filed. Mr. Bachofner stated that he could see the benefit to this but wondered if it may be a trap for the unwary, if a party originally intended to have a hearing and neglects to ask for a hearing in their response. Judge Zennaché noted that the committee tried to make the procedure very clear. Ms. David stated that the rule is designed so that the last provision of C(4)(e) "or unless the court sets a hearing on its own motion," will allow the court the discretion to grant a hearing in cases where a party may have overlooked this step. Judge Armstrong stated that felt

the same way as Mr. Bachofner at first, but that Judge Zennaché had convinced him that, until a party sees the objections, the party will not necessarily know whether a hearing is necessary. Judge Holland suggested requiring the request for oral argument to be in the caption because it makes it easier for the clerks. Judge Zennaché pointed out that the amendment still requires the request for hearing to be in the caption of the response or objection.

Prof. Peterson suggested two friendly amendments: 1) in paragraph C(4)(d) the phrase "Statements and objections may be amended," should read "Statements, objections, and responses may be amended"; and 2) in paragraph C(4)(e), the language "application, objection, response" should be changed to "statement, objection, response." A motion was made to adopt Prof. Peterson's amendments. The motion was seconded and passed unanimously. A motion was made to vote on the draft of the proposed amendment (with friendly amendments) at the September meeting. The motion was seconded and passed unanimously. Ms. Nilsson agreed to make the amendments and to circulate the amended draft to the Council.

VI. New Business (Ms. David)

A. Evidentiary Ruling re: Social Media

Ms. David informed the Council that a Multnomah County judge had ordered a plaintiff to produce all of his Facebook postings and correspondence relating to Facebook postings in a civil trial. She noted that this type of ruling is being upheld all over the country. She stated that she received two telephone calls asking where in the ORCP social media comes into play and she suggested that the callers read ORCP 36 through 46. Mr. Brian asked whether it was all postings or just postings relating to the case. Ms. David stated that it was all postings. Prof. Peterson, Mr. Bachofner, and Judge Miller related instances of cases where Facebook postings had been used as evidence.

B. Resolution

Mr. Bachofner asked whether the Council might consider passing a resolution commenting on the importance of financial support for the Judicial Department for education and the impact of the recent budget cuts. Judge Herndon observed that this is a nice thought but, in his opinion, might be a wasted effort because legislators do not seem to be that interested in the opinion of lawyers.

C. Next Meeting

It was pointed out that the September 8, 2012, meeting is very important, as the Council will vote on which draft amendments to publish. The meeting will take place at 9:30 a.m. at the Oregon State Bar offices. Prof. Peterson noted that a quorum and simple majority is required to publish drafts at this meeting.

VII. Adjournment

Ms. David adjourned the meeting at 12:04 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 2/10/12 - 5/31/12

I. Inquires

The Council received an e-mail from an attorney writing an article for The Verdict on the Council's recent changes to ORCP 36 B. She was looking for information regarding the legislative history for the amendment. She spoke to Prof. Peterson and received information regarding the history of changes for Rule 36 (and a referral to the website) from Ms. Nilsson.

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 three and a half months since the last website report. The site had 543 visits from 353 unique visitors, and 1,437 page views in this period. 57% of visits to the site were from new visitors; the average number of pages viewed per visit was 2.65; and the average time spent on the site was 2 minutes and 42 seconds.

Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. The number of visits and number of visitors seem slightly decreased when extrapolated and compared to those from the prior report. The Traffic Sources Overview page is of particular interest, as more visitors reached the Council's page via referral pages than by search engine or directly. The two largest referral pages during this period have been courts.oregon.gov and oregonlegalresearch.blogspot.com (the blog of Laura Orr, the Washington County Law Librarian).

