MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 5, 2016, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart
Arwen Bird
Michael Brian
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
Jennifer L. Gates
Hon. Tim Gerking
Robert M. Keating
Hon. Jack L. Landau
Hon. David Euan Leith
Maureen Leonard
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. John Wolf*
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

John R. Bachofner
Jay W. Beattie
Troy S. Bundy

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 15 ORCP 21 ORCP 22 ORCP 39 ORCP 47 ORCP 69	ORCP 15 ORCP 20 ORCP 21 ORCP 23 ORCP 25 ORCP 27 ORCP 32 ORCP 43 ORCP 44 ORCP 55 ORCP 57 ORCP 68	ORCP 27 ORCP 57	ORCP 22

I. Call to Order (Mr. Brian)

II. Minutes

A. Approval of February 6, 2016, Minutes (Mr. Brian) (Appendix A)

Judge Zennaché asked that the draft minutes be corrected to reflect that he appeared by telephone. Judge Gerking moved to approve the minutes as amended. Judge Armstrong seconded the motion, which passed unanimously by voice vote.

III. Administrative Matters (Mr. Brian)

A. Vacant Judge Position on Council

Prof. Peterson reported that Judge Josephine Mooney, current president of the Oregon Circuit Court Judges Association, had gotten in touch with him to state that several judges are interested in the vacancy on the Council, and to ask whether a senior judge can be appointed or a judge member who becomes a senior judge can remain on the Council. Prof. Peterson stated that his sense was that ORS 1.730 did not necessarily appear to preclude a judge who moves to senior status from continuing to serve on the Council so long as the judge did not return to private practice. Judge Gerking asked whether senior judge status is the same as a "Plan B" judge. Prof. Peterson stated that the terms are interchangeable.

Judge Armstrong pointed out that the statute speaks of categories of Council members by status, and that senior judge is not one of them. Judge Roberts observed that a senior judge is still a judge. Judge Zennaché observed that the language calls for eight judges of the circuit court, and wondered whether a senior judge is still a judge of the circuit court. Judge Armstrong stated that senior judges are no longer members of any court. Judge Gerking wondered whether that has that been changed as result of the Chief Justice's order making all judges pro tem of all the other districts around the state. Judge Zennaché stated that, to the extent that a Plan B judge is serving as a circuit court judge, he or she would qualify, but this is only the case for 35 days a year. Judge Armstrong agreed that Plan B judge appointments are very specific and noted that, if he were to be appointed as a Plan B judge, he would be a circuit court judge but he believes that this merely means that he is fulfilling that role on a pro tem basis rather than permanently becoming one. Mr. Brian expressed a preference for a sitting judge in the role. Prof. Peterson stated that he would communicate the Council's thoughts to Judge Mooney.

IV. Old Business (Mr. Brian)

A. Committee Reports

1. ORCP 7/9/10 Committee

Prof. Peterson stated that the committee was supposed to meet with a representative from the Oregon Judicial Department (OJD) regarding the eFiling technology, as well as outreach by the committee to the Uniform Trial Court Rules (UTCR) Committee. The committee was unable to schedule those meetings, and will report at the next Council meeting.

2. ORCP 15 Committee

Mr. Brian reminded the Council that the committee was dealing with the issues of ORCP 15 and 21. He stated that, after a judge enters an order requiring additional pleadings, there is a 10 day period in which the additional pleadings are to be filed, and the question was when does that 10 days start: when the proposed order is sent to the judge, when the judge signs the order, or when a copy of the order is sent to the attorney who is supposed to file the responding pleading.

Mr. Brian stated that the committee's conclusion is that the existing rules are clear enough and the committee does not recommend any changes to ORCP 15 or ORCP 21, particularly since some of the circuits have not yet adopted the eFiling system. He observed that, when a judge enters an order in the new eFiling system, an attorney must print the order after it has been signed and serve it on the other side. He noted that there is certainly some lag time due to the new system, but stated that this will change if the OJD institutes automatic electronic service upon the signing of an order.

The committee's work is concluded, and Mr. Brian's oral report serves as the final report of the committee.

3. ORCP 22 Committee

Ms. Payne reported that the committee had and produced a report (Appendix B) and two alternate versions of proposed amendments to Rule 22 (Appendices C and D). She stated that the committee had discussed primarily whether there should be a time limit or no time limit as to when a defendant should be able to add a cross-claim after a third party defendant is brought in by another party. Version A is the original amendment proposed by the committee and does not include a time limit – it simply allows "any party" to assert a claim against the third party

defendant if that claim arose from the same transaction or occurrence. Ms. Payne stated that the committee's initial discussion was that time limits would be left to the discretion of the judge. She noted that a party would obviously have to amend their complaint or answer in order to bring a cross-claim; therefore, the judge would have to address amendments that occur late in the process.

Ms. Payne stated that Version B is a proposed alternate amendment that contains a timeline within a new subsection, C(3). She explained that the new language states that a defendant who is not a third party plaintiff may amend its answer, or file its answer if it has not already done so, to include a claim against a newly added third party defendant under subsection C(2) without service of a summons within 90 days after service of the plaintiff's summons and complaint on the defendant so choosing to amend, or within 30 days after service of the third party plaintiff's summons and complaint on the third party defendant, whichever is later. Ms. Payne stated that the filing would either be within that 90 day period or by 30 days after the third party is brought in; otherwise, the defendant must obtain agreement of the parties and leave of court. She stated that some flexibility is still allowed on the timeline, just like in the existing 90 day rule. Ms. Payne explained that the committee had quite a bit of discussion about the timeline, with some committee members strongly believing that there should be a timeline to avoid defendants' ability to get around the 90 day rule by procrastinating and waiting until a third party defendant is brought in and then bringing a late cross-claim, and others strongly believing that there is no reason to add a timeline when there are no other existing timelines on cross-claims. The committee wanted to bring the two amendments to the full Council for discussion.

Mr. Eiva explained that it felt like the committee was split down the middle as to which amendment was better, but he did not feel that anyone was overly passionate about one amendment over the other. He stated that he had drafted Version B with the timeline and that his point was simple - that there is a limitation on third party practice in Oregon civil practice because adding new claims and blowing up a case to expand beyond the original controversy that was pleaded is currently limited by the 90 days, and version B is about motivating the parties to make these decisions early so we are not bringing in new issues and expanding the claims further down the line. Mr. Eiva stated that judicial discretion is a great thing in many ways, but uniformity across state law is also important. He noted that many attorneys would argue that it is more efficient to adjudicate everything having to do with a particular claim in one case, but stated that this it is not true in many cases because it complicates things for the court; makes scheduling, depositions, and discovery difficult; and increases the cost of litigation. Mr. Eiva stated that requiring agreement of the other party as well as leave of the court after 90 days may be appropriate since a late addition to the case brings with it a

potential increase in cost.

Judge Leith pointed out that the timeline issue arose late in the committee's discussions and that the issue that originally came before the committee was that a Washington County judge had disallowed a cross-claim because he found it not provided for by the Rule 22. He stated that the committee at first thought that it sounded like a one-off type of decision but, as they examined the rule more closely, it appeared that the judge may have been reading the rule correctly, even though most attorneys and judges assume that this type of cross-claim is permitted. The committee wanted to make the rule come into alignment with the expectation or current practice. Judge Leith explained that the committee originally made the two word amendment found in Version A, which was reviewed a few times after discussion by the full Council, and that the idea of adding a time limit on cross-claims was recently added. Judge Leith explained that his view is that timelines may well be appropriate, and he would be inclined initially to let judicial discretion guide the amendment of pleadings, but he pointed out that subsection C(1) contains a strict timeline for the pleading of a third party complaint but no timelines on counterclaims or any other type of cross-claim or third party practice. He expressed concern that the amendment contained in Version B would pick one particular category of cross-claim and add a strict timeline to it beyond judicial discretion, while every other type of third party practice would remain without a timeline. He noted that the Council has not fully vetted the idea and stated that it feels ad hoc to throw a timeline at this particular cross-claim without looking at the entirety of the rule across third party practice.

Judge Conover stated that he shares Mr. Eiva's concerns about timing, but agreed with Judge Leith's point that an argument can be made that everything should be decided at once in terms of timelines. He stated that his problem with having a timeline specifically for the additional claim of a defendant against a third party plaintiff is that the current language contains no timeline limiting the plaintiff from filing an additional claim against the new third party plaintiff and no timeline at all for a third party defendant to bring in a fourth party defendant. He stated that he is not sure how many cases occur that have a fourth or fifth party, but singling out this type of cross-claim complicates the rule for a limited instance and does not deal with all the other instances that can occur. Judge Conover opined that, if the Council wants to make a policy decision to limit the time when these other claims can be brought, it should be done wholesale.

Judge Gerking agreed with Mr. Eiva's concern about late motions to assert claims against third party defendants and the plaintiff losing control of his or her litigation, but he also agreed with Judge Conover's concern. He stated that perhaps these calls should be made by judges. Mr. Eiva apologized for the late

arrival of his amendment and explained that, as he redrafted it to include the timeline, he started to realize the tension with regard to third party practice that is alive within subsection C(1)'s timeline and he felt like it was an issue the Council at least needed to address.

Judge Armstrong observed that there is a risk of metastasis but that is still limited because it is the same transaction that is the subject of the litigation and the cross-claims are within that context, so even as it floats along it does so in a fairly circumscribed way. He stated that fourth or fifth parties is where the real risk of metastasis continues to expand, and it is not subject to limit. He therefore suggested that the Council adopt Version A this biennium. Mr. Brian asked whether any Council members have personally seen this problem arise. Judge Roberts stated that she has only seen it in the context of construction liability cases. Judges Gerking and Leith agreed. Mr. Eiva stated that he does not have much experience with that kind of litigation, and wondered if some of the judges that have handled those cases can speak to whether growth of the case through third party practice makes cases easier or more difficult to handle. Ms. Gates pointed out that it is a fact of life in that area of law and that everyone understands that subcontractors will be added to the case. She stated that this type of case may not be the best example because such growth is anticipated. Judge Roberts observed that this level of complication makes it virtually impossible to try the case, and such cases generally do settle. She stated that the parties end up having to arbitrate part of the case or split it up, because it multiplies and has to be divided or it is completely unmanageable. Mr. Brian asked whether that means that it is better to have a timeline. Judge Roberts stated that it is, but wondered whether that timeline should be imposed by an order at the beginning of the case or by a rule. She stated that a rule would be a residual rule for those parties or courts that are inexperienced and run into this situation and have not dealt with such cases with a management order at the beginning. Judge Gerking pointed out that many districts do not manage cases by using scheduling orders and that Multnomah County may be the exception to the rule. Judge Roberts stated that Multnomah County typically enters a scheduling order as soon as a case is designated complex.

