MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 9, 2016, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Arwen Bird
Michael Brian
Troy S. Bundy*
Hon. R. Curtis Conover
Kenneth C. Crowley
Hon. Roger J. DeHoog*
Jennifer L. Gates*
Hon. Timothy C. Gerking*
Robert M. Keating
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. John Wolf*
Deanna L. Wray

Members Absent:

Hon. Sheryl Bachart
Travis Eiva
Hon. Jack L. Landau
Hon. David Euan Leith
Maureen Leonard
Hon. Charles M. Zennaché

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 9 ORCP 43 ORCP 45 ORCP 46	ORCP 20 A ORCP 21 A ORCP 21 D ORCP 21 E ORCP 23 ORCP 25 ORCP 27 B ORCP 32 ORCP 43 B(2) ORCP 55 ORCP 57 F(5) ORCP 68 C(5)	ORCP 27 B ORCP 57 F(3)	

I. Call to Order

Mr. Brian called the meeting to order at 9:38 a.m.

II. Minutes

A. Approval of December 5, 2015, Minutes

Judge Gerking made a motion to approve the December 5, 2015, minutes (Appendix A); Mr. Crowley seconded the motion; and the motion was approved unanimously by voice vote.

III. Administrative Matters

A. Judge DeHoog's Appointment to the Court of Appeals

Mr. Brian stated that the question is, given Judge DeHoog's recent appointment to the Court of Appeals, whether it is appropriate or inappropriate for him to remain a member of the Council. He stated that, from a technical standpoint, he does not know the answer. Mr. Bachofner asked for clarification on what the Council's authorizing statute says regarding the separation and location of the judges. Prof. Peterson stated that it says that eight circuit judges need to be appointed and, while it talks about vacancies, it does not specify what to do in this situation. Prof. Peterson recalled that the Council had one lawyer who became a judge and then continued to serve on the Council as a judge member, but his appointment to the bench coincided with the end of his lawyer term. He also noted that the Council has had several members who served nearly 12 years because they were appointed to fill a vacancy and then served two additional full terms. Prof. Peterson pointed out that the statute talks about who appoints people and about vacancies, but does not indicate what to do if person transitions from one role to another. Judge Roberts asked whether the language used in designating the categories of people on the Council define the categories of who should be appointed, or define the qualification to serve. She observed that, if it is merely the qualification to be appointed, Judge DeHoog may continue but, if it is the qualification to serve, he likely cannot.

Judge DeHoog stated that the statute seems to talk about the composition of the Council rather than just the appointment process. Judge Armstrong agreed that there does not seem to be any doubt that Judge DeHoog is no longer a member of the Council as of his appointment to the Court of Appeals. Mr. Bachofner agreed. Judge DeHoog also agreed that it appears that he no longer has a slot that fits his designation. He noted that he would be concerned about staying on the Council and setting a precedent that results in an action of the Council being void. Mr. Bachofner noted that he would love to have Judge DeHoog still participate, and that there is nothing that prohibits him from attending

Council meetings or participating in work groups. Prof. Peterson added that there will be a vacancy in the Council's Court of Appeals slot at the end of this biennium when Judge Armstrong's second term is up, and that Judge DeHoog can express interest in that slot to the Chief Judge of the Court of Appeals. Mr. Brian stated that, since we are setting a precedent, as chair he is asking Judge DeHoog to formally tender his resignation. Prof. Peterson stated that he thought that an e-mail would suffice.

IV. Old Business

A. Committee Reports

1. ORCP 7/9/10 Committee

Prof. Peterson stated that a meeting was held but he had an issue with his phone and was unable to participate in the teleconference. Judge Wolf stated that the committee had a representative from the Oregon Judicial Department (OJD) familiar with the Odyssey eCourt system attend the meeting so that they could address the concerns about filings not appearing in the system and e-service not being executed contemporaneously. The OJD representative indicated that they were aware of an issue that likely resulted in the reported e-service problem – users filing documents must select a box stating that they want to e-serve as well as selecting the persons they wish to e-serve. The representative stated that many filers appear to be filing and believing that e-service is automatic and, therefore, are not making the appropriate selections. The representative stated that the OJD is working on a better process so that those choices are more obvious.

Judge Wolf observed that the committee does not need to worry about dealing with the e-service section of Rule 9, because most of that is covered under chapter 21 of the Uniform Trial Court Rules (UTCR), and the UTCR Committee has more flexibility to amend those rules than the Council has the ability to amend the ORCP on an expedited basis. He noted that the OJD representative stated that the Council should feel free to amend e-mail service however it sees as appropriate. Mr. Bachofner noted that he had just seen a change in one of the local court rules that requires sending a copy of the document to all other opposing counsel if a party serves by e-service or e-mail. He stated that he still feels that there would be no harm in requiring that there always be e-mail service to any party that has appeared in the case, because it errs on the side of making sure that a copy gets to the other side. Judge Wolf stated that he does not have an argument with that, but that his concern is that the e-service portion of Rule 9 at this point effectively says "see UTCR 21." He stated that he does not know if we want to have competing rules.

Prof. Peterson observed that, at the last meeting, Judge DeHoog mentioned that, unlike the federal system, the state system requires a person to look at the document and process it. He wondered whether there is a step between looking at the document and processing it for filing as opposed to for service, or whether that is a seamless process. Judge Wolf stated that his impression from the committee's telephone conference is that service does not take place until the document is reviewed and approved by a person in the courthouse and, under chapter 21 of the UTCR, the service does not actually occur until the system sends out the notice. If a document gets filed and a clerk waits a day before approval, the service is not effective until it is approved and the system sends it out for service, so there would be a day in that case between when the document was filed and when service occurs.

Ms. Wray stated that there is another practical technical problem that she has encountered. She stated that some attorneys have not entered their information into the eCourt system, so by rule they must still be served by sending paper copies. She noted that attorneys may not be aware when a party does not have information entered into the system and, therefore, may not be serving by paper when they should be doing so. Ms. Payne stated that she has also encountered this issue. Ms. Wray stated that she has often had to send e-mails to other attorneys asking them to have their staff enter their information into the eCourt system.

Mr. Shields reiterated that no document is e-served automatically, and that the person who is filing has to choose e-service because it is not required. He stated that, if a party does use e-service, that party can only e-serve those people who have already consented to e-service, which parties are required to do when they file a case, but not everyone does it. Mr. Shields stated that it is an education issue at this point – to let lawyers know that when they file a document they must put their information into the system, whether they want to or not. He observed that the system will likely become more automated, but right now it is working in the way it was designed to work, even though it may not be the way we want it to work. Mr. Bachofner suggested that the Professional Liability Fund (PLF) may want to send out some kind of reminder to attorneys, and stated that he would contact the PLF regarding this. Mr. Shields stated that there are lawyers who think that, when they e-file, their document is automatically going to get served to everyone, and that is not the case nor is that how the system is intended to work.

