DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, September 10, 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
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:

Hon. D. Charles Bailey, Jr.
Arwen Bird

Guests:

Matt Shields, OSB

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 45 ORCP 47 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 9 ORCP 22 ORCP 27 ORCP 36 (3 versions) ORCP 43 ORCP 45 ORCP 47 ORCP 57	ORCP 15 ORCP 22 ORCP 71

I. Call to Order

Mr. Brian called the meeting to order at 9:35 a.m.

II. Approval of June 4, 2016, Minutes

Prof. Peterson noted that Mr. Brian had pointed out an error in the spelling of Frank Pozzi's name on page three of the draft minutes (Appendix A). Mr. Bachofner made a motion to approve the minutes with that correction. Judge Bachart seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters

A. Council Member Mileage

Prof. Peterson explained that the Legislature gives the Council approximately $53,000 per biennium for general operating expenses, while the Oregon State Bar gives the Council $4000 a year earmarked for travel. He stated that the state money goes into a restricted account at Lewis and Clark Law School so it can be pushed forward to the next biennium if necessary but, If the travel money is not used, it does not carry over to the following year. The Council's practice has been to take care of mileage expenses for judge members and the public member first and, if any funds remain, to then pay for lawyer members' travel. Prof. Peterson explained that the Council has usually been able to manage with the travel funds it has available but that the Bar has been reluctant to allow the Council to use funds from one year to pay for non-reimbursed expenses from the previous year. He stated that, according to Council records, all judge members and our public member have had their travel expenses reimbursed to date. He asked any members who may have been overlooked to let staff know, and also asked lawyer members who want to be reimbursed for travel to send Ms. Nilsson an e-mail letting her know which meetings were attended so that she may take care of the paperwork. Prof. Peterson stated that the Council will likely have enough funds to pay all members through the September meeting, but may have to draw on Council funds held by the Law School to pay for travel reimbursement for the December meeting.

Mr. Brian asked about the current balance in the travel fund from the Bar. Prof. Peterson stated that about $600 is remaining. He explained that the Council typically does not pay for room and board for traveling members because there is simply not enough money. Mr. Bachofner stated that Bar staff had approached him about the issue of travel reimbursement. His understanding is that the Council has sometimes been short on funds because of the practice of paying a prior year's expenses from the current year and this is why the Bar is reluctant to do this. He noted that the idea for moving to annual sessions actually arose as a potential way to justify asking the Legislature for additional funds.

B. Potential for Annual Council Sessions

Prof. Peterson explained that, at end of the June Council meeting, Mr. Bachofner had approached him regarding the possibility of changing to annual Council sessions. He pointed out that Council staff had not included the topic on this month's agenda and, therefore, the requisite public notice requirements prevented a vote on the topic. He observed that the Council may nonetheless discuss the issue now and put it on the agenda for December's meeting if there is interest. He pointed out that Council staff does not have a position on the change other than that it potentially could be done.

Prof. Peterson stated that a concern that has been raised by members of the bar and, indeed, Council members in the past is that the Council's current biennial schedule makes it less agile and nimble than it could be with annual sessions. He noted that the current biennial schedule does allow Council members and staff a period of nine months between December of even-numbered years and September of odd-numbered years to regroup. He explained that Council staff uses this downtime to catch up on administrative matters such as maintaining the website and preparing materials for the upcoming biennium. He stated that the move to an annual schedule would provide for two more meetings every two years but that those meetings would be divided into seven each year, meaning that only five meetings would be dedicated to analysis of the rules and crafting potential amendments. This would result in a more compressed time line and would require a commitment on the part of Council members to get the work done in a timely manner. (Appendix B).

Mr. Bachofner stated that there would be a number of benefits to changing to annual Council sessions now that the Legislature is meeting annually. He noted that one of the biggest problems with the Council is that it takes so long for rule changes to take effect. He posited that there would still be some lag time in annual sessions, but that timeliness would be improved with a constant process of amendments being before the Legislature annually and being able to make those changes more nimbly, particularly with ongoing electronic filing and other technology changes. He stated that this change would justify an increase in Council funding in a very acceptable way to the Legislature. He stated that colleagues with whom he has spoken informally about the issue like the idea, but that his main concern is the potential impact on Council members and, particularly, Council staff. Mr. Bachofner explained that he had met with Council staff and talked at length and that staff was willing to move to annual sessions if the Council agreed. He pointed out that the impact on members would include two extra meetings and the need to work steadily throughout both years. He stated that another issue that needs to be addressed is the fact that he is the chair-elect this year but his term ends in August of 2017. He stated that this would not be a problem with a change to annual sessions but, otherwise, a different chair will need to be found for the new biennium.

Mr. Bachofner stated that he believes that there are enough benefits to the idea of annual sessions that the Council should try it, if members are willing to put in the extra work. Mr. Brian pointed out that he is not so sure that the Council needs to be nimble, as its function is more ponderous. He observed that it will be difficult for those members outside of the Portland area to come to meetings on a more regular basis. He stated that he is not in favor of a change to annual sessions. Judge Zennaché stated that he is not necessarily in favor of the change either because, as a policy, being more deliberative is a better way to approach changes to the ORCP. He also stated that he has not looked at the statutes and cannot remember if short sessions are considered regular sessions and that this may raise a legal issue. Mr. Eiva agreed with Judge Zennaché and Mr. Brian. He stated that he does not feel that the rules are fundamentally broken and that litigants need to be able to rely on the rules. He stated that he feels that slow, occasional change is better with the practice of law in terms of reasonable expectations of what will be governing your case.

Mr. Brian stated that the Council will discuss the issue and take a vote at the December meeting.

C. Council Rules of Procedure

Prof. Peterson stated that Council staff had made some draft changes to the Council's Rules of Procedure, which have not been looked at since 2009. (Appendix C). These draft changes include items that more accurately state how the Council actually operates, as well as proposed modifications in the event of a vote to change to annual sessions. He suggested that the Council revisit the Rules of Procedure at the December meeting.

D. Survey of Bench and Bar

Prof. Peterson reminded the Council that each biennium the Oregon State Bar assists the Council by sending a survey to the bench and bar asking whether those surveyed know what the Council is and how they think the Council is doing. He stated that Council staff had retooled last biennium's survey (Appendix D) to make sure that all of the response options were evenhanded. He pointed out that survey takers were also invited to make suggestions for changes to the ORCP. He explained that, in the past, respondents were told that their name would not be affirmatively linked with any suggestion unless they specifically gave permission. The proposed survey has been changed to indicate that respondents should provide their name if they wish to be available for any follow-up or questions from the Council. Prof. Peterson pointed out that one of the most important functions of the Council is to weed out ill-considered suggestions. He asked Council members to give feedback on the survey questions and explained that, if the Council moved to annual sessions, the survey would need to be sent relatively quickly. Ms. Nilsson noted that there would be no harm in sending the survey early, even if the Council were to choose to continue with biennial sessions. Prof. Peterson noted that there would just

be a lag time between when suggestions were proposed and when they were considered.

Mr. Beattie stated that he has no problem with this type of poll, which is similar to something handed out at the end of a continuing legal education seminar. However, he wondered what would happen if someone rated the Council as extremely poor and how that would affect the Council's operation. Prof. Peterson explained that, at one point, the Legislature wanted the Council to meet key performance measures and that these questions were useful for that purpose. He stated that this is no longer a requirement imposed by the Legislature. He noted that the Council receives relatively few "poor" ratings and that the stakeholders seem to think that the Council is doing a good job. Mr. Brian pointed out that we need to know negative thoughts as well. Prof. Peterson agreed that it is good to get all types of feedback. Mr. Bachofner stated that he believes that the survey should be sent out, even if the Council does not go to annual sessions. Judge Zennaché expressed a concern regarding question number eight's assertion that the Legislature once exercised exclusive authority over the ORCP. He wondered whether that is true, as he thought that the courts had always exercised authority to amend the rules and that this is part of why the Council is composed the way it is. Prof. Peterson explained that, the way the questions is worded, it says that the Legislature "did exercise" authority at one point, not that it had the right to do so. Mr. Bachofner observed that, before the creation of the ORCP in 1979, the Legislature did create the procedures by statute. Judge Zennaché stated that he still has concerns about it being called "exclusive," since courts have always inherently had the power to make their own rules.

Judge Leith noted that the other questions are all things in response to which the Council might try to adjust its performance, but that it seems a bit strange to include a question like question number eight because the Council cannot do anything to change it. Prof. Peterson stated that, in terms of justifying the Council's existence, lawyers and judges overwhelmingly say that the Council should retain the job of creating and amending the rules. Judge Zennaché again expressed concern about the word"exclusive." Mr. Bachofner stated that this word can be removed, as it merely indicates what has happened historically. Ms. Payne stated that she is not sure that people's opinion about who has authority matters, because it has in fact been given to the Council. Mr. Bachofner replied that we may not care that much about the response but, when there is a positive response regarding the Council being in charge of the ORCP, it does help to justify the Council's continued existence to the Legislature. He observed that it is something of a public relations issue. Prof. Peterson explained that there is always a very positive response to this question from lawyers, the majority of whom do not want a largely non-lawyer Legislature writing the rules. Mr. Bachofner agreed.

Mr. Brian suggested deferring sending the survey. He asked Council members with comments to get them to staff and stated that the Council can revisit the issue in December when there has been more time for consideration.

E. Election of Officers Postponed Until December

Prof. Peterson explained that the election of officers should have been included on the agenda for this meeting, but that the staff somehow seems to consistently miss this issue in September of even-numbered years. He noted that it will be included on the agenda for December's meeting. He also observed that it has always seemed odd that the election of officers in odd-numbered years happens at the first meeting of the biennium, and noted that changing to annual sessions would allow for elections at the end of the session, which might be an improvement.

F. Feedback from the Bar

Ms. Nilsson stated that attorney Martin Jaqua, who had made a suggestion regarding ORCP 71 early in the biennium, had expressed satisfaction that the Council had given his suggestion due consideration, despite not taking action. He also thanked the Council for moving forward with changes on ORCP 22.

IV. Old Business

Mr. Brian explained that today the Council will be discussing whether to publish draft amendments for public comment and that, in order to publish a draft amendment, Council members by statute need to pass that amendment by a simple majority of those present, as long as there is a quorum. Prof. Peterson stated that "publication" used to refer exclusively to the printing of the draft amendments in the Advance Sheets of the Oregon Reports. He remarked that lawyers do not pay as much attention to that publication as they used to and that, while the Council still includes the draft amendments in the printed and online versions of the Advance Sheets, the primary means of notifying lawyers is an e-mail blast to Oregon State Bar members notifying them that the draft amendments can be found on the Council's website. He stated that the Council used to receive comments in the form of actual letters through the U.S. mail but that this has not happened recently and that the primary means of communication is through e-mail. Mr. Crowley asked whether the e-mail blast from the Bar will include the proposed changes as an attachment or as a link to the website. Mr. Shields stated that he would check into that. Ms. Payne asked how comments are received. Ms. Nilsson explained that comments may be directed to the chair or to Council staff by mail or e-mail. Judge Zennaché recollected that Council staff compiles the comments for review by Council members prior to the December meeting. Prof. Peterson agreed and noted that bar members have also appeared in person at the December promulgation meeting to make verbal comments.

A. Staff Recommendations for Changes to Rules

1. ORCP 27

Prof. Peterson explained that the only change to Rule 27 was one pointed out by staff at the Office of Legislative Counsel after the end of the prior biennium. In subsection B(2), the word “or” was inadvertently omitted. He stated that adding this word does not change the meaning of the rule but, rather, makes it symmetrical with the other sections.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 27 (Appendix E)

Mr. Beattie made a motion to publish the draft amendment to Rule 27 for public comment. Judge Zennaché seconded the motion, which was approved unanimously by voice vote.

2. ORCP 57

Prof. Peterson explained that the only change to Rule 57 is to remove from subsection F(3) extraneous lettered headings (a), (b), and (c) that are contrary to Council format, which reserves that lettering for paragraphs [e.g., 7 B(1)(a)]. He noted that the Office of Legislative Counsel had also pointed out this formatting inconsistency.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 57 (Appendix F)

Mr. Beattie made a motion to publish the draft amendment to Rule 27 for public comment. Mr. Bachofner seconded the motion, which was approved unanimously by voice vote.

B. Committee Updates/Reports

1. ORCP 7/9/10 Committee

Mr. Bachofner reminded the Council that the changes to Rule 9 stem from an attempt to improve e-mail service and types of proof of service, and that the changes are primarily in section C and section G.

Mr. Brian asked for clarification that, under the proposed amendment, e-mailing a document is equivalent to putting a letter in the mail. Mr. Bachofner agreed that they are equivalent because there are still 3 days added under e-mail service.

Ms. Payne noted that the change in section G removes the current

language regarding consent in writing to e-mail service and observed that nothing is stated in that section about consent. She expressed concern that, since the only place in the rule that addresses consent to e-mail service is the language about certificates of service in section C, self-represented litigants might get confused and think that they no longer need to receive consent for e-mail service. Judge Wolf noted that the draft amendment requires the other party either to agree to be served by e-mail or to indicate that they received it, whereas the current rule requires both agreement to e-mail service *and* indication that it has been received. Ms. Payne stated that it is odd that the section that authorizes e-mail service no longer says that a party must consent to e-mail. She expressed concern about removing language about a requirement that is still a requirement. Mr. Beattie agreed that this could be a problem.

Mr. Bachofner explained that section G says that a party can serve by e-mail if the other party consents, and explained that the only time a serving party would state in the certificate of service that consent was given is if the other party had consented. Judge Wolf stated that someone who reads section G in isolation would see that consent is no longer required and may believe that they can serve by e-mail without consent and that service will be effective, even if the e-mail is not acknowledged. However, he pointed out that parties should always read the entire rule. Ms. Payne observed that legislative analysis usually states that, when something is removed from a law or rule, it is removed for a reason. Judge Roberts shared Ms. Payne's concern and stated that it seems odd to impose an affirmative requirement for service by way of the certificate of service if the language of the requirement is not contained in the section authorizing service by e-mail. She suggested squaring up the language in sections C and G so that what a party is required to do is what a party is required to certify and vice versa.

Mr. Bachofner explained that there is a difference between a party certifying that they have received consent to service by e-mail versus requiring consent in order to be able to serve someone by e-mail. He noted that the requirement for consent to service by e-mail has been removed, but that a party may still voluntarily consent to service by e-mail, so that service method is still effective and can be so noted on a certificate of service. Judge Roberts again pointed out that the rule is confusing without explanatory language in section G. Judge Leith observed that, under subsection C(2), a party does not need consent to e-mail service as long as the serving party receives acknowledgment of receipt, so requiring consent would also be inconsistent with subsection C(2), the certificate of

service requirement. Mr. Bachofner explained that, if someone consented and asked for documents to be sent to them by e-mail, the intent is to have that service be effective, even if confirmation of receipt has not been received.

Mr. Beattie suggested coordinating the two sections by adding language in section G indicating that e-mail service is complete when receipt is acknowledged or the party has agreed in advance to service by e-mail. He noted that certification typically states that someone has served in accordance with the rule, and proposed that the rule should also say "when e-mail service is completed." Judge Armstrong agreed that this makes sense.

Mr. Brian proposed a scenario where he and Mr. Bachofner are opposing counsel on a case. He noted that, if Mr. Bachofner wants to serve him by e-mail, in order for service to be effective, Mr. Brian either has to agree to accept service by e-mail or Mr. Bachofner needs to receive confirmation of receipt from him. Mr. Brian asked for clarification of how that confirmation would occur. Mr. Bachofner stated that it could include Mr. Brian e-mailing something back that includes the body of his transmitting e-mail, sending a fax, or some other kind of proof. Judge Wolf explained that Mr. Brian would have to do something affirmatively. Prof. Peterson observed that, if a party does not want to receive service by e-mail, that party can simply not respond, forcing the other party to attempt service in another fashion. He stated that this change makes e-mail one of the regular tools for service because, with electronic filing, it has become the new standard. He suggested that one possible solution to the problem would be to add after the first sentence of section G, "Service is complete upon filing of a certificate of service as specified in subsection C(2) of this rule." Judge Armstrong stated that service is actually complete before the filing of the certificate.

