MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 7, 2013, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart*
John R. Bachofner
Jay W. Beattie
Arwen Bird*
Kristen S. David
Hon. Roger J. DeHoog*
Travis Eiva*
Hon. Timothy C. Gerking*
Robert M. Keating
Hon. Jack L. Landau*
Maureen Leonard
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver*
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

Hon. Paula M. Bechtold
Michael Brian
Brian S. Campf
Hon. R. Curtis Conover
Jennifer L. Gates
Hon. Jerry B. Hodson

Guests:

Mike Fuller, OlsenDaines PC
Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 1 • ORCP 7 • ORCP 9 • ORCP 10 • ORCP 13 • ORCP 15 • ORCP 27 • ORCP 44 • ORCP 46 • ORCP 54 A • ORCP 54 E • ORCP 55 • ORCP 68 • ORCP 69 • ORCP 79-85	• ORCP 26 • ORCP 40 • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

I. Call to Order

Ms. David called the meeting to order at 9:40 a.m.

II. Approval of November 2, 2013, Minutes

Ms. David asked whether there were any changes or corrections to the November 2, 2013, minutes (Appendix A). Hearing none, she called for a motion to approve the minutes. Such motion was made and seconded, and the motion was carried by voice vote.

III. Administrative Matters

A. Contacting Legislators

Ms. David reminded Council members that they should have sent out their first communication to their assigned legislators by this point. Prof. Peterson stated that he will draft a new update and circulate it to Council members so that they can modify it as appropriate and send it after the current meeting.

B. Smart Phone/Tablet App for ORCP/ORCP in More Readable Format on Council Website

Ms. Nilsson stated that she had found the Oregon Rules of Court smart phone/tablet app by NOMOS (Appendix B), which was discussed at the November Council meeting. It costs $4.99 and is only available for iPhones/iPads, not for Android or other platforms. She also stated that she had e-mailed the creator of the Oregon Courts app that was discussed at the last Council meeting and suggested to them that including the ORCP would be useful for attorneys.

Mr. Bachofner also suggested contacting the publishers of any apps that include Oregon court rules and suggesting that they include a link to the Council's website as well. Judge Miller noted that it would be helpful to let the bench and bar know about available apps and suggested perhaps including an article or informational item in the Bar Bulletin or on the Oregon State Bar's website. Ms. David stated that she would work with Mr. Shields in this regard.

IV. Old Business

A. Committee Reports

1. Electronic Discovery

Ms. David reminded the Council that this committee is monitoring the situation regarding electronic discovery to see whether any new issues arise. The

committee will report again at the January Council meeting.

2. General Discovery

Ms. Payne stated that the committee has met and submitted a written report (Appendix C) recommending to the Council that it take no further action on this matter. She noted that the committee discussed complex case designation and felt that it was not new and did not present any reason to change the expert discovery rules in Oregon. Mr. Keating stated that the practice of judges in some Oregon courts is to require expert disclosure during voir dire to ensure that no one on the jury panel might be acquainted with a potential expert. He pointed out that, while he feels that this is a disadvantage to the defense bar, he also believes that it is not an ORCP issue. He feels that it is a trial management issue and not something the Council is equipped to address.

3. ORCP 1 and Legislative Counsel Suggestions

Ms. David reminded the Council that there was a statutory change about declarations made outside the United States. She stated that the committee has met and discussed how to make this more clear in Rule 1, and decided to add a subsection. She stated that Prof. Peterson has also been working with Legislative Counsel to get feedback about its suggestions. Prof. Peterson reported that the committee has a draft amendment, but needs to meet again with regard to one issue. He stated that the draft should be available for the entire Council's review in January.

4. ORCP 7/9/10 Regarding Service

Mr. Bachofner stated that the committee has met twice and that it is addressing a number of different issues.

One issue is whether or not to allow self-represented litigants (SRLs) to perform mail service under ORCP 7 D(2)(d)(I). Mr. Bachofner stated that, the way ORCP 7 E is written, only mail service by attorneys is allowed. He recalled that the Council has discussed this issue in previous biennia and that the consensus has been that there is a certain amount of vetting of attorneys in the bar examination process, as well as consequences to attorneys that are not there for SRLs, that would seem to make it wiser to keep this practice confined to attorneys. He stated that the committee wanted the input of the rest of the Council on the matter.

Judge Zennaché wondered whether section E, as written, would allow mail service by a process server, mail service by anyone over the age of 18, or mail service only by attorneys. He stated that there are differing interpretations, but that his feeling is that, if anyone over 18 is allowed, it probably would not make that much

difference to allow a SRL to serve by mail. Mr. Beattie pointed out that the rule states that a party cannot serve, which disqualifies SRLs. Judge Miller observed that SRLs are not subject to the same ethical problems if they certify something was mailed and it was not. Mr. Bachofner pointed out that SRLs are not well-versed in the ORCP like attorneys are. He stated that the majority of the committee did not want to expand the rule to allow such service since it involves constitutional notice informing someone they are going to be sued an a situation where default could occur. Mr. Bachofner stated that he has concerns about allowing the less formal practice of mail service to be performed by anyone but an attorney.

Judge Armstrong discussed a case where a SRL did send something for service by process server but did not bother to include the attachments to the complaint or the complaint itself. He stated that, although this case did not involve mail service, it is a good illustration of a SRL not understanding what the relevant principle was and getting a default that ended up having to be set aside on appeal because the trial court would not set it aside, even though the service did not include what it needed to include. He stated that mistakes on the part of an SRL are a real risk. Judge Miller agreed that she has had countless examples of errors on the part of SRLs. Judge Zennaché noted that the language that talks about service pursuant to ORCP 7 D 2(d)(I) says service may be made by an attorney for a party, but it does not say ONLY by an attorney for a party, so it seems to him that a process server or any person over the age of 18 can place an item in the mail and certify they mailed it. He stated that he is not sure what we gain by allowing a relative of a party to serve, but not the party him or herself. Judge Zennaché observed that Rule 7 D 3(a)(I) allows service by mail on an individual and that this service is only effective upon signing of the return receipt. He stated that the rule allows for service by mail on certain corporate and business entities which are not in the county where the lawsuit is filed, and that this is an entirely different issue that the Council has previously discussed the possibility of reviewing. Prof. Peterson observed that the rule states that the mail must be sent with return receipt requested, but that it does not say that service is effective upon return of the receipt. Mr. Bachofner stated that the committee had debated about whether the rule requires that a return receipt be signed for service to be complete. He stated that he did not necessarily agree with this interpretation of the rule.

Mr. Fuller asked whether the committee discussed whether an attorney representing him or herself would be allowed to serve by mail. Mr. Bachofner stated that the rule would seem to allow it. Judge Zennaché agreed. He stated that he reads ORCP 7 D(3)(a)(I) as requiring signature on the return receipt, and stated that he does not see how it would be constitutional if it were not required. Mr. Bachofner disagreed with that interpretation as applied in all circumstances, and noted ORCP 7 D(2)(d)(ii) states that, for the purposes of computing the period of time, service by mail, unless otherwise provided, shall be complete on the day

the defendant signs a receipt or three days after mailing if mailed to an address within the state or seven days after mailing if mailed out of state. Judge Zennaché stated that this three day time rule applies to a circumstance when other methods of service have failed and you get an order from the court stating that you can serve by mail without return receipt to the last known post office box. Judge Miller observed that, from the court's standpoint, it would be better for all concerned and due process would be better protected if the preferred form of service for SRLs were certified mail return receipt requested. She stated that, if the person being served does not sign the receipt, a judge could allow an alterative method, but she does not feel comfortable giving non-lawyers the same latitude to serve as lawyers unless the return receipt is a requirement. Judge Miller noted that she is not in favor of expanding the rule but, if it were to be expanded, anyone serving by mail should be required to use certified mail with a return receipt. Mr. Bachofner pointed out that the consensus of the committee was to not expand the rule.

Judge DeHoog noted that there is a difference on a county by county basis regarding what constitutes effective service by mail, and that he does not believe service is effective, even by an attorney, until the return receipt has been signed. Prof. Peterson stated that it appears that the limitation referring to attorneys serving by mail in ORCP 7 E is there because attorneys cannot serve in any of the other capacities. Judge DeHoog stated that neither can a party, and for SRLs he thought that the question at hand is whether they ought to be able to serve by mail perhaps *because* the extra precaution of requiring certified mail with return receipt exists. Prof. Peterson observed that the Council could have added language such as “by an attorney and only by an attorney” to make it clear that only attorneys can perform such service. He noted that ORCP 7 D (2)(d)(I) states that a return receipt must be requested, but it does not say that one has to come back. Prof. Peterson pointed out that for individuals a receipt has to come back, for mail agents one has to come back, but for corporations one does not have to come back. It seems to him that the return of the receipt is not universally required. He also observed that, in the family law context, if you get a first class, certified letter from your soon-to-be ex-spouse you may be inclined not open it, but if you get one from an attorney you may be more likely to open it. Mr. Bachofner stated that these questions bring up the notion of whether the Council should look at the rule as a whole, as it seems to be a morass. Judge Armstrong noted that there is plenty of good case law trying to interpret it.