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

Council on Court Procedures
June 9, 2012, Meeting
Appendix B-1

Google Analytics

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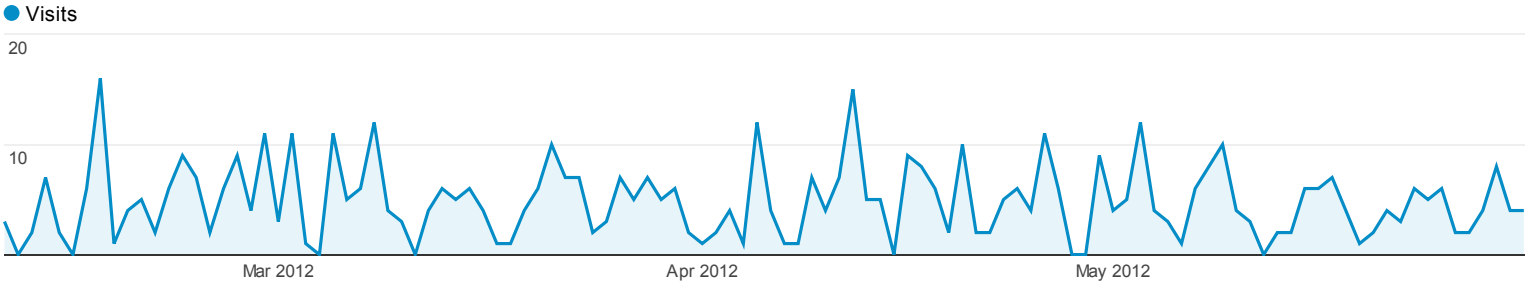
Visitors Overview

Feb 10, 2012 - May 31, 2012

% of visits : 100.00%

Overview



353 people visited this site

Visits: 543

Unique Visitors: 353

Pageviews: 1,437

Pages/Visit: 2.65

Avg. Visit Duration: 00:02:42

Bounce Rate: 51.93%

% New Visits: 56.54%

56.54% New Visitor
307 Visits

43.46% Returning Visitor
236 Visits

	Language	Visits	% Visits
1.	en-us	521	95.95%
2.	en	9	1.66%
3.	en_GB	3	0.55%
4.	es_ES	2	0.37%
5.	pt_BR	2	0.37%
6.	c	1	0.18%
7.	en_us	1	0.18%
8.	ga-ie	1	0.18%
9.	it_IT	1	0.18%
10.	pl	1	0.18%

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Google Analytics

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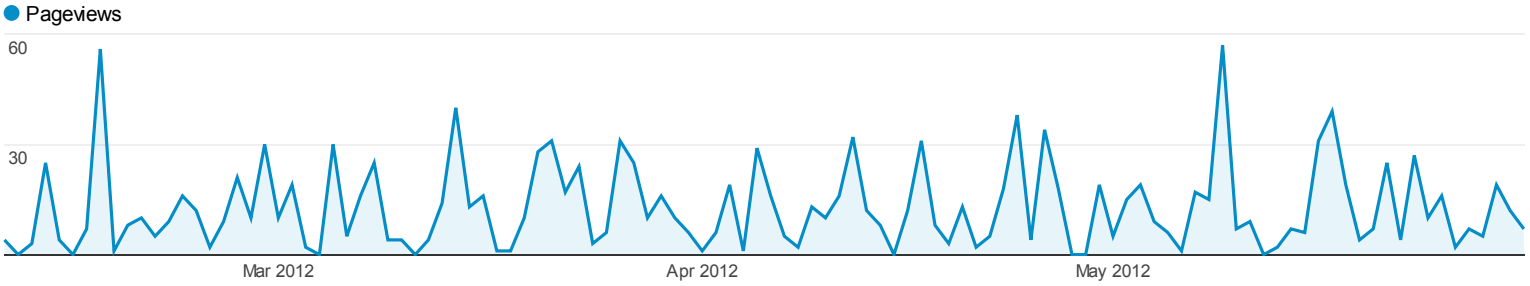
www.lclark.edu/~ccp [DEFAULT]