Ms. Payne stated that the certificate of service serves as confirmation that service is complete, so the certificate of service section should be referring to the section where service occurred, not the other way around. She suggested that the language from the section on certificates of service should be inserted in section G. Mr. Bachofner countered that section C is where all of the requirements for different types of certificates of service are located and suggested that it would be out of context in section G. He suggested instead changing the new language in section G that reads, "Whenever under these rules service is required or permitted to be made upon a party..." to "Whenever under these rules service is required or

permitted to be made upon a party pursuant to subsection C(2)..." Judge Armstrong suggested using the word “under” instead of “pursuant.” Ms. Wray pointed out that section F does not make a similar reference to subsection C(1). Mr. Bachofner agreed. Prof. Peterson pointed out that subsection C(1) is very different because you have to have a fax confirmation sheet, whereas you are not certain whether an e-mail has been received. Mr. Bachofner modified his suggested language to read, “under subsection C(2) of this rule." Judge Leith stated that he does not believe that subsection C(2) requires consent or confirmation but, rather, just explains how you certify it. Judge Roberts asked whether service is required or permitted under the proof of service provisions. She stated that those provisions just allow a party to certify that the party has served the document.

Mr. Beattie stated that you do not complete service by e-mail unless there is an acknowledgment of receipt or unless there is a pre-existing agreement. Judge Leith observed that all Council members are in complete agreement on what we want the rule to do, but that we are struggling with the best way to say it. He observed that the substantive requirement should probably be in section G. Mr. Beattie suggested adding the language, “Service is complete under this rule upon acknowledgment of receipt of the e-mail or on transmission of the e-mail if the receiving party has consented to service by e-mail." Judge Leith warned that the final language should ensure that the “if” clause at the end of the sentence does not look ambiguously like it modifies both parts. He stated that it should be clear that it is not if there is an acknowledgment but, rather, if there is consent. He suggested the following language, “Service is complete under this rule upon acknowledgment of receipt of the e-mail or on transmission of the e-mail if the receiving party has consented to service by e-mail.” Ms. Payne noted that, under subsection C(2), confirmation is different from acknowledgment. She suggested changing that word. Prof. Peterson recommended putting this language at the end of the first new sentence in section G.

After further wordsmithery, including a change from Judge Armstrong to move a clause to avoid an antecedent modifier problem, the Council agreed on the following language to be inserted in section G: “Service is complete under this rule upon confirmation of receipt of the e-mail or, if the receiving party has consented to service by e-mail, on transmission of the e-mail.”

Mr. Bachofner made a motion to add the suggested language to the draft

amendment of Rule 9. Judge Roberts seconded the motion, which passed unanimously by voice vote. Judge Armstrong made a friendly suggestion to change the word "upon" to "on" wherever it appears in this draft amendment and in any of the other amendments under consideration. Council members agreed to this suggestion.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 9 (Appendix G)

Mr. Bachofner made a motion to publish the draft amendment to Rule 9, as amended, for public comment. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

2. ORCP 22 Committee

Ms. Payne reminded the Council that the proposed change to Rule 22 relates to third-party practice and that this was achieved by changing the word "plaintiff" to "any party" in subsection C(1). Prof. Peterson explained that Council staff had made technical and grammatical changes to the rule including: changing the word "such" where appropriate; changing the word "which" to "that" where appropriate; and removing both extraneous lettered and numbered headings that are contrary to Council format. He stated that, in reading the rule carefully, staff noticed two instances (in subsection C(1) and in subsection C(2)) of the use of the phrase "third party" where the meaning was "third party defendant" and made the appropriate change in those two places. Mr. Bachofner asked whether there could ever be a situation where a third party could be something other than a third-party defendant. Judge Armstrong confirmed that, after a party has been brought in by someone, that party is a defendant.

Judge Leith observed that, every time the adjectival phrase "third party" is used in this rule, it should properly be hyphenated as "third-party." Mr. Bachofner agreed and stated that he would like to see such uses corrected. Judge Leith made a motion to make the hyphenation of "third-party" correct throughout Rule 22 when used to modify a noun. Judge Armstrong seconded the motion, which passed unanimously by voice vote.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 22 (Appendix H)

Judge Zennaché made a motion to publish the draft amendment to Rule 22, as amended, for public comment. Mr. Bachofner seconded the motion,

which was approved unanimously by voice vote.

3. ORCP 45 Committee

Ms. Wray reminded the Council that the main change to Rule 45 is a change to section F that allows to a reasonable degree an increase in the number of requests for admissions related to business records that a party can serve. She noted that this is reflected in the new subsection F(2). Mr. Bachofner stated that the change is designed for cases where there is no cooperation from the other side so that an attorney can at least submit a request to admit the genuineness of relevant documents without having an impact on the limitation on the total number of requests (30). Ms. Wray noted that staff had suggested some minor technical amendments to section D.

Mr. Eiva suggested that there may be superfluous language in subsection F(2) that might create the impression that there might be limitations as to what records are subject to the proposed subsection F(2). He asked whether the committee wanted the amendment to apply to any admissions to establish Rule 803 admissibility and authenticity. He suggested that the amendment could simply read, “the number of additional requests for admission to establish the authenticity and admissibility under Rule 803(6) of the Oregon Evidence Code.” Mr. Bachofner stated that he wanted to make clear that the exception only related to the hearsay aspect of records. Mr. Eiva pointed out that Rule 803 is the hearsay rule, and wondered if there is a category of writings within Rule 803 that the committee intended not to be included. He noted that some might see “relating to the business record exception of hearsay” as a limiting clause. Mr. Bachofner replied that it is a limiting clause purposefully drafted by the committee because the committee did not want the amendment to be an exception when the other party says “admit that this is admissible.” He stated that the proposed amendment only relates to the business records exception. Mr. Eiva again asked if the proposed subsection F(2) is limiting Rule 803(6) admissibility. Ms. Gates also asked for clarification about whether there are non-business records for which the amendment does not allow parties to use subsection F(2). She agreed that spelling out what Rule 803(6) says could potentially suggest a limitation that is not intended. Judge Roberts also agreed that, since Rule 803(6) only relates to the business records exception to the hearsay rule, the language seems redundant. Mr. Eiva repeated his suggestion for modifying the language of the sentence in question. He also suggested that the word "business" before "records" might be

superfluous.

Mr. Bachofner pointed out that he wants it to be clear that this is only an exception for business records. Judge Wolf stated that subsection (6) relates only to business records and nothing else. Mr. Beattie wondered if there might be another type of business record that Mr. Bachofner had in mind. Mr. Bachofner stated that there was not, but explained that the reader is drawn to the easily recognized "business records" reference. Ms. Leonard agreed that she liked the reference as a key. Ms. Nilsson pointed out that the term is also used in the lead line. Ms. Gates observed that Rule 803(6) uses more than just the term "records," and includes other categories of documents. Judge Armstrong suggested that the "records" reference could be mischievous in this case. Mr. Bachofner restated the suggestion of putting a period after the word "code" and deleting, "relating to the business records exception of hearsay." Mr. Eiva suggested replacing the word "records" with "documents" in both subsection F(1) and subsection F(2) to avoid any possible confusion relating to the other categories of documents in Rule 803(6). Mr. Brian explained that the words in Rule 803(6) are broader than the generic term "business records exception." Mr. Bachofner asked whether the Council still wanted to keep the term "business records" in the lead line of subsection F(2). After some discussion, the Council agreed that this generic term is acceptable in the lead line. Ms. Wray suggested changing the language in subsection F(1) to "Excluding requests identified in subsection F(2) of this rule..."

Judge Zennaché asked whether lead lines are a part of the rule or not. Prof. Peterson observed that the Office of Legislative Counsel, not the Legislature, writes the lead lines for the Oregon Revised Statutes, whereas the Council writes and votes and promulgates lead lines. He stated that he does not know precisely what that means. Judge Armstrong noted that, for statutes, a statute on statutory construction [ORS 174.540] says that captions do not mean anything, and wondered whether that extends to the Council. He stated that he assumes that it does. Judge Wolf observed that it is clear that there is enough history that the intent is to encompass all documents described in Rule 803(6).

Judge Roberts suggested deleting the word "thereby" after the changed word "furthered" in section D. The Council agreed.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 45 (Appendix I)

Mr. Bachofner made a motion to accept all suggested amendments as drafted by the Council. Judge Wolf seconded the motion, which was passed unanimously by voice vote.

Mr. Bachofner made a motion to publish the draft amendment to Rule 45, as amended, for public comment. Ms. Leonard seconded the motion, which was approved unanimously by voice vote.

4. ORCP 47 Committee

Ms. Gates reminded the Council that the primary changes to Rule 47, other than technical and grammatical changes, are in sections A and B to ensure that parties can move for summary judgment to challenge affirmative defenses. She stated that the language is consistent between sections A and B to refer to the moving party and the claims or defenses that may be moved against. Prof. Peterson explained that the draft also includes technical and grammatical changes that were suggested by the staff and approved by the committee.

Mr. Beattie asked why the new language states, "any type of claim" instead of "any claim." Ms. Gates explained that the original suggestion that came to the Council stated that some judges were not allowing motions for summary judgment against affirmative defenses. Using the phrase, “any type of claim” was seen as the most broad way of encompassing any claim that could potentially be moved against, and the amendment added “claim or defense” to make it abundantly clear that all types of claims and defenses can be subject to a motion for summary judgment. Mr. Bachofner stated that “any claim” could include counterclaims or cross-claims. Prof. Peterson observed that the committee made the decision to delete the words “counterclaim or cross-claim” and that he believes that is why the “any type of claim” language was used. Judge Armstrong noted that someone could say that a counterclaim is not a claim but, rather, that it is a type of claim.

Judge Roberts suggested removing the word “such” in the new language in section G. Judge Armstrong agreed and expressed a desire to change the words “pursuant to” to “under.” After some wordsmithery, the Council agreed to the following language for the beginning of that section:

> “Should it appear to the satisfaction of the court at any time that an affidavit or declaration presented under this rule was presented in bad faith or solely for the purpose of delay, the court shall order the party filing the affidavit or declaration...”

Justice Landau observed that, in section D and section E, the word “shall” has been changed to “must,” but that this is not the case in section C and section G. He stated that it appears that, whenever there is a reference to something the court does, the word “shall” is used and, whenever there is a reference to something a party does, the word “must” is used. Prof. Peterson agreed and explained that the rule is not ordering that a party “shall” do something–if a party wants what they seek to achieve (here to obtain a summary judgment), that party “must” meet the rule’s requirements.

Mr. Bachofner asked about the language that states that the court “shall promptly order the party” and wondered why the court would need to make the order promptly. Judge Zennaché agreed and suggested deleting the word “promptly.” The Council agreed.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 47 (Appendix J)

Judge Armstrong made a motion to accept all suggested amendments. Mr. Bachofner seconded the motion, which was approved unanimously by voice vote.

Mr. Beattie made a motion to publish the draft amendment to Rule 47, as amended, for public comment. Judge Armstrong seconded the motion, which was approved unanimously by voice vote.

5. Electronic Discovery

Judge Zennaché explained that the main goal of the changes to Rule 36 is a modification of the provisions that relate to what constitutes an undue burden and under what circumstance a party may receive a protective

order based on undue burden. He stated that there are two versions of this draft amendment and that both versions are the same but for one difference: whether the amount in controversy is included among the factors that a court considers when deciding what constitutes an undue burden. He stated that the committee's changes can be found in subsection C(1) and state that a court, in deciding what constitutes an undue burden, would consider, among other things, the proportionality of the request for production to the needs of the case, including several factors. He stated that the difference between the two versions (Appendix K) before the Council is that one includes the amount in controversy and one does not. Justice Landau pointed out that version B, which does not include the amount in controversy, also uses the language "the court may consider" instead of "the court shall consider." Judge Zennaché thanked him for the clarification. Judge Armstrong agreed that version B is less directive than version A.

Judge Zennaché explained that both drafts include technical and grammatical changes suggested by the staff. Prof. Peterson stated that the committee had already reviewed and approved these changes, which include removal of extraneous numbered headings that are contrary to Council format, which reserves that type of numbering for subsections, and changing the word "which" to "that" where appropriate.

Judge Leith stated that he likes having the list of factors for a court to consider because it is useful for a court to have suggestions of what are potentially relevant considerations. He observed that it is easy to imagine a case where it would be unnecessary to consider all of the factors because one of the factors is so overwhelming in the balance that there is no reason to bother with the complete list, so the "shall" seems inappropriate. He also stated that he supports a hybrid of the versions that uses the word "may" but includes the amount in controversy as a factor. Mr. Beattie agreed and stated that he thought that "may" and "shall" would be the only differences between the versions. Mr. Eiva remarked that he had proposed version B and that he specifically wanted the amount in controversy removed as an emphasis in the rule, particularly since the phrase "issues at stake in action" already appears in the list and the amount in controversy is embraced by that concept. He also suggested changing the version (A) that includes the amount in controversy to use the "may" language rather than the "shall" language because it reads better and it would be ridiculous to require the court to consider a fact that would not be relevant to a particular case. He stated that he feels that it is important to allow the bar the opportunity to comment on both versions.

Mr. Crowley pointed out that the language in version A is consistent with Rule 26 of the Federal Rules of Civil Procedure (FRCP) and stated that he thinks, because this issue very important for the entire bar, that it is a good idea to include a version that uses the language of the federal rule for people to have an opportunity to comment. He noted that version B does raise possibilities for tweaking the federal language. He stated that the Council is not in a position today to decide ultimately what the rule should be anyway. Ms. Gates noted that she will ultimately vote against both versions and that there is no need to rush. She stated that she would like to see some data from the federal courts' application of the amended FRCP 26. Ms. Gates then suggested voting no on both versions and tabling the issue until next biennium.

Mr. Eiva observed that the only reason he would offer to vote to publish version B is if the Council wants version A to move forward. Mr. Bachofner recalled that there was a pretty consistent outcry that we do not want to be basing our decisions on what the federal case law is saying. Judge Armstrong stated that he thought that the Council could adopt language it thought would be useful while, at the same time, making it clear that the Council does not want anyone to consider that what the federal court or any other body using that language is doing is determinative of Oregon. He observed that Oregon likes its courts to do their own thinking.

Judge Zennaché took issue with the suggestion that this change amounts to an adoption of the federal rule, because it does not. He stated that the federal rule addresses the scope of discovery on the front end and that the sole purpose of the Council's proposed change is to try to identify factors for the court to consider in ruling on motions for protective orders, given the somewhat unique and evolving costs and issues involved with electronic discovery. He does not see this change as an attempt to "federalize" Oregon's rules. He stated that he would be amenable to changing the language in both drafts to "may" and having the only difference be whether the language regarding the amount in controversy is included because it gives more information. He expressed concern that mixing "may" and "shall" may result in not getting meaningful feedback from the bar.

Judge Leith asked whether anyone was wedded to the word "shall" or whether it can be changed to "may" in both versions. Prof. Peterson suggested that a third version could be published: one that includes all factors with the word "shall"; one that includes all the factors with the word "may"; and one that omits the amount in controversy and uses the

word “may.”

Ms. Gates asked what the rush is to get something out there, and observed that this would be the first time since she has been on the Council that three versions of a rule would be published. Judge Zennaché pointed out that the process has not been rushed and that the drafts before the Council are the product of very careful consideration by the committee. He also noted that there has been a comprehensive Electronic Discovery Committee for several biennia and that this topic has been discussed for years. He stated that he is not sure he is going to support either of the versions yet, but that the current discussion is merely about publishing the drafts to get feedback from everyone else. He stated that feedback is very important and that he wants to hear what the rest of the bar has to say. Mr. Keating opined that it is important that “shall” should be in one of the versions. He stated that his point of view is that, when he asks a judge to consider a factor, he would like to know whether the judge considered that factor or not. He noted that, if the rule says that the judge shall consider these factors, presumably the judge will need to respond and state that he or she has considered them, even if the movant loses. He stated that, in his view, mixing the two is not a good idea. He was under the impression that, at the last Council meeting, the only difference was between the words “shall” and “may,” and stated that he was surprised to see that the amount in controversy was also omitted in one version. Mr. Eiva pointed out that he had specifically promoted that language and that the Council had voted on it.