Ms. David stated that new issues will arise as the e-court system is implemented, and that this is something to think about when making the rules and the systems mesh. She observed that there are many ways that there could be clarification of the rule, and that there are appellate court cases talking about the difference between attorneys having additional training and knowledge of the rules as opposed to SRLs. Mr. Bachofner asked whether anyone has the view that the rule

should be expanded to allow mail service by SRLs. Mr. Beattie asked why, if It is just a matter of adequate protections that service will occur, the Council does not prescribe the manner in which service must be completed, not who completes it? Judge Zennaché agreed and stated that the rules should be clear about what is expected. He stated that to say that SRLs should be treated differently than lawyers in serving is disturbing to him, and that a better approach would be to be clearer about how you get service perfected in general. He was bothered by the fact that a corporation can be served without requiring a return receipt. Mr. Beattie observed that the old rule was that you could serve corporations by mail and that was the only exception, but now you can serve anyone by mail if you are an attorney. Prof. Peterson noted that the constitutional standard is in Rule 7 D(1), but for corporations you at least have a professional, registered agent, plus an attorney, so there is less likelihood of things going awry. He stated that service of the summons is a really important step in litigation, since it attaches personal jurisdiction, and that he has always been troubled by the prospect of receiving service in an envelope. For example, in *Lake Oswego Review v. Steinkamp* [298 Or 607, 695 P2d 565 (1985)], the defendant admitted to receiving a letter, stated that he probably signed for it, but then that he put it with the rest of the mail he did not want to open. Prof. Peterson stated that, if process server or someone else shows up at the door, people are more likely to be on notice. Mr. Bachofner stated that the committee will take this discussion as a charge to more closely examine Rule 7 and perhaps undertake a more comprehensive revision.

Mr. Bachofner stated that the committee also looked at ORCP 7 D(3)(b)(ii), D(3)(c)(ii), and D(3)(d)(ii), to allow mail service to entities without first making an attempt to serve within the county. He stated that the consensus was that it would eliminate people using process servers and lead to serving by mail in all cases. The committee was not comfortable with that idea, but will look at it again in the context of the prior discussion.

Mr. Bachofner reported that Legislative Counsel had suggested changing language in ORCP 7 E regarding compensation to sheriffs or other process servers from “a reasonable fee” to “any fee agreed to between the server and the person requesting service.” He stated that the committee did not think a change was appropriate because there are circumstances where people would pay more than what is reasonable, and the committee did not want judges to be required to award costs for service that were unreasonable. He noted that ORS 21.300(2) does at least contemplate that parties can agree on any amount, but you still have the check of judicial discretion on what is reasonable. Mr. Bachofner stated that Legislative Counsel also wanted to add a lead line to ORCP 7 C, and that Prof. Peterson will draft this amendment and bring it back to the Council.

Mr. Bachofner stated that there was a proposal from Holly Rudolph at the Judicial Department regarding ORCP 7 F(2)(b)(I) questioning whether affidavits of

publication should be deleted, and the consensus of the committee was that both affidavits and declarations should be available.

Mr. Bachofner stated that another issue before the committee is a proposal to amend ORCP 10 C to add three days when service is made by e-mail. He stated that the committee believed that this was reasonable given our fast moving process, and that the committee will draft language to bring back to the Council. Prof. Peterson noted that the suggestion came from Mr. Weaver's office and suggested that more attorneys would agree to e-mail service if they were allowed the three days they get now for mail or fax service. Mr. Bachofner stated that this would result in a change to ORCP 10 C, as well as a change to ORCP 9 G to insert language to the effect that "subject to Rule 10 C service is effective..." With regard to the term "facsimile communication device," used in Rule 9, there was a concern expressed that faxes are no longer just fax devices, but can be applications and services as well. Mr. Bachofner also stated that a fax machine does not necessarily have to be in the attorney's office, but could be in another location maintained *for* the attorney's office. The committee will draft this change as well.

Ms. David noted that the Ecourt Law and Policy Work Group had submitted proposed amendments to ORCP 9 (Appendix D) and asked that the committee add these to its charge. She also asked that the committee keep in mind that, with the transition to ecourt, time periods will likely be measured in 7 day increments.

5. ORCP 13

Judge Zennaché reported that the committee had met. He stated that, with regard to the use of an order to show cause as opposed to a simple motion to modify, the committee felt that this kind of change is not within the purview of the ORCP but, rather, would be a substantive change that would need to be addressed in the UTCR. He stated that the committee would meet again and discuss redefining the pleading rule to make it clear that motions and orders to show cause and related affidavits are pleadings and that all of the rules that apply to pleadings apply to them. Judge Zennaché stated that, barring taking this step, the Council could ensure that certain other rules clearly articulate that they are applicable to motions and orders to show cause in domestic relations cases. The committee will continue discussion on those two issues at its next meeting.

Prof. Peterson stated that the issue seems to be clearly procedural and not substantive, and that he thinks the Council can tell the family law bar to call a motion to show cause whatever the Council chooses to. Judge Zennaché observed that it is not that easy, as there is language in the statues and the UTCR that talks about initiating by motion and order to show cause. Prof. Peterson stated that the issue still strikes him as procedural and that the Council could ask the legislature to change the language in the statutes, as it seems that we are sometimes working at

cross-purposes.

6. ORCP 15

Mr. Beattie stated that the committee had met and discussed the issue that ORCP 15 seemed imprecise and was perhaps a trap for the unwary because it does not have timelines listed within the rule. He stated that the consensus of the committee was that the ORCP are intended to be read in their entirety, and the other rules stating the timelines were sufficient. He also noted the Council's reluctance to make a practice of inserting cross-references to other rules within a rule. Mr. Beattie will draft short report confirming the committee's recommendation and bring it to the next Council meeting.

7. ORCP 27

Mr. Weaver reminded the Council that, last biennium, an amendment was published but not promulgated which addressed concerns that the guardian ad litem (GAL) process was being abused and GALs were being appointed without interested parties being given notice. He stated that the committee had identified most of the statutes that might be affected by the proposed amendment, and found that there were some statutory proceedings that could be adversely affected. Mr. Weaver stated that the committee discussed the possibility of making notice requirements discretionary with the court. He noted that the committee has not come up with a precise mechanism but, if it looks like someone is applying under questionable circumstances, the court could condition the appointment of a guardian ad litem with the notice requirements that were drafted last biennium. Mr. Weaver stated that the committee will have another meeting and include some people who were on the committee last biennium, including Brooks Cooper and Judge Lauren Holland. Prof. Peterson reminded the Council that a major concern last biennium was cases where the statute of limitations is approaching. He stated that, the way the amendment from last biennium was drafted, the notices had to go out at the time the GAL is being requested. Prof. Peterson stated that someone on the committee had an insight that, if the notices could go out soon after appointment of the GAL, it still would prevent mischief and give the judge the discretion to determine whether the case is the kind of case where notices should be required. Mr. Eiva noted that the language should be crafted carefully so that judges are sure that they only need to require notice if they are really concerned. Judge Miller agreed.

8. ORCP 44

Mr. Keating stated that the committee is discussing how broad is the obligation of the plaintiff to provide medical records under the existing language of ORCP 44 ("relating to injuries for which recovery is sought"). He stated that the defense bar

is concerned that it is being precluded from access to vital, relevant information necessary to address the claim for personal injury, whereas the plaintiff's bar is concerned about an unwarranted invasion of a patient's privacy by the production of personal information that has no bearing on the claim. He stated that it is the same issue that occurred last biennium – the defense would like it broadly construed while the plaintiffs would like it narrowly construed. Mr. Keating observed that committee member Judge Hodson had opposed the amendments last biennium and articulated the view that he does not like to support any change if it is perceived as moving the goal post or benefitting one party more than the other, but that he felt it was appropriate for the Council to look at a rule and see if there are behaviors or rulings being made not consistent with the intent of the rule. Mr. Keating stated that the committee discussed the 1986 Council amendment of Rule 44 where it was made clear that notations and medical records and not merely notes of medical examinations conducted for purposes of litigation were allowed. He stated that the committee decided it would be a good idea to explore the history of the rule to determine its original intent and how it had been applied in practice in the years since its implementation. He and Mr. Eiva are both doing research.

Mr. Bachofner stated that he thought that last biennium there were some on the plaintiff's bar that agreed there was an issue and the question was how do we approach the issue. He seemed to recall talk of a compromise. Mr. Bachofner recalled that, after *Vega v. Farmers Ins. Co.* [323 Or 295, 918 P2d 95 (1996)] , the plaintiff's bar and the defense bar compromised regarding uninsured motorist cases. He thought that there might be some kind of similar compromise approach here. Ms. Leonard suggested having a representative in the room for the plaintiff. Mr. Bachofner suggested perhaps a recording, in exchange for something from the other side.

Mr. Eiva stated that, in terms of a compromise, he has questions about whether the Council has the authority to affect the physician-patient privilege. Since we do not quite know what the original meaning of ORCP 44 was, and since it derives from a statute, we may not get clarity until the appellate courts give us that clarity.

Prof. Peterson reported that he has exchanged e-mails with Rep. Brent Barton and will report to the committee after they have communicated further.

9. ORCP 45

Ms. Wray stated that the committee will report in January.

