MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 2, 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
John R. Bachofner*
Jay W. Beattie
Michael Brian
Troy S. Bundy*
Hon. R. Curtis Conover
Kenneth C. Crowley
Jennifer L. Gates
Robert M. Keating
Hon. David Euan Leith
Shenoa L. Payne
Hon. Leslie Roberts
Hon. John Wolf*
Deanna L. Wray*
Hon. Charles M. Zennaché*

Members Absent:

Hon. D. Charles Bailey, Jr.
Arwen Bird
Travis Eiva
Hon. Tim Gerking
Hon. Jack L. Landau
Maureen Leonard
Derek D. Snelling

Guests:

Daniel Parr, Oregon Judicial Department
Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 9 ORCP 22 ORCP 36 ORCP 43 ORCP 71	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 71	ORCP 27 ORCP 57	

I. Call to Order (Mr. Brian)

Mr. Brian called the meeting to order at 9:34 a.m.

II. Minutes

A. Approval of March 5, 2016, Minutes (Mr. Brian)

Mr. Keating moved to approve the March 5, 2016, minutes (Appendix A). Mr. Crowley seconded the motion, which passed unanimously by voice vote.

III. Administrative Matters (Mr. Brian)

A. Introduction of New Judge Member (Prof. Peterson)

Hon. D. Charles Bailey, the judge appointed to fill Judge Roger De Hoog's slot on the Council, had a prior commitment and was unable to attend the meeting. Prof. Peterson remarked that Judge Bailey is the presiding judge in Washington County and that it will be good to have a Washington County presence on the Council again. He also noted that Judge Bailey had stated that the Council can appoint him to any committee where his presence is needed. Ms. Gates asked that he be appointed to the ORCP 47 committee. Judge Zennaché asked that he be added to the ORCP 79-85 committee. Prof. Peterson will relay these appointments to Judge Bailey.

IV. Old Business (Mr. Brian)

A. Committee Reports

1. ORCP 7/9/10 Committee

Mr. Bachofner reminded the Council that a problem the committee was grappling with was the issue of parties not receiving notice of a motion being filed electronically until some time after it is filed, sometimes as long as a week after filing. He reminded the Council that the committee's sense is that this is likely happening for various reasons, including backlogs in the system and filers anticipating that the state eFiling system is like the Pacer or federal system with copies being sent automatically to all parties. Mr. Bachofner explained that one proposal the committee considered was including an additional service requirement when a party serves electronically. The thought was that the burden on all counsel of making sure there is another form of service is fairly low and that many attorneys already do it anyway as a precautionary measure. He explained that some Council members raised the concern that, if the problem is a result of

issues with the eFiling system, the issue may already be something the Uniform Trial Court Rules (UTCR) committee is dealing with and that the UTCR committee could provide a more rapid response with a change to its rules than the Council could provide with a change to the ORCP.

Mr. Bachofner reported that he had contacted Bill Miner, the UTCR committee chair, and learned that the UTCR committee is not in the process of working on this issue. He stated that the UTCR will meet this coming Friday and Mr. Miner is going to add the issue to the agenda, but the UTCR committee staff feels that the problem is not with the system but with the attorneys or their staff not following the process for electronic service. Mr. Miner told Mr. Bachofner that the UTCR committee has been working to educate the bar for three years regarding this issue and it seems like it is kind of foundering. Mr. Bachofner stated that this brings us to whether the Oregon Judicial Department (OJD) is considering changing the system. Mr. Bachofner asked guest Daniel Parr, the communication outreach manager for the OJD and the administrator of the circuit court eFiling system, to address this issue.

Judge Zennaché asked Mr. Parr to start with an overview of how the eFiling process is supposed to work, for the benefit of those members who have not used the system. Mr. Parr explained that a plaintiff eFiles a complaint and cannot use the electronic service function because the complaint must be personally served. The plaintiff is required under UTCR 20.100 to add his or her service information to the case under the party that they represent. An attorney is required to enter this information every time he or she first appears on a case. This is one of the first places that the process breaks down, where counsel does not follow this process. When the opposing counsel files his or her first appearance, because plaintiffs's counsel's information is already entered into the system, he or she can electronically serve the plaintiff at the time of filing. Immediately after filing the defense counsel must add his or her contact information and, going forward, the two parties can electronically serve each other.

Judge Zennaché asked what process must be followed to electronically serve a party whose information is already entered into the system. Mr. Parr replied that, depending on the type of document, a party would either check a button or choose from a drop down menu to indicate that he or she wants to electronically serve, whereupon the party would receive a list of parties available to be electronically served. Judge Zennaché asked whether the system provides any kind of warning that a party would only be filing, not serving, unless a certain button were pushed. Mr. Parr stated that there is no such warning. Judge Zennaché asked whether there was any reason for the decision not to include such a warning. Mr. Parr stated that such warnings are generally not included in the

system. Mr. Bachofner asked why documents are not automatically served when they are filed. Mr. Shields noted that parties are not required to use electronic service at all; they can choose to eFile and serve conventionally. Mr. Parr agreed that electronic service is not mandatory, but consenting to receive electronic service is mandatory. He explained that a party must accept electronic service, but does not have to use it to send out documents to other parties.

Mr. Parr stated that OJD and other states that use this system (more than 30% of the states' circuit courts use this system) are working with the vendor to develop electronic service that is more automated and makes it easier so that mistakes do not happen. He observed that the Council is contemplating rule changes that would not go into effect for two years, and pointed out that the system will change dramatically in two years. He pointed out that electronic service as a concept is relatively new and is not widely used across the country, and electronic service was not a core part of the system. He noted that eFile was created years ago but electronic service was added recently and they are working on developing better processes so two years from now it will not look like it does now; the system will be more automated and will add service contacts automatically. Judge Leith asked whether electronic service will become automatic. Mr. Parr stated that it might have that feature that Oregon can turn on but, once you do that, electronic service will become mandatory. Judge Leith pointed out that a party can serve any other way they want, but such a change would just cause electronic service to actually happen. Judge Zennaché opined that, if eFiling is mandatory, electronic service might as well be. Ms. Gates wondered, if a party has to accept electronic service, why would that party not use it as well. Judge Wolf pointed out that, if an opposing attorney has contacted the plaintiff by mail stating that he or she is representing the defendant and asking the plaintiff not to take a default because they will file an appearance, that person will not necessarily get electronic service because they have not appeared yet and are not in the system. Mr. Parr agreed that this is true. He also noted that most states are basing their rules on Oregon's rules.