Content Overview

Feb 10, 2012 - May 31, 2012

% of pageviews : 100.00%

Overview



Pages on this site were viewed a total of 1,437 times

Pageviews: 1,437

Unique Pageviews: 953

Avg. Time on Page: 00:01:38

Bounce Rate: 51.93%

% Exit: 37.79%

	Page	Pageviews	% Pageviews
1.	/~ccp/index.htm	479	33.33%
2.	/~ccp/Past_Biennia.htm	393	27.35%
3.	/~ccp/LegislativeHistoryofRules.htm	132	9.19%
4.	/~ccp/Current_Biennium.htm	126	8.77%
5.	/~ccp/resources.htm	95	6.61%
6.	/~ccp/CurrentBienniumMeetings.htm	57	3.97%
7.	/~ccp/Council_Membership.htm	49	3.41%
8.	/~ccp/contact.htm	36	2.51%
9.	/~ccp/order.htm	30	2.09%
10.	/~ccp/LegislativeHistory.htm	15	1.04%

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Google Analytics

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www.lclark.edu/~ccp [DEFAULT]

Frequency & Recency

Feb 10, 2012 - May 31, 2012

% of visits : 100.00%

Performance

Count of Visits

Visits	Pageviews
543	**1,437**
% of Total: **100.00%** (543)	% of Total: **100.00%** (1,437)

Count of Visits	Visits	Pageviews	Percentage of total Visits Pageviews
1	**307**	**797**	**56.54%** **55.46%**
2	**59**	**186**	**10.87%** **12.94%**
3	**27**	**54**	**4.97%** **3.76%**
4	**22**	**53**	**4.05%** **3.69%**
5	**15**	**34**	**2.76%** **2.37%**
6	**10**	**71**	**1.84%** **4.94%**
7	**8**	**22**	**1.47%** **1.53%**
8	**6**	**23**	**1.10%** **1.60%**
9-14	**17**	**37**	**3.13%** **2.57%**
15-25	**15**	**23**	**2.76%** **1.60%**
26-50	**18**	**25**	**3.31%** **1.74%**
51-100	**18**	**53**	**3.31%** **3.69%**
201+	**21**	**59**	**3.87%** **4.11%**