10. ORCP 46 and 55

Judge Gerking stated that the committee had met and discussed the enforcement mechanism for the change the Council made last biennium to ORCP 55 H(2)(b). The committee revisited the proposed language change to ORCP 46 that was published but not promulgated last biennium. That proposal stated that a motion to compel could be filed if a party objects or fails to comply with the requirements of ORCP 55 H. Several members of committee were concerned with that approach. Two of the concerns were: 1) ORCP 46 compels the disclosure of documents in a party's possession, whereas ORCP 55 H is directed toward disclosure, through a subpoena, of records in the possession of a third party; and 2) technically, ORCP 55 is not part of the discovery rules, so perhaps the enforcement mechanism should be included in the rule itself.

Judge Gerking stated that Ms. Payne had proposed the potential solution of adding a sentence to ORCP 55 H(2)(b) stating something such as: "the party issuing the notice may at any time file a motion with the court to have objections resolved or to otherwise seek compliance with this rule." Judge Gerking added that perhaps some reference could be made to ORCP 46 as the authorizing rule for filing the motion that would trigger fees.

Mr. Eiva expressed concern about putting language in ORCP 46 and attaching sanctions to it, because a plaintiff's attorney is not giving these records over through discovery but, rather, they are being requested of a third party. He stated that his firm's practice is to provide defense counsel the records they feel are appropriate and, at that point, defense counsel can move to compel any additional documents. Since the documents are in his firm's control, they can explain to the court their objections and move for in camera review, if necessary. Mr. Eiva explained that all the sanctions flow from this type of non-compliance. He stated that the language that was added last year requires plaintiffs to object with specificity and that, in his practice, it often happens that the documents that are subpoenaed from a third party provider do not necessarily match the documents that he received earlier when he requested information from the same provider. He observed that sometimes a subpoena triggers more documents, depending on the clerk who pulls the records or other circumstances. Mr. Eiva stated that it is a second discovery, so to speak, which is not being filtered through the plaintiff, and that providing sanctions for the plaintiff not objecting with specificity puts the plaintiff in a bind because the plaintiff does not know for certain what is in the documents that the plaintiff has not yet reviewed. He stated that he appreciates the fundamental goal, which is to get any objections to a subpoena heard, and that it is not clear what the mechanism is.

Mr. Bachofner expressed confusion about why Mr. Eiva would not be able to object with specificity in the circumstances he described. Mr. Eiva explained that,

since he does not know what all of the subpoenaed documents are going to contain, he cannot make a specific objection. He stated that he can make an anticipatory objection, but he would not be certain. Mr. Eiva pointed out that the informal practice that many attorneys use is to have such records subpoenaed to the plaintiff so that the plaintiff can review them and remove any documents viewed as questionable for in camera review by a judge. Mr. Bachofner pointed out that Mr. Eiva had just given bases for objection on a theoretical level and wondered why he could not do the same in a real-life situation.

Mr. Beattie stated that, as a practical matter, the goal is for there to be an objection so defense counsel can approach the court and have it address any problem. He noted that this typically does result in some in camera inspection of the medical records or some determination by the court that records are obtainable. Mr. Keating observed that the Council addressed that issue last biennium, and that all we are addressing now is how to get it before a judge. He stated that the concern about ORCP 46 is that it does have language about sanctions. If language was to be inserted into ORCP 55 giving specific authority to bring a dispute to a judge to rule on the objection or the lack of compliance, there would be a mechanism to get it before the court. Mr. Beattie pointed out that what the Council addressed last biennium were random objections that stated no reasons and brought everything to a stop. Judge Miller observed that, in most cases, a client should be able to give guidance on what might be in their medical records and, in any case, most judges are willing to allow these objections, even if they are a little vague, as long as they are not disingenuous. Mr. Keating stated that, if the Council were to adopt Ms. Payne's suggested language in ORCP 55, it would eliminate the concern about sanctions, which was never his purpose.

Judge Gerking agreed with Mr. Keating that the suggested language is non-threatening and is a potential solution. Ms. David stated that it sounds like the committee is making good progress on this issue, and that adding language to ORCP 55 to reiterate the procedural requirements would make it more clear, especially to newer practitioners. She suggested that the committee draft a proposed amendment for the Council's review.

Judge Gerking stated that the committee's second issue is whether ORCP 55 H needs to be further clarified in regard to whether a copy of the trial subpoena for medical records or a notice thereof needs to be served on the opposing party at least 14 days prior to the subpoena being served on the third party from whom records are requested. He noted that the committee was in significant disagreement as to whether the current rule requires any notice to the opposing party prior to serving a trial subpoena for medical records. He observed that clarification might be in order because of a perceived conflict between ORCP 55 H(2)(a) and ORCP 55 H(2)(c). Judge Gerking stated that the disagreement was about whether notice is always required or is only required in situations where

documents are requested to be sent directly to defense counsel. Mr. Bachofner stated that there was confusion about whether advance notice is required when subpoenaing records to court.

ORCP 55 H(2)(c)(iv) reads:

> ...if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.

Mr. Keating noted that this subparagraph appears to state that if records are not being subpoenaed to a hearing, the 14 day requirement exists. Judge Gerking reiterated that the perceived conflict is with ORCP 55 H(2)(a), which seems to be overarching:

> H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of such information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that: (I) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to object; (iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with such resolution. The party issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

Mr. Keating expressed concern that this means that he cannot serve a trial subpoena until he has given 2 weeks' notice and the 2 weeks' notice has elapsed and no objections have been received. He stated that ORCP H(2)(d) provides that when records are subpoenaed to court, the parties show up on the day of trial,

counsel can look at the records, and everything is there for the judge to make a determination. He pointed out that it is not uncommon for a plaintiff to see a doctor two days before trial. Mr. Bachofner observed that it is also not uncommon to find new records that have not been seen before. He stated that, as a practical matter, if 14 days' advance notice is going to be required, defense counsel will likely start subpoenaing the custodian of records, which is a waste of time for the court and custodian, as well as a waste of money. He noted that, by subpoenaing records to court, this problem is avoided and that, 98% of the time in his practice, he is able to come to agreement with opposing counsel on the authenticity of records, which are then subpoenaed to court and reviewed. Mr. Eiva observed that such records are privileged. Mr. Bachofner stated that, once the plaintiff has called a treating physician, such records are no longer privileged.

Judge Gerking and Ms. Payne agreed that, as written, the rule is confusing. Ms. David agreed that there is clearly room for improvement. She noted that her firm recently issued more than 30 medical records subpoenas and that there was much debate about the issue. She suggested that the committee draft a survey to be sent to the Oregon Trial Lawyers Association (OTLA) and Oregon Association of Defense Counsel (OADC). She noted that it is often a good idea to circulate different versions of proposed rule changes to get feedback.

Prof. Peterson suggested that the committee draft language regarding the first issue and send it to Ms. Nilsson for her to put in proper format. He also asked the committee to look at Legislative Counsel's suggestions regarding ORCP 46 and see whether they seem appropriate. Ms. Nilsson agreed to send those suggestions to Judge Gerking.

11. ORCP 47 E

Ms. David stated that the committee feels that no changes need to be made to ORCP 47 E at this time. She stated that the committee is working on a memo to bring to the Council at its next meeting.

12. ORCP 54 A

Ms. Leonard reminded the Council that this is a carryover item from last biennium. She noted that concern was expressed that the rule may allow for abuse, and that it perhaps should be more like the federal rule which has a much shorter time within which dismissal is permitted unilaterally and, beyond that, dismissal requires court approval. The committee is recommending that the Council send out a survey to the bench and bar regarding: 1) the absence of court approval; and 2) the timing of five days before trial. She stated that the committee would like to hear the pros and cons of the rule and whether there seems to be an abuse issue. She noted that the committee also does not know whether there are particular practice areas in which a unilateral five day dismissal is being used abusively. Prof. Peterson pointed out that the Council's research last biennium showed that Washington and California are very generous about allowing dismissals up to and

during trial, while the federal rule requires judicial permission. Before the current Oregon rule was adopted, the legislature allowed dismissal without judicial involvement, so the current procedure is not a break in practice, but the question is whether there is a problem with the way parties are using it. Ms. Leonard heard one anecdote about a practitioner using the practice as a form of judge shopping, but that this issue would seem to have been resolved by higher filing fees.

The committee will send out its survey and meet further.

13. ORCP 54 E

Prof. Peterson stated that he and Ms. Gates had a telephone conference and discussed the fact that this issue has come up before and that it was previously brought before OTLA and OADC for comment. They wondered why the Council is spending time on it again. Ms. Leonard recalled that there was interest in a rule like California's, but that California's rule has statutory authorization for costs and disbursements of many kinds, including expert witness fees, that go both ways for plaintiffs and defendants, whereas Oregon does not. She stated that she was never able to discern how a rule change would help in Oregon in the absence of statutory changes. Prof. Peterson stated that the intent would be to facilitate speedy resolution of cases by creating some incentive and he recalled that, a few biennia ago, he drafted a neutral version of the rule with the consensus being "what difference would it make"? Mr. Bachofner stated it seems to be a solution in search of a problem. Prof. Peterson stated that the committee will meet again to make a final determination.

14. ORCP 68

Prof. Peterson reported that the committee had three charges. The first was to look at cross-referencing to make the pleading of attorney fees appear earlier in the rules. He stated that the committee is against that, but thought that the word "pleading" should be added to the title so it at least appears in a word search.