Mr. Keating stated that he agrees with the two word amendment. He stated that his thought is that there is one person in the courtroom who is the decider who has no strategic interest in any kind of manipulation of what is going on, and that is the trial judge. As far as he is aware, this may be the only rule that says the judge has no say if a party objects and he opined that, for complex cases requiring case management, a 30 day or 90 day limit on the judge's ability to actually act and decide on the merits of what is going on in the case is bizarre. Mr. Keating stated that he has been involved in his fair share of truly complex litigation and that it is

not unusual that facts surface 30 days after filing that show there ought to be somebody else brought in as a third party defendant. He stated that Mr. Eiva's argument is that a party should know within those 90 days whether that is the case but he suggested that, in a circumstance where that knowledge is not possible, a party ought to have the opportunity to go to the judge to talk about the case and the development of the evidence and explain why a new third party defendant's presence is actually important, and the current Rule 22 says a party cannot do that. Mr. Keating stated that he does not understand the underlying rationale for denying the trial court judge discretion, and he is opposed to adding language that basically adopts the language of subsection C(1), which he does not agree with.

Prof. Peterson noted that, at the last Council meeting, Judge Roberts pointed out the judge's authority to sever the case. He wondered if there is another workaround if a party says no to a new party being brought in – filing an independent case and having the judge su sponte move to consolidate it. Judge Roberts stated that this can happen, but Mr. Keating wondered why we would put up the barrier in the first place, and why we would tell the trial judge he or she has 90 days and then he or she is not running the show any more. Prof. Peterson pointed out that he was not the Executive Director of the Council at the time that change was made, and he did not know the answer to Mr. Keating's question. Mr. Eiva stated that there is a fundamental value that is being promoted by the time limit and that is to motivate parties to get their claims on the table. Ms. Leonard echoed Mr. Keating's concern about the need for a zone of discretion or opportunity to go to the judge and make a pitch, even with a timeline. Mr. Keating again stated that he believes that the current rule states that, unless the other party agrees, you cannot do that, and that he has never understood why this is the case. Judge Armstrong stated that he assumes that it is a Frank Posey principle regarding third party practice – that there will be the opportunity but it will be circumscribed and, unless the plaintiff wants it, that is the end of it. He noted that it may not be possible to undo whatever that policy choice was, but opined that there is no need to expand it, and that the idea of going back and reworking the whole rule or all of the rules to sort out how the Council wants this to work does not seem like it is a productive activity that the Council should undertake.

Ms. Payne pointed out that the more important concept being put forward in Version B is the timeline. She stated that the language in question was included because it was also in subsection C(1), but that the committee can consider removing it and leaving discretion with the judge if that prevents people from considering Version B. Judge Leith noted that there is one camp that says that the judge should always have discretion and subsection C(1) should be amended to remove the limit there, and another camp that urgently wants to have timelines

imposed on this particular category of cross-claim, despite the fact that every other category of counter and cross-claim lacks a timeline. He opined that the issue cries out for a broader discussion over a full Council biennium. Prof. Peterson asked whether Judge Leith would endorse the amendment contained in Version A. Judge Leith stated that he would. Prof. Peterson noted that another alternative would be to delete the first line of page 3 of Version B to leave the timeline in but say that a party must to obtain leave of the court. He stated that this would uncouple it from the language in subsection C(1). Judge Leith pointed out that this would still just be adding a timeline to that one category, when timelines for the entire rule need examination.

Mr. Eiva stated that the committee had discussed the 90 days and the consent of the parties and considered removing it. He noted that he had heard about a recent hearing in front of Judge Henry Kantor dealing with third party practice amendments and that Judge Kantor discussed how the issue was examined by the Council extensively in the 1980s and 1990s and the Council had made a policy decision with regard to limiting third party practice. Mr. Eiva stated that his sense was that the committee felt that, if it was going to discuss removing that provision, it should probably review that record and give weight to what the Council has already discussed in the past. He stated that, with regard to whether the Council should decline to amend the rule now and examine it next biennium, most committee members were kind of surprised that judges were not allowing the cross-claims in question, and he thinks that many judges were under the impression that they could allow a defendant to assert a cross-claim against a third party defendant. He stated that he is not certain we are dealing with an issue where a lot of people are dealing with barriers, but perhaps they are.

Judge Bachart proposed moving Version A forward because it does address the issue brought to the Council's attention. She agreed that a strict reading of the text of the rule does not allow the type of cross-claim in question and, if we can clean that up to be consistent with what we perceive to be the common practice, we should do so. With respect to timelines, she agreed that it is a larger discussion and suggested examining the language in subsection C(1) next biennium. Judge Bachart stated that she did not see why the Council should abandon Version A, as it seems to be a good solution to a well-founded issue. Ms. Payne agreed. She suggested a straw poll to see how many Council members want to move forward on Version A and how many want to table the issue. Mr. Brian stated that he would prefer to think about the issue a little longer. He noted that the easiest solution is to adopt Version A, but he expressed concern that there may be unintended consequences with an easy solution. Judge Leith noted that the Council had sent the committee back to explore whether there were unintended consequences and that Mr. Beattie and Ms. Payne had done research. The

committee had concluded that there were no specific unintended consequences with bringing the language of the rule into alignment with existing practice as most people understand it, there has not been a flood of concern about the lack of timelines under the existing rule, and the change would also be bringing the rule into alignment with the federal rules, which gave additional comfort that the Council was not going to step into a hornet's nest by adding a housekeeping amendment. Ms. Payne stated that the only unintended consequence would be the lack of a timeline, and noted that there will simply be some situations where claims are brought later and judges will have to deal with it. She stated that, if Council members are content with that and with leaving it within the judge's discretion to deal with late claims, that seems to be the only issue we are wrestling with right now.

Judge Zennaché echoed the suggestion for more time to think about it. He pointed out that no decisions need to be made today. Judge Gerking stated that he was agreeable to considering Version A and that he was a little uneasy about Version B because he was not entirely comfortable with the timelines. He gave an example of a case with a plaintiff and three defendants where defendant A files a third party claim against a newly added third party defendant on the 90th day after service. He asked whether that would prevent either defendant B or defendant C from asserting a cross-claim against the newly added defendant because it has been more than 30 days after service and more than 90 days after service of the initial complaint. Mr. Eiva stated that he may have written the Version B amendment incorrectly and that, if defendant B or defendant C serves it after day 90, they would get a whole new 30 days. He stated that we do not want the 30 days to cut off the initial 90 days. Judge Gerking suggested 30 days after the third party defendant appears, since it might be difficult to determine when service is made. Mr. Eiva stated that this is fair and is an appropriate change because removing the requirement of service of summons so it would be appropriate that they would have to appear so you would have an attorney to serve it on. Ms. Payne agreed that the committee will make this change to Version B and present it to the Council at the April meeting. Mr. Brian asked that the Council continue the issue of ORCP 22 to next month and have a concluding discussion about where we want to go with this. Judge Bachart asked for confirmation that the committee is not being asked to do more work, other than making Judge Gerking's suggested change. Mr. Brian confirmed this.

4. E-Discovery Committee

Judge Zennaché reported that the committee had a meeting scheduled to review draft language but, unfortunately, he ended up having to work through the lunch hour and there were not enough committee members on the call to address the issues. He stated that the committee will meet in March and hopefully will have language for the full Council to consider in April.

5. ORCP 44 Committee

Mr. Keating reported that the committee has concluded its work and is not recommending changes to ORCP 44.

6. ORCP 45 Committee

Ms. Wray stated that she missed the last Council meeting and was not sure what the status of the committee's proposal was. Prof. Peterson stated that there was a lively discussion at the meeting and that Council staff had sent the changes that were discussed in the February meeting to the committee, but that staff had not had a response. He noted that staff wanted to be certain that the committee was happy with the changes that the staff suggested at the February Council meeting before submitting them to the Council as a whole. Ms. Leonard stated that she had not received those changes and asked that the staff's draft amendment be re-sent to the committee in the hope that it can be included in April's meeting packet for the Council's consideration.

7. ORCP 47 Committee

Ms. Gates reported that the committee had originally considered a suggestion to modify ORCP 47 C to enlarge the 60 day period. The argument was that the time period was too short for parties that must file motions to strike affidavits or otherwise to contest evidence. The committee's sense was that a party can file an objection to the evidence along with the party's response or reply and get everything done at once, and that there has not been a history of a problem with that timeline. The committee reported this conclusion to the Council earlier in the biennium (Appendix E).

Ms. Gates also stated that the committee had discussed ORCP 47 A and B in response to reports that courts had ruled that parties could not move for summary judgment against affirmative defenses. She stated that everyone on the committee was under the impression that parties can move for summary judgment on a party's affirmative defenses and that it should be made clear in the

rule, if it is not already clear. She stated that the committee's proposed amendment regarding its proposal was distributed at the meeting (Appendix F).

Ms. Payne explained that the committee's third task was to look at ORCP 47 E and the use of expert affidavits. She stated that the committee discussed this issue extensively at its February meeting and did not reach consensus, but that the majority of members thought that nothing should be done. The committee's report is attached as Appendix G. She observed that some would like to see more specificity required in the Rule 47 E affidavit and stated that she understands that the reasoning is so that either the court or the opposing party can evaluate the sufficiency of the affidavit. However, many committee members felt that it raises a host of problems for the moving party to require that level of specificity. Ms. Payne reiterated that she cannot say that it is a consensus recommendation but that it is a majority recommendation not to make a change to ORCP 47 E this biennium. Judge Roberts recalled that she and Mr. Bachofner were going to meet and provide potential language to bridge the gap between these positions, but she had been ill and was not able to arrange such a meeting. However, she noted that she believes that the political divide is likely too wide. Ms. Gates explained that all three of the committee members who wanted to attempt such language either got ill or became very busy but she agreed that, even if such a change had been drafted, it probably would not have been able to surmount the political divide.

Judge Gerking asked whether any consideration should be given to amending ORCP 47 to recognize the need in some instances to file a motion to strike. Ms. Gates wondered if Judge Gerking was referring to section C. Judge Gerking stated that he did not believe that this section makes reference to challenging affidavits. Prof. Peterson observed that one of the initial complaints regarding Rule 47 was that parties are filing motions to strike affidavits and declarations in support of motions for summary judgment, and that this procedural tool is not provided for anywhere in the rule. He observed that it is a Rule 21 type of motion, but that it is kind of the practice if an opposing party's affidavit does not meet the requirements because one has to somehow bring it to the court's attention. This is the tool that parties have been using. Justice Landau pointed out that there is in fact a supreme court case that says that, if a party does not use such a motion, that party waives any right to object to it on appeal. Judge Armstrong stated that the record becomes what it is whether it is deficient legally or not – it is like a trial that is held where evidence comes in that should not be admitted. Judge Gerking stated that this would perhaps support the notion of addressing that right in section C. Judge Roberts noted that the party should make its objection to the affidavit or declaration in its response to the motion and not have motions within motions within motions. Judge Armstrong suggested that this is something that should be addressed in another biennium.