Prof. Peterson reminded the Council that some attorneys had reported that they had gone to the Odyssey system and had not seen documents they knew were supposed to be there. Mr. Shields stated that a party can see the items have been e-filed on the case, but not necessarily things that were not filed that way. Mr.

Brian asked for clarification on Mr. Shields' statement that a document could be filed with the court but would not show up on Odyssey. Mr. Shields responded that, if a document was filed conventionally or filed by a non-bar member, that may not appear. Judge Roberts noted that such documents will show up eventually, but that there may be a lag because of the time required for physical scanning. She stated that paper files are no longer kept and that Odyssey acts as the file. Mr. Shields stated that he is not certain that what judges have access to see on Odyssey is the same as what lawyers have access to see. Judge Roberts replied that judges of course have access to confidential files that lawyers may not, but that the main difference in the judges' edition of Odyssey is that the judges' edition is in a slightly different format. She pointed out that sometimes there are errors, such as things getting filed in the wrong place. She stated that this has gotten better since the Odyssey became active in her county and she hoped that, in time, it would improve even more.

Mr. Shields stated that the Bar is happy to bring any complaints to the OJD when problems occur, and noted that attorneys should be as specific as possible when explaining those issues. Judge Roberts noted that another problem that occurs frequently is that the court staff mislabels documents (for example, a motion that is labeled as an order). She stated that this happens enough that parties almost have to know the date of the document and check in that way. She stated that staff in the clerk's office is trying to categorize these documents since lawyers are not required to, and suggested that, in the future, perhaps the system could be changed and it could become the obligation of the filer to classify. Mr. Beattie observed that the federal eCourt system requires lawyers to label what they are filing. Mr. Bachofner suggested that the committee meet and discuss these issues further.

Prof. Peterson reminded the Council of one other Rule 9 issue the committee was dealing with: ORCP 9 C states that the attorney or a sheriff can issue a certificate of service for service by facsimile, and no one on the Council had heard of a sheriff serving in that way. He stated that he had heard back from the Oregon Sheriff's Association that they had never heard of a sheriff serving by facsimile, so the Association concluded that no harm would come from removing the word "sheriff" from ORCP 9 C.

2. ORCP 15 Committee

Judge DeHoog stated that he will draft an informal closing memo and will send it to Mr. Brian to present at the next Council meeting.

3. ORCP 22 Committee

Ms. Payne stated that the committee did not meet last month but that they are scheduling a meeting to talk about new issues that arose at the December Council meeting.

4. E-Discovery Committee

Mr. Crowley stated that the committee had met and also had another meeting scheduled for the following week. He stated that he had drafted a potential amendment to ORCP 36 incorporating the proportionality concept, a potential amendment to ORCP 43 incorporating the concept of some kind of discovery conference early in the case, and a potential amendment to ORCP 46 having to do with how to handle e-discovery issues if there is a motion for sanctions. He noted that this draft language was for the purpose of getting the committee's discussion going, and stated that there is not a lot of traction for the proportionality concept. He reported that Judge Zennaché has also sent out additional proposed language regarding the discovery conference idea and that the committee will discuss it at the next meeting.

5. ORCP 44 Committee

Mr. Keating stated that the ORCP 44 discussion at the last Council meeting was lengthy and tended to drift back into the larger medical privilege discussion from last biennium. He stated that, during that meeting, the Council discussed Mr. Beattie's responses from his survey of the Oregon Association of Defense Counsel. Mr. Keating stated that Mr. Eiva's summary of his responses from the Oregon Trial Lawyers Association (Appendix B) had just been sent that morning, and that he had not had a chance to read it. He stated that he will likely call another meeting of the committee to see if it is worth going any further with the issue.

6. ORCP 45 Committee

Ms. Wray stated that the committee had not had a chance to meet again. She distributed draft language that she and Mr. Bachofner had drafted. (Appendix C). Mr. Bachofner stated that the committee is looking at streamlining the process to avoid having to produce records custodians and waste the court's time in trials when it is unnecessary. He noted that there is now a limit on the number of requests for admissions that can be submitted, and the thought was to allow an exception to that limit for simple requests for admissions on authenticity for records and essentially whether a records custodian must be present at trial to permit admissibility of the records. Mr. Bachofner stated that the committee is trying to come up with a mechanism in the request for admissions rule so that the

parties can confer. He stated that it is typical that parties agree that the records are what they are and that a records custodian does not need to come to trial, but pointed out that there are some bad apples who will not respond to requests to confer and, in those circumstances, there is no reason that he can think of not to streamline admissibility through a request for admission on authenticity of the records. He stated that, if the other party does not respond, the documents are presumed to be authentic and, if they do respond and object, at least if they are wasting time for no reason and counsel needs to bring in the records custodian for no good reason, the aggrieved party can seek to have the costs reimbursed under the request for admissions procedure.

Ms. Wray stated that, if Council members think that this is a worthwhile endeavor, the committee can come up with a simple way to do it under the rule. She stated that she will circulate the draft language to Council members not present today, and noted that it is Mr. Bachofner's first proposal of how to amend subsection F(2) in the rule, which reads, "Notwithstanding subsection 1, a party is permitted to serve without limitation a reasonable number of admissions requesting authenticity of specified documents for the purpose of establishing that they are kept in the ordinary course of business." Ms. Wray stated that her issue with that proposed amendment is that it mixes authenticity and hearsay, and includes only one of the hearsay exceptions rather than all of them, so she drafted a proposed amendment that reads, "Authenticity and Hearsay. Admissions regarding authentication or identification as a condition precedent to admissibility, or admissions regarding the foundation for a hearsay exception, are not subject to the limitations in subsection (1)." Ms. Wray noted that the clause she used is taken from Rule 903 of the evidence code. Mr. Bachofner stated that he considered it a friendly amendment.

Judge Roberts asked whether the committee was considering any hearsay exception or just the business records exception. Ms. Wray stated that this is something the committee needs to talk about – if we are going to amend the rule for the business records exception, what about other exceptions? She stated that, if the point is to simplify foundation, we may want to go further. Mr. Bachofner noted that the idea is to streamline the trial and to streamline the costs for the litigants on both sides. Judge Roberts stated that we should consider whether we want to make the exception for foundation as to hearsay objections or foundation in general. She wondered whether we just want to make an exception for questions related to the foundation for admission of documents broadly. Mr. Bachofner stated that this is an interesting question, as there may be other objections.