Location

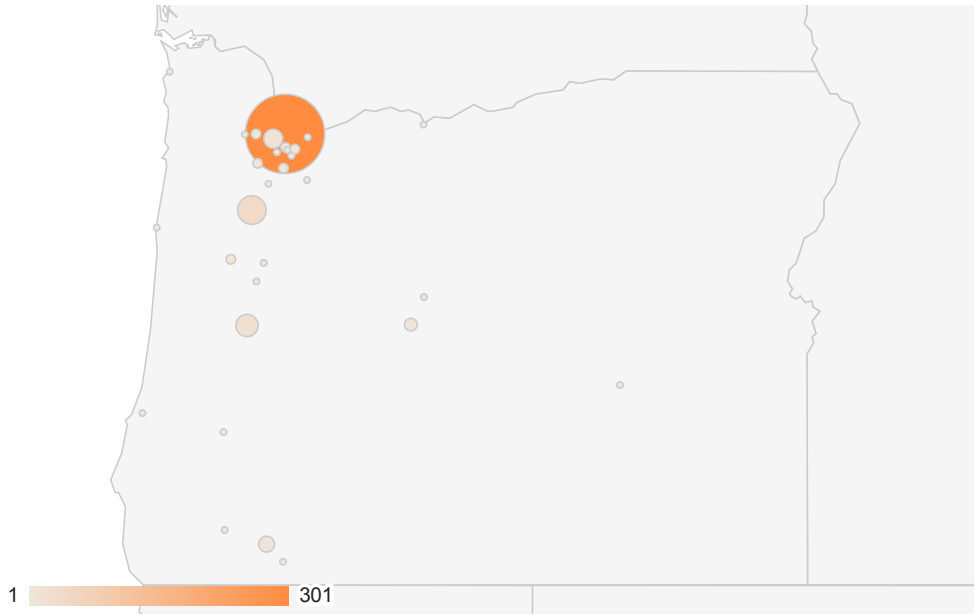
Feb 10, 2012 - May 31, 2012

ALL » COUNTRY/TERRITORY: United States » REGION: Oregon

% of visits : 80.66%

Map Overlay

Site Usage



Visits	Pages/Visit	Avg. Visit Duration	% New Visits	Bounce Rate
438	**2.88**	**00:03:03**	**50.68%**	**47.26%**
% of Total: 80.66% (543)	Site Avg: 2.65 (8.88%)	Site Avg: 00:02:42 (13.11%)	Site Avg: 56.54% (-10.35%)	Site Avg: 51.93% (-9.00%)

	City	Visits	Pages/Visit	Avg. Visit Duration	% New Visits	Bounce Rate
1.	Portland	301	2.80	00:03:05	40.20%	48.84%
2.	Salem	41	3.41	00:02:39	51.22%	41.46%
3.	Eugene	21	2.33	00:01:28	85.71%	42.86%
4.	Beaverton	16	3.19	00:03:48	100.00%	31.25%
5.	Medford	9	3.44	00:02:09	66.67%	66.67%
6.	Bend	8	3.62	00:09:28	62.50%	37.50%
7.	Hillsboro	4	2.00	00:00:48	100.00%	25.00%
8.	Canby	3	2.67	00:17:25	66.67%	33.33%
9.	Clackamas	3	1.00	00:00:00	66.67%	100.00%
10.	Corvallis	3	1.67	00:00:17	100.00%	66.67%
11.	Lake Oswego	3	2.00	00:04:27	100.00%	66.67%
12.	Newberg	3	11.33	00:03:04	66.67%	33.33%
13.	Colton	2	1.50	00:01:27	50.00%	50.00%
14.	Coos Bay	2	1.50	00:00:02	50.00%	50.00%
15.	Depoe Bay	2	1.00	00:00:00	50.00%	100.00%
16.	Marylhurst	2	2.00	00:00:40	50.00%	0.00%
17.	Oregon City	2	3.00	00:00:07	100.00%	50.00%
18.	Ashland	1	3.00	00:01:13	100.00%	0.00%
19.	Brownsville	1	2.00	00:00:28	100.00%	0.00%
20.	Burns	1	1.00	00:00:00	100.00%	100.00%

21.	Forest Grove	**1**	4.00	00:00:22	100.00%	0.00%
22.	Grants Pass	**1**	1.00	00:00:00	100.00%	100.00%
23.	Gresham	**1**	1.00	00:00:00	100.00%	100.00%
24.	Lebanon	**1**	1.00	00:00:00	100.00%	100.00%
25.	Redmond	**1**	1.00	00:00:00	100.00%	100.00%
26.	Roseburg	**1**	3.00	00:04:25	100.00%	0.00%
27.	Seaside	**1**	10.00	00:09:51	100.00%	0.00%
28.	The Dalles	**1**	2.00	00:03:31	100.00%	0.00%
29.	Tualatin	**1**	3.00	00:00:28	100.00%	0.00%
30.	Woodburn	**1**	5.00	00:08:17	100.00%	0.00%

Rows 1 - 30 of 30

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www.lclark.edu/~ccp [DEFAULT]

Search Overview

Feb 10, 2012 - May 31, 2012

% of visits : 20.26%

Explorer

Site Usage

Visits	Pages/Visit	Avg. Visit Duration	% New Visits	Bounce Rate
110	**3.51**	**00:03:54**	**47.27%**	**33.64%**
% of Total: **20.26%** **(543)**	Site Avg: **2.65** **(32.60%)**	Site Avg: **00:02:42** **(44.98%)**	Site Avg: **56.54%** **(-16.39%)**	Site Avg: **51.93%** **(-35.23%)**