The second issue is a timing issue: if you get a limited judgment that gets your client out of the case, unless you have the foresight to get attorney fees settled before you submit the form of judgment, it may be impossible to get a judgment for attorney fees until some years later when the rest of the case is complete. Judge Miller pointed out that, if you are no longer a party to the case, you will probably not get notice when the general judgment is filed. Prof. Peterson stated that the committee felt it could make a change to make it possible for judges to resolve those cases.

Mr. Weaver stated that the committee is considering sending a survey to judges to determine their thoughts on the idea of having a statement for attorney fees submitted after a limited judgment has been entered. He stated that the question would be whether it would put extra stress on the system or make extra work for judges.

The third issue was related to collection. Prof. Peterson stated that you have 14 days for filing a statement for attorney fees. The committee found the Court of Appeals case, Marquez v. Myers [96 Or App 214, 772 P2d 437 (1989)], which says that Rule 68 reads terribly; that you can always ask the court to expand the timeline under Rule 15; but that, if you do not do that, your supplemental statement for attorney fees should be denied. Prof. Peterson stated that the committee believes there should probably be a provision in the rule that authorizes a party to ask for collection fees. He stated that this is particularly appropriate because the UTCR form for the statement for attorney fees includes a provision for anticipated attorney fees. Prof. Peterson pointed out that some appellate cases say that such fees should be denied unless they have a good basis and they are not purely speculative, and that the Multnomah County Attorney Reference Manual says that anticipated collection fees will not be granted. Mr. Eiva stated that he believed that the Supreme Court provided that anticipated attorney fees are not available unless the contract specifically provides for that kind of attorney fee. Prof. Peterson observed that there is still the 14 day period issue to deal with. Judge Miller agreed that it needs to be fixed, but did not want to encourage people to load them up front, as this is bad practice. Prof. Peterson noted that the Council should probably send a memo to the UTCR Committee to let it know that its statement for attorney fee form should be changed since, not only is it bad practice to anticipate your fees, but the granting of such fees is not really grounded in the law.

15. ORCP 69

Ms. David stated that the committee had met and is working on the question of whether the notice of intent to take a default runs concurrently or consecutively with the 30 days after service of the summons and complaint. She noted that another issue is a request to consider requiring any motion for an order of default to be served again under ORCP 7 or ORCP 9. She observed that there are times when it is very difficult to obtain service the first time, let alone having to do it again. She stated that the committee is reaching out to other sources to get further information and input and will meet again.

16. Early Assignment of Cases/Scheduling

Judge Gerking had to leave the meeting early. His committee should issue a final report on its recommendation to the Council in January.

17. ORCP 79-85, Various Consumer Law Issues

Prof. Peterson stated that the committee did not hold a meeting but that, nonetheless, progress is being made. He stated that he has made contact with the Debtor Creditor, Consumer Law, and Real Estate and Land Use sections of the Bar. The Consumer Law Section is interested in the foreclosure/money judgment issue, and has a few people it has identified who would like to work with the Council on this issue. The Debtor Creditor Section said it would bring up the issue with its

litigation committee, but Prof. Peterson has not heard back. The Real Estate and Land Use Section put the item on its agenda for December 6, 2013. Prof. Peterson stated that the committee will have a meeting with a work group and ask non-Council members who are versed in consumer law to participate. Mr. Bachofner recommended Rich Parker and Russ Garrett to be part of the work group. Mr. Fuller recommended contacting Kelly Sutherland, specifically regarding the money judgment issue.

V. New Business

A. Proposed ORCP 9 Amendments from the Ecourt Law and Policy Work Group

The Ecourt Law and Policy Work Group recommendations (Appendix D) were discussed during the ORCP 7/9/10 committee report. Ms. David asked Mr. Bachofner to include them in his committee's charge.

VI. Adjournment

Ms. David adjourned the meeting at 12:00 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 2, 2013, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart*
John R. Bachofner
Jay W. Beattie
Michael Brian*
Hon. R. Curtis Conover*
Kristen S. David
Hon. Roger J. DeHoog
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson*
Robert M. Keating
Hon. Jack L. Landau
Hon. Eve L. Miller
Mark R. Weaver*
Hon. Charles M. Zennaché

*Appeared by teleconference

Members Absent:

Hon. Paula M. Bechtold
Arwen Bird
Brian S. Campf
Travis Eiva
Jennifer L. Gates
Maureen Leonard
Shenoa L. Payne
Deanna L. Wray

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 1 • ORCP 4 • ORCP 14 • ORCP 15 • ORCP 18 • ORCP 20 • ORCP 27 • ORCP 45 • ORCP 46 • ORCP 47 E • ORCP 54 E • ORCP 55 • ORCP 68 • ORCP 69	• ORCP 26 • ORCP 40 • ORCP 59 • ORCP 62 • ORCP 64		

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:40 a.m.

II. Approval of October 5, 2013, Minutes (Ms. David)

Prof. Peterson noted a correction to the minutes **(Appendix A)**. He asked that the language on page 3 regarding ORCP 68 be clarified. He suggested something along the lines of: "He noted that, in the post-judgment collection context, most judges say they will honor a statement of attorney fees filed and served more than 14 days after entry of judgment, but the rule as written would indicate that such a filing is too late."

Ms. David asked that the language on page 8 regarding ORCP 47 be changed from " she shared this information with the judges" to " she shared this information with the committee."

A motion to approve the minutes as amended was made and seconded, and this motion was carried by voice vote.

III. Administrative Matters (Ms. David)

A. Contacting Legislators

Ms. David pointed out that Prof. Peterson and Ms. Nilsson had created a matrix of legislator contacts **(Appendix B)** and assigned Council members who had not expressed a preference to legislators. Council members are responsible for contacting an average of between 3 and 4 legislators each. Judge Zennaché noted that Mr. Eiva had been assigned to contact Sen. Prozanski, whom the judge has known for many years. Ms. Nilsson stated that she would contact Mr. Eiva and ask him to correspond with Sen. Edwards rather than Sen. Prozanski.

Ms. David stated that Council members should feel free to share any feedback they receive with the Council and that, if legislators have any questions members cannot answer, those should be referred to Prof. Peterson and Ms. Nilsson.

B. Smart Phone/Tablet App for ORCP/ORCP in More Readable Format on Council Website (Ms. David)

Ms. David told the Council that she had received an advertisement for a smart phone/tablet app that included Oregon court rules, but lacked the Oregon Rules of Civil Procedure (ORCP). She also received information from a company that advertised that one could "create your own app." **(Appendix C)** Both advertisements appeared to be from out-of-state companies. She suggested that, if no apps could be found that contain the ORCP, we might consider contacting the first company and suggesting that they include the ORCP in their app, since this would be useful tool for attorneys.

Judge Miller stated that the Oregon Judicial Department (OJD) had loaded an app onto her iPad called ORS Rap 2012, which does include the ORCP. The app appears to be made by a company called NOMOS. She suggested getting in touch with someone at the OJD to learn more information about the app and whether it is available commercially.

Ms. David and Ms. Nilsson agreed to do further research on the issue and report back to the Council in November. She also suggested that Mr. Shields could be helpful regarding this issue.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David stated that the committee had met again and agreed that there does not seem to be the need to reach out to the bench and bar for further comment. She noted that the Council's prior rule change regarding e-discovery has been in effect for about a year and a half, and that the courts do not seem to be seeing a particular problem relating to it. Ms. David observed that there are still discovery issues that arise, but that they are generally similar to other discovery issues, and that there are mechanisms in the Uniform Trial Court Rules (UTCR) which require the parties to confer when such issues arise. She suggested that the committee watch and wait, as it did last biennium, and report back to the Council in March.

2. General Discovery (Ms. Payne)

Mr. Beattie, who was acting as chair of the committee during the month of October, was not able to schedule a meeting. This was due in part to the large size of the committee. He will attempt to get a meeting scheduled and, in the interim, he will see if he can find a model rule somewhere and explore the possibility of the creation of a limited rule change regarding the disclosure of expert witnesses at some time prior to trial. He suggested that perhaps the rule could be placed into the ORCP 50 series relating to the trial of cases as opposed to the discovery series. He stated that he does not foresee comprehensive expert discovery happening in Oregon. Mr. Bachofner pointed out that the committee is charged with the issue of interrogatories as well.

3. ORCP 1 and Legislative Counsel Suggestions (Ms. David)

Ms. David reported that the committee had met and discussed ORCP 1 E. She stated that Prof. Peterson had received feedback from the Oregon Law Commission, and that the committee is ultimately looking at revising some language in ORCP 1 E to include a section about foreign declarations. She stated

that the committee is also looking at various suggestions from Legislative Counsel, but was a little concerned with the suggestion to renumber sections in ORCP 4 regarding jurisdiction. She noted that such a change could significantly impact attorneys' legal research, and this has the potential to make a practitioner's life miserable. Ms. David stated that the committee would like to speak to someone with Legislative Counsel to better understand the rationale behind their request. She suggested that other committees considering Legislative Counsel suggestions should also take the issue of legal research into consideration. Prof. Peterson observed that the change appears to be an attempt to make the rules more uniform, which is a noble goal, but noted that Judge Armstrong found other rules formatted in the same way as is ORCP 4 that Legislative Counsel did not suggest changing.