Mr. Eiva wondered whether the "all or any part thereof or any defenses thereto" language in section A excludes motions for summary judgment against only parts of a defense. Judge Roberts stated that she does not believe that it excludes them. Mr. Eiva stated that he will often make a motion for summary judgement against a particular paragraph in a pleading because there is no evidence to support it, and the current language does not appear to support the ability to obtain summary judgment on part of a defense but not all of it in pretrial so that the alleged defense can only be asserted in a particular way once you get to trial. He wondered whether the stated limitation on claims (all or any part thereof) and any defense thereto (unmodified) puts us into another trap. Judge Zennaché asked for an example of bringing a summary judgment as to part of a defense. Mr. Eiva gave the examples of agency or where there was a preceding contract with an oral or a written waiver where there is no evidence as to the oral waiver. Judge Gerking observed that one may call it part of a defense, but pointed out that it is a defense nevertheless. Judge Zennaché asked why a party would not deal with this through a motion in limine saying that there is no evidence of an oral waiver so the defense should not be allowed to talk to the jury about it.

Prof. Peterson suggested that a change in both section A and section B might both modernize the language in the rule and solve Mr. Eiva's issue. Prof. Peterson suggested using the language "all or any part of any claim or defense." Judge Armstrong agreed that this is better English than the existing language. He stated that staff will do a new version of the amendment with this change. Ms. Gates pointed out one other change by the committee: the addition of a comma in section E.

8. ORCP 71 Committee

Ms. Leonard reported that the committee did not meet in February but that it would do so in March and report to the Council in April.

9. ORCP 79-85 Task Force

Prof. Peterson stated that he went through ORCP 79-85 and made some changes to modernize the language and conform the rules with the Council's drafting standards. He found several areas that do not say what they apparently mean to say, but noted that this is not his area of expertise and he would like to have a more seasoned hand to look at it. Despite having sent his revisions to the committee members as an impetus to set a meeting, a meeting has still not occurred. He asked whether any Council members work in this area of law and would be willing to join the task force. Mr. Snelling and Judge Gerking agreed to join. Prof. Peterson stated that he will send out another request to schedule a

meeting. Judge Zennaché stated that he would like to share the proposed suggestions with a former colleague who does a lot of provisional process work. Prof. Peterson suggested inviting this colleague to be on the task force as well.

V. New Business (Mr. Brian)

A. ORCP 39 C(6) (Prof. Peterson)

Prof. Peterson stated that he had received a telephone call from an attorney inquiring about the Council's recent change to ORCP 39 C(6) requiring identification of the deponent of an organization. The attorney stated that he was unaware of the change and had not identified the deponent, and a judge in Multnomah County had ruled as a sanction that he could not put on the evidence. Prof. Peterson referred the attorney to the Council's minutes for information about the change. The attorney found the minutes on the website and stated that he had simply missed the change. Prof. Peterson stated that the attorney had suggested that the Council make a change to include a warning in the rule that there may be consequences if a party does not identify its deponent. Judge Roberts pointed out that lawyers generally need to be aware of the rules and the consequences that may arise if they are not followed.

B. Concern Regarding ORCP 69 Changes from Last Biennium

Prof. Peterson stated that Holly Rudolph of the OJD had expressed concern that the Council's changes to ORCP 69 A last biennium might prevent defaults from being taken ex parte. He assured her that this is not the case and that the previous biennium's minutes clearly reflect that the Council was trying to make the process more understandable and that a party could definitely move and get an order of default and judgment by default in the same ex parte session. The language that caused Ms. Rudolph concern was the minor change the Council made to avoid some plaintiffs' counsel from serving a complaint, summons, and notice of intent to take default at the same time and trying to run the 10 day period concurrent with 30 day period to answer. Prof. Peterson stated that he told Ms. Rudolph that he believes that the OJD's ex parte forms are fine. He asked whether the Council concurs with this. Judge Zennaché stated that this sounds right to him and other Council members concurred. Prof. Peterson noted that his recollection was that ex parte would clearly be the way to go for a default unless a party asks for more or different relief.

C. Error in Source Notes for ORCP 18

Prof. Peterson explained that Ms. Nilsson has been updating the website to ensure that the histories of each rule amended by the Council are complete and up-to-date. During this process, she discovered an error in the source notes for ORCP 18 that state that the rule was amended by the Council in 1986. This is not the case. The first reference to this non-existent change appeared in 2005, perhaps when someone accidentally included information for changes to ORCP 17 in ORCP 18. Staff has reported the error to Legislative Counsel, who will make a change to the source notes in the Oregon Revised Statutes issued following the 2017 legislative session.

VI. Adjournment

Mr. Brian adjourned the meeting at 10:52 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 6, 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
Michael Brian
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer L. Gates
Robert M. Keating
Hon. Jack L. Landau
Hon. David Euan Leith
Maureen Leonard
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. John Wolf*
Hon. Charles M. Zennaché

Members Absent:

Hon. Sheryl Bachart
Arwen Bird
Hon. Tim Gerking
Deanna L. Wray

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
Electronic Discovery ORCP 9 ORCP 22 ORCP 45 ORCP 47 ORCP 71	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)

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

II. Minutes

A. Approval of January 9, 2016, Minutes (Mr. Brian)

Mr. Bachofner asked the Council about the appropriateness of including written commentary provided by committee members as attachments to the meeting minutes. He gave the example of Mr. Eiva's summary of his research on the Rule 44 issue, and wondered whether a counterpoint should be included if this type of written commentary is included in the minutes. He pointed out that, as he understands it, the written commentary is not the position of the committee as a whole and he wanted to make that clear in the minutes. Mr. Keating agreed that Mr. Eiva's written commentary was merely his research in response to some of the work that the Rule 45 committee was doing. He noted that Mr. Beattie had previously done a survey of Oregon Association of Defense Counsel members and reported on that at a previous meeting, and that Mr. Eiva's task was to do the same thing with Oregon Trial Lawyers Association members and summarize his findings. However, Mr. Keating echoed Mr. Bachofner's concern, particularly in light of recent court decisions looking at legislative history, and expressed concern that every Council member with an opposing view might need to write a paper in rebuttal of such written commentary in order to balance the record.

Prof. Peterson stated that he feels that any such written commentary from committee members has been and should continue to be taken as information that has come to the Council that informed the Council in one way or another in its work, but that the work of the Council is reflected in the Council's minutes. For purposes of legislative history, such written commentary shows that the Council was aware of issues surrounding the proposed amendment and that committees had done due diligence in researching and reporting back to the full Council. Judge Roberts noted that, if Mr. Eiva could have efficiently orally reported everything contained in the written commentary, it would have been in the minutes anyway. Mr. Eiva confirmed that he was only responding because he knew that both sides were collecting information, and that he thought it was a more efficient use of his time to put the information in letter form because it was voluminous. He stated that he frequently does research in the Council's legislative history, and that he often finds letters from people that are not an indication of the Council's position. Prof. Peterson observed that, even if there is a letter with no counterpoint in the record, the Council's deliberations are in the record; even if the Council does not pay attention to the letter, it was given its due regard and the Council moved on. Mr. Keating stated that this was his conclusion as well. Mr. Bachofner agreed that this is probably a correct way of interpreting the issue.

Mr. Eiva made a motion to approve the January 9, 2016, minutes (Appendix A). Judge Wolf seconded the motion, which was approved unanimously via voice vote.

III. Administrative Matters (Mr. Brian)

A. Judge Member Vacancy

Prof. Peterson reported that, since the Council is now one judge member short with Judge DeHoog's appointment to the Court of Appeals, he had asked Judge Christopher Marshall of Multnomah County to make a new appointment. However, Judge Marshall replied that he is no longer chair of the Circuit Court Judges Association and that he would pass along the request to Judge Josephine Mooney of Lane County, the current chair. Prof. Peterson asked any Council members who are acquainted with Judge Mooney to remind her of the need for an appointment. Judge Conover said that he would mention it to her.

B. Fiscal Impact Statements

Prof. Peterson informed Council members that, as a state agency, the Council is asked by the Legislative Fiscal Office (LFO) to create Fiscal Impact Statements (FIS) on bills that come before the Legislature. To complete a FIS, staff must read the bill, prepare an analysis of its contents, and fill out an Excel worksheet indicating whether the bill would have a fiscal impact on the Council if passed. Last session, there were so many FIS requests that it became a major burden. Prof. Peterson stated that most agencies have a fiscal impact coordinator, but since the Council only has a very part-time staff, it is difficult. He stated that the staff had managed to reply to all of the requests last biennium, although it was not easy. However, staff had received three requests for FIS within the first three days of the legislative session, and one before the session even began. He stated that so many requests for FIS affects the staff's ability to do its actual work, and impacts the Council's budget. Accordingly, he spoke with the person at the Department of Administrative Services who has been sending out the statewide requests, explained the situation, and received a concession that he can simply read the bills and, in cases of no fiscal impact to the Council, send short e-mails indicating that the bill will not impact the Council.

Mr. Shields stated that, if so many requests continue to arrive, the Bar could look into it or ask the Legislature to re-evaluate the Council's budget. Prof. Peterson stated that he had attended a training on FIS held in Portland to find out if the LFO really wants every agency to complete these FIS, and they do. He stated that he understands their point, because having multiple people read a bill and analyze it is helpful since not everyone in the Legislature is a lawyer. Mr. Beattie asked whether FIS are requested for every bill that comes through the Legislature. Prof. Peterson stated that LFO only requests them for bills that LFO feels are important. He stated that the dispensation from the Department of

Administrative Services will make staff's life a lot easier this session.

IV. Old Business (Mr. Brian)

A. Committee Reports

1. ORCP 7/9/10

Prof. Peterson stated that the committee had met and discussed the changes that have been discussed in the previous three Council meetings. He indicated that most of the proposed changes are not controversial, but stated that Mr. Bachofner had the suggested, since a problem has been reported in the eFiling process with documents not being served in a timely fashion or not at all, that a provision be included to address that concern. Prof. Peterson stated that he had put together a draft (Appendix B) so that the Council could see what such a provision would look like. Mr. Bachofner explained that he attempted to balance the burden we would place on attorneys – requiring simultaneous e-mail service when filing by electronic filing – with the consequences of someone on the other side not getting a copy of the document being filed for whatever reason. His understanding is that it is not uncommon that there will not be an electronic copy that immediately gets sent out to the other side. He stated that, when he weighs the consequences of not receiving a document and not being aware of the filing and the burden of being required to send an e-mail with a copy of what has been filed, it seems like a no-brainer to send a copy by e-mail service. Mr. Bachofner stated that this is already his practice and that most good practicing attorneys are probably doing this already.