Mr. Brian asked Judge Roberts if she would like to be on the committee. Judge

Roberts agreed. Mr. Beattie stated that it might be as simple as a request for admission as to the admissibility of the documents at the time of trial, because that would just cover everything. He stated that it might be wise to include something that does limit requests to documents that are reasonably expected to be offered as evidence at the time of trial so attorneys do not get oppressive "admit to everything under the sun" requests. Mr. Bachofner agreed that this is his concern but, unfortunately if we make it so broad as "admit that these are admissible at trial," we may find people very hesitant to make a determination because they do not know in advance what is going to come in. He stated that he is more concerned about the foundation and records custodian issue. Judge Roberts stated that we probably could not include things like relevancy, which is entirely context-driven.

Judge Conover stated that the most common response from his colleagues was to seek leave of the court to ask for more requests to admit and for an expedited hearing to put the issue in front of a judge if you are dealing with a bad apple. He stated that his colleagues could not imagine any judge who would not grant such a request to expedite the trial. He stated that this response from his colleagues was very strident. Mr. Bachofner agreed with that assessment, but pointed out that there is a cost for a litigant to file that motion. He stated that there is an obligation to confer and these issues typically are not going to come up until close to trial, and there is a concern when filing a motion close to trial that a party may not get a hearing in time to still subpoena the records custodians. He stated that, by making it a part of the rule, a party can do it pretty early before trial and it is relatively inexpensive, plus if the other party does not stipulate you still have time to serve the request for admissions without taking up court time. Judge Roberts stated that a lawyer cannot count on getting an expedited hearing on a discovery motion in Multnomah County.

Ms. Wray observed that 30 seems like a lot and wondered whether a party would really have that many business records. Mr. Bachofner stated that, if a party is going to use their requests for admissions for the fundamental issues of the case, they do not want to have to use their limited admissions to clarify authenticity with a lot of different medical providers or records custodians. He stated that he typically tries to use requests for admission early on for substantive issues. Ms. Wray stated that she does not know if the plaintiffs' side would view this change as having any benefit. Mr. Bachofner stated that he believes that the plaintiffs' bar would find it more helpful than the defense bar because they are the ones who are going to have to pay for a records custodian for the proof on the case, and they can send a request for admissions early on when they send the records. He stated that plaintiffs' attorneys to whom he has spoken like the idea. Ms. Wray stated that plaintiffs still get 30, and those 30 are pretty useless for substantive

issues anyway because they either get a response from the defendant saying that they object because it is too soon or they deny because it is too soon.

Ms. Payne agreed and stated that she does not find requests for admission to be particularly helpful. She stated that she uses them primarily for authenticity of documents, but that she does not find them very helpful substantively and does not usually use her 30. Ms. Payne stated, however, that she does not object to this change for lawyers who do because she does not see any harm in it, nor does she anticipate that it would cause any problems. She suggested asking the OTLA and OADC listservs whether they felt any issues might arise. Ms. Wray stated that the Council had surveyed PLF claims attorneys as well as OADC and OTLA last biennium, and that they did not hear much response that it was a problem. Mr. Bachofner stated that, anecdotally, every plaintiffs' and defense attorney he had talked to regarding this issue thought that the proposed change made sense. He pointed out that good attorneys should be conferring about this anyway and, when a lawyer encounters those that do not, this is a streamlined approach to give them relief.

Mr. Snelling asked whether Council members believe that all of the documents that a lawyer wants to get authenticity admitted can be put into one admission. Judge Roberts stated that she does not believe so. Mr. Snelling gave the example of a full set of records from one hospital and stated that it does not make sense to do 2000 admissions for one hospital's records. Judge Roberts agreed that this makes sense but stated that, if a party is asking for a variety of documents from a variety of sources, that would not fit into one question. Mr. Bachofner noted that subparts count under the rule. He stated that he can think of business cases where there have been thousands of pages from different providers, with as many as 100 different records custodians, and stated that this causes a problem with limits. Mr. Beattie noted that this issue comes up in federal court all of the time, and is usually handled by using a spreadsheet of exhibits and an exhibit day where they are discussed. He observed that there are ways of dealing with this other than discovery rules, but that many of these ways may put an undue burden on judges. He felt that, generally speaking, allowing an exception for authenticity before trial is a good idea.

Ms. Wray stated that the committee will discuss these issues further during the next committee meeting.

7. ORCP 47 Committee

Ms. Gates stated that the committee has a meeting scheduled for January 19, where they will wrap up discussion of ORCP 47 E. She stated that the committee has already proposed changes for sections A and B within the committee and that they hopefully will have those changes for the entire Council to review at its next meeting. Mr. Brian stated that he would like to formally add Mr. Eiva and Ms. Payne to the ORCP 47 committee, as they have already agreed to participate in the next committee meeting. Mr. Beattie also agreed to join the committee.

8. ORCP 79-85 Task Force

Prof. Peterson stated that the committee had a meeting tentatively scheduled for January 25 at noon. He stated that he had sent the current version of ORCP 79-85 to the task force members and hoped that they would read them carefully and bring any recommendations for amendments to the task force meeting.

V. New Business

No new business was raised.

VI. Adjournment

Mr. Brian adjourned the meeting at 10:33 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 5, 2015, 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
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
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Hon. Timothy C. Gerking*
Robert M. Keating
Hon. David Euan Leith
Maureen Leonard
Hon. Leslie Roberts
Derek D. Snelling
Hon. John Wolf
Hon. Charles M. Zennaché*

Members Absent:

Michael Brian
Hon. Roger J. DeHoog
Hon. Jack L. Landau
Shenoa L. Payne
Deanna L. Wray

Guests:

Amy Zubko, Oregon State Bar

Council Staff:

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

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I. Call to Order

Ms. Bird called the meeting to order at approximately 9:30 a.m.

II. Minutes

A. Revisit October 3, 2015, Minutes (Appendix A)

Prof. Peterson stated that, at the November Council meeting, an amendment was made to the October 3, 2015, minutes concerning a statement attributed to Justice Landau that was believed to have been made by Judge Armstrong. Prof. Peterson explained that the statement that was amended was actually referring to a statement made by Justice Landau at the September meeting. He suggested amending the sentence in paragraph two of page four of the October minutes to more accurately read, "Prof. Peterson recalled that, at the September meeting, he suggested that perhaps the Council should vote on them; but Justice Landau pointed out that this Council is not the last Council."

Prof. Peterson reported that the Office of Legislative Counsel had also contacted Council staff about a misstatement in the October minutes. On page 15, the sentence that reads, "Prof. Peterson reported that Legislative Counsel had decided to amend ORCP 69 C in a revisor's bill to add the missing conjunction "or" between paragraphs C(2)(a) and C(2)(b)." should be amended to read, "Prof. Peterson reported that Legislative Counsel had decided to amend ORCP 69 C in an authorized master copy correction to add the missing conjunction "or" between paragraphs C(2)(a) and C(2)(b)." Prof. Peterson explained that Legislative Counsel can use a master copy correction to fix minor errors, and that a revisor's bill would not be effective until January 1, 2018, whereas a master copy correction is effective upon passage.