Prof. Peterson stated that, with regard to ORCP 1, the Oregon Law Commission did not assign the matter to a work group but, rather, sent the matter directly to Legislative Counsel. He also stated that Holly Rudolph of the Oregon Judicial Department has been working on standardizing court forms and had sent him an e-mail **(Appendix D)** asking whether affidavits should be eliminated from the ORCP, as they seem to be archaic. The committee had a discussion about the difference between sworn statements and unsworn statements. Prof. Peterson pointed out that there are cases where statutes require an affidavit, and he wondered whether the Council has the power to say that a declaration is good enough in those cases. Ms. David noted that, when it comes to making procedural versus substantive changes, sometimes the Council does not have enough information readily at hand because the Oregon Revised Statutes are voluminous. She cautioned that we need to tread carefully so as not to make an unwitting impact elsewhere.

4. ORCP 7/9/10 Regarding Service (Mr. Bachofner)

Mr. Bachofner stated that the committee has not yet met. Prof. Peterson observed that Holly Rudolph's e-mail **(Appendix D)** had also mentioned the possibility of removing affidavits from ORCP 7, and he asked the committee to take a look at that issue as well.

5. ORCP 13 (Judge Zennaché)

Judge Zennaché reported that he attended the family law conference and asked the executive committee if they would appoint two people to be part of the committee's work group on this issue. He will schedule a committee meeting in November so that the committee can decide which issues in their charge are procedural versus substantive and proceed from there. Judge Zennaché noted that he had also received an e-mail from a judge expressing concern about a proposal that is circulating to ban any supplemental local rule (SLR) that would

require an order to show cause rather than a prejudgment motion. He stated that he will forward that e-mail to the committee. Prof. Peterson asked that the committee address Holly Rudolph's concerns **(Appendix D)** about defaults in family law cases as well.

Ms. David stated that she is stepping down from this committee and that Mr. Beattie will take her place.

6. ORCP 15 (Mr. Beattie)

Mr. Beattie reported that the committee has not yet had a follow-up meeting, but noted that the committee does not feel much momentum to make a change to a rule based on what appears to be a mere lack of understanding of the rule. He stated that Judge DeHoog had suggested that a reference to the number of days specified in Rule 7 C (2) could be inserted in ORCP 15 A. He stated that he personally does not believe that this is a good idea because referencing another rule that could eventually be changed is not a good precedent. He noted that his vote would be to do nothing, and suggested that the committee have a follow up meeting and finalize its decision. Prof. Peterson asked that, if the committee decides to take no action, it should write a short report discussing the rule and why the Council believes that it is clear in its current form.

7. ORCP 27 (Mr. Weaver)

Mr. Weaver reported that the committee has not had an official meeting since the last Council meeting, but that committee members have been working hard. He stated that he, Prof. Peterson, and Mr. Eiva went through the entire ORS to try to cull out any statute that may be affected by a potential rule change of the sort that was published but not promulgated last biennium. The three members are working on merging all three lists, and the next meeting will analyze whether last biennium's draft amended rule would affect statutes in addition to those discussed at the December 1, 2012, meeting. Prof. Peterson expressed his appreciation that Mr. Eiva not only produced a list of statutes, but a thorough analysis as well.

8. ORCP 44 (Mr. Keating)

Mr. Keating reported that the committee has not yet met, but will do so in November.

9. ORCP 45 (Ms. Wray)

Ms. Wray was not able to attend the meeting. Ms. David reported that the committee has reached out to the listservs of the Oregon Trial Lawyers Association

and Oregon Association of Defense Counsel and is gathering responses. She stated that the committee will meet in November and report back next month.

10. ORCP 46 and 55 (Judge Gerking)

Judge Gerking reported that the committee had met and reviewed what had been accomplished last biennium. He stated that the Council had added ORCP 55 H(2)(b), which requires individuals or attorneys representing individuals whose medical records are sought by subpoena and who object to file a written objection within 14 days of the issuance of the subpoena. Because there was no enforcement mechanism for that specific discovery rule, it was then proposed that ORCP 46 be amended to provide under subsection A(2) that a motion to compel may be filed if a party fails to comply with the requirements of ORCP 55 H. Prior to the vote to promulgate, that language was amended to read "if a party objects or fails to comply." Judge Gerking noted that the fact that the amendment was not promulgated last biennium was based partly on an e-mail from attorney Don Corson, who was concerned that there should not be any changes to ORCP 46 because the issue is covered adequately in ORCP 55. He stated that Mr. Corson felt that, if the other party failed to respond, it would be a violation of ORCP 55 and could otherwise be addressed by the existing contempt provisions in ORCP 55. If there was an objection filed by an attorney or a party, that would not be a violation, so there would be no problem.

Judge Gerking stated that the committee talked about the fact that Mr. Corson's letter preceded the last-minute changes in the ORCP 46 language at the December, 2012, Council meeting, and that the proposal that was defeated was designed to cover situations where a lawyer files a good faith objection and the parties cannot agree; the way to solve this would be to file a motion to compel under ORCP 46. He observed that, If the new requirement under ORCP 55 H is ignored and no response is filed by the other party, there is no way to deal with it. One of the problems a change to ORCP 46 would address is when a lawyer does not file an objection, but contacts a health care provider directly and tells the provider not to produce the records. Judge Gerking stated that Mr. Eiva was on the fence about how to solve the issue, but that all committee members agreed that there needs to be some type of enforcement mechanism. He stated that the committee will meet again and, hopefully, have a proposal by December.

Prof. Peterson observed that there appear to be two kinds of disputes: disputes over objections and disputes over the thwarting of getting the records. Judge Gerking agreed and stated that a failure to respond is not a violation but, if an attorney calls a provider and directs the provider to not produce the records, the provider probably will not produce them. Mr. Bachofner suggested amending ORCP 55 to make it clear that, absent a formal objection received from the party or the person whose records are being subpoenaed, the provider is required to

produce them. Judge Miller asked whether there is there confusion on the part of health care providers if they are not receiving an objection from the person whose records are subpoenaed. Mr. Beattie pointed out that providers are sometimes reluctant to comply because of potential Health Insurance Portability and Accountability Act of 1996 (HIPAA) issues. Judge Gerking observed that the rule states that 14 days' notice is required, accompanied by an affidavit stating there has been no objection. Judge Miller asked why a rule change would be needed if that is the procedure in place: if there is no objection and no one contacts the provider, the attorney will get the records. Mr. Bachofner replied that there are some providers who will not necessarily provide records, even in that case. Mr. Keating agreed that a mechanism for compliance is still needed.

11. ORCP 47 E (Ms. David)

Ms. David reported that the committee had met. Through an oversight, Judge Miller was not included in the meeting, but she will be forwarded information about what the committee has already done and invited to future meetings. Ms. David reminded the Council that the committee was asked to look at the word "retained," which is used twice in ORCP 47 E. She stated that the committee had looked at the Council's legislative history – Ms. David had previously researched the issue for a case – and that the word appears to have had a very specific intent. The committee will report back with a formal memorandum at the December meeting.

12. ORCP 54 A (Ms. Leonard)

Ms. Leonard was not able to attend the meeting. Members of the committee reported that they had not yet met.

13. ORCP 54 E (Ms. David)

Ms. David reported that she will be stepping down from the committee. Mr. Bachofner will take her place, and Ms. Gates will step in as chair. Ms. David stated that the committee had met, but that not all members were available. She reminded the Council that the question before the committee is whether an offer of judgment should be allowed to be reciprocal. Prof. Peterson noted that Ms. Leonard had pointed out when this was raised last biennium that it could be unfair if a plaintiff files a lawsuit and then makes a prompt offer of judgment when the defense is still trying to figure out all of the aspects of the case, because there is a really short time frame for responding to an offer of judgment. He stated that this could be an unfair tactical advantage and that, if a claimant in a lawsuit were to be allowed to make an offer of judgment, it should probably be at a later point in the litigation to allow the defense side adequate time.

Mr. Bachofner wondered why a plaintiff would even want to make an offer, since there are appellate court decisions to the effect that a rule 54 E offer does not cut off the right to statutory attorney fees in small tort and similar cases. He observed that there would be no teeth unless the Council makes a substantive change to cut off fees. Ms. David stated that Ms. Gates was going to reach out to OTLA and see if anyone could give her examples of situations where an offer of judgment from a plaintiff could be beneficial.

Judge Miller noted that many expert witnesses require non-refundable deposits in advance, and it could be problematic for a defendant to get a settlement offer the day after such fees were paid, for example. Mr. Beattie expressed confusion about how the process would work: a plaintiff makes an offer, the defendant does not improve on it, and the plaintiff still wins and gets costs. Mr. Bachofner stated that, if the Council were willing to consider a change that would allow ORS 20.080 or 742.061 attorney fees to be cut off as a result of an offer to allow judgment, then there would be some give and take. He observed that, if there is an offer from the defendant and it allows a cutoff of fees, but there is later an offer from a plaintiff in an amount more than what the defendant offers but less than what the ultimate recovery is, it could reopen attorney fees. Ms. David expressed concern that such a change would be substantive. Mr. Bachofner stated that there is a substantive element to the rule as it exists and that, if the Council had been this timid about the substantive/procedural issue when the rule was originally drafted, the rule would not exist at all. He noted that, if the purpose behind the rule is to encourage settlement, we need to come up with the procedures that achieve that result.