Prof. Peterson reminded the Council that members of the committee had met with a representative from the Oregon Judicial Department, who explained that the problem is one of operator error, when a party does not check the right box to indicate that they want to e-serve. He suggested that perhaps the process can be fixed, perhaps changed to an opt-out process, or that perhaps it is a lawyer education problem and, when lawyers learn how to use the eFiling system, the problem will go away. He pointed out that a different problem is that, when a document is eFiled, a human still must look at it and decide whether it is in proper form before it gets entered into the system. This can result in a lag between the date of submission and the date of service. Mr. Bachofner expressed concern that, because of budget issues, there may be even more delay.

Mr. Bachofner stated that, in the existing rules, a party would have to mail, e-mail, or otherwise serve when a document is filed. He stated that, from that perspective, requiring simultaneous service by e-mail is preserving the status quo.

Mr. Brian stated that, under the current rule, if he were to eFile a document and also e-mail the other party a copy of what he eFiled, the e-mail would not count unless the other party contacts him in some way and confirms that he or she received the e-mail. Mr. Bachofner asked whether, under the eFiling service guidelines, eFiling counts as service on the other side. Judge Wolf replied that, if a party eFiles and serves electronically and the other party receives notice that the document has been filed, that is service under electronic service. Under the current rule, if an attorney were to e-mail the other party in addition to electronically serving, at this point the attorney would need to have a prior agreement that e-mail service was acceptable, and would have to get confirmation that the other party received it. He stated that, under the proposed rule, e-mail service would be fine without agreement, but the other party would still have to confirm that they received the document. He stated that, in the case of a party who is irresponsible or just ignoring you, e-mail never works. Ms. Gates asked whether an e-mail read receipt is sufficient. Judge Wolf stated that it is not – there must be affirmative confirmation that the document was received.

Mr. Bachofner recalled that, under the proposed rules for eFiling under the Uniform Trial Court Rules (UTCR), eFiling in a case is acknowledgment that eFiling is the service, and that is consent if a party has entered his or her information into the system. He again pointed out that, if there is a delay in entering the document into the system, there can be delay before service on the other party is achieved. Mr. Shields stated that there is still a difference between eFiling and electronic service – a party still has to check the box to indicate that he or she wants to electronically serve the other party. Mr. Bachofner stated that, under the eFiling rules, it is still determined to be consent. Judge Wolf stated that the other party may have consented to electronic service but, if a party does not check the box to electronically serve and the other party does not receive the notice from the system, service has not been accomplished. He pointed out that service is not completed until a party receives notice from the system and, if there is a delay in entering the document into the system, there will be a delay in service. Mr. Bachofner stated that he would rather have the other party receive a copy of the document at the time of filing, and emphasized that this is an issue that affects both the plaintiffs' and the defense bar.

Judge Wolf stated that he is not opposed to a redundant service requirement, but stated that his only concern is whether the ORCP is the place to put it, given that the ORCP currently refer to the UTCR for the definition of electronic service. He noted that this is a rule that will not go into effect until 2018 and, if the problem gets addressed in the interim, the Council will have to re-amend the rule accordingly in an amendment that will not go into effect until 2020. Judge Wolf pointed out that the process of amending the UTCR can be quicker than the

Council's process for amending the ORCP. He also expressed concern about a report of a county establishing a Supplemental Local Rule requiring that an e-mail be sent with electronic service as well. He stated that he would hate to see a patchwork across the state where rules are different in different districts, because that would be disastrous. Ms. Payne likened the change to requiring a courtesy copy to make sure that there is some other way for a party to receive the document, not an attempt to make e-mail the actual service method. Mr. Bachofner stated that the situation is similar to a party going to court ex parte and being required to let the other side know. He stated that this is essentially what is happening with electronic service – something is getting filed and there is a strong potential for the other side not knowing that it has been filed for a period of time.

Mr. Eiva stated that, in the appellate court eFiling system, parties receive documents that are filed automatically and he wondered why a different choice was made in the state court system. Mr. Bachofner stated that he did not know. Ms. Payne wondered whether a technological problem is best solved by fixing the technology, but suggested that some type of rule change in the meantime might be appropriate. Judge Zennaché opined that the issue should not be addressed in the ORCP; it is a UTCR issue. He stated that the UTCR require electronic filers to certify who is getting served by electronic service versus who is getting served by other means. He stated that he is not personally aware of delays of a week. He stated that he missed the committee meeting with the representative from the OJD, but pointed out that it is incumbent under the eFiling rules for the person filing to select the persons they wish to serve. He stated that he believes that changing the ORCP because of this issue would be fixing something that does not need to be dealt with in this setting. Judge Zennaché indicated that, if there is a problem with the way the system is running, it should be addressed to the UTCR committee.

Mr. Bachofner asked why it would not be an appropriate change to the ORCP when the rule already talks about what is required for service. He stated that it appears that ORCP 9 already sets forth the requirements for service on other attorneys and parties, so such a change seems to him to be appropriate for the ORCP. Judge Zennaché stated that the original electronic filing provisions in the ORCP stated that, if one complies with the rules for electronic service, one complies with service. He stated that, if the problem is that the mechanism is not working, the UTCR committee needs to address the mechanism. He pointed out that the Council's process is a bit cumbersome and our process will take too long. If the Council decides to make a change, it would not take effect until 2018, and the technology would have changed much more dramatically by then. He echoed Mr. Eiva's remarks about automatic service in the appellate system and expressed surprise that the trial court system does not do the same thing. He stated that this

might be the fix that ultimately happens.

Prof. Peterson asked whether such a technological change would also fix the issue of timeliness of service, pointing out that the same problem of documents sitting and waiting for the approval and processing of a clerk may still exist. Judge Zennaché asked how long that delay might typically be. Prof. Peterson stated that there may be a delay from Friday to Monday if a document is filed on a Friday, or longer if clerks have a backlog. Judge Zennaché noted that, with current mail and e-mail service, an additional three days are accorded for a response. Judge Wolf agreed that, unless someone hands a document to a party in person, an additional three days for a response are accorded for all types of service. Prof. Peterson expressed concern about budget issues in the OJD and documents not being processed in a timely fashion because of not enough staffing. Ms. Payne stated that, whether the document is actually entered into system and accepted as a filing, there is no reason that the system should not be notifying parties immediately when something is filed. Mr. Eiva related an instance where he submitted a proposed judgment in Lane County where he had made a technical error and the court sent it back, but opposing counsel did not know that the whole exchange happened. He explained that the other party did not see that anything had been filed until he had corrected the error, and opined that all parties should see when anything happens on a case.

Mr. Bachofner stated that, considering the potential consequences of not knowing that something has been filed, the burden of sending out an e-mail seems very minimal He agreed that Judge Zennaché had brought up very valid points, but stated that he thinks the burden is low and he does it as a courtesy anyway. Judge Zennaché stated that the proposed rule change says that electronic service is "completed" by contemporaneously serving the other party by e-mail or any other form authorized by rule. He feels that, if the Council were to make such a change, it would basically be stating that reliance on electronic service will never be adequate no matter how much the system might be fixed. He stated that this seems like a concerning change in policy. Judge Leith asked whether such a change would be in conflict with the UTCR or an overlay with the UTCR. Judge Zennaché stated that he believes it would be a conflict. Mr. Bachofner stated that the ORCP are in conflict with the UTCR now, so a change must be made anyway. Judge Zennaché asked how the respective rules are in conflict. Prof. Peterson pointed out that, under the current Rule 9, attorneys need to consent to e-mail service. Judge Zennaché pointed out that this consent relates to e-mail service, not electronic service. He stated that the ORCP is not in conflict with the electronic service rule, but that it will be if the Council changes the rules to state that parties must serve by some other means authorized by section B of the rule to make service complete.

Judge Leith stated that Mr. Bachofner's proposal seems to be a good one, but that it would be better submitted to the UTCR committee. He feels that, rather than create a patchwork of different rules related to service, it is a better idea to keep the rules regarding electronic filing in one place.

Mr. Bachofner suggested that the committee contact the UTCR committee and get its opinion. He agreed that there needs to be coordination amongst the rules, and stated that asking the UTCR committee if it thinks such a change is one that it should adopt or the Council should adopt is a good idea. Mr. Brian stated that, in his opinion, with technology changing so quickly, we likely want the most agile agency to deal with rules relating to service, and agreed that the UTCR committee seems to be more agile. Mr. Bachofner wondered whether there is a way that the Council can become more agile now that the Legislature is having annual sessions.

Mr. Shields stated that, if the Council has a consensus that there is a fundamental flaw with the system itself in that notice is not going out immediately, perhaps a change to the eFiling system can effect a change more quickly than a change to a rule. He suggested talking to the OJD and noted that the representative who talked to the committee had indicated that he would be willing to come to a Council meeting if that would be helpful. Mr. Bachofner suggested having the committee meet with both the OJD representative and a representative from the UTCR committee and then, if appropriate, to have them both come to a Council meeting.

Judge Leith suggested asking the OJD representative whether it would be appropriate to have Tyler Technologies – the system designer – involved in that call. Judge Roberts expressed concern that the support from Tyler Technologies will be terminating because the system is up and running. Judge Leith stated the support contract will not expire until at least the date when the last county in the state is using the system. Judge Roberts stated that it is her impression that, when that day comes, there will not be further software modifications. Mr. Shields stated that his impression was that the OJD had requested funding for ongoing support. Judge Roberts stated that she hopes so.

Mr. Brian agreed that it is a good idea to have the committee communicate with the UTCR committee to share our concerns and see how we can best work together. Judge Leith proposed that, if the UTCR committee is willing to take the action, it is better left with them. Judge Zennaché agreed that this is a good idea. Mr. Bachofner stated that he will reach out to the UTCR committee and set up a meeting.

Prof. Peterson noted that on page 2, lines 20-22, of the draft there is a change to

service by e-mail to make it more clear what will and will not support a certificate of service. He stated that it is not sufficient if an attorney simply has an e-mail system set up so that he or she receives a response that his or her e-mail has hit the opposing party's e-mail server. He stated that the language that the committee has crafted also states that an out-of-office message will not support the notification requirement and that a party must open the e-mail and affirmatively let the serving party know that the document was received. He stated that one other change is on page 3, lines 2-5. In the current rule, when a party does not leave an address for service, which typically happens in domestic violence cases where there is a concern about an abusive party learning the victim's whereabouts, service is currently achieved by leaving an "extra copy" with the clerk. He stated that this language now seems a little dated and that the committee wanted to use language that indicates that the document is available for the adverse party at the clerk's office, even if a physical copy is not there waiting for them.

Ms. Payne asked whether it is the committee's intent to change the e-mail service rule to remove consent and include a requirement that the receiving party must reply and affirmatively state that the document was received. Prof. Peterson replied that, under the current draft, a party does not have to get consent for e-mail service but, if that party does not receive an affirmative response upon e-mail service, the party had better find another method to serve the document. Ms. Payne pointed out that she is attempting to run a paperless office and that she always wants to be served by e-mail, but that she is not always going to be available to immediately respond to an e-mail. She stated that such a requirement is absurd. Prof. Peterson stated that, when the Council made its last change allowing e-mail service, it put the certificate of service requirements in the same section which did not really work very well, so the committee has merely moved the certificate of service requirements forward to section C. He noted that the current iteration of Rule 9 states that service is not effective until a party has confirmed receipt, even if that party has consented to e-mail service. Judge Wolf reported that he has reviewed many certificates of service that state only that service was made by e-mail, with no indication that receipt was confirmed, which under the current rule is not effective.