Judge Zennaché moved to amend the approved minutes as proposed. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

B. Approval of November 7, 2015, Minutes (Appendix B)

No corrections or additions to the November 7, 2015, minutes were suggested. Judge Bachart moved to approve the November 7, 2015, minutes. Judge Armstrong second the motion, which was approved unanimously by voice vote.

III. Administrative Matters

A. Contacting Legislators

Ms. Bird stated that she wanted to briefly follow up regarding the last few unassigned

legislators and to remind Council members to contact the ones with whom they had agreed to correspond. Judge Zennaché stated that he had volunteered to contact the other Lane County members to split up the remaining Lane County legislators, but had not yet had a chance to do so. He stated that he will send an e-mail to his fellow Lane County Council members this week. Prof. Peterson observed that there may be a few legislators left in other districts who will not get updates, and that this is probably all right since we will be contacting legislators in key leadership positions as well as those who are personally known by Council members or those of whom Council members are constituents. He stated that he will write a second e-mail that recaps the Council's activity since the first updates were sent. Mr. Crowley asked where to find his legislators' e-mail addresses, and Mark recommended the legislature's website. Judge Leith stated that he sent his correspondence as letters through the regular mail rather than by e-mail, and that he believes it is more likely to make the legislators feel respected.

B. Staff Comments

Judge Leith asked for an update on the status of staff comments. Prof. Peterson stated that he had made the changes to last biennium's comments that were recommended by individual Council members, including changing the word "intent" to "intention," as well as adding the disclaimer agreed upon by the Council at the October meeting. He stated that he had re-circulated the comments via e-mail, and asked that Council members read them over and send individual comments to Council staff by the end of the year so that they can be put on the Council's website. Prof. Peterson explained that he has also attempted to get back in contact with Marisa James at Legislative Counsel about whether they will publish the ORCP in one of their specialty volumes and whether the comments will be included.

IV. Old Business

A. Committee Reports

1. ORCP 7/9/10 Committee

Prof. Peterson reported that the committee had met the previous day. He stated that they had intended to have someone who works with the Oregon Judicial Department's (OJD) Odyssey e-Court system participate because of the Council's discussion at the November meeting regarding documents apparently not being served contemporaneously with filing, and sometimes not showing up at all in the Odyssey system. Unfortunately, no one from the OJD was able to participate; however, the committee will reach out again to try to have a representative at the committee's next meeting.

Prof. Peterson stated that the committee had discussed some other matters, including a fairly thorough discussion of whether committee members trust e-mail service in all instances, and he reported that members of the committee are not quite at that point yet. He reported that, during the committee meeting, Mr. Brian had reminded committee members that the Council's previous change to Rule 9 allowing service by e-mail was made applicable only to lawyers who consented because the Council knew that some lawyers would be resistant to being served by e-mail. The thought was that this would both satisfy those who wanted to serve by e-mail and protect those who did not. Prof. Peterson stated that Mr. Brian had also pointed out that a party cannot complete a certificate of service for e-mail service until that party receives confirmation from the intended recipient that the document(s) have been received; consequently, if someone really does not want to accept service by e-mail, they can merely refuse to confirm receipt and the serving party will not be able to complete a certificate of service. Prof. Peterson noted that, in such cases, service will probably have to be made by regular mail or facsimile. He stated that this is a loophole that essentially allows the technologically impaired or the unwilling to opt out of e-mail service, and that this may be something the Council will have to live with.

Prof. Peterson also reported that the committee is working with section G regarding service by e-mail because that section contains language regarding certificates of service that might be more appropriately placed in section C. He stated that section C mentions certificates of service for facsimile service that can be signed by an attorney or sheriff, but noted that the committee was not aware of sheriffs ever serving by facsimile He stated that, if this is something that is happening, the sheriffs should also be given the right to serve by e-mail and, if it is not happening, the language should perhaps be removed. He explained that he had reached out to the Oregon Sheriff's Association to inquire about whether they serve by facsimile, but that he had not yet heard back.

Prof. Peterson stated that the committee has gone through two internal drafts and that they are not quite ready to present a draft to the full Council yet.

2. ORCP 15 Committee

Ms. Nilsson stated that she believed that the committee had completed its work, but that the Council was waiting for a final report. Prof. Peterson asked that someone on the committee assume responsibility for writing a final report for the record, and stated that he would e-mail Judge DeHoog, who was acting as chair of the committee.

3. ORCP 17 Committee

Judge Armstrong referred the Council to the committee's final report (Appendix C) and made a motion to take no further action on the questions presented to the committee. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

4. ORCP 22 Committee

Judge Bachart referred the Council to the committee's report (Appendix D). She reported that Mr. Beattie and Ms. Payne had done research on potential unintended consequences and had been unable to find any. She stated that the proposal from the committee is to amend ORCP 22 C to identify that "any party" may assert a claim, rather than just the plaintiff. Judge Bachart stated that, to the extent that there are some courts that have interpreted Rule 22 to limit a third party defendant's ability to assert claims, this amendment would clarify it. She explained that the e-mails with Mr. Beattie and Ms. Payne's research are attached to the committee report and that they refer to similar language in the federal rules and address concerns about timelines.

Judge Leith observed that, if the idea is to create a universal authority for cross-claims among parties, he is not sure that this amendment gives a third party defendant an unimpaired ability to cross-claim against any other party. He stated that the sentence prior to the committee's amendment allows a third party defendant to assert claims against the plaintiff, but noted that the third party defendant's ability to cross-claim is dependent on being cross-claimed against by one of the other parties, and that the language regarding this is contained in the sentence just after the one that was amended by the committee. Judge Leith stated that this may be too small of an issue for the Council to decide, or that it may be a bigger issue that should be taken up next biennium. He reasserted that, if the goal is universal cross-claim authority without impairment, this amendment falls short of the goal. Mr. Beattie asked whether Judge Leith's issue is covered by the last clause of the sentence: "and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule." Judge Leith replied that the third party defendant does not get to file cross-claims unless another party asserts a claim against the third party defendant and then they get to assert cross-claims against other defendants, but that the initial authority to assert claims in the sentence just before the committee's suggested amendment is limited to the plaintiff.