Mr. Brian asked for Mr. Parr's recommendations to the Council. Mr. Parr suggested that the UTCR committee is a better organization to deal with any rule changes because it can move more quickly. He noted that the OJD is working internally on a group of out-of-cycle changes to chapter 21 of the UTCR to wrap up some issues regarding eCourt because it is launching in Washington County in mid-April and in the eastern districts by the end of this summer. He stated that electronic service will be one of the areas they discuss. Prof. Peterson suggested including some type of pop-up window or other tool in the software that can appear and state something like, "You have not served. Do you intend to?" Mr. Parr stated that this is something that could happen, but it would require software

development. He noted that the software is a national system that is somewhat of a "one size fits all" template and that the OJD would have to work with the vendor (Tyler Technologies) on such a change, which could take months. Prof. Peterson pointed out that there is no promise that technology will fix the problem of an attorney who eFiles and simply forgets to electronically serve the document. Mr. Parr observed that this is similar to putting an envelope into a mailbox without a stamp. Judge Leith stated, however, that the reason the Council is discussing the issue is that it appears to happen quite a lot, whereas people are more familiar with the concept of putting a stamp on an envelope. Mr. Parr reiterated that this is an education issue. He stated that the OJD has a guide on eFiling that includes screen shots, as well as step-by-step videos outlining the process. He stated that, when electronic service is used the way it is supposed to be used, problems are extremely rare; the issue is getting people to understand the two steps of adding their contact information to cases and choosing to serve electronically. When we talk about service in general, we are always choosing an action, like mailing or faxing, and electronic service is the same way with choosing a button.

Judge Roberts pointed out the problem of more and more self-represented litigants who are not attorneys and who must also be able to use the system. She noted that they may not have a personal e-mail address and, in this case, they would not get served. She noted that Mr. Parr had mentioned that the system is a national system and wondered how realistic it is to expect that we will see a response to the problems that are occurring in Oregon. Mr. Parr stated that it is very realistic because Tyler Technologies has shown the OJD demos of what it will be adding to the system, including automatically adding e-mail addresses when parties eFile. Judge Roberts wondered how the process would work for those who do not have e-mail addresses. Mr. Parr stated that those people would be served by other methods because they are not using the eFiling system or consenting to electronic service. Mr. Shields pointed out that self-represented litigants are not required to eFile – only attorneys are – and no one is required to serve electronically. Attorneys serving self-represented litigants are required to serve them in a way that works. It is the responsibility of the lawyer to figure it out and that is not a problem with the system. Mr. Parr noted that the system will tell a lawyer whether or not he or she can electronically serve the other side.

Mr. Bachofner stated that the probability is that the majority of lawyers have assistants do the eFiling process for them, so it is important to educate the assistants as well, particularly since many attorneys file cases both in federal and state courts and it is easy to confuse the two. He observed that, right now, the rules regarding service of different documents appear in the ORCP, and worried that moving to a hodgepodge of rules in the ORCP, UTCR, and supplemental local rules (SLR) will confuse people who have been practicing for a while. He expressed

concern that those attorneys will continue to look solely to the ORCP for service requirements. He again expressed support for the concept of changing ORCP 9 to be clear that additional service is required, even when one is serving electronically, as the burden is very low and it prevents what could be a significant problem. Mr. Bachofner stated that it is a fairness and an access to justice issue and, no matter what changes are made to the UTCR and to the system itself, those parties who have essentially "appeared" through a letter and have not yet filed with the court are only going to receive notice if a change is made to ORCP 9. Judge Zennaché stated that he believes that part of the problem is that, because the federal system automatically serves the parties when a lawyer files a document, that is what lawyers and staff expect is going to happen in the state system. He wondered why OJD did not foresee that when choosing a system that does not have automatic service on parties who have already filed electronically. He respectfully pointed out to Mr. Bachofner that, like it or not, ORCP 9 H states that electronic service is service that utilizes the electronic filing system provided by the OJD in the manner prescribed by rules adopted by the chief justice of the Oregon Supreme Court. Judge Zennaché stated that the Council has already cross-referenced the rules to the UTCR, and UTCR 21.100(7) requires a party who is filing electronically to attach a proof of electronic service to his or her electronic filing. He expressed concern that the Council is spending a lot of time fixing a problem that will work itself out. He noted that the UTCR committee can choose to modify the UTCR to make it clear that a person wanting to serve electronically needs to choose a box. He also reiterated that there is no requirement to serve electronically.

Prof. Peterson stated that, while he would like to be told that the technology will change so there will be a hint that a party has not indicated service, he appreciates that Mr. Parr is not in a position to guarantee that this will happen. He reminded the Council of Mr. Eiva's example where he had electronically filed an order with a technical glitch, the court caught the glitch and told him to fix it, but the other side never saw the proposed order until it was resubmitted in proper format. Prof. Peterson noted that, under the old paper system, all documents were served on the opposing party, even if those documents were subsequently rejected. Mr. Parr explained that, currently, the electronic service e-mail goes out when the court accepts the document, which is why the 3 day rule applies because that acceptance could happen a few days after the person actually filed the document. He stated that the system can be configured to file either at the point where the person submits the document for review at the court or at the time of acceptance by the court. He noted that he was not involved in the initial decision four years ago, but he believes that a large portion of that decision had to do with the question of when an attorney's response time would start if the attorney was served with a document that was subsequently rejected by the court for a

technical reason and then the attorney was served again with the corrected document.

Prof. Peterson observed that part of this issue depends on courthouse personnel, which depends on budget. He also pointed out that the Council has heard anecdotal stories of attorneys who have found documents on Odyssey they did not know were there. Mr. Parr stated that this would only happen if the adverse party did not choose to electronically serve the document on the attorney. If the adverse party had chosen to electronically serve them, it would have gone out immediately. He stated that the error rate on electronic service is minuscule and that the serving party is immediately notified if the e-mail did not go through. He stated that Tyler Technologies is working on many of the issues he has talked about, such as automatically adding attorneys' information in the system. Judge Leith stated that his recommended input to Tyler would be to make adding the service information automatic, to make electronic service automatic in all cases, and to make service happen upon submission of the document instead of upon acceptance by the court. He pointed out that, if a document was put in a mailbox, it would be received by opposing counsel, regardless of whether the court had accepted it. He agreed with Judge Zennaché that any rule modifications should be considered by the UTCR committee.

Mr. Brian asked whether Mr. Bachofner's concerns were answered by these discussions. Mr. Bachofner stated that he still believes that attorneys have a tendency to look at the ORCP and, where the ORCP has service requirements in it, even if it does refer to the UTCR, he still thinks it makes sense to have service requirements in Rule 9 when it is a low burden. He stated that he is happy to talk more with Bill Miner about potential changes that the UTCR committee could make. He pointed out that just relying on what is in the system is not necessarily going to solve the problem because of people making an "appearance" through an ORCP 69 letter who need to know if something is filed. Mr. Bachofner stated that, with regard to the absence of notice regarding when an order was signed, we now require that a certificate of completion must accompany proposed orders and judgments. He stated that he believes that this takes care of part of the problem because a party must affirmatively certify that the order or judgment was provided to the other side, that they did not object, and that sufficient time has been provided.

Mr. Brian suggested referring the issue back to the committee, where the committee will either table it or come back to the Council with an affirmative recommendation for a language change. Prof. Peterson explained that there will be some unrelated changes to ORCP 9 relating to e-mail service irrespective of the committee's decision on this issue.