Judge Miller stated that, from a judge's standpoint, if there is some impetus to address a settlement offer early on in the litigation and before costs mount, it might encourage people to be more realistic and would provide more motivation to get cases settled. Judge Armstrong agreed that it could have the effect of moving a dialogue forward, but that perhaps the only realistic way of doing that is if there is some consequence if the offer is not taken seriously. Mr. Beattie noted that there is an existing weak penalty, the enhanced prevailing party fee. Judge Miller stated that this is infrequently used and that, in most cases there has to be bad faith in order for a judge to impose an enhanced prevailing party fee. Mr. Beattie agreed that it is rare. Judge Miller stated that plaintiffs' attorneys, especially inexperienced ones, sometimes file a case and ask for relief before fully realizing what the case is about, and defense attorneys are missing the opportunity to settle if they do not try early on in the case to look at it from the plaintiffs' standpoint. Ms. David agreed that, overall, there is a necessity to educate and encourage attorneys to confer and discuss early on to see if there can be an early resolution.

Mr. Brian opined that providing plaintiffs an opportunity to make an offer of

judgment is a waste and accomplishes nothing. Prof. Peterson stated that the impetus comes from members of the California bar, where expert fees are recoverable, so such offers have teeth. He stated that it might have an impact in terms of ORS 20.075 in determining how much the award of fees should be because there would be concrete evidence of the other side rejecting the offer and being unreasonable. Judge Zennaché noted that a copy of letter offering the settlement terms would be adequate for that. Mr. Brian agreed. Mr. Bachofner observed that it is common for plaintiff's attorneys to become more reasonable closer to trial. If they wait until a week or two before the trial to suddenly start talking about settlement, by that time a lot of expense has been incurred on both sides. The question is how to make lawyers evaluate their cases, or their clients, more realistically early on. Judge Miller stated that, unfortunately, settlement conferences in Clackamas County are now scheduled a month before trial so, perhaps, it is a matter of changing the practice to hold such conferences earlier. She stated that the conferences are scheduled for an hour and a half. Judge Gerking stated that they have a similar rule in Klamath Falls, but they only allow 30 minutes.

Prof. Peterson noted that the Council had polled OTLA and OADC regarding this issue in previous biennia, and that the committee may not wish to do that again this time.

14. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee had met and was discussing two potential issues. The first issue is considering whether to make an amendment about whether or not an attorney fee judgment can be entered after a limited judgment is issued. He stated that an example would be where one defendant has been completely dismissed from a case with a limited judgment with a right to attorney fees, and the question is whether that defendant can request an attorney fee judgment and enforce it or whether it can go up on appeal with the limited judgment.

The second issue before the committee is a suggestion to remind practitioners – in earlier rules that address pleading requirements – of the ORCP 68 C(2) requirement to specify the basis of a claim for attorney fees when filing a pleading or motion. He wondered whether it is really a problem and whether judges are seeing a lot of attorneys plead fees without specifying the basis. Judge Gerking stated that he sees it often. Judge Miller stated that she does not see it as a big problem, but that it sometimes comes up in family law. Mr. Beattie wondered, if an attorney pleads a right and is not specific about the statute allowing attorney fees, whether a judge would allow amendment. Judge Miller stated that her clerk looks at the complaint and compares it to the request for judgment and sees if they match. If they do not, she tells them to amend the complaint and come back

or they are out of luck. Judge Zennaché agreed that if the attorney amends the complaint and then serves the amended complaint he might allow it. Judge Armstrong noted that the Court of Appeals has written a number of opinions that have grappled with the importance of identifying the source of the law or the facts that otherwise give rise to an award of fees. He observed that it probably could not do any harm to add such a reference, although it might seem a peculiarity, but it would clarify and help people. Judge Zennaché stated that his concern is starting a trend of cross referencing every rule with every other rule, because the rules are supposed to be read as a whole. He stated that the Council had addressed this issue the last time it made changes to ORCP 68, and decided not to start adding cross-references.

Mr. Bachofner noted that Rule 20 is for special pleading rules, and suggested that perhaps a subsection could be added there. Judge Zennaché stated that Rule 20 addresses special cases – things that are not otherwise addressed in the rules. Mr. Bachofner stated that he did not see a problem with adding a section K that states something like "claims for attorney fees must be specially plead." Prof. Peterson reiterated that he believes that attorney fees are not special. He noted that the committee had discussed the possibility of amending ORCP 18 or even ORCP 14 because motions may state a claim for attorney fees. He also noted that ORCP 14 B references ORCP 17 A and basically states that, if you are going to file a motion, you need to be cognizant of ORCP 17 A which states that it needs to have a basis in law and fact. Prof. Peterson suggested that, If the Council does make a change to ORCP 68 with regard to timing issues, it might consider changing ORCP 68's title to add the word "pleading," since the title now only includes allowance and taxation of attorney fees. Judge Miller stated that she would be in favor of this, especially in light of the way people use word searches to do legal research.

Judge Zennaché asked to join the committee.

15. ORCP 69 (Mr. Campf)

Mr. Campf was not able to attend the meeting. Ms. David stated that some committee members had been having discussions and looking at interplay of the notice requirements of ORCP 7 and ORCP 69 B and whether those two time frames could run concurrently. She stated that the committee was also looking at whether a motion for an order of default needs to be served yet again, but there was some concern for debt collection cases that it might be difficult enough to track down a person the first time for service, let alone have to serve them again with a motion for an order of default. She noted the need to balance the desire to give adequate notice with the potentially onerous burden on the practitioner. Judge Zennaché noted that foreclosure cases are served by publication and that the cost is already outrageous – to require them to serve again would be burdensome. Mr. Beattie observed that the Council may want to think about

service by publication in general since fewer and fewer newspapers are being published.

16. Early Assignment of Cases/Scheduling (Judge Gerking)

Judge Gerking stated that the committee has not yet met, but observed that he is not sure it needs to. He stated that, when he first raised the issue of having a rule addressing scheduling conferences, he was not mindful of the fact that it is addressed in the Uniform Trial Court Rules. Regarding early assignment, he feels that it should be left up to the individual judicial districts. Ms. David asked that the committee meet or otherwise communicate to confirm whether members wish to take the issue any further and report back next month. She stated that, if anyone on the Council has a particular question or concern about the committee disbanding, they should contact Judge Gerking.

B. Items to Bring to the Attention of the Debtor/Creditor Section (Prof. Peterson)

Prof. Peterson stated that he had called former students of his who are now members of the Executive Committee of the Debtor Creditor Section of the Oregon State Bar, and that they all were doing mainly bankruptcy law and had no opinion on the issues at hand. He stated that the Executive Committee is meeting on November 8 and that he would try to forward the information to them. He will also contact former students who are on the Executive Committee of the Consumer Law Section. Judge Zennaché observed that the provisional process rules are not very well organized or consistent and really could use a comprehensive effort to make them more user friendly.

Judge Miller asked whether Ms. David sees malpractice cases in this area. Ms. David stated that she does not, but that it may be a sub-speciality where the Professional Liability Fund (PLF) uses a specific firm for representation. Ms. David asked Prof. Peterson to reach out to the PLF and ask if the PLF sees a lot of problems in this area. She stated that this might be an education area that the PLF needs to tackle. Judge Zennaché observed that there are firms doing foreclosures for $1,800, and that they cannot possibly do it right for that amount of money. He stated that he has been shocked at the number of errors he sees.

The Council agreed that a committee should be formed. Mr. Bachofner noted that he and his partner teach quite a bit on collection in Oregon and that he has dealt with provisional process. He volunteered to join the committee, as did Judge Zennaché and Judge Conover. Prof. Peterson will chair.

V. New Business (Ms. David)

A. Applicability of ORCP 69 to Show Cause Orders - Inquiry from Holly Rudolph (Prof. Peterson)

Prof. Peterson stated that he had received an e-mail from Holly Rudolph with the OJD **(Appendix D)** and that the Rule 69 committee should probably add this issue to its charge. He noted that he was dumbofounded that non-parties could be involved in asking for relief in a case, but Ms. Rudolph stated that it happens and he observed that clearly he has not done enough family law to be immersed in this. Judge Zennaché stated that he does not understand how it could happen. He stated that grandparents can intervene in a case and then become a party - an intervener - and seek relief, but people do not have the ability to just walk in the door and ask to modify someone's custody case. Ms. David suggested that the ORCP 69 committee add this to its agenda, but to wait until the ORCP 13 committee has some feedback. Judge Zennaché stated that the ORCP 13 committee will also add the issue to its charge. Prof. Peterson observed that, in some counties, a motion for show cause will require a party to go through ORCP 69 default procedures as if it were a complaint or petition but, in other courts, if the parties are already personally subject to jurisdiction of the court, the only requirement is to serve the motion. Judge Zennaché stated that the order to show cause tells a party to show up in 30 days and plead a case or else relief will be granted. Judge Miller observed that there is also a notice in the forms for self-represented litigants that states that a written response needs to be filed in so many days. Ms. David worried that, if forms being given to self-represented litigants use the term "defaulted," the litigants may search and find the language regarding default orders under ORCP 69 and not understand. Judge DeHoog stated that the forms use language more like "the following relief will be granted unless you take these steps."