	Keyword	Visits	Pages/Visit	Avg. Visit Duration	% New Visits	Bounce Rate
1.	oregon council on court procedures	**27**	4.96	00:02:59	44.44%	37.04%
2.	council on court procedures	**25**	3.84	00:06:12	32.00%	28.00%
3.	(not set)	**24**	2.67	00:01:47	29.17%	29.17%
4.	council on court procedures oregon	**7**	3.57	00:04:15	71.43%	14.29%
5.	oregon ccp	**3**	3.00	00:07:24	66.67%	0.00%
6.	council in court	**2**	1.00	00:00:00	100.00%	100.00%
7.	court procedures in oregon	**2**	1.00	00:00:00	50.00%	100.00%
8.	orcp 82 legislative history	**2**	3.00	00:26:08	50.00%	0.00%
9.	ccp oregon	**1**	2.00	00:00:12	100.00%	0.00%
10.	coucnil on court proceuidres	**1**	2.00	00:00:05	100.00%	0.00%

Rows 1 - 10 of 26

Google Analytics

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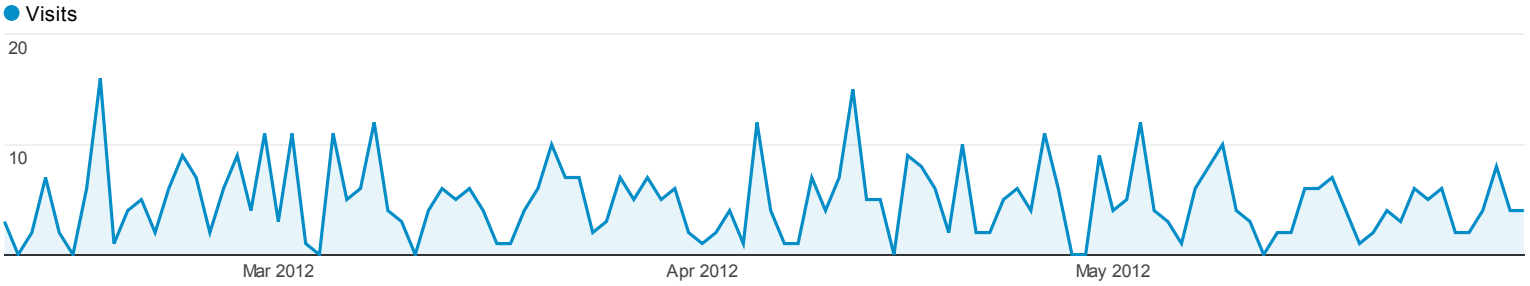
Traffic Sources Overview

Feb 10, 2012 - May 31, 2012

% of visits : 100.00%

Overview



543 people visited this site

20.26% Search Traffic
110 Visits

41.44% Referral Traffic
225 Visits

38.31% Direct Traffic
208 Visits

	Source	Visits	% Visits
1.	councilcourtprocedures.org	90	40.00%
2.	courts.oregon.gov	52	23.11%
3.	oregonlegalresearch.blogspot.com	25	11.11%
4.	lawlib.lclark.edu	18	8.00%
5.	osbar.org	14	6.22%
6.	oregonlegalresearch.com	7	3.11%
7.	www.tinyurl.com/BuyFacebookShares	7	3.11%
8.	intranet	2	0.89%
9.	libcat.lclark.edu	2	0.89%
10.	mbabar.org	2	0.89%

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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. **The signature for filings may be in the form approved for electronic filing in accordance with these rules or any other rule of court.** Pleadings need not be verified or accompanied by **an** affidavit or declaration.