Judge Zennaché asked whether Judge Leith would suggest modifying that sentence to say a third party may also assert a claim against any party arising out of this transaction or occurrence. Judge Leith stated that this would appear to him to be the amendment that would establish universal cross-claim authority without impairment. Judge Zennaché wondered whether the committee had discussed this issue or whether it is something they should take up at their next meeting. Judge Leith stated that the committee did not discuss it because he had just noticed it the previous day. Mr. Beattie noted that the committee's assumption was that the third party defendant had free reign to file whatever claims it had, and suggested that perhaps the word "thereupon" is the problematic part of the sentence. Judge Leith agreed that removing this word might remove the implication that there is a contingency. Mr. Beattie observed that this was a particularly sensitive reading of the rule. Prof. Peterson thanked Judge Leith for his observation and explained that he is always in favor of removal of the word "thereupon."

Mr. Beattie suggested that the committee could meet again and look at the issue. Judge Bachart explained that it certainly was the committee's intent to clean up what some courts had interpreted as a barrier versus other courts that had not. She stated that she was not sure the committee needed to meet again to discuss removing the word "thereupon," as it was clear that the timelines would still apply, and the committee did not want to create an unnecessary barrier to third party practice. She proposed just removing "thereupon" from the draft with no further committee discussion. Mr. Beattie asked whether the Council was voting on putting the amendment on the publication docket for September at this point. Prof. Peterson stated that he believed the amendment is worth another look to make sure that the everything flows well. He noted that the Council's minutes will now reflect that the Council's intention is providing the universal authority to cross-claim. Judge Conover stated that he would like to discuss the issue further since there is time to do so.

Judge Zennaché stated that he would like the sentence before the amended portion examined as well. Mr. Eiva agreed. Mr. Beattie asked Mr. Eiva or Judge Zennaché to explain the issue with the sentence prior to the amended portion. Judge Zennaché observed that the language stating that a third party defendant may also assert a claim against the plaintiff arising out the transaction or occurrence seems to suggest that a third party defendant's claim can only be against the plaintiff. Mr. Bundy observed that it would be a claim because it could not be a counterclaim, and noted that he is not seeing where the rule falls apart. He agreed that the rule seems a little convoluted and long, but it states that a third party defendant can only assert a claim against the plaintiff as he understands it – because there is no claim by the plaintiff against the third party defendant, the third party plaintiff has the claim against the third party defendant. He stated

that, if a party wanted to assert a claim, that party is either going to have to become a third party plaintiff and assert a new claim against a new defendant, to assert a counterclaim against the third party plaintiff, or to assert a claim against the plaintiff. He noted that, because the plaintiff has no claim against a third party defendant, a third party defendant cannot counterclaim or cross-claim. Mr. Beattie stated that he believes he understands the issue and that the committee will discuss it at their next teleconference.

5. E-Discovery Committee

Judge Zennaché stated that, at the committee's first meeting, they discussed three issues related to e-discovery:

1. the wisdom of requiring some sort of conference early in the case to discuss e-discovery issues and how that might be done;
2. the notion of the rules incorporating some sort of duty to preserve electronic data or at least having that be part of the conference discussion; and
3. the notion incorporated in the Federal Rules of Civil Procedure about some degree of proportionality in the amount of discovery that can be done in a case in relationship to the issues involved in the case.

Judge Zennaché stated that the committee had tasked Mr. Crowley with an attempt to draft language to incorporate some of these ideas. He stated that there is not necessarily a consensus amongst committee members, but that the draft will get the discussion going. The next committee meeting is scheduled for December 16.

6. ORCP 44 Committee

Mr. Keating stated that the committee had met and submitted a report (Appendix E). He reported that, at a previous meeting, members had tasked themselves with exploring what might be done procedurally to facilitate more efficient resolution of disputes regarding independent medical examinations (IMEs). He stated that committee members had heard different things from different people about the scope and geographical impact of the issue; therefore, the committee concluded that they should contact the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) and survey practitioners who run into this issue. Mr. Beattie stated that he had contacted OADC members and received several responses. He stated that the criticisms varied, but that defense attorneys who had complaints were managing to resolve them without court intervention, essentially by relying on the consensus ruling by the Multnomah

County Circuit Court that limits what sort of information has to be produced and what sort of conditions can be placed on the examinations. Mr. Beattie stated that his take is that there is a problem in Multnomah County cases because issues come up with more frequency there. He observed that, if the Council modifies the rules statewide to make life easier in Multnomah County, it would partly be addressing a problem that does not exist elsewhere.

Mr. Beattie stated that one of the respondents made a suggestion that the Council has previously discussed – an absolute right allowing IMEs as a matter of course, similar to a request for production, with no requirement for a court order or stipulation. He observed that this may not be something the Council wants to address again. Mr. Keating reported that the committee had discussed this possibility in its first committee meeting, including discussion of a recent mandamus case that stated that it is within the discretion of the trial judge both as to the initial ordering of an IME (a defendant must make an application for good cause shown) and, when the plaintiff wants to add restrictions, it is the plaintiff's burden to come forward. Mr. Keating stated that a suggestion was made to do away with the first part, substitute a notice of IME, and then have the plaintiff file a motion if they object. He recalled that the plaintiffs' attorneys on the Council were of the mind that this would remove the burden of establishing the need for an IME from the defense, and it was clear that the proposal would not go far.

Mr. Eiva stated that he had surveyed the plaintiff's side and received many responses, which he is trying to synthesize for a more formal presentation to the Council. He reported that, generally, those he surveyed believe that the idea of a straight notice of an IME creating a burden to appear is problematic, because ORCP 44 A is an exception to a very long-held principle in American society and in the common law of the privacy of health information and of the sanctity of the body from intrusion. He stated that ORCP 44 A makes a narrow exception to those principles, requiring good cause, and that he understands that good cause often exists in physical injury cases, but the nature of the intrusion also has to be defined within that good cause. Mr. Eiva pointed out that the idea of a notice of an IME that is basically conditionless until the plaintiff, who has no idea who the examiner is, moves for some type of protective order seems to be putting the burden in the wrong place. He stated that one of the reasons that the need for conditions is happening is not because plaintiffs are being stubborn but, rather, because their clients deserve protection from a cottage industry of charlatans that currently exists within the ranks of independent medical examiners. He noted that, in the Council's 1999-2001 biennium records, there are hundreds of pages of documents about abuse by these examiners, where IMEs are changed from mere interviews to rigorous, unrepresented cross-examination of patients. He opined that these are not independent examiners but advocates for a particular side. Mr. Eiva stated

that the idea that a defendant might have to move to require such an examination and have a court decide what the conditions of that examination will be is not offensive, nor should it be done away with. He stated that these motions can be dealt with by judges who can deal with them promptly on a case-by-case basis. Mr. Eiva stated that he is hearing from the plaintiffs' side that, when they end up litigating these exams, the court is not giving the defense everything they want. The process is working and creating well-reasoned protections, and he is not sure we should do away with that. He stated that in the 1999-2001 biennium there was a push to amend ORCP 44 to have plaintiffs be allowed a representative at the examination, like Washington State does. He observed that we would do away with a great deal of these disputes if a representative were allowed, because IME physicians would avoid nefarious conduct if they knew their conduct was under true scrutiny.