2. ORCP 22 Committee

Ms. Payne reminded the Council that there were two proposed draft amendments for consideration at the March Council meeting. One was a simple two word amendment allowing "any party" to assert a claim against the third party defendant if that claim arose from the same transaction or occurrence., while the other included a timeline for filing such a cross-claim against a newly added third party defendant. She stated that there was discussion during that meeting regarding changing the timeline language so that the time would run not later than 90 days after service of the summons and complaint on a defendant or 30 days after the third party defendant has appeared – otherwise it might be hard for all of the parties to know when that third party defendant was served. The committee made that change and was presenting a new draft to the Council for its review (Appendix B).

Mr. Keating noted that the general consensus of the Council at the last meeting was that ORCP 22 should be amended to recognize that any party could make a claim against a third party defendant. He stated that the main areas of discussion at the last meeting had to do with what the time frame would be in which such a cross-claim against the third party defendant could be made and whether all parties as well as the court must agree if that time limit is not met. Mr. Keating stated that, as far as he has been able to determine, this is the only rule that denies judicial discretion on an issue; the judge cannot extend the time allowed unless all of the parties agree. He stated that the thought was to look back at the history of the rule to see how that provision came to be included in the existing subsection C(1), and that some concern had been expressed that this might not be able to be accomplished this biennium. Prof. Peterson recalled that there was discussion about whether, if time limits are going to be placed in this specific instance, the entire rule should be looked at with regard to time limits.

Judge Leith agreed that these were the issues discussed at the last Council meeting. He stated that the issue of time limits arose later in the committee's discussions and suggested that, if a time limit is to be added, the Council should look at Rule 22 as a whole in a methodical, comprehensive way rather than throwing a single time limit into what amounts to a housekeeping amendment. He stated that, if the simple two word amendment must be deferred to next biennium in order to defer the timing discussion, he would be happy to defer everything. Judge Leith did not believe that the timing issue should be dealt with as an afterthought. Judge Zennaché wondered how much more time would be required to comprehensively examine the issue. Judge Leith suggested that the Council needs to look at not just the issue of timing, but also at the judge's authority. He noted that there is plenty to be considered and that there is no

urgency that he can see. Ms. Payne agreed that there are two separate issues, the timing and the agreement of the parties. She pointed out that the committee had just inserted the language regarding agreement of the parties from the existing subsection C(1) and stated that there is no reason that it must be included in any proposed amendment. She suggested tabling that portion until next biennium and exploring the timing issue in the remaining time left this biennium. She stated that the committee can explore the issue and, if it is not manageable in the remaining time, it can also be tabled until next biennium.

Mr. Brian suggested sending the issue back to the committee to come up with a recommendation to be given to the Council at the May meeting, because there will only be one meeting remaining after that until the summer break. Judge Zennaché asked whether, as a procedural matter, committees are allowed to meet and discuss issues during July and August, even if the Council does not meet. Prof. Peterson agreed that they can, but stated that there is clearly something important about the synergy of the entire Council discussing the potential amendments in one forum where flaws and weaknesses are exposed and questions arise. He stated that making minor changes between June and September is acceptable but, if it is a case of larger policy issues, the Council would likely have to agree to hold discussions over the summer by e-mail. Judge Zennaché stated that he is not a big fan of rules that deny judicial discretion, and he would like to see the Council examine why this rule is the only one that denies that discretion. He stated that he would prefer to look at both the timing and discretion issues now, if at all possible. Judge Leith stated that he sees the issues as being closely intertwined.

Ms. Payne suggested keeping the existing time limit in C(1) but not adding a time limit in the new language and deferring until next biennium the discussion about whether the time limit should be removed from C(1) or whether time limits should be expanded in the rule. Judge Leith noted that the proposed amendment applies to cross-claims by existing defendants against new third party defendants, but there is no timeline in the meantime about counterclaims or cross-claims against original defendants. He pointed out that there are many different types of third party practice that do not have timelines and suggested that perhaps there should be a general 30 or 90 day expectation, subject to judicial discretion, that would apply to third party claims, original cross-claims, and counterclaims as well as to these new types of cross-claims against third party defendants.

Mr. Beattie observed that the original discussion arose from someone noticing that the rule left out the situation where there was a potential claim by an existing defendant against a new third party defendant. He stated that the original solution was that those claims can be filed, but the issue just flowered into something

larger. Judge Armstrong agreed that it had metastasized. Mr. Beattie stated that he always thought that the court had discretion to allow amendments to an answer, which is what a party would have to do to get these claims in – file a motion and proposed amendment or, if there is no controversy, obtain the consent of the opponents . He opined that, other than adding two words to indicate that these are permissible claims, we do not need all of the time limits. Ms. Payne observed that there is a 90 day time limit in the rule, and to allow people to commence third party practice at any time subverts the purpose of that existing 90 day time limit. Mr. Beattie noted that this 90 day limit is for an existing defendant to bring in new third party defendants as a matter of right. Ms. Payne stated that she believes that it rewards defendants for sitting back and not doing what they can do and then, once another party adds a potential adverse party, the defendant can wait as long as they want. Mr. Beattie remarked that this is sort of a problem with practice in general and stated that this is why judges do not allow late amendments, because they do not want people to get bushwhacked. He suggested that there should either be a general time limit or that time limits should be erased and left to the discretion of the court. Judge Leith agreed.

Mr. Brian asked that the committee examine all of these issues and report back to the Council at the next meeting. Prof. Peterson asked whether changing the word "and" to "or" in subsection C(1) might solve some issues. Judge Conover thought that looking at the history of why judicial discretion is not allowed in the first place is important before making such a change. Ms. Payne reiterated that she does not know if there is enough time to do this. Judge Leith observed that the committee is splintered so there may be competing proposals. Mr. Brian agreed that the committee could present two competing proposals or that the committee could report that the issue is too large to tackle this biennium. Judge Zennaché asked that the committee specifically report back about the history of subsection C(1) that does not allow judicial discretion. Mr. Beattie stated that he will look through the history of Rule 22 for this information.

3. E-Discovery Committee (Appendix C)

Judge Zennaché stated that the E-Discovery committee is the only standing committee that the Council has had. He stated that, when the Council first made modifications to the rules to expressly provide for electronic discovery, the committee did extensive research about whether it should create a comprehensive rule that tried to address all potential issues or a bare bones rule authorizing e-discovery. The approach chosen was to authorize e-discovery, see what happens, and have the rules evolve as time goes on. Judge Zennaché stated that the committee has been monitoring developments relating to the e-discovery rules since that time.

Judge Zennaché reported that one of the things that is now happening is that e-discovery has become a larger component of civil litigation and that it is an expensive proposition for everyone involved. He stated that the committee is proposing to create a mechanism for a meeting for the parties to confer through a change to Rule 43. He observed that the original e-discovery committee had considered including this conferral mechanism at the beginning of e-discovery. Judge Zennaché stated that the proposed rule change allows any party who thinks that e-discovery will be an issue to request a meeting that will help the parties identify the sources of e-discovery, how it is stored and preserved, the costs, and other issues. This will allow the case to proceed in an intelligent way and it also incentivizes cooperation by authorizing the trial court to consider whether or not a party participated in such a meeting in good faith when ruling on motions to compel and motions for protective orders. Judge Zennaché stated that part of the reason the Council did not previously adopt such a requirement at the beginning of e-discovery was that there was already a rule requiring the parties to hold a conference before filing certain motions and the Council felt that would be enough to catch the issue, but the problem is that the issues are arising on the back end of cases. He stated that parties are spending time and money deposing experts and dealing with other issues regarding electronic discovery, and the idea of this conferral meeting at the front end is to allow parties to figure out how to deal with the issues more efficiently and how to not have to get a court involved.