Judge Roberts agreed with Prof. Peterson’s suggestion that there should be three versions. Mr. Beattie suggested that the three versions should be as follows: 1) current version A; 2) current version A with “may” instead of “shall”; and 3) current version B. He also suggested that, when Council staff publishes the amendments on the website, that a header be included to make clear that there are different versions of this rule, perhaps with some type of explanation of where the changes are on each.

Ms. Payne suggested publishing four versions since there are two questions at stake: 1) “shall” or “may”; and 2) include or exclude amount in controversy. Mr. Beattie disagreed. Prof. Peterson opined that anyone who likes the current version B would find “may” acceptable rather than “shall.”

Judge Roberts suggested striking the redundant word “thereof” in paragraph B(3)(ii).

a. ACTION ITEM: Vote on Whether to Publish Any of the Draft Amendments of ORCP 36 (Appendix L)

Judge Zennaché made a motion to create three versions of the rule as discussed by the Council, including the friendly amendment by Judge Roberts. Judge Leith seconded the motion which was approved by voice vote with three “nay” votes: Ms. Leonard, Ms. Payne, and Ms. Gates.

Mr. Bachofner made a motion to publish three versions of the rule as discussed by the Council. Mr. Crowley seconded the motion which was approved by voice vote with five “nay” votes: Ms. Leonard, Ms. Payne, Ms. Gates, Mr. Keating, and Mr. Snelling.

Judge Zennaché explained that the draft amendments to Rule 43 allow a party, if the production of electronically stored information (ESI) is anticipated in the case, to request a meeting with the other parties to discuss the production of ESI, and it lists topics that the parties are required to discuss. He stated that these changes were supported by all sides at one point because they wanted an opportunity to identify what the issues were in cases involving ESI. He pointed out that the original proposal was to make the conference apply to all cases but, since some cases do not involve much ESI, the Council agreed on this elective procedure. Judge Zennaché explained that the draft amendment also says that the court, in ruling on a motion to compel or a motion for a protective order will consider the parties’ participation in the conference. He stated that there are also some changes suggested by staff that the committee reviewed and approved. Prof. Peterson explained that the staff’s changes included adding subsections with lead lines in section A; adding lead lines to subsections B(1) and B(2); grammatical changes including remedying inappropriate uses of the word “which”; and rewording language in paragraphs B(2)(b) and B(2)(c) to make them parallel with the language in paragraph B(2)(a), with no intent to change the meaning of those paragraphs.

Judge Bachart suggested that the new language in subsection E(2) should read “Within 21 days of the request for a meeting, the parties *must* meet and confer” rather than “Within 21 days of the request for a meeting, the parties *shall* meet and confer.” Judge Zennaché accepted this as a friendly amendment. Judge Leith suggested changing the word "shall" to "may" in the new language in the second-to-last sentence of subsection E(2) regarding the court’s consideration of the parties’ good faith efforts to confer. Prof. Peterson explained that the word “shall” goes to how strongly the rule tells the court to consider it. Judge Zennaché noted that the

attempt was some parallelism with the rule to confer on discovery motions [Uniform Trial Court Rule 5.010], which already uses the word "shall." He pointed out that the rule does not say what weight the court shall give it, just that the court shall consider it.

Judge Armstrong suggested amending the lead line in subsection A(2) to read "entering property" because the rule goes on to address land or other property and "land" is encompassed within "property." Ms. Nilsson pointed out that the title of the rule itself uses the term "entry upon land." Judge Armstrong suggested changing the words in the title to "entering property" as well. He reiterated the Council's desire to use language that is easier to understand for self-represented litigants.

Mr. Brian asked for clarification as to whether "property" would include objects such as an automobile. Judge Armstrong agreed that it would. Mr. Brian agreed that this is a good reason to delete the word "land" and use the word "property." Mr. Bachofner expressed concern about removing the word "land." Judge Armstrong stated that he did not feel that anyone would be confused by such a change. Prof. Peterson observed that "property" is actually more expansive than "land." Judge Armstrong pointed out that the word "land" would also remain in the first sentence of subsection A(2).

Judge Roberts wondered about the meaning of the phrase "any designated object or operation thereon" and whether the word "thereon" was really necessary. Mr. Beattie explained that the phrase refers to operation of an object on property, such as operation of a cattle chute on a feed lot property. Judge Armstrong argued that the object on the property is still a part of the property. Mr. Bachofner expressed concern that changing this language might unintentionally appear as though the Council intended a substantive change. Mr. Brian agreed that this language should not be changed.

b. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 43 (Appendix M)

Judge Armstrong made a motion to accept all previously agreed-upon amendments. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

Mr. Bachofner made a motion to publish the draft amendment to Rule 43, as amended, for public comment. Ms. Leonard seconded the motion,

which was approved unanimously by voice vote.

6. ORCP 71-85 Task Force

Prof. Peterson explained to the Council that the task force was unable to schedule an additional teleconference or to create draft amendments to share with the Council. He expressed concern that, if the Council does not take action on these rules, it makes it more difficult to ask organizations like the Oregon Law Commission (OLC) to hold off and let the Council take care of any issues. He noted that OLC's work product is a suggestion to the Legislature, not rule creation.

V. New Business

A. *Hooker Creek v. Central Oregon Land Development* [279 Or App 117 (2016)]

Prof. Peterson stated that Mr. Bachofner had brought the above-referenced case (Appendix N) to the attention of the Council staff. He stated that there appear to be two things that are noteworthy about the case. The first is that the Court of Appeals paid attention to what the Council did in offering limited judgments on attorney fees in advance of a general judgment disposing of all of the issues in the case. He stated that the Court also seemed to speak approvingly of the Council's language, but decided not to save the successful party because that party had not quite proven what it needed to prove under the underlying statute to be entitled to fees. Prof. Peterson explained that the second noteworthy item is that, buried within the opinion, was a motion for summary judgment to knock out an affirmative defense that was successful. He stated that the Council's work on ORCP 47 has apparently met with tacit approval by the Court, for whatever that is worth. He observed that, overall, the opinion seems to say that the Council did a good job with its amendments to Rule 68 and that its changes to Rule 47 appear to be acceptable.

B. Inconsistency in Language in ORCP 71 B(1)

Judge Roberts explained that a fellow judge had e-mailed her regarding Rule 71 (Appendix O). He wrote of an apparent inconsistency in the limitation on when a party can move to set aside a default judgment. She stated that some language within the rule speaks about filing a motion seeking relief because of excusable neglect within one year of the entry of the judgment, while other language talks about a time period within one year of notice of entry of the judgment. She noted that those can be different times. Prof. Peterson stated that the underlying facts of the case at issue appear to be that the party that obtained the judgment kept notice of the entry of that judgment from the losing party, which might also go to fraud on the court but we do not have enough of the facts to know this.

Prof. Peterson suggested including this issue on the agenda for next biennium. The Council agreed.

VI. Adjournment

Mr. Brian adjourned the meeting at 12:09 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

<u>DRAFT</u> MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 4, 2016, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

<u>ATTENDANCE</u>

<u>Members Present</u>:

Hon. Rex Armstrong
Hon. Sheryl Bachart
John R. Bachofner
Hon. D. Charles Bailey, Jr.
Jay W. Beattie
Arwen Bird
Michael Brian
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Hon. Tim Gerking*
Robert M. Keating
Maureen Leonard
Shenoa L. Payne*
Hon. Leslie Roberts
Derek D. Snelling*
Hon. John Wolf
Deanna L. Wray
Hon. Charles M. Zennaché*

<u>Members Absent</u>:

Troy S. Bundy
Jennifer L. Gates
Hon. Jack L. Landau
Hon. David Euan Leith

<u>Guests</u>:

None

<u>Council Staff</u>:

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 22 ORCP 36 ORCP 43 ORCP 45 ORCP 47	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 9 ORCP 22 ORCP 27 ORCP 36 (2 versions) ORCP 43 ORCP 45 ORCP 47 ORCP 57	ORCP 15 ORCP 22

I. Call to Order

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

II. Minutes

A. Approval of May 7, 2016, Minutes

Mr. Bachofner made a motion to approve the draft May 7, 2016, minutes (Appendix A). Judge Bailey seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters

Mr. Bachofner asked for a reminder about the process for the remainder of the biennium and publication and promulgation of draft amendments. Prof. Peterson stated that, as a matter of procedure, it is best if committees are finished with their work by the June meeting and the Council votes to put draft amendments on the docket for the September publication meeting. He pointed out that voting to place draft amendments on the September docket is an informal process. At the September meeting, the Council votes on whether to publish these draft amendments for public comment. This vote requires a quorum and a simple majority. After the public comment period, the Council meets again in December and votes whether to promulgate any of the published amendments. That vote requires a quorum and a super majority. Any of those rules that are promulgated are submitted to the Legislature at the beginning of the legislative session and, if the Legislature takes no action, they become law. Prof. Peterson noted that the Legislature has the option to reject or modify any of the Council's changes, but that it has not done so during his tenure as Executive Director.

Prof. Peterson stated that, although no meetings are scheduled for July or August, there is nothing that prevents the Council from working over the summer to finalize matters. He noted, however, that amendments should be finalized well in advance of the September meeting in order to receive full consideration by the Council and because making amendments on the fly at the publication meeting can get messy and tends not to be the careful, deliberative work the Council strives to achieve. Prof. Peterson pointed out that, two biennia ago, the Council published a draft amendment of Rule 27 in September and received pretty effective public comment that resulted in a decision not to promulgate the rule in December. He observed that it is helpful to have the collective wisdom of the bench and bar when working on rule amendments. Prof. Peterson explained that, from September to December, the Council typically only makes changes that repair errors or reflect very modest adjustments based on public comment. It is not the practice of the Council to make wholesale changes to draft amendments after they have been published for public comment.

Mr. Brian reiterated that drafts can be placed on the publication agenda for September by a simple majority vote, can be published for public comment in September by a simple majority vote, but can only be promulgated in December by a super majority vote. He noted that not appearing at the December meeting is the equivalent of a "no" vote. Mr. Bachofner encouraged members not to do this.

IV. Old Business

A. Committee Reports

1. ORCP 7/9/10 Committee

Mr. Bachofner stated that the committee has completed its work and reminded the Council that a draft amendment had been moved to the September agenda.

2. ORCP 22 Committee

Ms. Payne explained that the committee had met again in May and talked further about whether to address the issue of judicial discretion in ORCP 22 C(1) this biennium or to postpone that discussion until the next biennium. She stated that the committee's consensus was to postpone the discussion in order to take a deeper look at the issue, particularly since the issue was raised late in the biennium.

Mr. Bachofner recalled that, at the May meeting, the Council had asked the committee to look at the history of why judicial discretion is not allowed in this case. Mr. Beattie stated that he had looked at the history and that it was a little opaque. He noted that former Council member Frank Posey had wanted a party to retain a veto over third party practice. Mr. Beattie stated that the Council had considered changing this provision at a later time and that the former Council Executive Director, Fred Merrill, had an issue with there being veto power in this rule while other rules authorize judicial discretion. He noted that the Council had roughly the same discussion at that time as it has been having this biennium, but that there apparently was no momentum at that time to change the rule. He summarized by stating that there were some strong personalities who proposed the current rule and opposed changes to it later.

Mr. Eiva noted that the issue is not necessarily one of giving plaintiffs veto power but, rather, involves the resolution of cases in a timely fashion and not making cases more complicated as they progress, and is also related to the allocation of fault and making fair decisions with that kind of policy in Oregon. He pointed out that there is a lot more in the legislative history than has been presented to the

Council, and opined that the Council should review that history more thoroughly before making any decisions. Mr. Beattie noted that the extent to which legislative history is relevant to our current inquiry is a systemic issue. He stated that, particularly since 1987, there has been significant tort reform legislation, abrogation of joint and several liability, and fault allocation as a part of general trial practice as opposed to the third party practice that Oregon used to have. While legislative history may be illuminating or instructive, it is not necessarily binding. Mr. Beattie stated that the Council must look at the circumstances now and ask whether the existing rule can be justified in the current environment. He reiterated that the committee could not reach a consensus and that there are many issues besides this "veto power" that need to be resolved, hence the committee's suggestion to examine the rule more comprehensively next biennium.

Prof. Peterson agreed that another issue to be discussed is the time frame imposed in section A and whether it should be imposed more broadly throughout the rule. Mr. Bachofner opined that the person in the best position to determine whether it is too late or inappropriate to add a third party is the judge, who should be allowed that discretion. He also suggested that, if a judge believes that more than 90 days is appropriate, the judge can exercise that discretion. He added that, particularly since the enactment of tort reform in Oregon, we do not have the ability to have the jury consider the fault of a non-party as part of the fault allocation so, if it has to add up to 100 percent and it is determined more than 90 days later that there is another party at fault, amendment would be necessary. Mr. Bachofner stated that his feeling is, if the Council is already amending the rule to allow any party to add a third party defendant, it would be simple to change the word “and" to "or" in subsection C(1). He stated that this is the only rule of which he is aware that gives a party veto power over a judge.

Mr. Eiva stated that he could think of five policy reasons why the rule should remain in its current form, and suggested that the Council should wait until next biennium to have a comprehensive debate on the policy. He stated that he did not feel that making the change at this time would allow the full benefit of the Council's consideration. He noted that Oregon lawyers have been living with the rule in its current form for three decades, that the Council has opposed changing it several times, and that there are important policy reasons as to why it did so. Mr. Eiva volunteered to put in the necessary time and effort next biennium to research the issue. He stated that he appreciates that judicial discretion is generally a good thing but opined that sometimes there should be limitations on it.

Ms. Payne stated that the committee's proposed amendment of ORCP 22 (Appendix B) is a simple amendment changing the words "the plaintiff" to "any party" in subsection C(1). She asked that the Council vote on whether to place the draft amendment on the September agenda. Mr. Beattie made a motion to put the amendment on the September agenda. Mr. Eiva seconded the motion, which passed unanimously by voice vote. Prof. Peterson stated that Rule 22 will be placed on the agenda for the first Council meeting of the next biennium.

3. Electronic Discovery Committee

Judge Zennaché reminded the Council that the committee had brought two proposed draft amendments for discussion at the last Council meeting. One was a change to Rule 43 to require a conferral in regard to electronically stored information (ESI) if one of the parties requested it. He stated that the other draft was a potential modification of Rule 36 C to identify some criteria for courts to use in determining what constitutes an "undue burden." With regard to the modification of Rule 43, Judge Zennaché stated that the Council had asked the committee to meet again. The committee met and reached consensus and had prepared for the Council's consideration a draft amendment of Rule 43 (Appendix C) that requires conferral at the request of a party who believes there is ESI, but includes some limitations on the duty to confer to address some concerns of Council members. For example, a meeting is not required until all of the parties have appeared or indicated that they intend to appear. He stated that the committee also added a modification saying that the court can consider "good faith" compliance with the rule in deciding on protective orders or motions to compel production. Judge Zennaché explained that the committee had prepared a report to provide some legislative history that illuminates the good faith requirement and the expectation of the committee that these conferrals are not going to be a one-time event. He explained that, more often than not, there will be an initial meeting and a need for later meetings to fully resolve all of the issues. He reiterated that the committee had reached consensus on the draft amendment to Rule 43, and suggested that the Council vote on this draft before discussing the potential change to Rule 36.

Judge Gerking suggested adding the word "also" to the new language in subsection E(2) to make it read more smoothly: "The court may also require that the parties meet to confer about ESI production." Judge Zennaché did not oppose such a change.