Mr. Beattie stated that it sounds like Mr. Eiva is suggesting sending a circuit court judge to each IME to mediate or moderate between the representative and the doctor. He noted that such changes could result in the process becoming so Byzantine that IMEs would never occur. Judge Roberts asked whether anyone had heard of an IME being denied if there are medical claims. Mr. Bundy stated that he had heard of limitations, but not denials. Judge Roberts asked why, if there has never been a denial, a party would go through the steps other than just to throw up roadblocks for the other party. Mr. Keating replied that the issue is always the conditions. Judge Roberts suggested that perhaps we can have a discussion about the conditions, but noted that there are issues about conditions at depositions as well and we do not require parties to file a motion in court for that.

Mr. Snelling pointed out that one of the responses to Mr. Beattie's survey was that our rule seems to be modeled on the federal rule. He stated that one of the benefits of having Oregon's rule modeled on the federal rule is that we can use the federal case law to help solve disputes here. He noted that this perhaps suggests not tinkering too much with the rule. Mr. Beattie stated that a peculiarity is that there is a disconnect between federal practice and Oregon practice in terms of general discovery of expert opinions. He pointed out that prior medical records are discoverable in federal court to the same extent they are in state court because the federal courts follow our privilege rule, but that Oregon is one of maybe four or five states where the filing of a personal injury claim does not waive the physician/patient privilege. Mr. Beattie explained that, in most states, when a plaintiff files a lawsuit, his or her medical records, subject to HIPAA, are subject to discovery. In Oregon it is more like trial by ambush, not producing medical records, and locking down what can be learned about a plaintiff prior to trial. He stated that he understands the frustration on the defense side that their hands are being continuously tied and that the ropes are getting tighter with the conditions

plaintiff's counsel is trying to place on IMEs, which is really one of the defense's only tools for getting medical information, apart from chart notes and written records of the injury itself. He stated that he also understands Mr. Eiva's point about bodily integrity but explained that, prior to becoming an attorney, he was a claims adjuster doing worker's compensation cases, and he sent people for exams all of the time and it was not a big deal. Mr. Beattie stated that he sees the issue from different perspectives. Mr. Keating stated that the rule is different in Oregon and in every other state, when you file a claim for personal injury, you waive the physician/patient privilege – of course that is entirely within the control of the plaintiff, but with it comes the right of the defendant to get necessary information to be able to defend the claim. Mr. Beattie stated that, in an ordinary personal injury case, the defendant does not get to depose the treating physician prior to trial and, in fact, does not even get to talk to the doctor. All the defendant can do is to hope that the doctor is going to testify consistently with chart notes.

Mr. Eiva noted that these exams are mostly happening in lesser injury cases. Mr. Beattie stated that he would not necessarily agree. Mr. Eiva stated that the issue often arises in soft tissue cases and that, while the defendant cannot do a deposition of the plaintiff's physician, they can request a report under ORCP 44 C. He stated that there is still access to information from the plaintiff's own physician, and that defendants should be using that, and that he does not feel that the defense is being left in the dark that much.

Ms. Leonard observed that this discussion sounds like the same discussion the Council had last biennium. She noted that Oregon has a privilege that lawyers have to work with and work around, and that we cannot ignore that and have open season on injured people's privacy. Prof. Peterson stated that Judge Roberts correctly pointed out that the exams are going to happen anyway, and agreed that it would be nice to come up with a procedure. He stated that Oregon has consultation as a part of discovery, and observed that it would be nice to come up with procedure that would force a little more agreement before people need to go before a judge. Judge Leith stated that, with the exception of Multnomah County matters, he has never had to hear an issue of whether a plaintiff would be subject to an IME and has never had to hear a case defining what conditions should apply. Judge Bachart stated that she has had hearings on it, but they have been very claim-specific and driven by that. She stated that modifying a rule may not address some of the concerns here, and she does not see it as an issue clogging the docket. She feels that, since the issue is driven by the claims in any given case and the exams are not going to be denied, there should not be a modification of the rule. Judge Leith agreed that this is a case of "if it's not broke, don't fix it." He observed that parties are working these issues out and, if an issue comes up that needs litigation, standards are readily adapted and applied. He stated that he

feels that an amendment would be fixing a Multnomah County issue at the risk of breaking something that is not a problem elsewhere.

Mr. Bundy noted that one of his partners had just argued a three hour motion concerning physician/patient privilege and whether or not it allows the plaintiff to prevent the discovery of medical records concerning a body part that is at issue. He stated that they had reviewed the case law in *State Ex Rel. Grimm v. Ashmanskas* [298 Or 206, 690 P2d 1063 (1984)], which states that the privilege is not waived until the defendant's doctor's deposition is taken. He stated that some plaintiffs have taken the position that defendants do not get any medical records in the case before then and, if they never depose the doctor, the defense never receives any discovery. Mr. Bundy observed that, if a party is going to sue somebody for injury, that party needs to be able to produce the medical records that relate, but he did not believe that there is any specific rule other than the "body part rule" in the Multnomah County consensus statement that states that these records are discoverable. He suggested that this may be an issue for the Legislature rather than for the Council.

Mr. Eiva pointed out that ORCP 44 C carves out a modification of the privilege and that is the authority to get the overall records the defense needs. He asked whether Mr. Bundy had lost the motion. Mr. Bundy stated that there has been no ruling yet, but the issue is what is a "body part" – what does that really mean? Mr. Beattie stated that the "injury for which recovery is sought" has become shorthand for the "same body part rule" in Multnomah County, but not in every county. He stated that, in the federal courts, it is not uncommon for the court to order the disclosure of all medical records for a particular time frame, believing that those records (at least on some plausible showing) are relevant to what the injuries are, particularly in a case where there is a pre-existing condition that has been aggravated or a condition that could be caused by some other bodily condition. Mr. Keating pointed out that, when there is a claim of permanent injury, the jury instruction states that the patient's health must be considered. He also wondered why the defense would not be able to explore a patient's heart disease, even if he or she had died from a surgical error, to assess the question of life expectancy. Mr. Beattie stated that the federal courts have recognized that, and other Oregon courts will allow defendants more leeway, but it is really another Multnomah County construct that is causing some problems.