Mr. Brian asked what he perceives the conference to be: a physical meeting of the lawyers, conferral by e-mail, etc. Judge Zennaché stated that the amendment requires the parties to confer about a number of issues and that he believes that means that a meeting is necessary, either by telephone, video conference, or in person. Mr. Keating stated that, when you are dealing with a really large information technology system, a very detailed meeting is required. He gave the example of a request for production directed to a large organization for all e-mail regarding certain issues. He pointed out that, for this type of organization, “all e-mail” may consist of e-mail stored on servers, some that is stored on desktop computers for certain people, and potentially even some that is stored on hand-held devices such as tablets or smart phones. In such a case, a party cannot just send someone to the server and say "give me all emails that talk about this subject." He stated that it would be impossible to respond to this type of request without a detailed conference, and a telephone conversation would not be practical. Since both sides have the same duties to preserve, it makes sense from a practical point of view to meet. Mr. Keating noted that gathering all of the e-discovery in a complicated case within 20 days is difficult but, with a meeting, the discussion can at least begin and a framework for getting the remaining documents to the opposing counsel can be determined. He stated that, if the parties deal in good faith, such conferences work.

Judge Zennaché stated that the need for such a detailed conference is why the proposed amendment uses the word "meeting" rather than just "conference" or "conferral." Prof. Peterson pointed out that the language in UTCR 5.010 states that a good faith attempt to confer must be made, which is different from the "request a meeting to confer" language in this amendment. Mr. Bachofner expressed concern that the word "meeting" implies a live meeting, but he agreed with Judge Zennaché that sometimes a video or telephone conference is sufficient. Ms. Payne suggested defining the word "meeting." Mr. Bachofner suggested using the phrase, "meeting by telephone or in person."

Ms. Gates asked whether a discussion about metadata was considered as a listed topic. She pointed out that it can become a huge morass if the parties do not agree on those issues at the beginning. Mr. Crowley noted that the list was not intended to be comprehensive. Judge Zennaché stated that the phrase "any other issue a requesting or producing party deems relevant to the request for ESI" was intended to cover any issues of concern to the parties that were not listed. He stated that the committee did not specifically discuss the metadata issue and noted that the list used came from the Sedona Conference protocol. Ms. Gates suggested adding "production of metadata" to the list since it is such an important issue. Judge Zennaché agreed to add it to the committee's next draft. Ms. Gates asked whether the committee had considered requiring that the parties confer about a timeline regarding when things should happen in the event there is a later dispute. Judge Zennaché stated that the idea was not to have an exclusive list, and noted that timelines are covered by the"any other issue" language.

Judge Roberts pointed out that there is a contrast between this voluntary meeting, where failure to comply shall be considered by the judge when ruling on motions to compel and motions for protective orders, and the mandatory obligation under UTCR 5.010 to confer or make a good faith effort to confer before filing any motion to compel. She wondered how those two pieces work together. She noted that a court cannot even rule on a motion to compel unless the parties have either conferred or offered facts to show that they have made an effort to confer. Judge Bachart stated that, because there are so many cases where electronically stored information may be an issue but not necessarily a large issue, the amendment includes some discretion not to hold a meeting but, once a party asks for it, the court can consider it. She observed that virtually every case in this day and age involves some type of electronically stored information. Judge Roberts stated that, since this is a more specific rule than the general rule, it might be a good idea to point out that this change does not relieve the parties of the mandatory conferral requirements before filing motions to compel. She noted that telling the judge that you called the other party once and they did not call back will not be sufficient under UTCR 5.010, and the implication that a party can

file a motion to compel electronic discovery and that the court can hear it and just consider whether that party requested a meeting on electronically stored information earlier in the case undermines the UTCR 5.010 duty to confer requirements. Judge Zennaché stated that he does not believe that is true, because UTCR 5.010 requires the parties to confer about the motion to compel, and this amendment requires the parties to meet about the electronic discovery issues in the case, which is a different thing and does not relieve a party of the requirement to confer about a motion to compel before filing it. He stated that the he and the committee had concerns about making the meeting requirement automatic because of cases like divorces where there is often simple electronically stored information, such as bank statements and personal e-mails, that would not require a meeting. The committee therefore chose to make the request to meet an additional requirement that applied only in cases in which a party thought it should apply. Judge Roberts still felt that adding clarification that the amendment does not in any way affect UTCR 5.010 was a good idea. Judge Zennaché stated that he would attempt to draft language to that effect.

Prof. Peterson stated that the staff had also suggested some changes to the rule. He noted that the committee's new language used the word "case" twice and "action" is the preferred language. He also suggested changing 20 days to 21 days to comply with the Council's attempt to use multiples of 7. Judge Zennaché agreed with these changes. Judge Roberts proposed a friendly amendment that "any party or the court" be allowed to request a meeting to confer about electronic discovery issues. Judge Zennaché noted that the court can always require the parties to confer, but agreed that this is a good addition.

Judge Zennaché stated that the committee is also proposing a change to ORCP 36. He stated that the new language should have been placed at the end of the preceding paragraph rather than at its current location. Ms. Nilsson apologized for misunderstanding where the new language should be inserted. Judge Zennaché stated that the federal rules have modified the discovery rules to require some sort of proportionality regarding the issues at stake in the case. He observed that, from his point of view, the Oregon rules have been narrower about discovery and avoid a lot of discovery problems that exist in the federal system by simply limiting the vehicles of discovery, such as interrogatories and expert discovery, more distinctly. He stated that the committee had pondered whether it should modify the scope of discovery or whether it should say that what is at stake in the case should be a factor in a court deciding what is an undue burden . Most of the committee thought that proportionality of what is at stake in the case already was a factor that the court will consider in deciding what is an undue burden. He stated that the committee had chosen to include language that says that the court shall consider certain factors when deciding what constitutes an undue burden.

Ms. Payne stated that she is a member of the committee and that she had strong reservations about adding the proportionality language to Rule 36. She noted that the committee had initially discussed putting proportionality in the scope of discovery and that there was some strong pushback from the plaintiffs' side on that. She stated that she still has some concerns about defining undue burden as a proportionality test. Ms. Payne pointed out that this follows a recent change in the federal rule, and that there has been a lot of discussion among the plaintiffs' bar regarding whether that amendment was a good or bad idea. Ms. Payne stated that there is fear about what consequences the federal rule change will have, and she pointed out that we have not yet seen how it will play out. She stated that her preference is to wait and see what happens with the federal rule before adopting similar language in Oregon's rule. Ms. Payne observed that the term "undue burden" gives trial courts a lot of discretion and, if "undue burden" is defined as proportionality, it requires the courts to consider things that she thinks will hurt plaintiffs in a particular way. She expressed concern that it could be harmful in low dollar cases where a plaintiff's ability to get discovery may be limited if the court determines that the discovery the plaintiff is asking for is not proportional to the dollar amount that they seek. She stated that tying an Oregon rule to federal case law is not necessarily something that the Council wants. Ms. Payne noted that Oregon has a history of having its rules be different from the federal rules, and she expressed concern that such a change could lead to a lot of motion practice that our limited state resources cannot handle. She also expressed concern about unintended consequences because the Council has not fully vetted what undue burden already means in the state courts.