Mr. Bachofner expressed concern about triggering the request for conferral with the written notice of intent to file an appearance because common defense practice is to send out an ORCP 69 A request to not enter a default immediately

upon receipt of the assignment, which is typically anywhere from 3 to 20 days before one even has the file materials. He stated that requiring the parties to meet and confer about the scope of production within 21 days after serving an intent to file an appearance may be premature. He stated that he would prefer that the time frame in the draft amendment be changed to "after all parties have appeared" because that at least gives a recently retained lawyer the opportunity to examine the file. Judge Bailey observed that there are many parties who do not appear and are nonetheless working on negotiations. He stated that, if a lawyer sends a notice of intent to appear and has not had the opportunity to look at the file, he or she can merely say in good faith that there is nothing to work with at this point in time. Mr. Bachofner pointed out that the draft language says that within 21 days the parties "shall meet." Ms. Wray noted that the problem that the committee was attempting to solve with the new language was the request coming with the complaint but, as a defense attorney, she does not want to encourage plaintiffs' lawyers to send her ORCP 69 A 10 day notices just so they can ask for an ESI meeting. She noted that there can be unintended consequences.

Mr. Keating pointed out that, while Mr. Bachofner stated that the defense usually sends out a letter of intent to appear as soon as the assignment is received, he personally usually first determines whether he has service issues and when the statute runs, as he has 30 days from the date of service to file a response. He stated that, sometimes, a defendant will hire him and say "I learned the insured was served three weeks ago," which speeds up the timeline, but observed that if you get timely notice of service you can extend it out. Mr. Keating noted that he drafted the language to which Mr. Bachofner objected. He explained that he will frequently send the letter and not make an appearance because he wants to negotiate or get more discovery before he starts making representations about the facts. He observed that, like Ms. Wray, he does not want to have the plaintiff's lawyer send him the 10 day notice of intent to take a default because of this issue. He stated that, if he receives a request for production served with the complaint, he can call the vast majority of lawyers that he works with and tell them he will be working on discovery and have negotiations begin during the telephone call. Mr. Bachofner stated that his concern arises from the "shall" requirement, but he agreed that it is helpful that the word "reasonable" occurs later in the rule. He stated that he believes that a good practice that he has followed for a while is that, when you get the assignment, you send a notice of intent to appear, not waiving any defenses because you need to be able to look at the file. He gets assignments frequently where he does not get materials for at least 10 days after he has gotten the telephonic assignment, and there could have been service or not, but the better practice is to send the notice of intent to prevent a default. He observed that he is concerned about this, but that it is not a huge issue and that he can live with it, especially since the Council has created some history about it. Prof.

Peterson asked whether it is helpful that the conference is seen as a step in an ongoing process. Mr. Bachofner stated that it is. Judge Armstrong noted that there is no particular sanction for failing to be helpful; an attorney can appear for a conferral meeting and explain that he or she will not be able to be very helpful because he or she has not received much information, but that he or she is there and prepared to have the discussion. Mr. Bachofner explained that he takes the rules seriously and, when a rule says "shall," he considers that an obligation. Judge Zennaché noted that the rule does say that an attorney has a duty to be there in good faith, so if that attorney shows up at the meeting and has a good reason that he or she cannot answer the questions yet, the court should consider it.

Judge Gerking pointed out that, if a lawyer does not yet have the file and meets with opposing counsel who does, that lawyer can always ask what kind of ESI opposing counsel is seeking. After the meeting he or she can communicate that to the client, which gives a heads up to the defense before they even see the complaint and the file material. He stated that he believes that the proposed amendment is a good change. Judge Roberts observed that this is the kind of technical rule where having published comments in addition to the rule itself would be very valuable. She explained that the Council knows what it has in mind, but fleshing that out in staff comments would also be helpful. Judge Zennaché explained that this is also why the committee submitted a report in an effort to make some legislative history.

Mr. Eiva noted that, the way the proposed amendment is written right now, it could be read that a party can only ask for one meeting. He wondered whether a party is allowed to ask for more meetings or whether just one is allowed. Judge Zennaché stated that this goes to the consideration of whether a party is acting in good faith or not. He stated that he does not feel it is necessary to make a change to the proposed amendment to clarify that. Mr. Beattie stated that, as a practical matter, if you intend to move to compel production or for a protective order, you will need to meet anyway and that most people have multiple meetings. Judge Bailey stated that he does not read the proposed amendment in the same way that Mr. Eiva does and that he does not see anything that limits the number of meetings. Mr. Eiva stated that his problem is that he could see someone potentially saying "we met once, we do not need to meet again under the rule because the language states 'any party may request a meeting to confer.'" Judge Roberts suggested a friendly amendment adding the language "at any time" or changing the word "meeting" to "meetings." Mr. Crowley noted that the committee has addressed this issue in its report that establishes legislative history. He stated that he expects that, in most cases, more than one meeting will be required. Mr. Eiva observed that it is not that often that members of the bar

access legislative history.

Mr. Brian asked whether the Council would like to accept Judge Roberts' suggestion to make a modification to the proposed amendment to clarify that the expectation is that there may be more than one meeting. Judge Bailey suggested putting the letter "s" in parentheses after the word "meeting." Judge Armstrong suggested the language "one or more meetings." Judge Roberts noted that the reality is that many attorneys do not carefully read the existing rules, so it is unrealistic to expect that attorneys will carefully read the Council's legislative history. Mr. Brian suggested that making it clear in the rule that there can be one or more meetings eliminates the possibility of gamesmanship. Judge Bachart stated that, given the opportunity to make the language explicit, she believes that the Council should. Judge Roberts made a motion to adopt the language suggested by Judge Armstrong. Mr. Bachofner seconded the motion, which was passed unanimously by voice vote. Mr. Bachofner moved to put the amended rule change to Rule 43 on the September publication agenda. Mr. Crowley seconded the motion, which was passed unanimously by voice vote.

With regard to ORCP 36, Judge Zennaché noted that the proposed change has been more controversial within the committee and involves adding language to modify section C regarding motions for protective orders based on undue burden (Appendix C). He stated that the added language has become quite controversial and that the committee has been unable to close the gap between the plaintiffs' members of the committee and the defense members of the committee. He explained that the committee had provided the following materials to the Council: information from Ms. Payne and Mr. Eiva regarding the proportionality requirement and concerns that the plaintiffs' bar has with it (Appendix D), Sedona Conference materials from Mr. Keating (Appendix E), and a memorandum prepared by Mr. Crowley regarding his perspective on why the proposed language is necessary at this time (Appendix F). Judge Zennaché suggested that, rather than having him try to explain the different positions of these different parties, it would make more sense to have the various parties explain their positions. Mr. Eiva noted that Ms. Leonard has also done a great deal of research on this issue and that he wished to have her explain her position.

Judge Zennaché stated that, before the Council began a discussion, he wanted to be clear that the proposal is not to modify the scope or production but, rather, to add content to the section on undue burden. Ms. Nilsson pointed out for the Council that, from a procedural standpoint, if the Council votes to put a proposal on the publication docket for September, it does not mean that the Council will vote to publish it and, even if it does get published in September, that does not mean it will be promulgated in December. She stated that, if a proposal is

published for public comment, that may bring some additional perspectives that the Council had not previously considered.

Ms. Leonard stated that she had to educate herself and that she does not claim any expertise on eDiscovery. She stated that Mr. Crowley's memo was helpful and confirmed a couple of things she had previously heard. She observed that virtually all discovery these days is eDiscovery. She pointed out that, if the idea of proportionality is inserted in Rule 36, it would not be limited to eDiscovery but, rather, would apply to all discovery. She asked herself what the problems with eDiscovery are and, in talking with other lawyers, came up with a list of four items. The first is the difficulty in finding and retrieving old documents when formats have been superseded over many years. The second involves data that is manipulated with proprietary software applications and cannot be accessed without those applications, which are often under license and have confidentiality protocols. She stated that these concerns may be addressed with the protective order process already in place under the existing rules. The third issue is that relevant data is sometimes enmeshed with proprietary materials and trade secrets with no way to separate them. Again, this issue could possibly be resolved by protective orders and confidentiality requirements. The fourth issue is volume, because there are many more documents available in electronic format than were maintained in paper format. Ms. Leonard stated that the question with this issue becomes, what does it actually mean for discovery. She stated that, at one level, the electronic world actually makes it easier to retrieve, sort, find, and manipulate data. She pointed out that Mr. Crowley's memo to the Council mentions that the State has adopted a voluntary conferral process, and stated that this fourth issue is what the conferral process is meant, in part, to start to address.

Ms. Leonard stated that her understanding is that businesses need to be managing their documents in a retrievable way in any case, and obligations of discovery should not be that much different from what businesses are already doing. She observed that ESI is not like her basement, where random items might be thrown down the stairs but, rather, it is an organized world. Businesses need to be able to manage, retrieve, index, and discard ESI after a relevant period of time passes for storage. She wanted to identify what is unique to ESI that makes lawyers get so frustrated, and she could not see that much that could not be resolved with more knowledge about the technical aspects of manipulating data. She stated that her research renewed and confirmed some of her concerns about the factors set forth in the proposed rule. If a business cannot retrieve documents in storage because the process of retrieval is unmanageable, it is not a discovery problem but, rather, it is a business problem. She wondered why a factor like case value would be used to limit access to relevant information and stated that, if the problem is the cost to retrieve, it may be an exaggerated problem. She pointed out that she does not

know what it would really cost to retrieve certain information from someone's business files, but that there are technical people who do know. Ms. Leonard opined that this is more a process of educating the bar, especially the older generation. She stated that her concern with the proposed rule is that we have identified certain problems with ESI, and perhaps some of those need a remedy, but the proposed proportionality rule is not the answer. Her feeling is that it is simply a global way of limiting discovery in every case based on factors that really do not address what she believes the ESI problems are.

Mr. Eiva stated that he wished to emphasize the statement from Prof. Arthur Miller of New York University School of Law before the Advisory Committee on Civil Rules in 2014. He observed that his concerns are not just plaintiffs' lawyers' concerns. He pointed out that Prof. Miller, who is known as the "dean of the federal rules," had expressed great concern when the federal proportionality rule was being passed. He stated that Prof. Miller had emphasized that the problems that the proportionality rule was trying to address seem like technology problems that will ultimately be healed by technology. Mr. Eiva stated that most of us understand that we can access an enormous amount of information by getting on the Internet and searching. He explained that he knows that such a method is impossible due to privacy concerns but, if he could have eight hours on a company's intranet, he would likely be able to access the information he needed without having to go through the process of having to ask the other side to produce thousands and thousands of pages. He opined that the real problem is the way attorneys have to request documents in order to motivate the other side to go find them; it has to be a broad request as opposed to a pinpointed request, so perhaps the solution is more about conferral in order to defuse costs as opposed to limiting discovery in toto. Mr. Eiva stated that, under Rule 43, he can call someone to a deposition and require that they bring a certain item. Ideally, that person could appear with a computer that has intranet access to that company's computer system and be asked to search the database for a certain item. He stated that, obviously, defense counsel would need to see that item before plaintiff's counsel could, so such a solution could not work now, but he suggested that perhaps there could be a special rule for eDiscovery instead of a global proportionality rule, with special masters or referees who can actually work out issues after a conference between the parties. He noted that a great part of the problem of the large volume of documents arises from the fact that there is an inefficient game of telephone where plaintiffs must ask broadly for documents so as to make sure they get what they need, and so defendants must respond broadly.

Mr. Bachofner pointed out that proportionality would actually force other plaintiffs' attorneys to follow the guidelines that Mr. Eiva just suggested, and

stated that such a rule change just brings everyone to that point. He stated that, if the whole point is to consider the proportionality of the case, the attorneys on both sides are going to have to look at ways to get to the necessary documents in a more efficient manner because the value of the case may not justify a large expenditure. For instance, in a case with a value of $50,000, would it make sense to spend $20,000 on eDiscovery to locate various documents? Judge Zennaché pointed out that it might make sense if the social issues are valuable enough. Mr. Bachofner agreed and stated that this is another reason that it makes sense to have some way to have the court consider proportionality and all of these issues. Mr. Eiva opined that the court is in a very dark place to make that decision and has no light to shed on the problem.

Judge Roberts noted that undue burden is part of the rule now, and that the Council's discussion is about the content of that concept and whether there is any degree of uniformity among courts or any degree of guidance to practitioners on what to bring to the court to establish or to refute an argument of undue burden. She noted that it applies just as much to Ms. Leonard's hypothetical basement as it does to eDiscovery; in a lawsuit with a private individual who wants to search everything in that basement, what do you talk about with the court? She stated that this rule is about is how the court should address that question and how the practitioner should address that question, not how it should be resolved. She pointed out that, in any case, the rule does not tell the court how it should resolve those issues but, rather, just tries to channel the discussion. Ms. Leonard disagreed and pointed out that such a rule change would put factors before the court about which the court has to make some resolution, such as case value. Judge Roberts stated that it does not tell a judge what the resolution should be. Ms. Leonard suggested that it weights toward resolution. She stated that a plaintiff with a low value case is already in a defensive posture when it comes to seeking discovery to prove their case. She opined that the proposed amendment would be a significant change.

Judge Armstrong stated that Ms. Leonard's scenario would also be true under the existing rule. He stated that, when a party appears before the court and states that it wants to prevent discovery because there is a low value case and such a high cost discovery burden should not be imposed, a court could absolutely agree under the existing rule. He noted that he appreciates Ms. Leonard's point that, by now identifying specific factors, the rule change would focus people's attention in a way that starts to cause thoughts, but pointed out that those thoughts would still be there whether the rule told people to think in those terms or not. Judge Zennaché agreed. Mr. Beattie wondered in what way the language does not simply inform the court's exercise of its discretion, as it always does. Ms. Leonard stated that she finds the proposed factors to not be very directive and that they do

not inform the discussion. She referred to the specific factor, “importance of the issues” and stated that the parties will not agree about that and who knows what the court will make of that disagreement, especially at the beginning of a case where it is unclear what evidence will emerge. Judge Bailey opined that the change will help focus each judge as to what undue burden is and encourage more uniformity among the courts. He stated that there are some factors to consider that are more specific than just "undue burden," whereas now “undue burden” can mean all of the things listed in the proposed rule and a lot more. Judge Roberts suggested that, if Ms. Leonard believes that there should be other factors included or some that should be eliminated, she should raise them so that the Council may discuss them. Ms. Leonard stated that she believes that the factors proposed are the wrong factors and that we should have a discussion generally and build a factors test. Judge Zennaché pointed out that extensive discussions to determine the appropriate factors had already occurred during committee discussions.

Mr. Keating stated that he has already reported to the committee and the Council on several occasions about his experiences that have focused his attention on this particular issue. He gave an example of representing a hospital system with five hospitals and many clinics where the opposing party sent a request for every picture, document, e-mail, and computer record relating to a certain issue. In such a case, under the current rule, he would provide what he thinks is reasonable eDiscovery and, if a motion to compel is filed, explain to the court what he has already done and that, if more is required, it will cost much more money, an expense that he believes is disproportionate. He explained that, when the answer from the court is “motion to compel allowed,” he would like to know if the court considered the expense involved. He stated that the response to a motion to compel is asking for the court to recognize undue burden and expense, which is really simple. He pointed out that he has been going through this procedure with no guidance to assist the judge in determining exactly how much is undue.

Mr. Keating observed that there is a fear that “proportionality” will somehow cause harm to plaintiffs, but pointed out that the definition of “undue” is “disproportionate” according to Webster’s Dictionary, and “undue” has been in Rule 36 C since its inception as well as in the statutes that preceded it. He remarked that the proposed rule change points to issues that may create a disproportion. He stated that it is important that the significance of the issues be in the rule because there may be a low value case that is subject to a statutory cap where the opposing counsel is looking for evidence based upon probable cause of misbehavior by the defendant and broad, expensive discovery may well be in proportion to the importance of the issue because there is, separate from the money, a social function that our legal process serves. Mr. Keating stated that he

can think of cases where that might occur. He submitted that putting the burden on the defense to answer open-ended, unlimited, unfocused requests is inappropriate, and that the proposed amendment to Rule 43 is a big step forward, because now conversation only takes place when negotiating on a motion to compel a year after the lawsuit is filed. These two things work together to inform not only judges when they have to rule on a motion to compel, but to inform parties when they sit down and confer. He stated that this is a legitimate change that creates a forum where a conversation can be had about whether it is really important to, for example, search the janitor's e-mail inbox.