Mr. Bachofner pointed out that the committee's changes on page 2, line 15 only refer to a certificate of service by attorney but then page 4, line 9 talks about an attorney's designee, which seems to be a little bit of a conflict. He asked what the current state of the rule is with regard to whether a certificate of service can be signed by a non-attorney. Prof. Peterson stated that, in the case of no attorney, an affidavit or declaration must be used. Mr. Bachofner asked whether we want to have attorney's designee in the service by e-mail section on page 4 because it is

inconsistent. Prof. Peterson stated that he does not believe there is a conflict because page 4 states how one can serve a document and on whom one can serve it, but he again noted that the that language regarding proof of service was pulled out of section G and put into section C. He did point out that the language in the current section G does say that service is effective when the server has received confirmation that the e-mail was received so, in Ms. Payne's case, if she does not have time to respond to that e-mail to confirm receipt, service is not effective. Ms. Payne opined that no one is going to do that, and that it basically makes e-mail service null and void. Prof. Peterson re-emphasized that it is the current rule. Ms. Payne stated that no one she knows does it, and that everyone is under the impression that consent is enough. Prof. Peterson noted that there is a partial fix in the language on page 2, lines 21-22, stating that service by e-mail is effective at the time of receipt. Ms. Payne observed that it has to do with timing – a party serves and waits for the other party to respond before filing the certificate of service.

Ms. Gates asked whether parties are coming to court saying that there was no service because they did not respond to an e-mail. Judge Roberts stated that, many times, parties say they never received a document. Mr. Crowley stated that, if a party has consented ahead of time to e-mail service, the other party should not have to wait for a confirmation e-mail. Mr. Beattie noted that attorneys have been mailing documents without requesting a return receipt for a long time. Ms. Payne pointed out that, in her opinion, "consent" implies that an attorney regularly checks his or her e-mail and that it is all right for other parties to send something by e-mail because that party will rely on it for service. She observed that one would not serve someone who has not consented; it may be that they do not check their e-mail or that they want to continue to receive documents in paper form because they are still living in the age of paper. While she respects that, in her case it is wasteful to receive paper because she just scans it and recycles it. She stated that, if she has to respond to something on the same day she receives it for service to be effective, that is a problem. Mr. Bachofner asked when the three days start to run. Prof. Peterson stated that the change makes service effective when received, not when the sender gets the response. He noted that there are a couple of concerns that the committee was dealing with. One was an attempt to force people, because of eFiling, to join the electronic age. The second was that many people do not trust e-mail to get there to the degree we do regular mail because of things like spam filters.

Judge Zennaché suggested trying to accommodate the concern and saying "allow a party to consent to service by e-mail" – if they do that we do not need the response. Mr. Bachofner stated that, as practical matter, if someone had consented to e-mail service and then claimed not to have received a document he

sent, he would pull out the consent and show that and state that he did not receive an e-mail bounce back message. He believes that the committee should further explore the issue and that Judge Zennaché's idea is a good one. He asked whether Ms. Payne can attempt to join the committee's next meeting to provide input. She agreed.

Mr. Eiva wondered whether e-mail service should be treated like mail service where confirmation is not required, and also suggested perhaps adjusting Rule 9 to include a provision for an attorney declaration to raise an issue when a document is not received in order to provide a remedy for those who legitimately did not receive a document served by e-mail. Mr. Bundy pointed out that a judge always has discretion. Mr. Beattie asked what the rule is when mail is returned. Prof. Peterson replied that this is not addressed in the rule. Mr. Bachofner stated that he experienced a case where the opposing attorney claimed he never received notice from the court about a hearing and never received the documents that Mr. Bachofner had sent, and Mr. Bachofner could not find anything that specifically overcame that. He wondered what a judge can do in such a case.

Prof. Peterson mentioned the "mailbox rule" from the first-year law school contracts class – we treat mail like it has some kind of quality – and the committee last biennium was not willing to give the same presumption to e-mail. Judge Wolf stated that Judge Zennaché's suggestion about allowing parties like Ms. Payne to say that they do trust e-mail enough is perfectly appropriate. Ms. Payne stated that she thinks people are going to continue to not indicate that they received e-mails, and that the rule as it reads in its current form is somewhat ineffective. Judge Wolf again noted that he does not see parties indicating in certificates of service that receipt was confirmed. Mr. Bundy stated that he has been receiving service by e-mail for a year and that he has never confirmed that he received a document. He noted that the only true fix is that if a party consents, that consent is prima facie evidence that service was appropriate and, if there is a problem with it, it is up to the judge's discretion. He pointed out that he has never run into trouble by not confirming receipt of an e-mail, and stated that it is incredibly inconvenient to have to wait around for somebody to respond.
Prof. Peterson stated that it is February and the committees should be done with most of their work by June. He noted that this is the first time that the Rule 7/9/10 committee had authorized him to put a draft in front of Council as a whole, and that the committee is now going back to the drawing board. He therefore asked that any committee that does not have a draft before the Council submit a draft to present to the Council as soon as possible.

2. ORCP 15 Committee

Prof. Peterson reminded the Council that Judge DeHoog was going to write a final report indicating that the ORCP 15 committee had completed its work but, considering that Judge DeHoog is no longer a member of the Council, he suggested that another committee member do so. He stated that the staff will contact the committee to arrange for this to happen.

3. ORCP 22 Committee

Ms. Payne stated that the committee met in late January to address the concerns raised by the Council regarding the draft amendment presented at the December Council meeting. Those concerns were that the amendment did not accomplish universal third party practice. Ms. Payne stated that the committee discussed whether that is an issue that the committee should address, since the original issue presented to the Council was whether a defendant could bring a cross-claim against a third party defendant. She stated that the committee had not fully vetted universal third party practice and whether there would be any unintended consequences, and stated that the committee had tabled the issue for now. She stated that Mr. Eiva had circulated another draft of an amendment to the rule and, in doing so, raised some additional concerns in amending the rule that had been discussed, but not in depth. For example, if a defendant is allowed to bring a cross-claim against a third party defendant, what should be the proper timing of that cross-claim? Ms. Payne noted that there is an existing 90 day rule and all parties have to add third parties within that existing 90 day period and, if a defendant can wait beyond 90 days and bring a cross-claim at any time, such defendants are almost sitting on their hands and defeating the 90 day rule because they could have brought the third party claim during the 90 day period. She stated that the committee is considering whether the rule should also require a defendant to bring a cross-claim within 90 days or within a certain time period after someone brings the third party claim.

Mr. Bachofner opined that it should be a certain period of time after someone brings the third party claim because, for strategic reasons, a party may not want to assert a third party claim against that party but if that party is brought into the suit and now is going to be a part of the litigation, you need to make a choice. He observed that his client may not want him to spend the money to bring someone in as a third party defendant but, if that party is brought into the suit by someone else, then he should have the opportunity to consider a cross-claim, but he would not want it to be a long period. He suggested that 14 days or 21 days would seem to make sense. Judge Roberts suggested the alternative of explicitly pointing out that the court's leave can be sought so conditions can be imposed, like how quickly it will happen. Mr. Beattie stated that new cross-claims will likely be brought by amendment to an answer, so the same issues would adhere there as far as

whether to allow an amendment too close to trial. He noted that he had missed the last committee meeting but pointed out that, at the prior full Council meeting, a concern was raised about the rule being opaque and cumbersome. He indicated that it would probably be easier to adopt Federal Rule of Civil Procedure (FRCP) 15, making a word change there and doing a more complete revision, because the current rule keeps accumulating moss like a rock rolling downhill.

Mr. Eiva pointed out that the rule does incorporate the ability to file a claim against the third party and to him it is very clear that a party can amend but must follow the same rules relating to timing that everyone else follows. Mr. Beattie stated that he is content with that but has heard that the prior sections of the rule need to be cleaned up. Mr. Bachofner stated that, by virtue of filing a third party claim, the plaintiff's claim is automatically considered, and recalled that the tort reform statutes essentially do that. Mr. Beattie stated that Chapter 31 of the Oregon Revised Statutes on comparative fault is relevant. Mr. Bachofner noted that comparative fault automatically gets considered, so it is not as much of an issue where the plaintiff has to bring a claim specifically, although it may be something where the plaintiff wants to amend to clarify that. He stated that it may be a strategic issue for the plaintiff too – if the plaintiff was originally not going to file suit against a party but now that the party has been added they want to amend to be able to add a claim.

Mr. Eiva stated that this was his thinking with the new language – that the controversy is generally framed by the complaint and then there is a certain time during which third parties can be added. He noted that there may be a claim that is not necessarily ripe right now because the third party defendant claim does not exist on its own and cannot be made without the plaintiff's original complaint. He stated that what parties are doing is breaking away and creating complaints that do not exist but for plaintiff's complaint. For that reason there is this timeline on the front end so we cannot exclude the plaintiff's complaint too much; there are 90 days to consider adding parties but, at a certain point, we draw the line. Mr. Eiva stated that the amendment means we will have cross-claims against third party defendants, and that causes more issues; therefore, having the timeline toward the front end so everyone involved in the litigation understands the nature of the controversy is useful.

Mr. Beattie noted that, in federal court, there is a drop-dead date for adding parties. Judge Roberts stated that the type of case in question is usually complex with multiple levels of controversy, and she hoped that these cases would be subject to overall management by the court to deal with all of these deadlines by virtue of a scheduling order and not by virtue of the rules. She noted that such contract or liability cases usually go into some sort of administrative scheduling

order in their own little world.

Prof. Peterson recalled that, at the last Council meeting, there was a concern that allowing claims to come in very late could upset trial schedules. He stated that this is why the 90 day period exists and anything after 90 days requires consent of all parties and the court. He stated that he thinks that Judge Roberts was saying that, rather than putting a time frame on it, she was suggesting requiring permission of the court. Judge Roberts stated that, if cases get that complex, they ought to go to the management of the trial court anyway. Judge Leith pointed out that this is essentially what the rule already does by requiring that the amendment be approved by the court. Mr. Brian observed that the other party's permission is also required by the rule. Judge Roberts stated that the plaintiff obviously has to be at the table and it ought to be done by a scheduling conference and not by rules that can be gamed, because the plaintiff has the right to get their claim to trial.