Judge Conover stated that he thinks that something the Council needs to take into account when talking about low value cases is the expedited jury trial program that is already available under the UTCR and that is now getting anther serious push. Under this program, discovery is limited and further required conferences with the court will really take into account these types of issues. He stated that Lane County and Jackson County have draft SLRs regarding this program and those will be in place soon, which may take care of those low value cases.

Mr. Keating related that, under the existing rules, he had received a request to produce all e-mail relating to a specific issue. Defendant objected to the request as overly broad and unduly burdensome. When Mr. Keating produced a large volume of e-mails in response, opposing counsel filed a motion to compel. In response to the motion, Mr. Keating submitted an affidavit from the director of information technology at the company he represented detailing all of the places where e-mail was retrieved from, whose e-mail boxes were searched, and what time frame was searched, and explaining that to conduct an exhaustive search would cost in excess of $1 million in personnel and other expenses. He stated that

the trial judge nonetheless granted the motion to compel with no explanation, and that the petition for mandamus was still pending when the case eventually settled. Mr. Keating pointed out that the new language merely states that the judge needs to consider certain factors, and that this will lead to judges actually considering factors and telling the parties why he or she does not want to address them. Mr. Keating stated that the discretion is enormous and the mere fact that the prayer is low does not solve this question, noting that the first exception is the importance of the issues at stake in the action. He stated that there are probably a lot of cases where a party has a very important issue that they need to get in front of the court (e.g., they need to understand the defendant's policies and how these policies have evolved). Mr. Keating stated that this is an answer to the question: it is proportional to the issues being raised in the case before the court, and it is not a defense simply to say that the plaintiff only wants $50,000 but it will cost $250,000 to produce the discovery. He stated that at least the issue gets addressed and, absent any sense that it is necessary to address it, many parties and judges will not address it. Mr. Keating stated that the only redress currently available is to seek interlocutory relief to tell the judge that he or she has abused his or her discretion. Mr. Keating opined that the proposed amendment advances the argument and the decision making. He noted that judges who attended the Sedona Conference with him were the ones expressing a preference for proportionality and showing concern that judges were not addressing the issue. He stated that, if the issue is addressed early, it can largely be eliminated or modified at the meeting and, if a party cannot get agreement after the meeting, it is a nicely defined issue for the trial judge to address and, if they do, it is really hard to find an abuse of discretion.

Judge Armstrong noted that courts like discretion but occasionally also like guidance. Judge Roberts agreed. She stated that she does look at proportionality and that there are times when she has had motions to compel where she has said that she will grant a certain portion of the motion and allow a party to come back on the other portion if they can show that the trail leads further. She noted that some judges merely say that, if the rules say this is the scope of discovery, this is the scope of discovery and they will order it. She stated that she has seen discovery used as a club on both sides, and that the Council's mission is to provide rules that allow effective efficient trial of cases on their merits.

Ms. Payne pointed out that undue burden is already included in the rule. Judge Roberts stated that it is not defined. Judge Zennaché observed that the amendment does not define what constitutes an undue burden; it simply says that, in deciding what constitutes an undue burden, the court shall consider certain factors, among others. He took exception to the idea that the amendment is a definition. Mr. Beattie opined that guidance is very necessary and helpful because there is not a lot of Oregon case law regarding undue burden arguments

and lawyers end up making vague arguments that are really institutionalized whining and hoping for a sympathetic judge. He stated that he thinks that giving a judge something to consider is helpful. Judge Armstrong noted that, with regard to Ms. Payne's concern about linking case law development by adopting something that tracks the federal rule, we can explicitly, whether through history or otherwise, say that the Council is not going to do that. He stated that a lawyer's obligation is always to figure out what the rule means within the state.

Ms. Payne stated that her main concern is that, early in the case before a plaintiff obtains discovery, a judge will be considering things like the importance of the issues at stake and the value of the case and limit a party's ability to get discovery. She wondered how plaintiffs in consumer and employment cases would ever obtain critical discovery to prosecute their cases when the other side comes in and says it is too expensive, and she expressed concern that this will prohibit plaintiffs in consumer and other small dollar cases from being able to get information critical to their cases. Mr. Crowley noted that he has been doing civil litigation representing the state for about a decade and, during that time, discovery has changed dramatically from mostly paper to almost exclusively electronic discovery. He stated that, if we do not have standards for dealing with electronic information, we will be buried in it. He noted that the changes to the federal rules are trying to do this and it will take time to see how the changes play out, but he opined that Oregon should not sit on the sidelines and see how it goes because we are facing the same exact issues now in our state court actions.

Judge Leith wondered whether other Council members had examples of courts failing to apply the undue burden standard in a sensible way. Mr. Crowley stated that it is not just the courts, but litigators and clients who are grappling with these issues. He opined that, if the rules do not provide some real direction, things will become even more difficult. He pointed out that everyone is learning at the same time and that paralegals are becoming information technology experts because not many lawyers are at that level. Because companies have different information technology systems and there are no set standards, it is impossible to just assume that information can be retrieved from all systems in the same way. Mr. Crowley stated that meeting and conferring is all about getting in front of these issues, as is the amendment regarding proportionality. The changes will help both sides and the court to understand how the process will proceed, and help to keep these issues out of the hands of the judge as much as possible to avoid burdening the court system. Judge Armstrong wondered how many rulings are currently made regarding undue burden and what those decisions are. Mr. Crowley stated that he has had some difficult rulings in the last few years where he has asserted undue burden and the court has said it does not appear undue. He observed that this is a difficult issue for the courts too, as many judges have not been practicing since

electronic discovery became commonplace. He stated that, when a party has to argue undue burden, it is sometimes not easy to explain that burden to the court. Judge Leith stated that the criteria listed in the draft amendment seem pretty intuitive, and wondered whether anyone has experienced a case where a judge said no, the burden or cost of producing discovery does not seem relevant to whether it is an undue burden. Mr. Keating stated that, in the case he discussed earlier, he filed an affidavit establishing what it would cost to produce that discovery, and there was no response from the other side nor any attempt to engage in a discussion of the actual burden and expense. The motion was just granted, and there are judges who do not consider these factors.