Mr. Keating pointed out that the language before the Council is the product of a process that was thoroughly considered by the drafters of the federal rule and that the rationale is laid out in the Sedona Conference papers. The proposed language is not unreasonable and is already the product of a process. He pointed out that the change does not tell the judge how to make a decision but, rather, requires that the judge address proportionality when a request has been made for a protective order or in ruling on a motion to compel where the defendant asserts one or more of these particular criteria. He observed that the change would be very helpful to the bar and reiterated that the current process is unpredictable. Mr. Keating observed that it would also be helpful to be able to explain to his client that, while the client believes that the burden of eDiscovery is terribly disproportionate, these are the reasons why the court does not think so and that the client will have to comply or be sanctioned.

Mr. Beattie observed that similar language is currently working in the federal court. He stated that he has a considerable amount of experience with the federal rule because he is handling an environmental pollution case where the accumulation of documents has been occurring for 20 years, with pollution that has been occurring since World War II, with a lot of ESI and frequent issues about how far, how much, and how expensive it will be to produce that information. He observed that federal court judges have no problem applying the new federal rule and actually taking into consideration the expense and even the allocation of that expense, and it is a consideration they look at along with the other considerations under FRCP 26. He stated that there is no stumbling block to the plaintiffs in getting everything that they want but, rather, there is a good framework for the court.

Mr. Eiva observed that the federal court is one stumbling block after another for plaintiffs in general. He opined that adding the proposed language would marry Oregon law to federal case law, which has been restricted with many opinions by federal court judges. He wondered why the Council would choose to do this. He stated that Oregon looks to *Pamplin v Victoria* [319 Or 429, 877 P2d 1196 (1994)]

for guidance because Oregon does not have trial court opinions. Mr. Eiva suggested that adopting the proposed amendment right after adoption of the new federal rule implies that Oregon wants to do what the federal courts are doing and Oregon will end up adopting federal jurisprudence. He noted that every problem Mr. Keating mentioned can be addressed in the undue burden analysis. Mr. Keating replied that this does not currently happen. Judge Bailey noted that he currently has plaintiffs who appear before him and argue that judges cannot address those kinds of considerations or look at those criteria. He stated that this rule says, “yes you can”; it is that simple. Judge Bailey stated that plaintiffs’ attorneys often say that it is not fair to look at the nature of the case or the costs because it is unfair to the plaintiff, who has a vested interest in getting the information. Mr. Eiva observed that, the way the rule is written, it says that the judge "shall" think about the factors. He posited that the proposed amendment focuses on the extraordinary case, and wondered what case it is where a judge would say “no discovery because your case is not worth it.” Judge Zennaché pointed out that no one is talking about getting no discovery. Several plaintiffs’ bar members of the Council noted that discovery is denied frequently at the present time for this reason. Mr. Bachofner stated that it is not just about what the court considers, but also about what litigants need to consider and emphasize in motions and responses to motions. He submitted that Oregon enjoys a pretty collegial atmosphere where the overwhelming majority of parties will be able to confer and work out the issues using these considerations. He stated that he already considers proportionality and, most of the time, he is able to work it out with opposing counsel. He stated that this change at least gives everyone notice that these are things you need to look at so that the court can be consistent. He wondered why any attorney would not want consistency.

Judge Armstrong wondered, with regard to Mr. Eiva’s concern about federal case law, if there could be some way that the Council could emphasize that it likes the language of the federal rule as guidance but does not like federal case law as a source for insight into it and, in adopting the language, the Council is not adopting any federal decisions as guidance about the meaning of these principles. He stated that the words are good words but the Council does not want the federal court’s overlay and approach because Oregon does not share that overlay or approach and does not believe it represents the right sensibility. Therefore, what has already been said in any federal case law applying these principles or any case law that follows does not become part of the adoption itself. Mr. Eiva stated that, if such a comment is only found within legislative history, it is not enough. He reiterated that generally, in Oregon, discovery is not restricted and that it is an extraordinary circumstance where the cost so outstrips the value of litigation. He noted that he has been practicing for 11 years in a practice with many high-value cases and, in ordinary circumstances, he does not face these motions. He

expressed concern about placing this “extraordinary case” rule prominently in the Oregon Rules of Civil Procedure.

Ms. Wray stated that, while she would love to have more consistent trial court rulings in Oregon, she can think of a number of other rules the Council could start working on today. She stated that it is not just undue burden in discovery where there are inconsistent trial court rulings. She stated that this rule in particular does not deserve or need judicial guidance as opposed to summary judgment or Rule 21 motions. She noted that there are a host of rules that need factors if the Council is going to go down that path. Ms. Wray pointed out that the factors listed in the proposed draft are not factors that were developed by the Council’s committee but, rather, were developed in the federal rules. She wondered whether time was spent in committee meetings debating each of these and whether we want them in the Oregon rules. She stated that she did not become a Council member so that she could rubber stamp the insertion of federal court rules into Oregon rules because she respects that Oregon has a long tradition of being different from the federal courts. She expressed that she would like to hear from the committee about what factors it believes should be considered and, if that work still remains to be done, it should be done. Ms. Wray stated that she is not opposed to the concept of proportionality, but that this process seems rushed. She feared that the Council may be proceeding on the concept that these are great factors because people across the country that we do not know have decided that they are. She stated that non-personal injury plaintiffs’ attorneys are totally on board with this rule, as it works in a lot of different settings, but there is a segment of personal injury cases where it might be unfair.

Ms. Payne agreed that it is a good idea to wait and get more information before moving on a rule change. She wanted to clarify that the information submitted by her and Mr. Eiva was a compilation of material that did not just come from the plaintiffs’ bar but, rather, included information in opposition to the new federal proportionality rule from a congressperson, a federal district court judge, 171 academic professors, and the Center for Constitutional Litigation. She stated that their submissions show that there were a lot of neutral organizations in opposition to the change to the federal rule. She noted that the paper submitted by the professors discussed a study done by the Federal Judicial Center that examined whether there was an issue with discovery, whether discovery in the federal bar was really a problem, whether it was expensive, and what the new federal rule was trying to fix. She stated that the study found that the average cost for discovery in the average case was $15,000 for plaintiffs and $20,000 for defendants, which is not the extreme case but the point was whether the new rule was being put into place to fix a problem that does not exist. Ms. Payne pointed out that there is no evidence of the average cost of discovery in Oregon at this

point, but she wondered whether the Council is attempting to create a rule for the extreme case rather than for the general case. She observed that the goal should be to craft the rules for the general case, because the undue burden analysis and protective orders already exist for extreme cases. She noted that more information will become available over time, particularly as the federal rule is used and it becomes more clear how it is working and affecting parties. She stated that she would also like to know how other states are handling the issue, and whether they are adopting or rejecting the federal language and why. Ms. Payne explained that she had also provided information to the Council about the Pound Civil Justice Institute's July forum on whether states should adopt the federal rule, and stated that there will be a lot of useful material for the Council on both sides of the issue from that forum. She observed that there is no reason to rush into adopting the federal rule when we could really be considering the appropriate factors for undue burden.

Mr. Beattie asked about changing the language in the proposed rule to state that the court "may" consider these factors because at least this would give the court some certainty that economic factors are one of the concerns to consider in deciding what constitutes an undue burden. He stated that, as Mr. Eiva has mentioned, Oregon does not report trial court decisions, discovery issues rarely make it up to the Court of Appeals or Supreme Court, and discovery is never the subject of mandamus because it is subject to direct appeal, so there is no guidance from the courts on this. He stated that this leaves it open for an argument that economic factors are not to be considered in the undue burden analysis, so he thinks the rule should just make it clear that they are; the rule should not direct that the factors will dictate a particular outcome, but that they may be considered.

Mr. Crowley stated that, when he joined the Council, he thought this was an important issue and felt very strongly that an eDiscovery committee was needed. He stated that, in the last 10 years, he has seen a complete revolution in how civil litigation is conducted, with no more paper files; all litigation is eDiscovery, and all litigation is large. In his experience, every little case, even with pro se litigants, involves eDiscovery. While he has heard a lot of talk about the extreme cases, his experience is that these issues arise in the *regular* cases and, for those who are practicing law and do not see this in regular cases right now, it is going to be happening in regular cases, because at some point we will see a paperless system. For him, the most important thing about the proposed rule change is that it allows Oregon to be a part of the conversation whereas, if we wait, we are not a part of the conversation. He noted that Oregon is already behind on this issue, which impacts how everyone practices law and drives up the cost of litigation for everyone. He stated that what is happening across the country now in litigation is that firms are forced to hire outside vendors to help manage the mountain of data

in their cases, and this is complex, time-consuming, and a huge added litigation cost.

Mr. Crowley stated that the state strives to get a handle on the discovery process in several ways, the first of which is an early case conference to talk about such costs and ways to manage them. He stated that, hopefully, this will be the answer in most cases, because once the court and opposing counsel become educated about the specific issues involved, it will be easier to reach reasonable solutions. However, this will not always happen; there will be times when the court will need to be brought in on a case, and the proposed proportionality rule addresses how to manage those issues. He noted that the committee has a difference in opinion, from his perspective largely because there is now an advantage on the plaintiffs' side with the existing rules. He observed that there is a huge disadvantage to defendants because all of these costs, complexities, and time disadvantages weigh down the defense and, when it is time to go to court, the burden is on the defense to explain that. He stated that he does not believe that the proposed proportionality language will create a big disadvantage in those cases where the damages are small and costs of discovery are higher, because a court is in a good position to be able to weigh how that plays out in terms of the proportionality language and he does not think that will shut off those plaintiffs' opportunities for justice. That is certainly not the intent of the proposed rule. He thinks that the proposed rule balances the playing field and moves us forward in our modern times by addressing the issues that we face today.

Mr. Crowley noted that the committee has been debating how to approach this issue throughout the year and the conclusion is not something that has been rushed. He stated that there is just a difference of opinion between members of the committee and the committee felt that it was important to bring the issue to entire Council. The discussion today reflects that difference, but it is a huge issue on which the Council is in a position to take leadership, and the Council is the perfect body to move the bar forward in how to deal with these issues. Mr. Crowley observed that, if the Council does move forward to public comment, there will be a lot of comment to weigh, and he does not know where that leaves us in December. He stated that the most important thing is that the Council not sit back and wait because, two years from now, the issue will be even bigger and there will be even more issues to address. He stated that he recognizes that the proposed language does come out of the federal rules, but pointed out that this does not mean that Oregon will apply the language in the same way as the federal rules. Mr. Crowley believes that Oregon can be a leader in how this language is interpreted, but not if the Council does not include it the ORCP and adopts a "wait and see" attitude.

Mr. Brian stated that his problem with the potential rule change is the hypothetical case where there is a "smoking gun" document buried among all of the documents that Mr. Keating was requested to produce for what he claimed was a disproportionate cost of $5 million. Mr. Keating observed that, with all the thinking he has been doing about this issue, he does not understand the damage to a plaintiff's case because of the proposed rule change. He noted that, in reality, all the change would do is to ask the court to assess and address the burdens. He stated that every plaintiffs' lawyer he knows believes in his or her soul that there is a smoking gun and that, given that belief, there would only be one solution to the problem – to say there is no burden undue enough. He stated that there could be no fact a defendant could ever use to justify limiting the plaintiff's request to say "I want every document in your organization that uses the plaintiff's name" and, if that were true, we ought to just take the words "undue burden and expense" out of the rule. Mr. Keating stated that a lawyer needs to have trust that his or her opponent, a member of the bar with a loyalty to the court and the system, will not knowingly sit on a smoking gun. He stated that he also does not believe that the system can proceed on a built-in attitude that a defendant, particularly a corporate defendant, is corrupt and would do everything in the world to prevent the disclosure of a particularly bad thing. He stated that he has never done that and that he produces items if they are not privileged, so why would his client have to spend $5 million to look in the janitor's email box?

Mr. Brian explained that his problem is not with the lawyer but, rather, with the client who chooses not to tell the lawyer. He noted that he has had clients who do not tell him everything and he is sometimes unaware of a fact until he hears about it in a deposition. He stated that it seems that, in the end, the proposed changes are a squeezing down of the access to relevant data on both sides, and he struggles with that issue. He stated that he has not come to a possible solution in his own mind. Mr. Beattie stated that this is always the personal injury paradigm because there are huge corporate plaintiffs and defendants, some of whom are insured under defense within limits (DWL) policies, who blow through their indemnity providing eDiscovery. He observed that a plaintiff with a $1 million DWL policy who had a $20 million discovery demand would be on his or her own.

Judge Roberts stated that, with so many judges in the state of Oregon, the current rule does get applied with standards but she observed that there is one set of standards for each and every judge. She stated that, with the current rule, Oregon is doing justice on the fly. She pointed out that most of Oregon's rules *do* have standards, including the summary judgment rule, and stated that it would be comparable to the discovery rule if that rule said simply "any party can move for summary judgment and the court can issue it," because that is the state of the current discovery rule – anybody can say "undue burden" and the court can say

“yes” or “no” without anything to channel that discussion. Judge Roberts opined that even changing the proposed amendment to read "may consider” would be better than the existing rule. She suggested that, perhaps, the Council could insert an unprecedented parenthetical in the rule that says “Oregon is not adopting the federal rule or federal case law.” She stated that, because there are so many federal trial court decisions in this country, anyone can give her 25 federal cases on any side of any issue that are not relevant to Oregon law. She pointed out that discovery will be developed at the trial court level, not on appeal, so there will not be a body of case law that tells us what the standard is. Judge Roberts observed that, with most Oregon rules, the standards are either patent or express in the rule, and they ought to be in the discovery rule as well. With regard to delaying the change, she stated that her courtroom contains a standard in gold letters on the wall that says “justice delayed is justice denied.” She suggested that the Council ought to do things, and ought to deal with this unguided consideration so that there is some uniformity within the state courts. She did agree that the proposed amendment does deal in large part with extraordinary cases because, in the vast majority of cases, discovery issues never come to court; the court only deals with the troubling issues.

Judge Bachart stated that she does not view the proposed change with any particular case in mind. She stated that she does not see it as leveling the playing field but, rather, structuring the analysis. She stated that, regardless of the size of the jurisdiction, judges are already seeing these issues in motions to compel in every type of case. She noted that judges spent two days at the Circuit Judges’ Conference on eDiscovery issues because they are constantly confronted with them. Judge Bachart explained that she views proportionality as a factor that judges are going to consider among other things in a non-exclusive list, and that she expects that all of the arguments that plaintiffs and defendants are making to the court will be presented to her in a memo that will include at least these factors so that, when she is confronted with a motion to compel, she can go through each one in her findings. She noted that it is not an exclusive list and that “importance” does not necessarily equate to “money.” She also stated that “undue burden” does not necessarily equate to “volume.” She stated that she has Portland attorneys coming into her courtroom showing her Multnomah County or Washington County decisions just to give her some guidance about eDiscovery issues so, while those decisions are not controlling, that is what they are relying on now. She expressed concern about waiting to discuss this issue more next biennium, since the problem is happening now. She stated that she feels that the change will provide some uniformity to a very diverse Oregon bench and frame the discussion when motions to compel are brought before the court.

Mr. Bachofner opined that the proposed change does not favor plaintiffs or

defendants but, rather, is neutral. He stated that he finds it particularly interesting that, when the Council discusses a neutral change like this, there is an outcry that it is somehow unfair but, when defense attorneys try to get medical records from a party that has filed a lawsuit and chosen to litigate, they get push back on getting access, even though he has seen countless times where he has subpoenaed records to trial and found documents that were not produced regarding prior injuries in records that were not necessarily related to the same body part. He pointed out that there is always going to be some suspicion on one side that the other side is not providing him or her with all available discovery; which party feels that way will change depending on the case. Mr. Bachofner observed that it makes sense to have some guidance provided about the particular factors that should apply. He stated that, while some Council members believe that these are not the correct factors, he does not hear them saying what the correct factors should be. From his perspective, the proposed factors seem to be good factors to start with and, at this point, the only issue at hand is putting the proposed amendment on the publication agenda for September. He suggested that the rule should, in fact, be put on the publication agenda and moved forward for public comment in order to have an even more informed discussion. He pointed out that these actions do not mean that the Council will vote to promulgate the rule. Even if the Council decides to go back to the drawing board next biennium, it would do so with the wisdom of our bar and our judges throughout the state to assist in coming up with the best possible rule.