Mr. Eiva observed that ORCP 44 C is a rewording of a statute that created the incursion into the privilege, and he is not sure we can do anything to the scope of ORCP 44 C anyway. Mr. Bundy stated that he will let the Council know what the court decides, but that this has become quite an issue in his firm. He stated that, even five years ago, it was not nearly the problem that it is now. He has heard

people saying that they do not have to produce post-accident medical records in other counties as well. Mr. Eiva stated that it is reasonable to say that someone's hurt foot is not related to the injuries sought for recovery if the claim is a broken arm. Mr. Beattie asked how one would know if he or she is not a doctor. Mr. Eiva pointed out that the fact that a plaintiff objected to producing particular records is not a basis to say that the plaintiff was wrong. Mr. Bundy stated that it is more subtle than that; for example, if someone has an injured foot, are records relating to diabetes discoverable? Mr. Eiva agreed that a defendant should win that one every time. Mr. Bachofner raised the issue of an extremely minor accident where the plaintiff gets shoulder surgery and the defendant wants to find out about any earlier issues or later issues relating to the upper extremity and any post-accident treatment with any provider, because it is highly unlikely in an accident where the plaintiff does not even move or strike their shoulder that they have rotator cuff surgery six to ten months later.

Mr. Keating stated that the committee will wait for Mr. Eiva's information so that the record is complete, and will have another meeting if necessary.

7. ORCP 45 Committee

Ms. Leonard reported that the committee had not met.

8. ORCP 47 Committee

Ms. Gates reported that the committee had already looked at sections A and B, which make it clear that a party can move for summary judgment against affirmative defenses, or any defense for that matter. She stated that the committee was now dealing with the ORCP 47 E process by which a party can submit a declaration in response to a motion for summary judgment that says the non-movant will have an expert that will provide testimony that will create a disputed fact or an issue of law. Ms. Gates reported that the committee had just started talking about the issue and realized that the plaintiffs' lawyers on the committee do not encounter it frequently enough to provide meaningful input. She stated that she had also done some research and found some concerning cases about what would happen if more detail were required in a declaration. Ms. Gates stated that Mr. Eiva and Ms. Payne are going to join the committee at its next meeting to weigh in on these issues before the committee brings the discussion to full Council for deliberation. She observed that she is not sure it will be a hotly contested issue, but that the committee feels that input from more experienced practitioners is important.

Prof. Peterson stated that the committee was also charged with determining

whether affirmative defenses were subject to summary judgment and whether one should be able to knock out an affirmative defense based on a summary judgment motion. Ms. Gates stated that the committee has language drafted regarding that change and that they will present it when they have a final report. Prof. Peterson asked that the committee send the draft amendment to Council staff when they are close so that staff can put the amendment in proper format.

Mr. Beattie observed that, prior to the addition of ORCP 47 E in 1981 or 1982, for a bright shining moment in 1978 we actually had expert discovery in Oregon. He stated that Frank Pozzi approached the Legislature and asked it to change the rule to eliminate the provision that allowed for expert discovery, then became a Council member and encouraged the passage of ORCP 47 E which further contracted any sort of potential for expert discovery via the summary judgment rule. Mr. Beattie pointed out that there is a fairly abundant Council history as to where ORCP 47 E came from and that the committee may want to take a look at it.

9. ORCP 79-85 Task Force

Judge Zennaché stated that the task force has not yet met. Prof. Peterson will contact attorney Russ Garrett next week and will call the executive officers of the Consumer Law and Debtor/Creditor sections and see if they can get more participants in the task force. Mr. Bachofner stated that he will mention it to Mr. Garrett, as he may have missed Prof. Peterson's e-mail, having been out of the office for a period of time.

V. New Business

Mr. Bundy stated attorney Larry Brisbee had raised an issue regarding some plaintiffs who take the position they do not need to number responses to requests for production of documents and requests for admission, which makes things difficult and confusing. He observed that the rule does not require it. Mr. Bachofner pointed out that the rule does say that responses need to be organized. Mr. Beattie stated that the rule requires that you identify your response to the specific request. Mr. Bundy asked about requests for admission Mr. Keating stated that these need to be numbered because there is a cap on the number that can be made. He noted that some plaintiffs' lawyers ask a question with multiple subparts to stay within the limits. Mr. Beattie asked how one would answer a request for admissions without doing it specifically by number – would it be just a blank paper saying "yes, yes, no"? Mr. Bundy stated that attorneys Don Corson and Lara Johnson have experience with this, and it usually looks like, "Response: Response: Response:" if the request said "Request: Request: Request:" Judge Roberts stated that it seems like an issue of professional courtesy, and a practitioner could merely respond by putting numbers in brackets before the responses. Council members agreed that it did not seem like an issue that should be taken up formally by the Council.

VI. Adjournment

Ms. Bird adjourned the meeting at 10:50 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Travis Eiva
Trial Attorney
travis@zempereiva.com

Erin J. Zemper
Trial Attorney
erin@zempereiva.com

72 West Broadway Suite 201 Eugene Oregon 97401 | T: 541.636.7480 | F: 458.205.8658 | zempereiva.com

January 8, 2016

Council on Court Procedures

Re: *Proposed Amendments to ORCP 44A to allow defendants to compel a medical exam of a plaintiff without a showing of "good cause".*

Dear Council:

I write to supplement the record regarding the proposal from some members of the defense bar to amend ORCP 44A so that defendants may compel the medical exam of a plaintiff without a predicate showing of "good cause." So this Council may have a more complete record upon which to consider the amendment, below I (1) discuss the historical context of ORCP 44A, (2) review some concerns about whether this Council has authority to adopt the proposed amendment, (3) summarize a survey of members of the plaintiff's bar regarding the amendment, (4) and discuss alternative amendments to the rule.

A Brief Review of the Context and History of ORCP 44A

Generally, our society regards a medical examination of an individual as private. Although there are exceptions, the law reflects that understanding in numerous ways. For example, federal and state statutes, rules of evidence, and the common law have long recognized a person's right to keep private a medical exam of his or her own body. Likewise, the law also has long recognized a person's right to preserve the sanctity of his or her body from unwanted touching or an unconsented invasive procedure.

Notwithstanding those values, when a plaintiff's medical condition is at issue in a civil case, in some circumstances it may be fair and necessary for a defendant to ask a court to compel a medical exam of the plaintiff to evaluate that condition. In Oregon, this was first recognized in *Carnine v. Tibbetts*, 158 Or 21, 27, 74 P2d 974 (1937), where the Supreme Court held that a trial court has "inherent general power" to order such an exam. However, the Legislature in 1973, passed *former* ORS 44.610, which limited a court's "inherent general power" to order a medical exam and set forth that a court may only order the exam upon a defendant's showing of "good cause." The statute provided:

> "In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, the court in which the action is pending may order the person claiming to be injured to submit to a physical or mental examination by a physician employed by the moving party. ***The order may be made only on motion for good cause shown and upon notice to the persons to be examined and to all parties***.

> The motion and order shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(Emphasis added). That statute was renumbered as ORCP 44A in 1978 with minor changes.