Council on Court Procedures
June 9, 2012, Meeting
Appendix C-1

MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of [*minor*] parties by guardian or conservator. When a [*minor*] **person**[,] who has a conservator of such [*minor's*] **person's** estate or a guardian[,] is a party to any action, such [*minor*] **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**. [*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*] **an** action **and does not have a guardian or conservator**, 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 **and pursuant to this rule**. [*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 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

Council on Court Procedures
June 9, 2012, Meeting
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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(1)*] **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(2)] **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 affidavits or declarations which provide admissible evidence sufficient to prove by a preponderance of the evidence that the proposed protected person is a minor or is 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~~ affidavit(s) or declaration(s), 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~~ to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and

custody of the ~~respondent~~ minor 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~~:

D(2)(a) To the person;

D(2)(b) To the spouse, parents, and adult children of the person;

D(2)(c) If the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the ~~respondent~~ person;

D(2)(d) To any person who is cohabiting with the person and who is interested in the affairs or welfare of the ~~respondent~~ person;

D(2)(e) To 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~~ person, 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;

D(2)(f) If the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the protected person;

D(2)(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, to a representative of the Department;

D(2)(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, to a representative of the Authority;

D(2)(i) If the person is committed to the legal and physical custody of the Department

of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

D(2)(j) If the person is a foreign national, to the consulate for the person's country; and

D(2)(k) To any other person that the court requires.

E Contents of Notice. The notice shall contain:

~~(a)~~E(1) 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~~ person for whom a guardian ad litem is sought;

~~(b)~~(E)(2) 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; and

~~(c)~~(E)(3) 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 any 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 to receive the funds. Such settlement must be sought and obtained by a conservator or pursuant to ORS 126.725.

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief[,] on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court shall stay the proceedings pending the selection of [*the*] **a** jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk shall draw names at random from the names of jurors in attendance upon the court until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a

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time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, [*they*] **each** shall be examined as to [their] **his or her** qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualification[*s*] prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor[,] to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of[,] the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: [*(i)*] the action; [*(ii)*] either party to the action; [*(iii)*] the sex of the party, the party's attorney, a victim**,** or a witness; or [*(iv)*] a racial or ethnic group [*that*] **of which** the party, the party's attorney, a victim**,** or a witness is a member[*of*], or is perceived to be a member[*of*]. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case**,** or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection[,] except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors [*have*] **has** been passed for cause, peremptory challenges shall be conducted by written ballot or outside the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before

another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors [*are*] **is** in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge [*be*] **is** not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken **as** to any juror before the jury is completed and sworn, notwithstanding **that** the juror challenged may have been [*theretofore*] **previously** accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

D(4) Challenge of peremptory challenge exercised on basis of race, ethnicity, or sex.

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, or sex. Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside of the presence of [*potential*] **the** jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the [*potential*] juror on the basis of race, ethnicity, or sex.

D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not

violate paragraph (a) of this subsection is rebutted.

D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity**,** or sex, the court shall disallow the peremptory challenge.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors. The court may direct that not more than six jurors in addition to the [*regular*] jury be called and [*impanelled*] **empanelled** to sit as alternate jurors. Alternate jurors**,** in the order in which they are called**,** shall replace jurors who, [*prior to the time*] **before** the jury [*retired*] **retires** to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner[**,**]**;** shall have the same qualifications[**,**]**;** shall be subject to the same examination and challenges[**,**]**;** shall take the same oath[**,**]**;** and shall have the same functions, powers, facilities, and privileges as the [*regular*] jurors. An alternate juror who does not replace a [*regular*] juror shall be discharged **by the court either** as the jury retires to consider its verdict **or after the jury has reached a verdict or otherwise been discharged. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be appointed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.** Each side is entitled to one peremptory challenge in addition to those otherwise allowed by these rules or other rule or statute if one or two alternate jurors are to be [*impanelled]* **empanelled**, two peremptory challenges if three or four alternate jurors are to be [*impanelled]* **empanelled**, and three peremptory challenges if five or six alternate jurors are to be [*impanelled*] **empanelled**. [*The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules or other rule or*

statute shall not be used against an alternate juror.] **The [*trial*] court shall have discretion as to when and how additional peremptory challenges may be used and how alternate jurors are selected.**

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Shari Nilsson <nilsson@lclark.edu>

Fw: ORCP 57F Amendment Draft

Eve.MILLER@ojd.state.or.us <Eve.MILLER@ojd.state.or.us> Wed, Jun 6, 2012 at 1:01 PM
To: Charles.M.ZENNACHE@ojd.state.or.us, Rex.E.ARMSTRONG@ojd.state.or.us, Leslie O'Leary <LOLeary@wdolaw.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

I am forwarding this email from Judge Susie Norby for consideration at the Council meeting.