Judge Zennaché noted that the draft language was a compromise between the plaintiffs' lawyers and defense counsel on the committee. He stated that the defense had proposed modifying the scope of discovery to match a federal proportionality rule that allows a party to unilaterally say they will not produce discovery because it is not proportional and the other party must file a motion. The plaintiffs' bar said in response to this proposal that proportionality is probably just a factor the court can consider in what constitutes an undue burden, and that made sense to him as a judge because it is intuitive that, as the neutral party, he would consider these things. The committee decided to put it in the undue burden portion to give the court a tool to consider these things. He stated that the amendment does not define what constitutes an undue burden, and does not say that the defense has a unilateral right not to produce it, and it is very different than the federal approach. He noted that the phrase "proportionality" is in the federal rules, but the ORCP discovery rules were modeled after the federal rules when they were first drafted so there is often a lot of overlap. His intent was that this amendment would generate its own meaning in time, independent of the federal system.

Judge Leith noted that Judge Zennaché had stated that these are factors that a court can consider, but that the language in the draft uses the word "shall." He wondered if the word "may" would be more appropriate. Ms. Payne stated that she would feel more comfortable with the word "may." Mr. Crowley and Mr. Keating stated that they prefer the word "shall." Judge Leith stated that using the word "shall" might lead to a situation where a case goes up on appeal because a judge did not demonstrate in checklist form that he or she did consider all of those factors. Judge Roberts noted that very few people write opinions on discovery motions so that likelihood is low. She stated that she really does like judicial discretion but, on the other hand, she likes some measure of uniformity on how these questions are approached. She observed that this amendment gives a sharp elbow to judges to say you really can and should think about this, but it does not tell them how to resolve the issues. Judge Bachart stated that she likes the word

"shall" because it will frame how the issue will be presented by each side to the court. The way the amendment is drafted will make her accountable for her decisions but will also focus the parties on those issues as opposed to presenting a broad scope argument.

Mr. Beattie noted that Ms. Payne's concerns are legitimate, but agreed with Mr. Keating that it is a sliding scale and depends on the importance of the issue so, for small employment or consumer cases, if it is the fundamental issue of the case, the court will go out of its way to give the parties what they need. He noted that there is usually not a large volume of discovery in smaller cases but, in large cases, there could be massive amounts of financial and medical records where a party could be pulling out hard drives from machines that have been dead for decades and the compiled information could look like the warehouse in the closing scene from *Raiders of the Lost Ark*.

Prof. Peterson suggested that perhaps language could be added to the amendment that suggested that none of these factors should be considered to the exclusion of the others. Ms. Gates pointed out that some factors might legitimately be considered to the exclusion of the others. Prof. Peterson wondered if there is some way to wordsmith the language to say that they are all independent factors. Judge Zennaché explained that "among other things" is a way to tell a judge that this is not an exclusive list and that other factors may be considered. Judge Leith agreed with Ms. Gates that one factor may weigh so strongly that the other factors may not need to be considered.

Mr. Brian asked whether the committee was prepared to have this decided on as written or whether changes need to be made. Judge Zennaché stated that he would like to make the suggested changes to the rules and that the committee will come back with language that will probably be very similar.

4. ORCP 47 Committee

Ms. Gates stated that the committee will meet one more time and report back to the Council at the May meeting with a more defined proposal.

5. ORCP 71 Committee

Judge Armstrong reported that the committee had met and decided that the decision made by the previous ORCP 71 committee in the 2009-2011 biennium based on Judge Zennaché's memo (Appendix D) regarding eliminating the distinction between extrinsic and intrinsic fraud made perfect sense and that there is no reason to reconsider the wisdom of that decision. The committee's report is attached. As to the idea that there might be some tension between that change in 71 B and the language contained in 71 C regarding fraud on the court and the inherent authority of the court to consider such fraud, and other grounds, in ruling on a request for relief from judgment, the committee had no concern that there is a need to try to reconcile those two sections or to imagine how they differ. The committee's recommendation is to do nothing and to send a letter to Mr. Jaqua informing him of this decision and thanking him for his inquiry.

Prof. Peterson stated that Mr. Jaqua had given two examples of fraud and that the Council thought that either one of those were reprehensible. The first was convincing someone to default after serving them, and the other was fraudulently upgrading the damages in a motion for default. Prof. Peterson stated that the Council thought that judges should be able to say that neither of those behaviors is acceptable and that, even though one used to be intrinsic and one used to be extrinsic, they are both bad things that we should have tools to deal with. Mr. Beattie stated that the standards for setting aside a judgment within one year under section B are more permissive than under section C, which is beyond a year. He noted that it is easier to do it promptly to get out of a judgment, and the distinction does not violate the policy in favor of finality of judgments. Mr. Brian asked that Council staff write to Mr. Jaqua and also provide him with a copy of the committee's report and Judge Zennaché's memorandum from 2009-2011.

6. ORCP 79-85 Task Force

Prof. Peterson reported that the task force had met and had a thorough discussion about ORCP 79, 80, and 81. Between Council staff and the task force, there will be some suggestions and proposals. He stated that he will make the changes to ORCP 80 recommended by the task force and send that draft back to the task force so that it can decide whether to present the proposed amendments to the Council. He stated that he believes that it is feasible for the task force to work through the

remaining rules and to have a report for the Council at the May meeting. Judge Zennaché stated that most of the changes are just language cleanup to make the rules comply with current modern language. Prof. Peterson noted that Judge Zennaché had provided a good suggestion that the form of the order should enumerate that there are some powers included within the order, because it does not currently say that, and that such a change would follow the Council's aspirational goal to have the rules follow more of a checklist format for ease of use.

V. New Business (Mr. Brian)

No new business was raised.

VI. Adjournment

Mr. Brian adjourned the meeting at 11:36 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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

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

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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.

GENERAL PROVISIONS GOVERNING DISCOVERY

RULE 36

A Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B(2) Insurance agreements or policies.

B(2)(a) A party, upon the request of an adverse party, shall disclose:

B(2)(a)(i) the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based.

B(2)(b) The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may

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supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

B(2)(c) Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement or policy.

B(2)(d) As used in this subsection, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B(3) Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a

transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. **In deciding what constitutes an undue burden, the court shall consider, amongst other things, the proportionality of the request for production to the needs of the case including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.**

GENERAL PROVISIONS GOVERNING DISCOVERY

RULE 36

A Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property[,] for inspection and other purposes; physical and mental examinations; and requests for admission.

B Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, [*which*] **that** is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not **a** ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B(2) Insurance agreements or policies.

B(2)(a) **Requirement to disclose.** A party, upon the request of an adverse party, shall disclose:

B(2)(a)(i) the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment [*which*] **that** may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based.

B(2)(b) **Procedure for disclosure.** The obligation to disclose under this subsection shall

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be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

B(2)(c) **Admissibility; applications for insurance.** Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement or policy.

B(2)(d) **Definition.** As used in this subsection, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B(3) Trial preparation materials.

B(3)(i) Materials subject to a showing of substantial need. Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

B(3)(ii) Prior statements. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The

provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is [*(a)*] **either:** a written statement signed or otherwise adopted or approved by the person making it[,]**;** or [*(b)*] a stenographic, mechanical, electrical, or other recording, or a transcription thereof, [*which*] **that** is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure.