Judge Zennaché also reminded the Council that it is just considering putting the proposed amendment on the agenda for September. He stated that the committee very purposely did not include the proportionality language in Rule 36 B with regard to the scope of discovery but, rather, put it in section C with regard to what constitutes an undue burden and a list of non-exclusive factors that the court should consider in making that determination. He stated that this was because Oregon is not trying to adopt the federal rule in toto. Judge Zennaché remarked that the Council is certainly not trying to say that Oregon wishes to adopt federal jurisprudence. He also pointed out that, with regard to criticism of the factors listed, it has been his perspective from the very first meeting of the committee that these were the factors to be considered and, frankly, the committee did not fall apart on factors but, rather, on proportionality. He stated that the factors became a concern later but that the committee initially included the undue burden analysis because it thought that, whenever a court decides undue burden, it necessarily implies a balancing. He stated that it was not intended to be a sea change because, frankly, courts can already consider all of the listed factors. He urged the Council to put the proposal on the September agenda and put it out for public comment so that the Council can make a more informed decision about whether or not to promulgate it.

Judge Armstrong stated that, looking back through the criteria themselves, he was struck that the provisions that caused the greatest anxiety to the bar are the importance of the issues at stake and the amount in controversy, which represent value judgments. From the plaintiff's perspective, whatever it is that someone wants to litigate and achieve what they believe is a just result is important. He observed that to suggest that there is an overriding value judgment exercise that the court can put into play is a source of some discomfort to people. With regard to the amount in controversy, it may be the case that a person has suffered an injury that caused them to lose a small body part, which may not be deemed to be worth a huge amount of money, but the person would still feel understandably aggrieved. Judge Armstrong opined that justice cannot be achieved without some appreciation of cost and, since society does not provide the money it broadly needs to run the justice system, at some level there has to be a constraint on what justice is worth to society. He pointed out that, from the side of people who wish to litigate, it is easy to think that there should not be any limit to that cost and that society should provide those resources. He stated that, with regard to the suggestion Ms. Payne and others made about considering different criteria or principles to guide the ultimate determination of what undue burden is, the Council could remove or add a factor.

Judge Conover stated that Judge Armstrong made a very good point. He asked whether the opponents of the proposed amendment were suggesting that any one particular factor should not be included. He stated that a judge, under the current undue burden and expense analysis, could still consider any of these factors and wondered whether the concern is that these particular points are being emphasized. Ms. Leonard opined that the proposed amendment would reverse the burden of proof so that plaintiffs would be required to justify their discovery requests. Judge Zennaché noted that the committee included that the language in the section of the rule regarding protective orders purposely so that the burden would be on the party asking for the protective order, not the other way around. Ms. Payne explained that Ms. Leonard is asking how one would justify the importance of the issues at stake. She stated that the burden is likely going to fall on the plaintiff at that point to say that the issues are important, resulting in a disagreement between the plaintiff and the defendant about whether the issues are important, where the plaintiff will encounter the problem of not having the discovery to support his or her argument. She noted that Judge Armstrong's points are very well taken and that the two factors he mentioned are definitely where plaintiffs' counsel's concerns lie. Ms. Leonard pointed out the importance of discovery and stated that it would be difficult for one seeking information to support the need for the requested discovery absent knowledge about information the defendant possesses. Judge Armstrong observed that, often, a lawyer will have a specific, tangential, yet important issue that he or she

feels needs to be proven, about which discovery presumably will provide information. While the requested discovery may seem non-essential to the opposing party, the proposed rule change gives the court some guidance to help it determine what is afoot and what might make that information important to the case.

Prof. Peterson noted that most of the factors seem arguable, and stated that he understood Ms. Leonard's point about shifting the burden. If one considers the needs of the case or the importance of the issues, both sides will have very different opinions. Some factors that are more objective would be the amount in controversy or costs. In terms of uncoupling Oregon's rule from federal law, Prof. Peterson suggested using the language "may weigh" instead of "shall consider" and removing the amount in controversy. Mr. Eiva agreed that this would be helpful. He stated that he currently has a workplace injury case against several corporate defendants with about 40 discovery requests, the answer to each of which was "not proportional." He opined that the reason is that the defendant is a billion dollar corporation and for them to do anything, even to make a telephone call, is expensive. He suggested that this will be the new objection; every time an individual has a suit against a corporation, the corporation will invoke the proportionality analysis as a matter of fact, because what is one life worth compared to the company spending money to find the requested information. Judge Zennaché asked whether Mr. Eiva really believes that a defendant's lawyer would file a motion for a protective order based on the argument that a client's life should not justify him or her making a telephone call. Mr. Eiva explained that he was talking generally about the cost of defendants getting the discovery. He stated that it is not an extreme example but, rather, the first example of what is happening in Oregon since the federal rule passed.

Judge Armstrong asked why the defendant would not just argue "undue burden" in an objection to the request. Mr. Eiva stated that this goes back to what Judge Zennaché said, that the proposed amendment is carefully placed within the section of the rule addressing motions for protective orders. He stated that the basis for a motion for a protective order is often initially put in the objection to the request for production and, therefore, it really is the plaintiff's motion to compel that gets the dispute addressed, as opposed to a motion for a protective order where the defendant lays it all out and explains why it is a problem. Judge Zennaché pointed out that the defendant could already say it is an undue burden, and that adding this language would not change the ability to make such a specious objection to discovery. Mr. Eiva stated that one of the concerns with the proposed language is that it does not put any value on the weighing but, rather, it says "here is a factor to consider." It is in the context of ORCP 36 B(1) that says that discovery is broad. Judge Zennaché agreed and stated that he is trying to

change that. Mr. Eiva reiterated that discovery is broad, and wondered how much value to give these factors within that realm. He pointed out that the proposed amendment does not give that kind of guidance because it emphasizes certain factors over others that are not enumerated in the rule, even though it says "among other factors." He wondered how much weight those other factors are going to get when they are not emphasized in the rule. Judge Roberts asked what other factors Mr. Eiva would like to see included. Mr. Eiva stated that he had not been asked to consider what other factors he would like to include, and that he would need time to consider it. Judge Armstrong stated that this is where the response would come in, in theory, that the opposing party could weigh in on the factors in the response.

Judge Gerking observed that Council members had been discussing this issue for some time and that he had not heard one legitimate argument preventing the Council from at least voting to put the proposed amendment on the September agenda or publishing it for comment. He opined that it makes no sense to discuss it further, since no one would talk anyone else out of anything. He observed that feedback from the bench and bar might help the Council get through this difficult issue.

Mr. Bachofner made a motion to change the word "shall" to "may" in one version and put both this amended version and the existing version on the September agenda so that the Council could vote to publish the rule in potentially two different ways for the public to consider. Mr. Eiva objected to public comment on these versions and stated that there should be a version of the rule that has different factors and removes the amount in controversy from the factors. Mr. Keating stated that, with regard to removing the value of the case, he does not know how to make a calculation as to whether the expense is undue if the cost of production is three times larger than the prayer. He stated that he is somewhat attached to the word "shall" because of the experiences he has had. He would prefer for the judge to comment on it because receiving an order stating "the motion to compel is granted" does not give him any information about why. Judge Wolf stated that, if the amount in controversy were removed, the Council likely would not receive any comments. Mr. Eiva suggested one version with the language and one without.

Mr. Bachofner made a motion to put the proposed amendment as drafted on the September agenda. Mr. Crowley seconded the amendment, which passed by voice vote with several nay votes.

Mr. Eiva made a motion to put a second amendment on the September agenda, as drafted except for the following changes: changing the word "shall" to "may" and

removing "amount in controversy." Ms. Payne seconded the motion. Judge Conover asked for clarification that the intent is not to preclude a judge from considering the amount in controversy – just not to specifically enumerate it. Mr. Eiva agreed that the intent is not to preclude a judge from considering the amount in controversy and that, among other things, the extreme case can be decided that way. The motion passed by voice vote with several nay votes.

4. ORCP 45 Committee

Ms. Wray explained that the committee has had a draft (Appendix G) prepared for several months but that it had not yet come before the Council for a vote on whether to advance it to the September publication agenda. She noted that the Council had discussed the issue fully during previous meetings, and that she did not want to belabor the issue. Mr. Bachofner reminded the Council that the issue at hand was brought up late last biennium, and that the proposed change allows a party to include in a request for admissions a request to stipulate to the authenticity of documents to avoid the need to bring a records custodian to the trial simply to authenticate documents. He stated that virtually every plaintiffs' and defense attorney to whom he has spoken about the issue thinks that this is a good way to streamline trials so that records custodians do not need to be present at trial unless absolutely necessary.

Mr. Bachofner made a motion to put the draft amendment on the September publication agenda. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

5. ORCP 47 Committee

Judge Roberts explained that the committee's proposed draft amendment (Appendix H) is before the Council and that the committee has removed any controversial changes. Mr. Brian stated that his recollection is that the purpose of the change is to permit any party to move for summary judgment. Judge Roberts agreed. Prof. Peterson stated that he had noticed that Council staff had inadvertently deleted the word "or" in section A. Mr. Beattie suggested a friendly amendment to re-insert the word. Judge Armstrong made a motion to put the draft amendment, as amended, on the September publication agenda. Judge Roberts seconded the motion, which was approved unanimously by voice vote.

6. ORCP 79-85 Task Force

Prof. Peterson suggested that the Council may need to appoint a new convener for the ORCP 79-85 task force. He stated that he has been ineffective in scheduling meetings with the diverse members. He reported that the task force has met by teleconference a few times and has agreed upon changes to Rules 79, 80, and 81, most of which are to clean up antiquated language but some of which put the rules into more of a checklist format, as suggested by Judge Zennaché. Prof. Peterson stated that the Oregon Law Commission (OLC) is looking at the issue of receiverships and, since a few biennia ago the language that the OLC proposed regarding foreign depositions required extensive revision by the Council, it might be wise to work with the OLC on these changes. He asked the Council for authority to do so, as well as to have the task force meet over the summer and then have the staff circulate the task force recommendations by e-mail in advance of the September meeting. The Council would then vote on whether or not to publish them at that meeting, and any draft amendments would then be subject to public comment. Judge Zennaché asked for clarification that, if the Council votes to put a draft amendment on the agenda for the September meeting, the Council is not voting to publish them. Prof. Peterson confirmed this.

Mr. Brian asked who the task force members are. Prof. Peterson stated that Mr. Bachofner, Judge Bailey, Judge Conover, Judge Gerking, Mr. Snelling, and Judge Zennaché are the Council members on the task force, and that attorneys Michael Fuller and Russ Garrett are also members. Mr. Bachofner stated that pre-judgment remedies are somewhat of an esoteric area and that, for those who do debtors' or creditors' rights, it requires a complex approach that takes a little bit of thinking through before it can even be intelligently discussed. Mr. Beattie asked whether the committee has been working though drafts. Prof. Peterson stated that draft amendments of rules 79, 80, and 81 have been informally passed by the task force but without any clear direction to forward them to the Council. He suggested that, if a meeting could be arranged, the task force could likely get those three draft amendments to the Council fairly quickly. Mr. Brian asked if the changes would be substantive. Prof. Peterson replied that the changes are not really substantive; however, he is concerned with any potential changes being made by the OLC. He stated that, if the OLC is going to make a change that involves practice, it would behoove the Council to be involved in that process.

Mr. Brian asked whether any Council members had concerns about the task force working during the summer and forwarding any draft amendments for the Council's review well in advance of the September meeting. No such concerns were expressed.

Judge Zennaché volunteered to be the new convener for the task force. Prof. Peterson stated that he would support Judge Zennaché in any way he could. Mr. Beattie noted that, if there is a comment from the Council in general, it should be compact and focused so that the discussion does not become wide ranging. Judge Bailey noted that the changes are not particularly nuanced things and thus far have not been substantive. Prof. Peterson stated that input from the Council will be helpful to avoid unintended consequences that any seemingly innocuous changes might bring.

V. New Business

No new business was raised.

VI. Adjournment

Mr. Brian reminded the Council that the next meeting will be on September 10, 2016, at the Oregon State Bar Offices. He adjourned the meeting at 12:02 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

CURRENT BIENNIAL SCHEDULE

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KEY

Council Meeting Month/Day

Meeting-Free Month

Deadline for Publishing Proposed Amendments (30 days before promulgation meeting): November 3, 2016

Legislative Session

Deadline for Publishing Promulgated Amendments (60 days after promulgation meeting): February 1, 2017

Election of officers

Election of Legislative Advisory Committee

PROPOSED ANNUAL SCHEDULE

2017

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KEY

- Council Meeting Month
- Meeting-Free Month
- Deadline for Publishing Proposed Amendments (30 days before promulgation meeting): October 5, 2017 /October 4, 2018
- Legislative Session (estimated)
- Deadline for Publishing Promulgated Amendments (60 days after promulgation meeting): January 2, 2018 / January 1, 2019
- Election of officers and Legislative Advisory Committee

There would be 3 additional meetings in the odd-numbered calendar years (7 vs. 4). There would be one less meeting in the even-numbered calendar years (7 vs. 8). In short, we would meet 14 times in 2 years rather than 12 times. We would continue to have two summer months off, plus additional time around the holidays.

We would need to change expiration of members' terms from August 31 to December 31. (This should not be a problem for current members because their terms will still end in the same calendar year.) We would also need to amend the rules of procedure to require the election of the chair, vice-chair, treasurer, and Legislative Advisory Committee at the final meeting of the year (November).

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). [*The*] **These** rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in [*the statute.*] **ORS 1.725-1.760.**

I. MEETINGS

Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the [*Executive Committee.*] **Council.** At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of **any** such meeting shall be given personally**,** by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of [*such*] **that** meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a [*period*] **term** of one year**. Officers for the succeeding year shall be elected** at the [*first*] **last** meeting of the Council [*following September 1*] of each year **and shall serve until a successor is elected**. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive

Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and **shall** perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to [*such*] **the** meeting and provide reasonable notice to Council members of [*such*] **the** agenda.

C. Committees. The Chair may appoint [*such*] **any** committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. [*Such*] **All** committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee [*selected*] **elected** pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. The Council[*, during its current biennium,*] had previously

approved such technical analysis and advice through a super majority; or

b. The LAC, after a request by a legislative committee, has presented any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless [*such*] **<u>that</u>** position has been submitted to the Council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and **<u>who</u>** has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that [*such*] **<u>the</u>** member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. <u>Executive Director</u>. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of **<u>all</u>** required [*notice*] **<u>notices</u>** of meetings of the Council; preparation and [*disbursement*] **<u>distribution</u>** of Council [*agenda*] **<u>meeting agendas</u>**; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. <u>Staff</u>. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be

required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council **appropriated by the Legislature** shall be retained by [*the Office of Legislative Counsel and/or*] **Lewis and Clark Law School and funds authorized for the Council by** the Oregon State Bar **shall be retained by the Bar. All such funds** [*and*] shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. **The** Council shall designate a location for an administrative office for the Council. All Council records shall be kept in [*such*] **that** office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the [*promulgations, amendments, or repeals,*] **promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure,** the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals,

together with a list of statutory sections superseded thereby, [*and appropriate explanatory comments,*] in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby[*, together with explanatory comment,*] to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures [*this 12th day of September, 2009.*]

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). These rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in ORS 1.725-1.760.

I. MEETINGS. Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Council. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of any such meeting shall be given personally, by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of that meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called. All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a term of one year. Officers for the succeeding year shall be elected at the last meeting of the Council of each year and shall serve until a successor is elected. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and shall perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to the meeting and provide reasonable notice to Council members of the agenda.