The Legislature's choice to insert a "good cause" threshold matters, because "good cause" is a legal standard that requires a court to decide whether an exam is warranted as a matter of law rather than as a matter of discretion. The Oregon Supreme Court has explained:

> "'We acknowledge the temptation to treat indefinite terms like 'good cause,' . . . as calling for a subjective determination and, thus, as invoking personal judgment. However, it is clear that, when such terms appear in a statutory context, they are focused on real, albeit sometimes difficult to discern, legal standards: the legislature's view of what is 'good[.]' As such, in the absence of a factual dispute, a determination [of] 'good cause' . . . invokes an objective standard and must be reviewed for legal error."

State v. Johnson, 339 Or 69, 116 P3d 879 (2005). *See also State v. Biscotti*, 219 Or.App. 296 (2008) ("when the relevant facts are not in dispute, what constitutes 'good cause' within the meaning of the statute is a question of law, not discretion")

The Council's Authority to Remove the Defendant's Predicate Obligation to Make a "Good Cause" Showing

The proposed amendments to ORCP 44A would undo the Legislature's requirement that defendants must first make a "good cause" showing before having a right to an unconsented medical exam of the plaintiff. The change would give defendants the right to the exam upon notice alone. As a result, the right to the exam is presumed and the burden would be placed on the plaintiff to seek a protective order in the event that a defendant does not have "good cause" for the exam.

Of course, such a change would require the Council to delete the legal standard for the exam that was set by the Legislature. As we learned last biennium, members of the Oregon Supreme Court have publically questioned whether this Council has authority to do such a thing. *State v. Vanornum*, 354 Or 614, 632, 317 P3d 889, 899 (2013) (Justices Landau and Brewer so concurring). Likewise, the amendments would further limit the privacy and bodily integrity rights that the law currently affords litigants. That is, litigants presently are entitled to be free from unwanted and invasive medical examinations unless there is a showing of "good cause." Removing that "good cause" protection arguably alters or modifies a substantive right of the litigant, which this Council cannot do. ORS 1.735(1) (the Council "shall not abridge . . . or modify the substantive rights of any litigants").

A Survey of the Plaintiff Bar's Reaction to the Proposed ORCP 44A Amendments

Setting aside questions about whether this Council has the authority to promulgate the proposed amendments to ORCP 44A, it still should consider whether the proposed amendments actually would improve civil litigation in Oregon. The amendment proponents anecdotally suggest that motions for ORCP 44A examinations have become too litigious and, without any detail, suggest that the amendments would somehow improve upon that circumstance.

I have surveyed members of the Oregon Trial Lawyers Association (OTLA) on their position regarding the potential amendments and whether motions on ORCP 44A exams have become "too litigious." I have received many responses. Many assert that any increased motions practice is because of defendant over reaching in the exam setting which has caused the need for plaintiff's counsel to seek more protections for their clients. Moreover, all of the responses I have received on the issue oppose the proposed amendments as unwarranted.

Multiple plaintiff attorneys noted that at the heart of ORCP 44A motions practice is not that plaintiffs are unwilling to stipulate to the exams without court order, but rather that many defendants refuse to agree to a plaintiff's request to have a representative present at the exam or refuse to agree to the plaintiff recording the examiner's conduct or questioning. The requested conditions are reasonable and far from exercises in needless litigation.

Often, the exams are far from independent and are performed by adversarial representatives of the defendant. There exists a lucrative cottage industry of medical doctors who perform these exams solely for the defense bar and insurance companies. When plaintiffs are forced to appear at these examinations unrepresented or without a recording device, the examiner often will question the plaintiff extensively on numerous matters not necessary to the exam. In essence, they conduct an informal, unrepresented deposition of the plaintiff.

When one senior member of the plaintiff's bar learned of the proposed amendments, he replied:

> "It is appropriate . . . to ask what problems are generating so much litigation over [defense medical exams – 'DMEs']. The answer is that it is the need for conditions that protect injured persons against unwarranted intrusions, unrepresented cross-examination by their [adversaries], un-called for tests, and so forth. If there weren't systemic over-reaching by insurance companies, there wouldn't be so much litigation. And if the system gave explicit recognition to the obvious fact that a DME is an adversarial

> procedure in which a lay person is required to submit to an attack on their credibility by a trained professional agent of the other side, and nothing to do with 'independent' or 'neutral' or 'objective' search for truth, with rules that adopt the kinds of conditions we always have to advocate for (tape recording, no re-deposition, time limits, test limits, etc.) then most of the litigation over it would go away."

Another member of the plaintiff's bar explained:

> "the rights of the plaintiff being forced to be interviewed outside the presence of their attorney – a situation unknown elsewhere in [the] law. . . is a big enough reason to always have the defense get an Order."

Plaintiffs simply are not being "too litigious" by requesting the added conditions. The conditions are a reasonable response to a plainly adversarial procedure. Indeed, when defendants balk at these requested conditions and ask trial courts to order the exams free of the plaintiff's requests, many courts agree with the plaintiff's position. For example, the Multnomah County Court's "Civil Motion Panel Statement of Consensus" sets out that "audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam." Consequently, if defendants simply agreed to the conditions in the conferral process in the first place, there would be a great reduction in ORCP 44A motions practice.

Based on the above, it appears that the Legislature got it right in the first place, when it decided that such exams should only be allowed upon a showing of "good cause." There is little in the record before this Council to suggest that that standard should be removed.

Alternative Amendments that Should Also Receive Consideration

Due to the above concerns, Washington State's rules of procedure provide plaintiffs the right to have a representative present at the exam. During this Council's 1999-2001 biennium, the plaintiff's bar proposed a change to ORCP 44A to include the same protections. The plaintiff's bar put forward a substantial amount of evidence of the adversarial nature of these exams that is still relevant today. For example, the record included some examiner marketing flyers to insurers and defense lawyers claiming that their exam reports could make cases go away or otherwise lose value. If there is any further consideration of the proposed amendments, it may be worthwhile for this Council to review the substantial record from the 1999-2001 biennium and reconsider whether the rule should be amended to give plaintiffs a right to have a representative present at the exam.

It also should be mentioned that many from the plaintiff's bar in the recent survey proposed other alternative amendments that would prevent excessive ORCP 44A motions practice by more clearly defining the conditions of defense compelled medical exams.

Many focused on having presumed conditions of audio or video recording of the exam record and limiting unrepresented questioning by the examiner. To the extent that this Council considers amendments to ORCP 44A, I respectfully suggest our discussions consider those alternative amendments as well.

Thank you,

Travis Eiva

F(1) Number. Excluding requests in subsection (2), a party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed 30, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined, or arranged.

F(2) Authenticity and Hearsay. Admissions regarding authentication or identification as a condition precedent to admissibility, or admissions regarding the foundation for a hearsay exception, are not subject to the limitations in subsection (1).