Ms. Payne stated that, by having a timeline in the rule, heavy motion practice in front of the court can be avoided because the 90 day rule already exists. She stated that, if a third party is added to the case, there are an additional 10-15 days to file cross-claims and a party can seek leave from the court if additional time is needed. Ms. Payne opined that, if the timelines are there, motion practice is avoided and the process is clean. She noted that an attorney already knows what the claims are and stated that there may be strategic reasons for not bringing them. She stated that it will not be a huge surprise that a third party is being brought into the case. It is more of a strategic reason as to why that party was not brought in already, but there is no reason to wait two or three months until right before the trial and then seek leave and create motion practice for everyone. Mr. Eiva stated that the 90 day rule requires due diligence early so that all parties know early what is going on, and it is a smart rule in that way.

Mr. Bachofner wondered why both leave of the court and the plaintiff's approval are required beyond 90 days. He stated that he could imagine a circumstance where it might be entirely appropriate to add a third party after 90 days because of a legitimate ignorance as to that party's involvement but, if the plaintiff says no, even if the court would allow the addition, there would be no opportunity for adjudication of all parties and claims. Mr. Beattie stated that the original impetus was to allow an existing defendant to bring claims against new third party defendants, so the issue would just be between the two defendants. He stated that it does not carry the same impact, to the extent that a third party defendant is prejudiced now because there is a bunch of other defendants coming after him or her. Mr. Bachofner stated that this is not a cross-claim issue but, rather, an original third party complaint. He suggested that the court should be the gatekeeper in such matters. Judge Leith observed that the issue was discussed

during committee meetings and the committee decided that such a change would be beyond the scope of what caused the Council to be looking at Rule 22 to begin with.

Prof. Peterson noted that the Council can make changes to the rules for any reason, not just to respond to concerns raised by those outside of the Council. If the Council believes that there are other rule changes that would be appropriate, even if they are unrelated, the Council can take action. Mr. Bachofner suggested that the committee look at changing the rule to allow the judge to have the authority to allow inclusion of third parties without a veto from another party. Mr. Beattie observed that a change to the rule in this regard could perhaps be made with one word change ("*or* leave of the court" rather than "*and* leave of the court"). Judge Wolf pointed out that such an amendment would remove the court from the decision altogether and allow the parties to agree without judicial approval. Mr. Beattie stated that the court could allow the third party suit but not extend the trial date. Judge Roberts stated that the court could also sever on its own motion.

Mr. Eiva noted that the court's power is limited by the pleadings and opined that there must be a place where the growth of the case stops. He stated that there is a reason that the court is not given absolute power beyond the 90 days within the rule – because there is a pleading that has generated this controversy, everyone has to respect that and keep the original claim in relation to that complaint and not add on to it through discretionary rulings. Mr. Eiva stated that there is a reason not to shift discretion to the court and to leave the bright line rule as it is. He stated that 90 days is enough time for due diligence and to investigate who is part of the controversy. Mr. Beattie observed that, with a complex case designation with a two year docket, 90 days is short, and the rule gives a plaintiff absolute veto power which seems peculiar to him. He suggested an FRCP 16-type rule where the court says "on this date you cannot add any more parties." Mr. Bachofner stated that he cannot imagine that a judge is not going to be looking at those issues in deciding whether or not it is appropriate to add a party. Judge Armstrong pointed out that the court can change any rule. Judge Roberts agreed that the court already inherently has the authority to change a rule's limitations for good cause. Mr. Brian stated that is not sure that is the case with this rule.

Ms. Payne indicated that the committee will have more discussions and hopefully bring a new draft to the Council at the next meeting. Prof. Peterson asked the committee to get that draft to the staff to be put into preferred Council drafting format before the next meeting.

4. E-Discovery Committee

Judge Zennaché stated that the committee had discussed a number of issues and had considered and set aside the issue of modifying the discovery rules generally to express or state that there should be some proportionality in discovery relating to the claims. He stated that the committee's thought was that it was a factor for the court to consider in determining whether there is undue hardship under motions to quash or suppress or other relief from discovery requests. He stated that the committee is coalescing around the notion that, when e-discovery is requested, there should be some kind of mandatory meeting between the parties to discuss e-discovery and its parameters. Judge Zennaché stated that he is working on drafting language that might mirror language on the need to confer on Rule 21 motions. He reported that the committee had also considered some other ideas on modifying the protective rules to be clear that proportionality is an issue, but he believes that the committee agreed that proportionality already is a factor in determining what is an undue burden. He hoped that the committee would have a draft for the Council at its next meeting.

5. ORCP 44 Committee

Mr. Keating stated that the committee will meet and provide a report to the Council at its March meeting.

6. ORCP 45 Committee

Mr. Bachofner stated that the committee had proposed language (Appendix D) for a change to ORCP 45 at subsection F(2) regarding allowing the parties to ask for a reasonable number of requests to establish the authenticity and admissibility of specified business records outside of the ordinary limit of 30. Mr. Beattie asked whether this exception should remain limited to business records and not be expanded to other records that may be non-hearsay. Mr. Bachofner stated that the committee had decided to limit it to business records. Judge Roberts explained that the committee had a fairly lively discussion about the breadth of the exception and decided that this relatively narrow change was the one that was agreed upon. Judge Wolf expressed concern that, if the door were cracked any further, it might get thrown wide open. Judge Armstrong wondered whether the change might have a “toe in the water” kind of feeling and that there might be attempts in the future to add more types of records. Ms. Leonard stated that she does not see this change as an incremental thing because it is dealing with a practical problem. She also sees it as a reminder to practitioners, and a fairly efficient resolution to some of these document-heavy cases that can get bogged down with administrative concerns about proving records. Mr. Bachofner pointed out that he had spoken with both plaintiffs’ and defense attorneys and that they

universally liked the change because it is a benefit to both sides as well as the court. It avoids wasting time bringing in records custodians when it is not necessary, and uncooperative people may bear the brunt of a refusal to admit.

Mr. Brian expressed concern about the word "reasonable." He envisioned a case where an attorney wishes to include 50 business records and the other side claims that is unreasonable and goes to the judge and seeks a protective order to limit it to 25. Mr. Bachofner explained that there was a reason behind using the word reasonable – the committee did not want someone to use the rule as a sword to create make-work. He pointed out that, if it is a case that has 50 different records custodians, 50 requests may be entirely reasonable but, in the case of 150 requests with just four providers, it may be unreasonable and the other party might need to seek a protective order. Mr. Brian noted that this shifts the burden onto the objecting party to seek relief. Mr. Beattie pointed out that the burden has always been there and that what the change really does is to say that such a request is subject to rule 36 and if the request is unduly burdensome a party can get a protective order.

Prof. Peterson stated that he has two technical concerns with the language in the proposed amendment. The internal references to subsections on lines 5 and 13 should be changed to conform with the Council's preferred drafting format and mirror the language used in the rest of the ORCP. He also suggested changing the word "issues" in the lead line for new subsection F(1) to "business records" to be more clear. Judge Leith stated that subsection F(2) does not really address the admissibility of business records but, rather, requests related to the admissibility of business records, and that its lead line should so reflect. Prof. Peterson suggested all of these changes as friendly amendments to the committee's draft and stated that staff will make those changes if the Council agrees. The Council agreed.

7. ORCP 47 Committee

Ms. Gates noted that the committee had added a few additional Council members because the plaintiffs' lawyers on the committee did not have significant experience with the use of affidavits stating that a party has retained an expert. However, at least three committee members were not able to attend the most recent committee meeting. At that meeting, the members present concluded that no changes should be made to rule 47 E. The issue was whether it is unfair or abused that a party can use a generic affidavit without identifying the testimony or issues in responding to a motion for summary judgment. Ms. Gates stated that some members had expressed the view that requiring a more detailed affidavit would be a substantive change. She stated that, of two Oregon cases, one says

that it is appropriate to use generic language and that will rebut the motion, while the other states that, if more specific language is used, the party is then limited to those issues at trial. She stated that these authorities would serve to box in the party using the 47 E affidavit at some point before trial. She noted that this view was not unanimous and not every committee member was present.
Mr. Keating stated that he was not able to attend the last committee meeting, but his thought is that the whole purpose of summary judgment is to eliminate issues from trial. He noted that he is very familiar with the issue because 90 percent of the cases he handles turn on expert testimony. He stated that the facts are generally agreed to but the issues are the opinions of experts. Mr. Keating pointed out that the purpose of a change would be to tell defense attorneys whether the plaintiff really has an expert who is, for example, going to say that any reasonable surgeon would have cut a person's leg off. As it stands now, the plaintiff does not have to answer that, and it would be of benefit to him in defending a case to know what issues he has to rebut at trial, as well as a benefit to the court in narrowing down the issues as the trial proceeds. He stated that he believes an amendment to ORCP 47 E is a worthy thing to do.

Mr. Eiva disagreed that this is the purpose of summary judgment. He stated that it is intended to remove frivolous claims from the case, not as a discovery tool. He felt that there is not a real problem right now with many cases under Rule 47 E ending up in directed verdicts. Mr. Bachofner opined that the purpose of summary judgment is to narrow the issues for trial. Mr. Eiva questioned whether there is a problem that has to be fixed and wondered whether judges are seeing so many of these expert-laden cases and turning them all out in directed verdicts when the 47 E affidavits are false. Judge Roberts asked how many examples he needs. Mr. Keating stated that he could tell stories all day long. Mr. Beattie stated that trials are frequently tried inefficiently because issues are going to the jury where there is inadequate expert support. He stated that lawyers are shotgunning instead of culling before trial and that the problem with Rule 47 E is that the affidavit gets spewed out that all of a sudden creates an issue of material fact on 37 different specifications of negligence where perhaps three will be supported by expert testimony. Ms. Gates stated that this is perhaps the defense attorney's failure because, if there was no expert testimony on one of the elements, the defense attorney should move for directed verdict. Judge Roberts suggested that summary judgment is supposed to avoid mammoth expense and the delay of getting to trial. Mr. Bachofner pointed out that a defendant is forced to prepare for the 37 specifications of negligence when there may be no evidence on 35 of them.

Judge Leith stated that it is a false certification under Rule 47 E to say that you have an expert when you do not. Judge Roberts noted that sanctions are rarely

applied in such a case because of the "pure heart and empty head defense" where lawyers claim that they thought the judge would allow them to put on an expert to support their position. She stated that it is an empty sanction and everybody knows it, and that every judge has had a case where they disallowed expert testimony because it was not a subject on which expert testimony could be received, yet every single case would get past summary judgment because the non-movant never has to say what the issue is, only that they have an expert.