Judge Miller observed that the Council discussed this issue last biennium in regard to counterclaims versus responses to motions. She noted that a number of counties would not treat as one process a pending motion to modify where the other party wants to counter with an opposing motion. Judge Miller stated that the UTCR committee raised concerns about making a rule where such claims could be joined and stated that they would take action in the UTCR to disallow any such practice. She stated that she would look for her notes from last biennium to share with the committee.

Prof. Peterson observed that it is good that Ms. Rudolph is communicating with the Council because it is helpful for us to be aware of her concerns as forms are drafted. Ms. David observed that Ms. Rudolph is involved with creating e-court forms and, as they progress, the Council wants to maintain a relationship so there is consistency among all systems. Judge Armstrong noted that part of the reason for the creation of e-court is to encourage consistency among systems.

B. Suggestions from Rep. Brent Barton regarding ORCP 44 (Prof. Peterson)

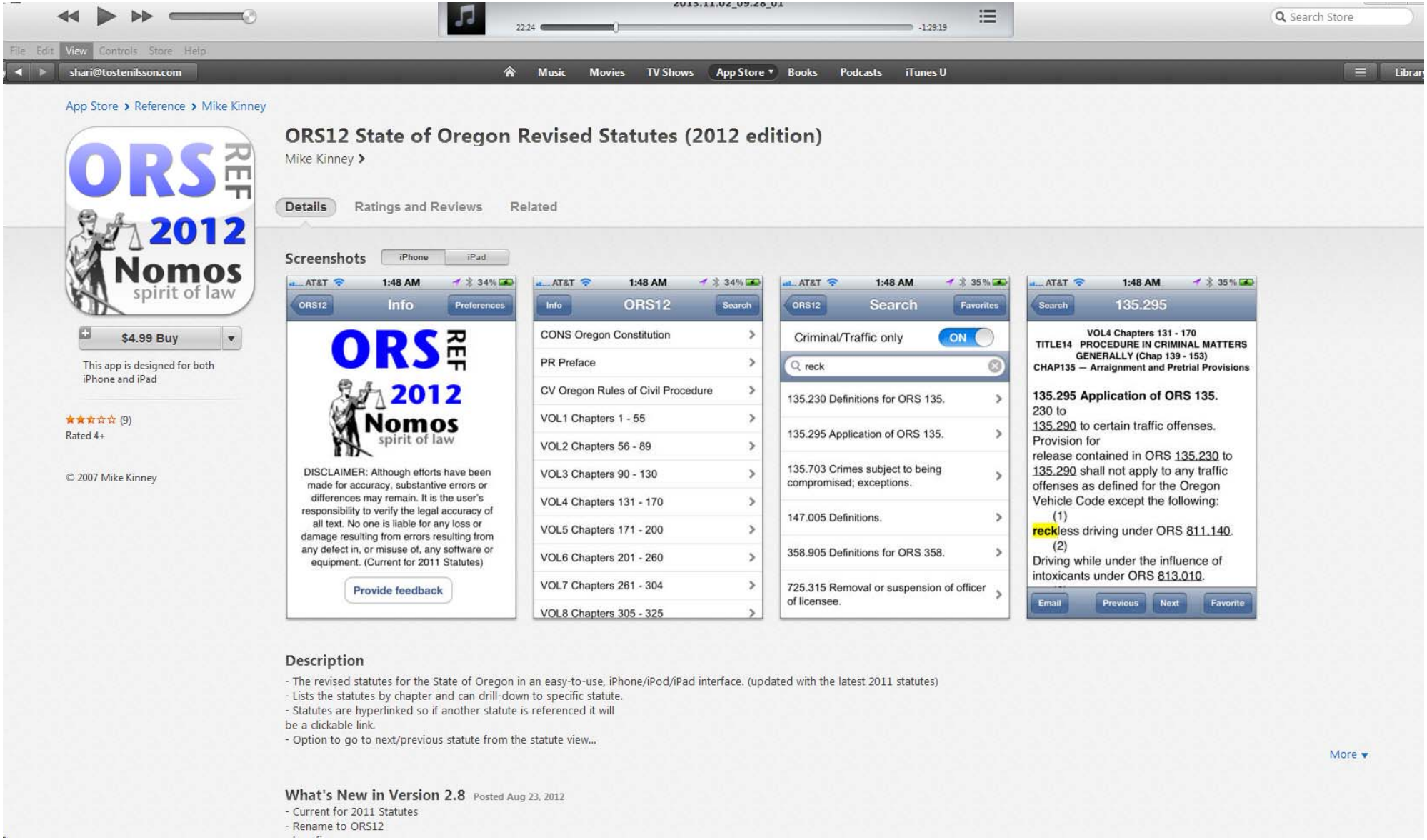
Prof. Peterson stated that he left a voice mail with Rep. Barton regarding his concerns **(Appendix E)** and he will follow up with him and report back at the next meeting.

VI. Adjournment

Ms. David adjourned the meeting at 11:23 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director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CHAP135 — Arraignment and Pretrial Provisions
135.295 Application of ORS 135. 230 to 135.290 to certain traffic offenses. Provision for release contained in ORS 135.230 to 135.290 shall not apply to any traffic offenses as defined for the Oregon Vehicle Code except the following:
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General Discovery Committee Report

Date: November 14, 2013, 4:00 p.m.

Location: Conference call

Present: Shenoa Payne (chair), Mike Brian, Judge Hodson, Bob Keating

Absent: Travis Eiva, Jennifer Gates, Judge Bachart, Mark Weaver, Deanna Wray, Jay Beattie[1]

Committee Topic

Whether expert discovery is appropriate in certain types of cases (yes or no). If so…

a. What types of cases? (*i.e.*, cases that have been designated complex case designations),
b. When to disclose?
c. What to disclose? (*i.e.*, disclosure of the expert file, names of experts only)

Committee Discussion

Complex case designations. The committee members discussed that complex case designations are not a new phenomenon and therefore present no impetus to revisit expert disclosure in Oregon. The committee agreed that complex case designations do not necessitate expert discovery and provide no reason to promulgate rules regarding the same.

Trial management. Bob Keating explained that the practice among some judges is to require expert disclosure during voir dire. That rule is a judicially created rule in order to prevent having to remove a juror that might know one of the expert witnesses. Keating explained that requiring expert disclosure at the voir dire stage often disadvantages the defense. For example, in a two or three week trial, where the defense does not plan to put on the expert until the end of trial, the plaintiff will have a much longer time to research the defense expert, while the defense will have maybe only days to do so. The committee agreed that this appears to be a disadvantage and discussed whether the committee has jurisdiction over trial management, or whether that is a judicial discretion issue or UTCR committee issue. Ultimately, all members of the committee felt that it was a trial management issue that must be taken up with the particular judge.

Recommendation

The committee recommends no action at this time.

[1] This report was circulated to all committee members, including those that were absent from the conference call, with an opportunity for feedback and approval. Changes were made to this report in response to feedback due to all committee members. The recommendation was approved by all committee members.

MEMORANDUM

TO: Council on Court Procedures

FROM: Lisa Norris-Lampe, Chair, Oregon eCourt Law & Policy Work Group (Oregon Judicial Department)

RE: Proposed ORCP 9 Amendments: 9 B, 9 G, new 9 H, Service by Email and Electronic Service

DATE: November 6, 2013

This memo refers to the Council on Court Procedures three proposed amendments to Oregon Rule of Civil Procedure, Rule 9 (service and filing of pleadings and other papers) -- specifically, an amendment to ORCP 9 G, a new ORCP 9 H, and a conforming amendment to ORCP 9 B. The proposed amendments originated in the Oregon eCourt Law & Policy Work Group (LPWG) of the Oregon Judicial Department (OJD), and the State Court Administrator has approved this referral to the Council. The amendments are proposed for inclusion in the Council's 2015 ORCP submission.

(1) Oregon eCourt and LPWG Background: The Oregon circuit courts are in the midst of a multi-year transition to an electronic court environment, including electronic filing and electronic service. To date, the new Oregon eCourt system has been installed in eight counties, and electronic filing and electronic service are available in all those counties[1]; the Oregon appellate courts also have offered electronic filing and electronic service since 2008 (Supreme Court) and 2009 (Court of Appeals). Several years ago, in anticipation of the availability of electronic filing and electronic service in

[1] The eight counties are Yamhill, Crook, Jefferson, Linn, Jackson, Tillamook, Columbia, and Clatsop. Oregon eCourt will continue to roll out across the state through 2016.

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December 7, 2013, Meeting
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the circuit courts, and in conjunction with installing an electronic filing system in the appellate courts, the courts adopted Chapter 21 of the Uniform Trial Court Rules and Chapter 16 of the Oregon Rules of Appellate Procedure, which set out rules pertaining to electronic filing and electronic service.[2] As noted later in this memo, although the Oregon Judicial Department (OJD) has adopted those rules and now offers electronic filing and electronic service, ORCP 9 currently refers to service by email as the only form of service based on an electronic process.