Eve L. Miller
Clackamas Co. Circuit Court
807 Main St. #206
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----- Forwarded by Eve MILLER/CLA/OJD on 06/06/2012 12:58 PM -----

From: Susie L NORBY/CLA/OJD
To: Eve MILLER/CLA/OJD@ojd
Date: 06/06/2012 12:38 PM
Subject: ORCP 57F Amendment Draft

Hi Eve,

Thanks again for your kind explanation of the evolution of the proposed amendments to ORCP 57F that you sent me for comment. I am very grateful for the extensive consideration my proposal was given by the Committee, and look forward to appearing by telephone at the Council meeting this Saturday.

I understood that Saturday's meeting would be a time to wordsmith the proposed draft, and discuss the suggested amendments with the full Council. I understood that non-substantive alternative wording is considered at this meeting. I truly appreciate the hard work spent to construct the draft you sent. I hope it would not be rude or disrespectful to offer my suggestions in writing for possible alternative wording that does not alter the substance of the proposal. My suggestion is to condense the proposed changes to avoid unnecessary repetition. (I also thought that the Council may wish to correct the mis-spellings of "impanelled" that currently appear in this section of the rule -- "impaneled" does not actually have a double "l" at the end.)

I attach my suggestion for condensing the proposed draft amendment. My idea is to remove the limiting language in the first paragraph that allows alternates to be replacements during the trial phase, and instead use a few words at the sentence's end that allow seating of alternates *either* during the trial phase or during deliberations. This would avoid repeating the language allowing alternates to be seated during trial by adding more language allowing alternates to be seated during deliberations. That would condense the proposed change to a few words permitting discharge after deliberations as an option, which appears to be the essence of the amendment offered for Council discussion.

I again express my gratitude to your Committee members, and apologize if this e-mail is not the proper manner to suggest a non-substantive alternative. It's always easier for me to see things on paper, so I thought writing my suggestion down might be helpful to others too. I tracked my changes here for clarity.

(See attached file: ORCP 57 Revised 6.6.12.doc)

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Thank you for including me in the process!!

Appreciatively,
Susie Norby

ORCP 57 Revised 6.6.12.doc
28K

JURORS

RULE 57

F Alternate jurors. The court may direct that not more than six additional jurors ~~in addition to the regular jury~~ be called and impane~~l~~led to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who~~, prior to the time the jury retired to consider its verdict,~~ become unable or are found to be ~~unable or~~ disqualified to perform their duties during trial or deliberations. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors, except the ability to deliberate and vote on the jury's verdict. An alternate juror who does not replace a regular juror shall be discharged **by the court either** as the jury retires to consider its verdict **or** ~~**after the jury has reached a verdict or otherwise been discharged**~~ **at the conclusion of jury deliberations**. ~~**Alternate jurors who do not to replace jurors before the beginning of deliberations and who have not been discharged may be appointed to replace jurors who become ill or otherwise are unable to complete deliberations.**~~ **If an alternate juror replaces a juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.**

Each side is entitled to one peremptory challenge in addition to those otherwise allowed by these rules or other rule or statute if one or two alternate jurors are to be impane~~l~~led, two peremptory challenges if three or four alternate jurors are to be impane~~l~~led, and three peremptory challenges if five or six alternate jurors are to be impane~~l~~led. ~~The additional peremptory challenges may be used against an alternate juror only, and the other peremptory~~

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~~challenges allowed by these rules or other rule or statute shall not be used against an alternate juror.~~ **The trial court shall have discretion as to when and how additional peremptory challenges may be used and how alternate jurors are selected.**

INSTRUCTIONS TO JURY AND DELIBERATION

RULE 59

* * * * *

H Necessity of noting exception on error in statement of issues or instructions given or refused.