Mr. Eiva stated that ORCP 47 E was written in a way to preserve the right to work product. He stated that explaining the content of his expert's testimony is an invasion of the work product privilege and that he is not sure that the Council can do that because it is a substantive right. Judge Roberts disagreed and stated that it is procedural. Mr. Beattie also disagreed and noted that the Council placed expert discovery in the ORCP in 1978 and it was there until the Legislature removed it. Judge Roberts pointed out that the Legislature can reverse anything in the ORCP. Mr. Eiva opined that the Council has an issue with the opinion in *State v. Vanornum* [354 Or 614, 317 P3d 889 (2013)] and wondered, if the Legislature made a change to the ORCP, whether the Council can reverse it. Mr. Beattie felt that the Council could. Mr. Bachofner pointed out that changing the affidavit would not necessarily be waiving the attorney-client privilege and that there are ways the affidavit could be prepared that do not waive it. He stated that a party could just specify which allegations the expert is addressing, putting everyone on notice of which issues are still in dispute and which are not in order to narrow the case so that the court can proceed more efficiently. Mr. Eiva stated that there is no "other side" for defense and that the defense does not, for example, have to disclose how they are going to be bringing in the standard of care in the case or how they will be using their expert. He stated that, if the change is all toward the plaintiff's side and the plaintiff has to disclose the subject matter their expert will address and the defendant can stay behind the veil, it probably should not be that way.

Mr. Bachofner noted that it is the same as moving against counterclaims and affirmative defenses. Mr. Keating pointed out that a plaintiff pleads the theory in the complaint and, for example, lists 37 ways they believe the defendant was negligent. In the affidavit, all that needs to be said is that there is an expert who will state that 35 of these ways violated the standard of care. He stated that a plaintiff does not have to explain any more than what they plead. Mr. Beattie gave the example of a *Tiedemann v. Radiation Therapy Consultants* [701 P2d 440, 299 Or 238 (1985)] motion in medical malpractice cases where a doctor for the defendant makes a declaration that certain things were not malpractice as a way that plaintiffs do get evidence from the defense. In response, the defense gets a generic shotgun "I have an expert who is willing to testify to admissible facts that

will create a genuine issue of material fact," and the first thing that comes to mind for the defense lawyer is "on all of these?"

Ms. Payne observed that these complaints arise from bad lawyering that does not need to be fixed with a rule change. She stated that she is in compliance if she has an expert that only addresses the issue she specifies in her affidavit, and that she should not have to reveal specific issues or what her expert is going to talk about by a change in the rule requiring her to reveal exactly what her expert is going to talk about. Judge Roberts pointed out that Ms. Payne is stating that she does more than the rule requires and that, therefore, the Council should not change the rule. She stated that there are other lawyers who do not. Ms. Payne opined that it is an education issue because some people are not complying with the rule. Judge Roberts stated that they are complying with the existing rule. Mr. Bachofner asked whether there could be an argument that a lawyer who does more than what the rule requires is committing malpractice because the lawyer revealed more than what he or she was required to and, as a result, their client's claims got dismissed. Mr. Eiva stated that those lawyers are not revealing more than what they were required to, but they had to do a good faith analysis of their complaint and write an affidavit accordingly. Judge Wolf stated that, if they do not have an expert to back up an allegation, it is going to get thrown out of court anyway so there is no harm. Ms. Payne stated that you can only say in an affidavit that on which your expert is going to create material issues of fact. Mr. Beattie stated that one answer is the request for admissions.

Mr. Bundy stated that he deals with this situation often. He stated that, according to Janet Schroer, the defense does not have to send in the doctor's affidavit any more in regard to the motion for summary judgment because the plaintiff has the burden of persuasion. He stated that he agrees that the only way to fix this problem that is fair to both parties is to have expert discovery, and that the Council cannot really solve that. He noted that there are always inherent problems with ORCP 47 E, and that there are always going to be problems with lawyers who will misstate or over exaggerate their cases. He stated that he sometimes uses requests for admissions. As an example, in the case of a negligent delivery with prenatal and resuscitation issues where there is no way the defense can attack resuscitation he sends in a request for admission asking them to admit that they do not have a medical expert to satisfy the allegations set out regarding resuscitation. If the defense objects and says that such a request is prohibited expert discovery, then he brings the issue to court, but at least the issue is out there and, if they get to trial and the defense says they are going to withdraw that allegation, he can say that he hired an expert and he wants his costs and fees. He stated that there are ways to deal with lawyers who are not being ethical about the rule. He stated that usually, when faced with the risk of exposure, the other

lawyer will call him before trial to say they are going to amend because they do not have an expert – most of the time that is the additional pressure that is needed. He stated that there are various checks and balances and you have to be willing to assert them. He is in favor of expert discovery. He practices in Washington and it is great because they know exactly what the issues are. Mr. Bundy pointed out that the rule as written now, as well as the body of law, is that Oregon does not have expert discovery. He stated that at least the plaintiff can file a motion for summary judgment granting judgment in their favor as well. He thinks you just have to be diligent and assume you are dealing with someone who is honest and, if you have had a bad experience, you need to follow up with appropriate discovery tools to make sure you make a record.

Mr. Beattie stated that the reason the committee suggested doing nothing is that a fix would be politically unacceptable. Judge Roberts stated that good lawyers can work around almost all of the procedural issues we are talking about in one way or another, but the rules are not an obstacle course for good lawyers. Mr. Bachofner stated that he would like to see the committee come up with an unobtrusive way of narrowing the issues for trial. He opined that there must be a way to draft such a change that does not enter too far into the expert discovery realm but allows the parties to narrow the issues for a more efficient trial.

Judge Leith wondered whether the Council has any appetite or will to tackle the expert discovery issue. Mr. Brian did not feel that it does. Other Council members seemed to concur. Mr. Bachofner stated that he also practices in Washington and that he actually prefers Oregon's rule, as much as it is cumbersome sometimes, because he feels that it makes cases go much more efficiently, is less expensive, is more interesting, puts more onus on the defense attorney to be nimble, and represents the joy of practicing law.

Mr. Eiva pointed out that a great benefit is that Oregon does not have giant summary judgment motions arguing technical facts in front of the court. He experienced a case in another jurisdiction where there was plainly evidence that would survive a summary judgment in a jury trial, but there was still a giant motion, with everyone spending money on experts to satisfy that motion and judges putting a lot of time and effort into figuring it all out. He stated that, at the end of the day, he would survive summary judgment or end up on appeal, but this was just another opportunity for more things jamming up the works on the way to trial. Mr. Beattie stated that it is a way for the judge to fulfil his or her gate keeping function when it comes to scientific evidence. He has seen identical cases go one way in state court and one way in federal court because of that kind of filtering. Judge Armstrong opined that Oregon does it better than the federal courts.

Mr. Brian questioned whether the committee should continue to meet or whether it should wrap up its work with a final report now. Ms. Gates noted that the committee would still have changes to sections A and B, even if it stopped working on other sections, allowing any party to move against any claim. Mr. Keating stated that he would like the committee to continue discussion on section 47 E. He suggested one more meeting. Judge Roberts stated that she believes it is a bad situation, but does not know if there is a way to fix it politically. Mr. Brian agreed, but thought that perhaps something could be done in the longer term, maybe next biennium. Mr. Bachofner opined that there should be some way to make a change that still preserves expert privilege but allows courts to narrow issues and prevent abuse. Judge Leith stated that he has during summary judgment motions essentially given the defense what defense counsel has asked for in this amendment, so he feels that it is not necessarily impossible in the course of the summary judgment process to get the information Mr. Bachofner is looking for with an ORCP 47 E amendment.

Mr. Bachofner stated that he might try to draft some language and forward it to the committee. Judge Roberts stated that she can work with Mr. Bachofner on this. Mr. Brian asked whether the committee should meet again or whether Mr. Bachofner's and Judge Roberts' work should be presented to the full Council. Ms. Gates noted that the function of the committee is to actually discuss the issues fully to streamline the discussion for the full Council, but maybe this is the kind of issue that everyone on the Council will want to passionately dive into. Ms. Gates noted that the committee had lost a judge member when Judge DeHoog was promoted to the Court of Appeals. Judge Wolf agreed to join the committee. The Council agreed that, if draft language is proposed, the committee should meet again. Ms. Gates stated that she would send out a deadline by which a draft should be received in order to have time for a committee meeting.

8. ORCP 79-85 Task Force

Prof. Peterson stated that he has had difficulty getting the task force to find a meeting time that works for everyone. He stated that he has gone through the rules himself and that there are some things that are peculiar, some that are archaic, and some that are badly formatted. He stated that he could use some more Council members on the task force, or perhaps someone else could attempt to convene a meeting.

V. New Business (Mr. Brian)

A. ORCP 71 (Prof. Peterson)

The Council discussed the issue brought to its attention by attorney Martin Jaqua regarding ORCP 71 (Appendix E). Ms. Leonard stated that Judge Zennaché had done research and written a memorandum regarding the difference between extrinsic and intrinsic fraud during the biennium when the last change to ORCP 71 was made. Judge Zennaché stated that the intent of the Council was not to extinguish the distinction between extrinsic and intrinsic fraud in ORCP 71 B but, as far as the interplay with what constitutes fraud on the court under ORCP 71 C , he could not remember how much consideration was given to that issue. Judge Zennaché pointed out that the FRCP have done away with that distinction and that most of the states have also done away with it. He stated that the distinction seemed somewhat artificial and antiquated and that it was the intention of the Council to do away with it.

Judge Leith stated that Mr. Jaqua seemed to be concerned that the change to the ORCP was trying to change the law of fraud rather than just the law of Rule 71. He stated that the Council obviously would not have been doing anything affecting the law of fraud, just what counts as a ground for relief from judgment. Mr. Beattie observed that the complaint seems to be that the change allows too broad of a latitude to set aside a judgment. Judge Armstrong observed that perjury is perjury and it is bad behavior, but you still get to keep the judgment. He noted that it is a policy choice, but that the Council made that choice. Prof. Peterson's recollection was that the choice was, if a party wants a hearing because someone might have committed perjury, they may have that rehearing in front of the same judge who probably will remember pretty well what went on and will accord that party's concerns the appropriate weight. Mr. Beattie stated that it is a discretionary call.

Prof. Peterson also recalled that the Council was concerned that there was a gray area between extrinsic and intrinsic fraud, and that this was supported by case law. He stated that the concern was that ORCP 71 B relates to issues within a year so maybe it does not make such a difference, whereas ORCP 71 C is out in the future. He wondered if the

language should be changed to "extrinsic fraud" instead of a "fraud upon the court" in section C. Prof. Peterson stated that the Council's minutes last biennium had pretty good discussion about the issue. He stated that ORCP 71 B has to be done rather seasonably and 71 C is catch-all provision for things that happen later. He wondered whether the Council had any interest in going back and revisiting the rule.