C(1) Grounds for limitation. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order [*which*] **that** justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

[*(1)*] **C(1)(a)** that the discovery not be had;

[*(2)*] **C(1)(b)** that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

[*(3)*] **C(1)(c)** that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

[*(4)*] **C(1)(d)** that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

[*(5)*] **C(1)(e)** that discovery be conducted with no one present except persons designated by the court;

[*(6)*] **C(1)(f)** that a deposition after being sealed be opened only by order of the court;

[*(7)*] **C(1)(g)** that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

[*(8)*] **C(1)(h)** that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or

[*(9)*] **C(1)(i)** that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

C(2) Denial; grounds. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. **In deciding what constitutes an undue burden, the court shall consider, among other things, the proportionality of the request for production to the needs of the case including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.**

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PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY

UPON LAND FOR INSPECTION AND OTHER PURPOSES

RULE 43

A Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy any designated documents (including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices or software into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B Procedure.

B(1) A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property upon which entry is requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and related acts.

B(2) A request shall not require a defendant to produce or allow inspection, copying, entry, or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or the

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parties may agree upon in writing, a party shall serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, which items shall be organized and labeled to correspond with the categories in the request;

B(2)(b) as to any requested item not in the party's possession or custody, a statement that reasonable effort has been made to obtain it, unless specifically objected to, or that no such item is within the party's control;

B(2)(c) as to any land or other property, a statement that entry will be permitted as requested unless specifically objected to; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control.

B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so within a reasonable time.

C Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as

provided in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter upon land.

E Electronically stored information.

E(1) Form in which information is to be produced. A request for electronically stored information may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

E(2) Duty to confer. In any case in which a request for production of electronically stored information ("ESI") is anticipated, any party may request a meeting to confer about ESI production in that case. Within 20 days of the request for a meeting, the parties shall meet and confer about the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; and any other issue a requesting or producing party deems relevant to the request for ESI. Failure to comply with this requirement shall be considered by a court when ruling on any motion to compel or motion for a protective order related to ESI.

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY

UPON LAND FOR INSPECTION AND OTHER PURPOSES

RULE 43

A Scope. Any party may serve on any other party [*a request*] **any of the following requests**: [*(1)*]

A(1) Documents or things. A request to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy any designated documents (including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices or software into reasonably usable form) or to inspect and copy, test, or sample any tangible things [*which*] **that** constitute or contain matters within the scope of Rule 36 B and [*which*] **that** are in the possession, custody, or control of the party upon whom the request is served; [*or (2)*]

A(2) Entry upon land. A request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B Procedure.

B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property upon which entry is requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and related acts.

B(2) **Time for response.** A request shall not require a defendant to produce or allow

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inspection, copying, entry, or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or **to which** the parties may agree [*upon*] in writing, a party shall serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, [*which items*] **and that the items are or** shall be organized and labeled to correspond with the categories in the request;

B(2)(b) **a statement that, except as specifically objected to, a reasonable effort has been made to obtain** [*as to*] any requested item not in the party's possession or custody, [*a statement that reasonable effort has been made to obtain it, unless specifically objected to,*] or that no such item is within the party's control;

B(2)(c) **a statement that, except as specifically objected to,** [*as to*] **entry will be permitted as requested to** any land or other property[*, a statement that entry will be permitted as requested unless specifically objected to*]; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to [*which*] **that** comes into the party's possession, custody, or control.

B(5) **Seeking relief under Rule 46 A(2).** A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so within a reasonable time.

C Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter upon land.

E Electronically stored information ("ESI").

E(1) Form in which information is to be produced. A request for [*electronically stored information*] **ESI** may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

E(2) Duty to confer. In any action in which a request for production of ESI is anticipated, any party may request a meeting to confer about ESI production in that action. Within 20 days of the request for a meeting, the parties shall meet and confer about the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; and any other issue a requesting or producing party deems relevant to the request for ESI. Failure to comply with this requirement shall be considered by a court when ruling on any motion to compel or motion for a protective order related to ESI.

MEMORANDUM

TO: Council on Court Procedures
FROM: Fraud Subcommittee – ORCP 71 B& C
DATE: March 31, 2016
RE: Consideration of Letter from Martin Jacqua, dated January 29, 2016

Fraud Subcommittee members: Maureen Leonard (convener), Judge Rex Armstrong, Judge Charles Zennache, Justice Jack Landau, Jay Beattie

Three subcommittee members (Armstrong, Beattie and Leonard) met by phone on March 16, 2016 and prepared this memo for review and endorsement by all subcommittee members.

Mr. Jacqua raised two concerns. The first questioned the wisdom of the 2011 amendment to ORCP 71B that abandoned the distinction between intrinsic and extrinsic fraud. The amended rule now allows a court to set aside a judgment within one year for, among other reasons, "fraud (whether previously called intrinsic or extrinsic)." The subcommittee reviewed Judge Zennache's research memorandum recounting that the federal courts (since 1946) and 34 states have abandoned the distinction. The subcommittee is in agreement that the amendment is justified as likely to promote justice more effectively, and as unlikely to undermine the finality of judgments.

Mr. Jacqua's second concern focused on ORCP 71 C, which recognizes the inherent power of the court to set aside a judgment for "fraud upon the court." Mr. Jacqua suggests that this section should be reconciled with 71 B and/or made clear that it refers only to extrinsic fraud. Subcommittee members discussed some cases in which a judgment was set aside for fraud upon the court. These included:

• *J.G. v. N.D.G.*, 348 Or 525, 236 P3d 709 (2010).
Grandmother filed an affidavit in an adoption proceeding falsely claiming that mother's address was unknown and notice of adoption must be by publication.

• *In Re Adoption and Change of Name of Walker*, 59 Or App 641, 652 P2d 362 (1982)
Attorney committed fraud on the court by submitting NY consent documents in adoption proceedings when he/she knew they were altered docs and consent was not final in NY.

Another case of fraud on the court is *In re estate of Heniken*, 244 Or 200 (1966), in which the claimant filed a probate action in Oregon claiming decedent died intestate, while knowing that her estate had already been probated according to her will in Washington.

The subcommittee discussed that "fraud on the court" probably had a different meaning from intrinsic or extrinsic fraud. At least the cases discussing fraud on the court did not make any mention of in/ex-trinsic distinction. The subcommittee discussed that this was OK and saw no need to reconcile 71 B and 71 C.

We recommend a letter to Mr. Jacqua thanking him for his letter and providing him a copy of Judge Zennache's research memo on intrinsic/ extrinsic fraud.

MEMORANDUM

To: **Council on Court Procedures**

From: **ORCP 69 Committee (Kristen David, Chair, Hon. Charles Zennache, Mark Petersen, Kary Pratt, Maureen Leonard)**

Re: **OCRP 71 – Extrinsic vs Intrinsic Fraud**

Date: **May 25, 2010**

Background: The Council on Court Procedures received written inquiry from a practitioner asking that the Council "eliminate the archaic and unreasonable distinction between intrinsic and extrinsic fraud as a basis for seeking relief from a judgment".