C. Committees. The Chair may appoint any committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. All committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee elected pursuant to ORS 1.760. The phrase "super majority"

means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. the Council had previously approved such technical analysis and advice through a super majority; or

b. the LAC, after a request by a legislative committee, has presented any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures. The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless that position has been submitted to the Council and approved by a super majority. Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and who has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that the member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of all required notices of meetings of

the Council; preparation and distribution of Council meeting agendas; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council appropriated by the Legislature shall be retained by Lewis and Clark Law School and funds authorized for the Council by the Oregon State Bar shall be retained by the Bar. All such funds shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. The Council shall designate a location for an administrative office for the Council. All Council records shall be kept in that office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE. The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare

and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby, in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this ___ day of _______________, 2016.

The Council on Court Procedures (CCP) is responsible for conducting an ongoing review of the Oregon Rules of Civil Procedure (ORCP) to ensure the prompt and efficient administration of justice in Oregon's circuit courts. The CCP wrote the ORCP and drafts amendments to the ORCP which go into effect unless amended by the Legislature. The purpose of this survey is to find out from the users of the ORCP how well the CCP is doing its job as well as to solicit suggestions for additions or amendments to the ORCP.

1. Do you agree that the ORCP promote the just, speedy, and inexpensive determination of civil court actions?

❏ Agree strongly
❏ Agree
❏ Agree somewhat
❏ Disagree somewhat
❏ Disagree
❏ Disagree strongly
❏ No Opinion

2. Please rate your familiarity with the composition and work of the CCP:

❏ Very familiar
❏ Somewhat familiar
❏ Vaguely familiar
❏ Unfamiliar
(If you answered unfamiliar, please skip to question 9.)

3. Have you visited the CCP website?

❏ Yes
❏ No

4. If you have visited the CCP website, please rate its usefulness:

❏ Excellent
❏ Good
❏ Fair
❏ Poor
❏ Extremely Poor
❏ No Opinion

5. Have you ever made a proposal to the CCP?

❑ Yes
❑ No

5. If you are very or somewhat familiar with the work of the CCP, how would you rate the quality of its work:

❑ Excellent
❑ Good
❑ Fair
❑ Poor
❑ Extremely Poor
❑ No Opinion

7. If you are very or somewhat familiar with the work of the CCP, how would you rate the CCP's responsiveness to the needs of litigants, lawyers, and judges:

❑ Excellent
❑ Good
❑ Fair
❑ Poor
❑ Extremely Poor
❑No Opinion

8. The Legislature once exercised exclusive authority to enact and amend Oregon's civil procedure rules. That authority is now shared between the Legislature and the CCP. Who do think should have this authority?

❑ Continue shared authority
❑ Favor CCP
❑ Favor Legislature
❑ Other (please specify): _______________
❑No Opinion

9. The following best describes my practice area:

❑ Defense lawyer
❑ Plaintiffs' lawyer
❑ Administrative law lawyer
❑ Appellate lawyer

❑ Transactional lawyer
❑ Probate lawyer
❑ Family law lawyer
❑ Government lawyer
❑ Mediator/Arbitrator
❑ Trial judge
❑ Appellate judge
❑ Other (please specify): __________

10. The following best describes my office:

❑ Large firm
❑ Mid-size firm
❑ Small firm
❑ Solo practice
❑ Corporation
❑ Non-profit
❑ Judicial Department
❑ Other (please specify): __________

11. If you have a specific proposal for an amendment of an ORCP to improve its functionality, please let us know here. If possible, please identify the specific rule or rules to which the change or changes pertain.

12. Other than proposals for changes in rules or procedures, please add any comments you feel are appropriate about the CCP or its work:

13. If you have provided a proposal or other feedback and would like to be available in case the CCP has any questions, please provide your name, telephone number, and e-mail address.

MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator. When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B Appointment of guardian ad litem for minors; incapacitated or financially incapable parties. When a minor or a person who is incapacitated or financially incapable, as defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons; or

B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor, or other interested person;

B(3) when the plaintiff or petitioner is a person who is incapacitated or financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or

other interested person; **or**

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons or, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or financially incapable, as defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsections F(2) or F(3) of this rule.

E Notice of motion seeking appointment of guardian ad litem. Unless waived under Section H of this rule, no later than 7 days after filing the motion for appointment of a guardian ad litem, the person filing the motion must provide notice as set forth in this section, or as provided in a modification of the notice requirements as set forth in Section H of this rule. Notice shall be provided by mailing to the address of each person or entity listed below, by first

class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of notice prescribed in Section F of this rule.

E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the motion; and, if the minor has no living parents, to any person nominated to act as a fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

E(2) If the party is 18 years of age or older, notice shall be given:

E(2)(a) to the person;

E(2)(b) to the spouse, parents, and adult children of the person;

E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

E(2)(d) to any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

E(2)(e) to any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

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

E(2)(g) if the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a representative of the Department;

E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a representative of the Authority;

E(2)(i) if the person is committed to the legal and physical custody of the Department of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

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

E(2)(k) to any other person that the court requires.

F Contents of notice. The notice shall contain:

F(1) the name, address, and telephone number of the person making the motion, and the relationship of the person making the motion to the person for whom a guardian ad litem is sought;

F(2) a statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 14 days from the date of the notice; and

F(3) a statement indicating that the person for whom the guardian ad litem is sought may object in writing to the clerk of the court in which the matter is pending and stating the desire to object.

G Hearing. As soon as practical after any objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make any order that is appropriate.

H Waiver or modification of notice. For good cause shown, the court may waive notice entirely or make any other order regarding notice that is just and proper in the circumstances.

I Settlement. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of any settlement must be sought and obtained by a conservator unless the court, for good cause shown and on any terms that

the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

JURORS

RULE 57

A Challenging compliance with selection procedures.

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

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

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

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

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

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

D Challenges.

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

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

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

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

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

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

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

1 D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind
2 on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror
3 cannot try the issue impartially and without prejudice to the substantial rights of the party
4 challenging the juror. Actual bias may be in reference to: the action; either party to the action;
5 the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of
6 which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a
7 member. A challenge for actual bias may be taken for the cause mentioned in this paragraph,
8 but on the trial of such challenge, although it should appear that the juror challenged has
9 formed or expressed an opinion upon the merits of the cause from what the juror may have
10 heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the
11 court must be satisfied, from all of the circumstances, that the juror cannot disregard such
12 opinion and try the issue impartially.
13 **D(2) Peremptory challenges; number.** A peremptory challenge is an objection to a juror
14 for which no reason need be given, but upon which the court shall exclude such juror. Either
15 party is entitled to no more than three peremptory challenges if the jury consists of more than
16 six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where
17 there are multiple parties plaintiff or defendant in the case, or where cases have been
18 consolidated for trial, the parties plaintiff or defendant must join in the challenge and are
19 limited to the number of peremptory challenges specified in this subsection except the court, in
20 its discretion and in the interest of justice, may allow any of the parties, single or multiple,
21 additional peremptory challenges and permit them to be exercised separately or jointly.
22 **D(3) Conduct of peremptory challenges.** After the full number of jurors has been passed
23 for cause, peremptory challenges shall be conducted by written ballot or outside of the
24 presence of the jury as follows: the plaintiff may challenge one and then the defendant may
25 challenge one, and so alternating until the peremptory challenges shall be exhausted. After
26 each challenge, the panel shall be filled and the additional juror passed for cause before

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

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

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

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

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

violate paragraph (a) of this subsection is rebutted.

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

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

F Alternate jurors.

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) Decision to allow alternate jurors. The court has discretion over whether alternate jurors may be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to: [*(a)*] one peremptory challenge if one or two alternate jurors are to be empanelled; [*(b)*] two peremptory challenges if three or four alternate jurors are to be empanelled; and [*(c)*] three peremptory challenges if five or six alternate jurors are to be empanelled. The court shall have discretion as to when and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors shall be drawn in the same manner; shall have the same qualifications; shall be subject to the same examination and challenge rules; shall take the same oath; and shall have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror shall not attend or otherwise participate in

deliberations.

F(5) Installation and discharge. Alternate jurors shall be installed to replace any jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

A Service; when required. Except as otherwise provided in these rules, every order; every pleading subsequent to the original complaint; every written motion other than one that may be heard ex parte; and every written request, notice, appearance, demand, offer to allow judgment, designation of record on appeal, and similar document shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7.

B Service; how made. [*Whenever*] **Except as otherwise provided in Rule 7 or Rule 8, whenever** under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to that attorney or party; by mailing it to the attorney's or party's last known address; **by e-mail as provided in section G of this rule;** by electronic service as provided in section H of this rule; or, if the party is represented by an attorney, by facsimile communication [*or by e-mail*] as provided in [*sections*] **section** F [*or G*] of this rule. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at the person's office with the [*person's clerk or*] person **who is** apparently in charge [*thereof*]; or, if there is no one in charge, leaving the copy in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving the copy at the person's dwelling house or usual place of abode with some person 14 years of age or older then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing [*a copy of*] the pleading or other document with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon that party personally.

C Filing; proof of service. Except as provided by section D of this rule, all documents required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of service of all documents required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Proof of service may be made upon the document served or as a separate document attached thereto.

C(1) Proof of service by facsimile communication. If service is made by facsimile communication [*or by e-mail,*] **under section F of this rule,** proof of service shall be made by affidavit or by declaration of the person making service, or by certificate of an attorney [*or sheriff. If service is made by facsimile communication under section F of this rule,*] **and** the person making service shall attach to the affidavit, declaration, or certificate printed confirmation of receipt of the message generated by the transmitting technology.

C(2) Proof of service by e-mail. If service is made by e-mail under section G of this rule, [*the person making service must certify*] **proof of service shall be made by affidavit or by declaration of the person making service, or by certificate of an attorney, stating either that the other party has consented to service by e-mail or** that he or she received confirmation that the message **and attachment** [*was*] **were** received[, *either by return e-mail, automatically generated message, facsimile communication, or orally; however, an*] **by the designated recipient and specifying the method by which the sender received confirmation**. **An** automatically generated message indicating that the recipient is out of the office or is otherwise unavailable cannot support the required certification**, nor can an automatically generated e-mail delivery status notification**. **Service by e-mail is effective at the time of receipt of the message and any attachment by the designated recipient.**

C(3) Proof of service by electronic service. If service is made by electronic service under section H of this rule, proof of service shall be made by affidavit or by declaration of

the person making service, or by certificate of an attorney, specifying that service was completed by electronic service.

C(4) Proof of service upon a party without a service address. Service upon a party who has appeared without providing an appropriate address for service shall be by affidavit or by declaration of the person filing the document, or by certificate of an attorney, that service by filing as provided in section B of this rule is appropriate.

D When filing not required. Notices of deposition, requests made pursuant to Rule 43, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial. Offers to allow judgment made pursuant to Rule 54 E shall not be filed with the court except as provided in Rule 54 E(3).

E Filing with the court defined. The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon the pleading or document the time of day, the day of the month, the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless a caption that includes the name of the court; the case number of the action, if one has been assigned; the title of the document; and the names of the parties are legibly displayed on the front of the document, nor unless the contents of the document are legible. Further, the clerk is not required to receive for filing any document that does not include the name, address, and telephone number of the party or the attorney for the party, if the party is represented.

F Service by facsimile communication. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of facsimile communication if the attorney has such technology available and said technology is operating at the time service is made. Service in this manner shall be subject to Rule 10 [*C*]**B**. Facsimile communication includes: a telephonic

facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via e-mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing e-mail account.

G Service by e-mail. [*Service by e-mail is prohibited unless attorneys agree in writing to e-mail service.*] **Whenever under these rules service is required or permitted to be made upon a party, unless the party or the party's attorney is exempted from service by e-mail by an order of the court, the service may be made by means of e-mail.** [*This agreement*] **Any party or any party's attorney** must provide the [*names*] **name** and e-mail [*addresses*] **address** of [*all attorneys*] **that party or that attorney** and [*the attorneys' designees,*] **that attorney's designee,** if any, [*to be*] **on any document** served **by e-mail**. Any **party or** attorney who has [*consented to*] **communicated by** e-mail **or by electronic** service must notify the other parties in writing of any changes to [*the*] **that party or that** attorney's e-mail address. [*Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. Subject to Rule 10 C, service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or is otherwise unavailable.*] **Service in this manner shall be subject to Rule 10 B.**

H Service by electronic service. As used in this section, electronic service means using an electronic filing system provided by the Oregon Judicial Department and in the manner prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court.

1 **COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS**

2 **RULE 22**

3 **A Counterclaims.**

4 A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as

5 [*such*] **that** defendant may have against a plaintiff.

6 A(2) A counterclaim may or may not diminish or defeat the recovery sought by the

7 opposing party. It may claim relief exceeding in amount or different in kind from that sought in

8 the pleading of the opposing party.

9 **B Cross-claim against codefendant.**

10 B(1) In any action where two or more parties are joined as defendants, any defendant

11 may in [*such*] **that** defendant's answer allege a cross-claim against any other defendant. A

12 cross-claim asserted against a codefendant must be one existing in favor of the defendant

13 asserting the cross-claim and against another defendant, between whom a separate judgment

14 might be had in the action**,** and shall be[: *(a)*] one arising out of the occurrence or transaction

15 set forth in the complaint[*;*] or [*(b)*] related to any property that is the subject matter of the

16 action brought by plaintiff.

17 B(2) A cross-claim may include a claim that the defendant against whom it is asserted is

18 liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim

19 asserted by the plaintiff.

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

21 appeared.

22 **C Third party practice.**

23 C(1) After commencement of the action, a defending party, as a third party plaintiff,

24 may cause a summons and complaint to be served upon a person not a party to the action who

25 is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the

26 third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's

1 summons and complaint on the defending party. Otherwise the third party plaintiff must obtain
2 agreement of parties who have appeared and leave of court. The person served with the
3 summons and third party complaint, hereinafter called the third party defendant, shall assert
4 any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert
5 counterclaims against the third party plaintiff and cross-claims against other third party
6 defendants as provided in this rule. The third party defendant may assert against the plaintiff
7 any defenses [*which*] **that** the third party plaintiff has to the plaintiff's claim. The third party
8 defendant may also assert any claim against the plaintiff arising out of the transaction or
9 occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff.
10 [*The plaintiff*] **Any party** may assert any claim against [*the*] **a** third party defendant arising out
11 of the transaction or occurrence that is the subject matter of the plaintiff's claim against the
12 third party plaintiff, and the third party defendant thereupon shall assert the third party
13 defendant's defenses as provided in Rule 21 and may assert the third party defendant's
14 counterclaims and cross-claims as provided in this rule. Any party may move to strike the third
15 party claim, or for its severance or separate trial. A third party **defendant** may proceed under
16 this section against any person not a party to the action who is or may be liable to the third
17 party defendant for all or part of the claim made in the action against the third party
18 defendant.
19 C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party
20 **defendant** to be brought in under circumstances [*which*] **that** would entitle a defendant to do
21 so under subsection C(1) of this section.
22 **D Joinder of additional parties.**
23 D(1) Persons other than those made parties to the original action may be made parties
24 to a counterclaim or cross-claim in accordance with the provisions of [*Rules 28 and 29*] **Rule 28**
25 **and Rule 29**.
26 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)*] <u>be more convenient, avoid prejudice, or</u> be more economical and expedite the matter.

1 **REQUESTS FOR ADMISSION**

2 **RULE 45**

3 **A Request for admission.** After commencement of an action, a party may serve upon
4 any other party a request for the admission by the latter of the truth of relevant matters within
5 the scope of Rule 36 B specified in the request, including facts or opinions of fact, or the
6 application of law to fact, or of the genuineness of any relevant documents or physical objects
7 described in or exhibited with the request. Copies of documents shall be served with the
8 request unless they have been or are otherwise furnished or made available for inspection and
9 copying. Each matter of which an admission is requested shall be separately set forth. The
10 request may, without leave of court, be served upon the plaintiff after commencement of the
11 action and upon any other party with or after service of the summons and complaint upon that
12 party. The request for admissions shall be preceded by the following statement printed in
13 capital letters [*of the type size*] **in a font size at least as large as** that in which the request is
14 printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED
15 BY ORCP 45 B WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."