Ms. Leonard stated that it is true that the Council intended to get rid of the distinction between extrinsic and intrinsic fraud for the purposes of Rule 71. Justice Landau noted that Mr. Jaqua raised the additional issue in section C that the "fraud on the court" wording creates an ambiguity about what kind of fraud. Judge Armstrong wondered whether it is duplicative and, if section B allows it, how does section C add anything. Prof. Peterson observed that it does raise a point – in ORCP 71 C is there a historical basis for fraud upon the court? Ms. Leonard stated that the Council did not address that and that Judge Zennaché's memorandum was all about section B. Judge Armstrong stated that the very fact that it is time limited would seem to imply there is a distinction, and that they may not be the same if there are two different sections that deal with it. He stated that there could be a reason that will make it extrinsic as it relates to section C something that goes on in the future – sort of the judgment that should never be allowed to see the light of day issue, versus run of the mill fraud where a year is good enough to fix it. Prof. Peterson stated that it was his recollection that, if someone simply wanted to complain that a trial was not right, that happens within a year and most judges are going to know how to rule on those motions but, if it is some time in the future, it may not be the same judge. He stated that there may be a reason for maintaining a difference and he did not know whether fraud upon the court is something that a committee should look at and decide whether to make it extrinsic or intrinsic.

Ms. Leonard stated that she would be happy to chair a committee if anyone wanted to join. Justice Landau, Judge Armstrong, and Mr. Beattie agreed to join the committee. Prof. Peterson stated that he will ask Judge Zennaché, who had to leave the meeting due to a conflict with another meeting, to participate as well. Prof. Peterson will also let Mr. Jaqua know of the Council's actions in response to his query.

VI. Adjournment

Mr. Brian adjourned the meeting at 11:42 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Rule 22 Committee Report

February 24, 2016, 12:00 p.m.

Committee members present: Shenoa Payne, Bob Keating, Travis Eiva, Hon. Sheryl Bachart, Hon. David Leith. Hon. Curtis Conover, Jay Beattie

Travis Eiva proposed an alternate proposed amendment (Version 2).

Keating raised a concern about the proposed amendment (version 2) – particularly that defendant should not be limited to 90 days because may not know about third-party complaint until late in 90 days.

Payne agreed that a timeline might not need to run from the date of service on a defendant, but could run from time of third-party complaint, but would need to be a reasonable time period.

Judge Leith does not like the proposed amendment (version 2) at all. He would strike it and leave the rule as is.

Eiva agreed and appreciates the position Judge Leith is taking. Suggests we not push forward any amendment at this time. Wants to look at other considerations of rule by the council of previous biennium.

Judge Bachart mentioned that some courts were interpreting the rule to limit third-party practice. We considered this and there is no problem in tabling this to another biennium. We may create more issues than what was presented as a concern.

There was one case in Washington County. Two incidents that we know of. A couple bad experiences – not sure a reason to change the rule without a close reading of the history of the rule.

Beattie mentioned that the complaints at the December meeting were that the rule is complicated and it needs to be simplified. There was a general objection to making a one-word change and leaving the rule as it is.

The question was raised as to why there are time-lines for third-party complaints and cross-claims by defendants, but not other types of claims? Eiva said there was a policy decision to limit the amount of parties and claims against them within the first 90 days so that the claims are fairly solidified and the case can move forward. Keating says it denies the judge the right to manage it because it allows the plaintiff to deny it after 90 days.

Payne explained that there is a 90-day time limit for third-party complaints. If a party brings in a third party, the defendant can then get around the 90-day time limit by cross-claiming against the third-party defendant outside the 90-day time-limit, when the defendant originally

had been limited to 90 days to bring a claim against that third party. Now they get unlimited time up to the time of trial?

Judge Leith doesn't want to add another time limit. He thinks courts would be suspicious of parties bringing cross-claims late in the game and would be a sufficient gate-keeper.

The committee decided to propose the original amendment (version 1) to the council with no time-line, as well as the alternative amendment (version 2) with a timeline. The council can consider both amendments, as well as the committee's concerns.

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's

Council on Court Procedures
March 5, 2016, Meeting
Appendix C-1

summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. [*The plaintiff*] **Any party** may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, 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. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a

debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

Council on Court Procedures
March 5, 2016, Meeting
Appendix C-3

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's

Council on Court Procedures
March 5, 2016, Meeting
Appendix D-1

summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, 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. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

C(3) A defendant, that is not the third party plaintiff, may amend its answer, or file its answer if it has not already done so, to include a claim against a newly added third-party defendant under C(2) as a matter of right, without service of summons, not later than 90 days after service of the plaintiff's summons and complaint on the defendant so choosing to amend or 30 days after service of the third party plaintiff's summons and complaint under C(2) on the third-party defendant, whichever is later. Otherwise that defendant must obtain

Council on Court Procedures
March 5, 2016, Meeting
Appendix D-2

agreement of the parties who have appeared (other than the third party defendant) and leave of the court to assert a claim against a third party defendant.

D Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

ORCP 47 Committee Report
September 25, 2015

The committee examined ORCP 47C in the context of the current 60 day rule. This rule requires that a motion for summary judgment be filed no later than 60 days in advance of trial. The consensus of the committee was that the time delineations contained within the rules are adequate. The committee reflected that the concerns raised by bar members were reasonable, but practice changes were probably the best way to remediate any issues associated with delayed filings of summary judgment motions. There were also concerns that shortening the time to file a summary judgment motion further (perhaps to a 90 day window) in some instances would amplify certain strategy decisions that are made by trial lawyers in stalling or delaying timely discovery process, including depositions, in order to circumvent or limit a parties time to file a motion for summary judgment. Ultimately, the consensus was that there is nothing in the rules that prevent counsel from approaching the court and requesting a case scheduling order, setting out discovery and substantive motion timelines. The scheduling order could extend or restrict pre-existing timelines set out in the rules on a case-by-case basis. As is specifically set out in the rule, "the court shall have discretion to modify" those timelines. Given the foregoing, the committee decided to take no action in regard to the deadlines applicable to the filing of summary judgment motions one way or the other.

In regard to a modification of rule 47 as it relates to the filing of motions to strike or other objections to evidence presented within the body of a motion for summary judgment or a response to the motion, the committee highlighted the fact that standard practice is to deal with these issues within the existing briefing structure. The practical application of the rules invite counsel to prepare appropriate motions to strike or objections to evidence with in their motion, response, or reply brief. Adding an additional motion that must be heard before a ruling on the summary judgment issues at hand are concerned would further complicate the process, create substantial delay, and provide no additional benefit to the parties or the court. It was determined that this issue is best dealt with in the form of a practice suggestion, rather than an affirmative and perhaps substantive rule modification.

SUMMARY JUDGMENT

RULE 47

A For claimant. A party seeking to recover upon any type of~~a~~ claim~~, counterclaim, or cross-claim~~ or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor ~~upon~~ as to all or any part thereof or any defenses thereto.

B For defending party. A party against whom any type of~~a~~ claim~~, counterclaim, or cross-claim~~ is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part thereof or any defenses thereto.

C Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits or declarations and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall grant the motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit or a declaration under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D Form of affidavits and declarations; defense required. Except as provided by section E of this rule, supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or a declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or further affidavits or declarations. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits, declarations or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, the court shall grant the motion if appropriate.

E Affidavit or declaration of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit or declaration shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney, who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment.

F When affidavits or declarations are unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that such party cannot, for reasons stated, present by affidavit or declaration facts essential to justify the opposition of that party, the court may deny the motion or may order a continuance to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

G Affidavits or declarations made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits or declarations presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits or declarations caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be subject to sanctions for contempt.

H Multiple parties or claims; limited judgment. If the court grants summary judgment for less than all parties and claims in an action, a limited judgment may be entered if the court makes the determination required by Rule 67 B. [CCP 12/2/78; §D amended by 1979 c.284 §31; §G amended by 1981 c.898 §6; amended by CCP 12/4/82; §C amended by CCP 12/8/84; §G amended by 1991 c.724 §30; §C amended by 1995 c.618 §5; §C amended by 1999 c.815 §1; amended by 2003 c.194 §9; §C amended by CCP 12/14/02; §H amended by 2003 c.576 §260; §§C,D,F amended by 2007 c.339 §§15,16,17]

Report on Rule 47 Committee Discussion and Determinations
March 4, 2016

Rule 47A and 47B:

The Council received comments noting that the wording of these sections of Rule 47 did not allow a party to seek summary judgment on affirmative defenses. The committee discussed this and all agreed that affirmative defenses are included as bases for summary judgment despite the lack of explicit referral to them in the rule, and that explicit referral was appropriate to prevent summary judgment motions from being denied on this basis. The point of a summary judgment motion is to narrow the issues for trial and there is no reason affirmative defenses should not be able to be addressed and potentially determined inapplicable prior to trial. Attached for the Council's review and approval is a redlined version of ORCP 47A-B with changes to make clear that affirmative defenses may be moved against.

ORCP 47C:

The committee discussed a comment to the Council that the 60 days-before-trial time period for filing summary judgment motions was insufficient generally, and especially in cases where parties needed to engage in motions to strike evidence submitted in support of motions or responses. The committee determined that no action was necessary; a summary of the committee's discussion and thoughts is attached hereto (thanks to Troy Bundy).

Rule 47E:

The Council received a comment, similar to some received in the past, that Rule 47E should be deleted or changed to require more specificity in the affidavit; in this case, it was a generic request to fix Rule 47E with no detail provided as to the concerns of the commenter. The committee discussed whether to take any action on this comment, including in light of the full Council's discussion during the February 2016 meeting.

Some members of the committee noted the potential difficulty of evaluating (judges) and disputing (opposing counsel) the sufficiency of a generic ORCP 47E affidavit (e.g. it simply states that "an expert has been retained who is available and willing to testify to admissible facts or opinions which would be a sufficient basis for denying the motion.") when there are multiple issues, elements or claims disputed in the summary judgment motion. Members also recognized that an attorney could take advantage of the generic language to disguise the fact that the attorney actually does not have an expert for each element or issue on which expert testimony would be necessary.

Other members of the committee noted that significant abuse of the affidavit process allowed by 47E was not known to the committee, and to the extent that instances arise where an attorney submits a generic affidavit despite not having an expert for every element of the claim at issue, this is a limited circumstance that should and can be addressed by education, and also as an ethical issue. Also, attorneys can take steps to mitigate these bad acts, such as use of requests for admissions, so that the moving party later has grounds to seek costs or other sanctions.

Members also noted that Oregon law allows the use of the generic statement in 47E affidavits, and to the extent a party provides more detail regarding the subjects on which the expert will provide testimony, the party will then be limited to those subjects at trial. *Moore v. Kaiser Permanente*, 91 Or.App. 262, 754 P.2d 615 (1988) and *Two-Two v. Fujitec America, Inc.,* 355 Or. 319, 325 P.3d 707 (2014). Affirmatively requiring a more specific statement in the affidavit would place the non-moving party in a difficult and possibly untenable position. Requiring more specificity also could begin to cross the line into expert discovery, which is not allowed in Oregon.

Members also questioned whether requiring Rule 47E affidavits to be more detailed in some way is a substantive change not within the Council's province, and noted the legislative history of the rule and the Council's determination not to address it in the past, at least after receipt of superficial public comments.

The committee did not reach consensus but a majority of members felt that the Council should take no action to change Rule 47E to require greater specificity in the affidavits allowed by the rule.