Question Presented: **Should the Council abolish the distinction between "intrinsic" and "extrinsic" fraud in ORCP 71?**

Answer: **Yes, we recommend that the distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order under Oregon Rule of Civil Procedure 71B(1)[1] (hereinafter "ORCP 71B(1)") should be abolished.**

Summary of Analysis: The committee feels the distinction should be abolished for several reasons. First, the distinction between extrinsic fraud and intrinsic fraud is unclear and leads to extensive litigation over the issue which distracts from the underlying issue of addressing fraud. Second, maintaining the distinction has the unintended consequence of making it more difficult for parties who have been defrauded to get justice and rewarding those who engage in brazen dishonest behavior. Third, experience in other jurisdictions proves that abolishing the distinction had not undermined the finality of judgments.

Oregon is one of a mere sixteen jurisdictions that continue to recognize a distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order.[2] ORCP 71B(1), entitled "Relief from Judgment or Order," addresses "fraud," stating, in pertinent part, that:

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[1] ORCP 71B(1)

[2] Other jurisdictions include: Georgia, Illinois, Iowa, Louisiana, Mississippi, Nebraska, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Texas, Wisconsin, Connecticut, and Virginia.

> On motion and upon such terms are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons…(c) fraud, misrepresentation, or other misconduct of an adverse party.[3]

Though there is no explicit distinction made between intrinsic and extrinsic fraud in the statutory language of ORCP 71B(1), Oregon case law has made it clear that relief from judgment or order cannot be granted for implicit fraud. The Oregon Supreme Court first drew a distinction between intrinsic fraud and extrinsic fraud, in a 1937 case entitled *Oregon-Washington R. & Nav. Co. v. Reid*.[4] The Court affirmed its *Oregon-Washington R. & Nav. Co.* reasoning and holding in a 1986 case, *Johnson v. Johnson*,[5] in which it reiterated that:

> It is not every species of fraud, however, that vitiates a judgment. It is fraudulent to give perjured testimony and such evidence may result in a judgment but, according to the great weight of authority, equity will not interfere for that reason alone, since the unsuccessful party had his opportunity to refute the false testimony. If the rule were otherwise, there would be no end to litigation.[6]

In *Johnson*, the Court explicitly declined to abolish the distinction between extrinsic fraud and intrinsic fraud as a basis for relief from judgment or order.[7] The Court also stated that precedent, including a United States Supreme Court case entitled *United States v. Throckmorton*,[8] and the fact that the legislature failed to abolish the distinction supported its decision to maintain the current Oregon rule.[9]

The distinction between extrinsic fraud and intrinsic fraud is confusing and extremely subjective. Extrinsic fraud is has been defined as "…fraud that has induced a party to default or to consent to a judgment against him or her."[10] In contrast, intrinsic fraud has been defined as:

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[3] ORCP 71B(1)
[4] *Johnson v. Johnson*, 302 Or 382, 389 (1986).
[5] *Johnson v. Johnson*, 302 Or 382, 389-90 (1986).
[6] *Id.* at 389 (quoting *Oregon-Washington R. & Nav. Co. v. Reid*, 155 Or 602, 609 (1937)).
[7] *Id.*
[8] *United States v. Throckmorton*, 98 U.S. 61 (1878). See also discussion below re: abolition of the distinction.
[9] *Johnson*, 302 Or at 389-90.
[10] 37 C.J.S. Fraud § 3 (2009).

> [A]ny fraudulent conduct of the successful party during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his or her injury after announcing that he or she was ready to proceed with trial.[11]

The subjectivity of the distinction between extrinsic leads to unnecessary time spent arguing over which type of fraud may be before the court and disparate treatment among cases. "[T]he problem is that the cases attempting to apply the distinction are inconsistent, and the definition of intrinsic fraud is incomprehensible. It also seems that in some cases of gross fraudulent presentation of facts or of perjury, some relief should be available.[12]"

Further, parties engaging in intrinsic fraud may even be rewarded by such behavior when faced with less sophisticated adversaries, such as pro se litigants. In such cases, the less sophisticated parties may not be aware or understand how to refute the fraudulent evidence. Perhaps even more troublesome is the fact that such a party may not know how to identify such fraudulent evidence. It is safe to assume that had a party known that the testimony or evidence presented was fraudulent, they would have addressed the issue in the course of the proceedings rather than resting the ultimate outcome of the case on the possibility of prevailing on a motion for relief from order or judgment. By allowing a distinction between extrinsic and intrinsic fraud to remain in place in Oregon, more sophisticated and crafty parties may be rewarded with an undeserved judgment simply by duping their adversary.

The United States Supreme Court and the federal court system has done away with the distinction. Just over a decade after deciding *Throckmorton*, the Supreme Court abandoned its hard line stance in favor of a narrower rule.[13] As more time passed, the federal distinction

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[11] *Id.*

[12] Council on Court Appointed Procedures, Oregon Rules of Civil Procedure and Amendments: Preliminary Drafts and Final Draft, at 65 (1979-1981 Biennium).

[13] In *Marshall v. Holmes*, 141 U.S. 589 (1891), a mere 13 years after its ruling in *Throckmorton*, the Supreme Court held that courts of equity could enjoin the enforcement of a judgment at law if that judgment was fraudulently

further tapered through case law until it was finally abrogated by the 1946 Amendment to Rule 60(b)(3) of the Federal Rules of Civil Procedure (hereinafter "FRCP 60(b)(3)").[14] Though there was no mention of relief from judgment based on fraud of any type under the Federal Rules of Civil Procedure as adopted in 1937, the 1946 Amendment to FRCP 60(b)(3) officially provided a relief from judgment for both intrinsic fraud and extrinsic fraud, thereby ending the federal distinction between intrinsic and extrinsic fraud as a basis for relief. FRCP 60(b)(3) currently states, in pertinent part, that:[15]

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons…(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party…

The Notes of the Advisory Committee on Rules for the 1946 Amendment serve to clarify the abandonment of the extrinsic/intrinsic distinction in case law. The Notes state that fraud, whether intrinsic or extrinsic, committed by an adverse party is an express ground for relief as "There is no sound reason for their exclusion."[16]

In addition to the federal courts, thirty-four states, the District of Columbia, and Guam have all explicitly abandoned the distinction between explicit fraud and implicit fraud as a basis for relief from judgment or order in their respective rules of civil procedure.[17] There is no evidence that those jurisdictions have courts inundated with motions for relief of judgment nor that that parties do not feel that their cases have achieved finality.[18]

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obtained by the use of a forged instrument and false testimony which was not discovered until after the judgment had been entered and the time for a new trial motion had run.

[14] Fed.R.Civ.P. 60(b)(3) Advisory Committee's Notes.

[15] *Id.*

[16] *Id.*

[17] *See* Honorable James J. Brown, Judgment Enforcement Sect. 8.11. (3rd Ed. 2009).

[18] It should be noted that most of the 37 jurisdictions have a time limit for moving for relief of judgment varying from six months to a "reasonable time." As such, the option to make such a motion is not without limits.

In conclusion, and for the foregoing reasons stated above, Oregon should amend ORCP 71B(1) to abolish the distinction between intrinsic fraud and extrinsic fraud as a basis for relief from judgment or order. Doing so comports with widely accepted policy reasons such as deciding each case equitably and does not jeopardize the finality of judgments nor over-extend judicial resources.