As part of the Oregon eCourt Program, OJD formed the LPWG to address various law and policy issues arising as part of the transition, including, as appropriate, suggested statutory amendments. The LPWG has identified the suggested amendments described in this memo as candidates for referral to the Council. Primarily, the LPWG seeks statutory clarification that service by email is a different process from electronic service; related suggestions also are included below.

Service by eMail: ORCP 9 G currently provides for service by email on attorneys in a case, if the attorneys agree in writing. However, that rule currently does not require an attorney whose email address changes to notify the other attorneys in the case of the change. The LPWG therefore recommends the following amendment to ORCP 9 G, to ensure that attorneys who consent to receive email service notify other attorneys in the case of a change in email address:

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[2] ORS 1.002(2) grants the Chief Justice rulemaking authority regarding electronic applications in the courts, including applications based on the Internet and similar technologies ((2)(a)); the use of electronic documents or images in lieu of original paper copies for documents or paper served, delivered, received, filed, entered, or retained, in any action or proceeding ((2)(b)); the use of electronic signatures ((2)(c)); and the use of electronic transmission for the service of documents in a proceeding, other than service of a summons or service of an initial complaint or petition ((2)(d)).

ORCP 9. Service and filing of pleadings and other papers

* * * * *

G Service by e-mail. Service by e-mail is prohibited unless attorneys agree in writing to e-mail service. This agreement must provide the names and e-mail addresses of all attorneys and the attorneys' designees, if any, to be served. **{Any attorney who has consented to e-mail service must notify the attorneys for other parties in writing of any change to the attorney's e-mail address.}** Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. Service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or otherwise unavailable.

Service by Electronic Service: UTCR 21.100[3] currently sets out the rules for electronic service in the Oregon eCourt circuit court, and ORAP 16.45[4] sets out the rules for electronic service in the Oregon appellate courts. Both rules -- consistently with the concept set out in ORCP 9 G -- require that a service recipient consent to electronic service before he or she may be so served.[5] However, the Oregon Rules of Civil Procedure currently do not provide for "electronic service" through an electronic file-and-serve system. The LPWG therefore recommends the following amendment to ORCP 9 -- as new section H -- both to clarify the difference between service by email and electronic service, and to confirm that electronic service requires consent by the service recipient (the same as email service):

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[3] See Attachment A

[4] See Attachment B; note that ORCP 9 G is made applicable to the appellate courts by ORS 19.500.

[5] In the appellate courts, only Oregon State Bar members may use electronic filing and electronic service. In the Oregon eCourt circuit courts, any person filing a document may use electronic filing and service.

ORCP 9. Service and filing of pleadings and other papers

* * * * *

{H Service by electronic service. Service by electronic service is permitted as prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court. Service by electronic service is prohibited unless the person being served agrees to electronic service as prescribed in applicable rules adopted consistently with this section. As used in this section, "electronic service" means service using an electronic filing system provided by the Oregon Judicial Department.}

Conforming Amendment to ORCP 9 B: Adoption of a new ORCP 9 H would require a conforming amendment to ORCP 9 B, as follows:

ORCP 9. Service and filing of pleadings and other papers

* * * * *

B Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party, by mailing it to such attorney's or party's last known address**{, by using electronic service as provided in section H of this rule}** or, if the party is represented by an attorney, by telephonic facsimile communication device or e-mail as provided in sections F or G of this rule. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing a copy of the pleading or other documents with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon such party personally.

Thank you in advance for your consideration of these proposals.

ATTACHMENT A -- UTCR 21.010 AND 21.100

UTCR 21.010 DEFINITIONS

The following definitions apply to this chapter:

* * * * *

(4) "Electronic filing system' means the system provided by the Oregon Judicial Department for the electronic filing and the electronic service of a document via the Internet * * *. A filer may access the system through the Oregon Judicial Department's website (http://www.courts.oregon.gov/OJD).

* * * * *

UTCR 21.100 ELECTRONIC SERVICE

(1) Consent to Electronic Service and Withdrawal of Consent

(a) A filer who electronically appears in the action by filing a document through the electronic filing system that the court has accepted is deemed to consent to accept electronic service of any document filed by any other registered filer in an action, except for any document that requires service under ORCP 7 or that requires personal service.

(b) A filer who is dismissed as a party from the action or withdraws as a lawyer of record in the action may withdraw consent to electronic service by removing the filer's contact information as provided in subsection (2)(a) of this rule.

(c) Except as provided in subsection (b) of this section, a filer may withdraw consent to electronic service only upon court approval based on good cause shown.

(2) Contact Information

(a) At the time of preparing the filer's first electronic filing in the action, a filer described in subsection (1) of this rule must enter in the electronic filing system the name and service email address of the filer, designated as a service contact on behalf of an identified party in the action. If the filer withdraws consent to electronic service under subsection (1)(b) or (1)(c) of this rule, then the filer must remove the filer's name and service email address as a designated service contact for a party.

(b) A filer described in subsection (1)(a) of this rule may enter in the electronic filing system, as another service contact in the action:

(i) an alternative email address for the filer; and

(ii) the name and email address of any additional person whom the filer wishes to receive electronic notification of documents electronically served in the action, as defined in UTCR 21.010(9). If a lawyer enters a client's name and contact information as another service contact under this subsection, then the lawyer is deemed to have consented for purposes of Rule of Professional Conduct 4.2 to delivery to the client of documents electronically served by other filers in the action.

(c) A filer is responsible for updating any contact information for any person whom the filer has entered in the electronic filing system as either a service contact for a party or as another service contact in an action.

(d) A filer may seek court approval to remove a person entered by another filer as another service contact in an action if the person does not qualify as another service contact under UTCR 21.010(9).

(3) Selecting Service Contacts and Other Service Contacts

When preparing an electronic filing submission with electronic service, a filer is responsible for selecting:

(a) the appropriate service contacts in the action, for the purpose of accomplishing electronic service as required by law of any document being electronically filed; and

(b) the appropriate other service contacts in the action, if any, for the purpose of delivering an electronic copy of any document being electronically filed.

(4) When the court accepts an electronic document for filing under UTCR 21.060(1)(a), the electronic filing system sends an email to the email address of each person whom the filer selected as a service contact or other service contact under subsection (3) of this rule. The email contains a hyperlink to access the document or documents that have been filed electronically. Transmission of the email by the electronic filing system to the selected service contacts in the action constitutes service.

(5) Completion and Time of Electronic Service

Electronic service is complete when the electronic filing system sends the email to the selected service contacts in the action.

(6) Electronic service performed in accordance with this chapter is equivalent to service by mail as provided in ORCP 10 C.

(7) Proof of Electronic Service

A filer must attach at the end of any document submitted electronically a list of names and addresses of all parties requiring conventional paper service, followed by a clearly identified list of the names of all parties requiring service that will be served electronically by the electronic filing system.

(8) Service Other than by Electronic Means

The filing party is responsible for accomplishing service in any manner permitted by the Oregon Rules of Civil Procedure and for filing a proof of service with the court for the following documents:

(a) a document required to be filed conventionally under this chapter;

(b) a document that cannot be served electronically on a party who appeared in the action; and

(c) a document subject to a protective order.

ATTACHMENT B -- ORAP 16.05 AND 16.45

ORAP 16.05 DEFINITIONS

* * * * *

(4) 'Electronic filing system' or 'eFiling system' means the system provided by the Oregon Judicial Department for the electronic filing of a document in the appellate courts via the internet. The system may be accessed at <http://tinyurl.com/eFile page> (<http://courts.oregon.gov/OJD/OnlineServices/eFile/index.page? >).

* * * * *

ORAP 16.45 ELECTRONIC SERVICE

(1) Registration as an eFiler with the eFiling system constitutes consent, within the meaning of ORCP 9 G to receive service via the electronic mail function of the eFiling system.

(2) (a) A party electronically filing a document, other than an initiating document, with an appellate court may accomplish service of that document on any other party's attorney, if that attorney is a registered eFiler, by using the electronic service function of the eFiling system. The eFiling system will generate an e-mail to the attorney to be eServed that includes a link to the document that was electronically filed. To access the electronically filed document, the attorney who has been eServed must log in to the eFiling system.

(b) Notwithstanding ORCP 9 G, electronic service is effective under this rule when the eFiler has received a confirmation e-mail stating that the eFiled document has been received by the eFiling system.[6]

(3) A party electronically filing a document with the court must accomplish service as to parties who do not qualify for eService under subsection (2)(a) of this rule via the conventional manner as provided by the applicable statutes and by the Oregon Rules of Appellate Procedure, which may include service via electronic mail as provided by ORCP 9 G. Parties who do not qualify for eService include parties represented by attorneys who are not registered eFilers and parties who are self-represented. Parties who electronically file initiating documents must accomplish service conventionally.

(4) All electronically filed documents must be accompanied by a proof of service under ORAP 1.35(2)(d). The proof of service must certify service on all parties regardless of the means by which service was accomplished, including eService.

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6 If proposed ORCP 9 H is eventually adopted, then this provision of ORAP 16.45(2)(b) would be amended.

(5) If an eFiled document is not electronically served by the eFiling system because of an error in the transmission of the document or other technical problem experienced by the eFiler, the court may, upon satisfactory proof, permit the service date of the document to relate back to the date that the eFiler first attempted to serve the document electronically. A party must show satisfactory proof by filing and serving an accompanying letter explaining the circumstances, together with any supporting documentation.