H(1) Statement of issues or instructions given or refused. A party may not obtain **appellate** review [*on appeal*] of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party [*who seeks to appeal*] **seeking review** identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury **or at such other time as the trial court directed. The requirements of this rule do not preclude an appellate court from reviewing asserted errors in jury statements or instructions for errors of law that are apparent on the record**.

H(2) Exceptions must be specific and on the record. [*A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.*] **The notation of exception required by subsection (1) of this section must be made orally on the record or in a writing filed with the court and must identify with particularity the points on which the exception is based. In noting an exception, a party may incorporate by reference the points that the party previously made with particularity to the trial judge on the record regarding the statement or instruction to which the exception applies.**

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ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS

RULE 68

A Definitions. As used in this rule:

A(1) Attorney fees. "Attorney fees" are the reasonable value of legal services related to the prosecution or defense of an action.

A(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; any fee charged by the Department of Transportation for providing address information concerning a party served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7; the compensation of referees; the expense of copying of any public record, book, or document admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification, or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by **any** other rule or statute. The court, acting in its sole discretion, may allow as costs reasonable expenses incurred by a party for interpreter services. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

B Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, unless these rules or **any** other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the

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court otherwise directs. If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements.

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof**,** and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except when:

C(1)(a) Such items are claimed as damages arising prior to the action; [*or*]

C(1)(b) Such items are granted by order, rather than entered as part of a judgment[.]**; or**

C(1)(c) A statute refers to this rule but provides for a procedure which varies from the procedure specified in this rule.

C(2)(a) Alleging right to attorney fees. A party seeking attorney fees shall allege the facts, statute**,** or rule that provides a basis for the award of such fees in a pleading filed by that party. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in this subsection **or subsection C(2)(b) of this rule**.

C(2)(b) If a party does not file a pleading [*and seeks judgment or dismissal by motion*] **but instead files a motion or a response to a motion**, a right to attorney fees shall be alleged in such motion **or response,** in similar form to the allegations required in a pleading.

C(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to "reasonable attorney fees" is

sufficient.

C(2)(d) Any allegation of a right to attorney fees in a pleading**,** [*or*] motion**, or response** shall be deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objection[*s*] to the form or specificity of **the** allegation of the facts, statute**,** or rule that provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing.

C(3) Proof. The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

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 **which explains the application of 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**, 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 **a** written objection[*s*] to the statement. The objection[*s*] **and supporting documents, if any,** shall be served within 14 days after service on the objecting party of a copy of the statement. The objection[*s*] shall be

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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 paragraph C(4)(b) of this rule. The response and supporting documents, if any, shall be served within seven 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.

C(4)(d) Amendments. Statements and objections may be amended or supplemented in accordance with Rule 23.

C(4)*[(c)]*(e) Hearing on objections. No hearing shall be held and the court may rule on the request for attorney fees based upon the application, objection, response, and any accompanying affidavits or declarations unless a party has requested a hearing in the caption of the objection or response or unless the court sets a hearing on its own motion.

[*C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule],*

C(4)(e)(i) If a hearing is requested the court, without a jury, shall hear and determine all issues of law and fact raised by [*the statement of attorney fees or costs*

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and disbursements and by] the objection[s]. [*The parties shall be given a reasonable opportunity to 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)*](e)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements.

C(4)[*(d)*](f) No timely objections. If objections are not timely filed, the court may award attorney fees or costs and disbursements sought in the statement.

C(4)*[(e)]*(g) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party **must** [*shall*] make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements, [*or*] objections**, or response** filed pursuant to paragraph (a), [*or*] (b)**, or (c)** of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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

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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.

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