16 **B Response.** The matter is admitted unless, within 30 days after service of the request,
17 or within such shorter or longer time as the court may allow, the party to whom the request is
18 directed serves upon the party requesting the admission a written answer or objection
19 addressed to the matter, signed by the party or by the party's attorney; but, unless the court
20 shortens the time, a defendant shall not be required to serve answers or objections before the
21 expiration of 45 days after service of the summons and complaint upon [*such*] **that** defendant.
22 If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the
23 matter or set forth in detail the reasons why the answering party cannot truthfully admit or
24 deny the matter. A denial shall fairly meet the substance of the requested admission, and when
25 good faith requires that a party qualify the answer or deny only a part of the matter of which an
26 admission is requested, the party shall specify so much of it as is true and qualify or deny the

remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C, deny the matter or set forth reasons why the party cannot admit or deny it.

C Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

D Effect of admission. Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be [*subserved*] **furthered** thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice [*such*] **that** party in maintaining [*such*] **that** party's case or [*such*] **that** party's defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending action only, and neither constitutes an admission by [*such*] **that** party for any other purpose nor may be used against [*such*] **that** party in any other action.

E Form of response. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably

calculated to enable the answering party to insert the admissions, denials, or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials, or objections and refer to them in the space provided in the request.

F Number.

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

F(2) Requests related to admissibility of business records. Notwithstanding subsection F(1) of this rule, and in addition to any requests made under that subsection, a party may serve a reasonable number of additional requests for admission to establish the authenticity and admissibility of specified business records under Rule 803(6) of the Oregon Evidence Code relating to the business records exception to hearsay.

1 **SUMMARY JUDGMENT**

2 **RULE 47**

3 **A For claimant.** A party seeking to recover upon [*a*] **<u>any type of</u>** claim [*, counterclaim, or*
4 *cross-claim*] or to obtain a declaratory judgment may, at any time after the expiration of 20
5 days from the commencement of the action or after service of a motion for summary judgment
6 by the adverse party, move, with or without supporting affidavits or declarations, for a
7 summary judgment in that party's favor [*upon*] **<u>as to</u>** all or any part [*thereof*] **<u>of any claim or</u>**
8 **<u>defense</u>**.

9 **B For defending party.** A party against whom [*a*] **<u>any type of</u>** claim[*, counterclaim, or*
10 *cross-claim*] is asserted or a declaratory judgment is sought may, at any time, move, with or
11 without supporting affidavits or declarations, for a summary judgment in that party's favor as to
12 all or any part [*thereof*] **<u>of any claim or defense</u>**.

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

1 liability alone although there is a genuine issue as to the amount of damages.

2 **D Form of affidavits and declarations; defense required.** Except as provided by section

3 E of this rule, supporting and opposing affidavits and declarations [*shall*] **must** be made on

4 personal knowledge, [*shall*] **must** set forth such facts as would be admissible in evidence, and

5 [*shall*] **must** show affirmatively that the affiant or declarant is competent to testify to the

6 matters stated therein. Sworn or certified copies of all [*papers*] **documents** or parts thereof

7 referred to in an affidavit or a declaration [*shall*] **must** be attached thereto or served therewith.

8 The court may permit affidavits or declarations to be supplemented or opposed by depositions

9 or further affidavits or declarations. When a motion for summary judgment is made and

10 supported as provided in this rule**,** an adverse party may not rest upon the mere allegations or

11 denials of that party's pleading[*, but*]**; rather,** the adverse party's response, by affidavits,

12 declarations**,** or as otherwise provided in this section, must set forth specific facts showing that

13 there is a genuine issue as to any material fact for trial. If the adverse party does not so

14 respond, the court shall grant the motion**,** if appropriate.

15 **E Affidavit or declaration of attorney when expert opinion required.** Motions under

16 this rule are not designed to be used as discovery devices to obtain the names of potential

17 expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for

18 summary judgment, is required to provide the opinion of an expert to establish a genuine issue

19 of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed**,**

20 qualified expert has been retained who is available and willing to testify to admissible facts or

21 opinions creating a question of fact[*,*] will be deemed sufficient to controvert the allegations of

22 the moving party and an adequate basis for the court to deny the motion. The affidavit or

23 declaration [*shall*] **must** be made in good faith based on admissible facts or opinions obtained

24 from a qualified expert who has actually been retained by the attorney**,** who is available and

25 willing to testify**,** and who has actually rendered an opinion or provided facts [*which*] **that**, if

26 revealed by affidavit or declaration, would be a sufficient basis for denying the motion for

1 summary judgment.

2 **F When affidavits or declarations are unavailable.** Should it appear from the affidavits
3 or declarations of a party opposing the motion that [*such*] <u>**the**</u> party cannot, for reasons stated,
4 present by affidavit or declaration facts essential to justify the opposition of that party, the
5 court may deny the motion or may order a continuance to permit affidavits or declarations to
6 be obtained or depositions to be taken or discovery to be had, or may make [*such*] <u>**any**</u> other
7 order as is just.

8 **G Affidavits or declarations made in bad faith.** Should it appear to the satisfaction of
9 the court at any time that any of the affidavits or declarations presented pursuant to this rule
10 are presented in bad faith or solely for the purpose of delay, the court shall [*forthwith*]
11 <u>**promptly**</u> order the party [*employing them*] <u>**filing such an affidavit or declaration**</u> to pay to the
12 other party the amount of the reasonable expenses [*which*] <u>**that**</u> the filing of the [*affidavits or*
13 *declarations*] <u>**affidavit or declaration**</u> caused the other party to incur, including reasonable
14 attorney fees, and any offending party or attorney may be subject to sanctions for contempt.

15 **H Multiple parties or claims; limited judgment.** If the court grants summary judgment
16 for [*less*] <u>**fewer**</u> than all parties [*and*] <u>**or fewer than all**</u> claims <u>**or defenses**</u> in an action, a limited
17 judgment may be entered if the court makes the determination required by Rule 67 B.

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1 **GENERAL PROVISIONS GOVERNING DISCOVERY**

2 **RULE 36**

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

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

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

16 **B(2) Insurance agreements or policies.**

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

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

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

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

1 be performed as soon as practicable following the filing of the complaint and the request to
2 disclose. The court may supervise the exercise of disclosure to the extent necessary to insure
3 that it proceeds properly and expeditiously. However, the court may limit the extent of
4 disclosure under this subsection as provided in section C of this rule.
5 B(2)(c) **Admissibility; applications for insurance.** Information concerning the insurance
6 agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes
7 of this subsection, an application for insurance shall not be treated as part of an insurance
8 agreement or policy.
9 B(2)(d) **Definition.** As used in this subsection, "disclose" means to afford the adverse
10 party an opportunity to inspect or copy the insurance agreement or policy.
11 **B(3) Trial preparation materials.**
12 **B(3)(i) Materials subject to a showing of substantial need.** Subject to the provisions of
13 Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable
14 under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for
15 another party or by or for that other party's representative (including an attorney, consultant,
16 surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
17 substantial need of the materials in the preparation of such party's case and is unable without
18 undue hardship to obtain the substantial equivalent of the materials by other means. In
19 ordering discovery of such materials when the required showing has been made, the court shall
20 protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of
21 an attorney or other representative of a party concerning the litigation.
22 **B(3)(ii) Prior statements.** A party may obtain, without the required showing, a
23 statement concerning the action or its subject matter previously made by that party. Upon
24 request, a person who is not a party may obtain, without the required showing, a statement
25 concerning the action or its subject matter previously made by that person. If the request is
26 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) Relief available; 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)*] 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. **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**

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information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.

C(2) Denial of motion. 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.

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

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

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

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

11 **B(3) Trial preparation materials.**

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

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

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

7 **C Court order limiting extent of disclosure.**

8 **C(1) Relief available; grounds for limitation.** Upon motion by a party or by the person
9 from whom discovery is sought, and for good cause shown, the court in which the action is
10 pending may make any order [*which*] **that** justice requires to protect a party or person from
11 annoyance, embarrassment, oppression, or undue burden or expense, including one or more of
12 the following: [*(1)*] that the discovery not be had; [*(2)*] that the discovery may be had only on
13 specified terms and conditions, including a designation of the time or place; [*(3)*] that the
14 discovery may be had only by a method of discovery other than that selected by the party
15 seeking discovery; [*(4)*] that certain matters not be inquired into, or that the scope of the
16 discovery be limited to certain matters; [*(5)*] that discovery be conducted with no one present
17 except persons designated by the court; [*(6)*] that a deposition after being sealed be opened
18 only by order of the court; [*(7)*] that a trade secret or other confidential research, development,
19 or commercial information not be disclosed or be disclosed only in a designated way; [*(8)*] that
20 the parties simultaneously file specified documents or information enclosed in sealed
21 envelopes to be opened as directed by the court; or [*(9)*] that to prevent hardship the party
22 requesting discovery pay to the other party reasonable expenses incurred in attending the
23 deposition or otherwise responding to the request for discovery. **In deciding what constitutes
24 an undue burden, the court may consider, among other things, the proportionality of the
25 request for production to the needs of the case including the importance of the issues at
26 stake in the action, the parties' relative access to relevant information, the parties' resources,**

1 **the importance of the discovery, and the burden or cost of producing the information.**

2 **C(2) Denial of motion.** If the motion for a protective order is denied in whole or in part,

3 the court may, on such terms and conditions as are just, order that any party or person provide

4 or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in

5 relation to the motion.

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1 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**

2 **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

4 **A Scope.** Any party may serve on any other party [*a request*] **any of the following**

5 **requests**: [*(1)*]

6 **A(1) Documents or things. A request** to produce and permit the party making the

7 request, or someone acting on behalf of the party making the request, to inspect and copy any

8 designated documents (including electronically stored information, writings, drawings, graphs,

9 charts, photographs, sound recordings, images, and other data or data compilations from which

10 information can be obtained and translated, if necessary, by the respondent through detection

11 devices or software into reasonably usable form) or to inspect and copy, test, or sample any

12 tangible things [*which*] **that** constitute or contain matters within the scope of Rule 36 B and

13 [*which*] **that** are in the possession, custody, or control of the party upon whom the request is

14 served; [*or (2)*]

15 **A(2) Entry upon land. A request** to permit entry upon designated land or other property

16 in the possession or control of the party upon whom the request is served for the purpose of

17 inspection and measuring, surveying, photographing, testing, or sampling the property or any

18 designated object or operation thereon, within the scope of Rule 36 B.

19 **B Procedure.**

20 B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the

21 action and on any other party with or after service of the summons on that party. The request

22 shall identify any items requested for inspection, copying, or related acts by individual item or

23 by category described with reasonable particularity, designate any land or other property upon

24 which entry is requested, and shall specify a reasonable place and manner for the inspection,

25 copying, entry, and related acts.

26 B(2) **Time for response.** 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 **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.

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

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

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

11 **E Electronically stored information (“ESI”).**

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

17 **E(2) Meetings to resolve issues regarding ESI production; relevance to discovery**
18 **motions. In any action in which a request for production of ESI is anticipated, any party may**
19 **request one or more meetings to confer about ESI production in that action. No meeting can**
20 **be requested until all of the parties have appeared or have provided written notice of intent**
21 **to file an appearance pursuant to Rule 69 B(1). The court may also require that the parties**
22 **meet to confer about ESI production. Within 21 days of the request for a meeting, the parties**
23 **shall meet and confer about the scope of the production of ESI; data sources of the requested**
24 **ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying**
25 **responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues pertaining to**
26 **metadata; and any other issue a requesting or producing party deems relevant to the request**

1 **for ESI. Failure to comply in good faith with this subsection shall be considered by a court**

2 **when ruling on any motion to compel or motion for a protective order related to ESI. The**

3 **requirements in this subsection are in addition to any other duty to confer created by any**

4 **other rule.**

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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

HOOKER CREEK COMPANIES, LLC,
an Oregon limited liability company;
and Siteworks Excavation, LLC,
an Oregon limited liability company,
Plaintiffs-Appellants,

v.

CENTRAL OREGON LAND DEVELOPMENT, INC.,
an Oregon corporation, et al.,
Defendants,

and

LA PINE VILLAGE CREDIT PARTNERS, LLC,
an Oregon limited liability company,
Defendant-Respondent.

Deschutes County Circuit Court
09CV0402MA; A150968

A. Michael Adler, Judge.

Argued and submitted April 14, 2015.

Michael W. Peterkin argued the cause for appellants. With him on the briefs were Megan K. Burgess and Peterkin & Associates.

Stephen A. Mensing argued the cause for respondent. With him on the brief was Widmer Mensing Law Group, LLP.

Before Duncan, Presiding Judge, and Lagesen, Judge, and Flynn, Judge.

LAGESEN, J.

Limited judgment of foreclosure affirmed. Appeal of limited judgment for attorney fees dismissed; remanded with instructions to vacate that judgment.

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LAGESEN, J.

Plaintiffs, Hooker Creek and Siteworks,[1] appeal from the Limited Judgment of Foreclosure and Money Award in defendant La Pine Village Credit Partners' (LVCP's) favor on LVCP's counterclaim and cross-claim to foreclose its trust deed, as well as from a second Limited Judgment and Money Award awarding LVCP $102,210 in attorney fees against Hooker Creek under ORS 87.060(5), which provides for an award of attorney fees in a construction lien foreclosure case to "the party who prevails on the issues of the validity and foreclosure of the lien." They assign error to the trial court's use of the word "invalid" in the limited judgment on LVCP's trust deed foreclosure claim to describe the trial court's ruling regarding the scope of property subject to plaintiffs' liens, and the trial court's determination in the second limited judgment that LVCP is entitled to an award of attorney fees against plaintiffs pursuant to ORS 87.060(5). As to the first limited judgment, we conclude that plaintiffs have identified no reversible error in that judgment and, accordingly, affirm it. As to the second limited judgment, for reasons to be elaborated further, we conclude that that judgment is not valid. In accordance with *Shelter Products v. Steelwood Construction*, 257 Or App 382, 384 n 3, 307 P3d 449 (2013), and *Lindsay v. The Nicewonger Co., Inc.*, 203 Or App 750, 757, 126 P3d 730 (2006), we ultimately dismiss the appeal from that judgment and remand with instructions to vacate it.

BACKGROUND

Plaintiffs provided construction materials and labor related to the excavation and paving of a planned residential development project on 19.8 acres in Central Oregon.[2]

[1] Siteworks assigned its claims to plaintiff Hooker Creek. As a result, Hooker Creek is pursuing both its own claims, as well as Siteworks' claims, and Siteworks is not a direct participant in this case. Nevertheless, the parties have continued to refer to both companies as "plaintiffs," and so do we.

[2] The major disputes between the parties were resolved on summary judgment. Although plaintiffs assign error to the trial court's grant of summary judgment, ultimately, we conclude that the parties' arguments do not require us to review the merits of the court's grant of summary judgment. We nonetheless state the facts in the light most favorable to plaintiffs, as that is how the trial court was required to view the facts when ruling on the summary judgment motions.

Defendant Central Oregon Land Development, Inc. (COLD) owned approximately three acres of that property, referred to by the parties as Parcel 1; defendant La Pine Village, LLC (La Pine) owned the remainder, referred to by the parties as Parcel 2. Plaintiffs provided the labor and materials pursuant to a contract with COLD, but COLD never paid Siteworks the $87,126.00 due it, or Hooker Creek the $56,729.75 due it.

Plaintiffs filed and recorded construction lien claims under ORS 87.035 and ORS 87.050 for the amounts owed. They then initiated this action to foreclose those liens on the entire 19.8 acre parcel, naming COLD and La Pine as defendants, as well as a number of creditors with interests in the parcel.[3] LVCP, which held a trust deed on the entire 19.8 acre parcel, was among those named. LVCP then asserted a counterclaim and cross-claim to foreclose its own trust deed. It also asserted, as an affirmative defense to plaintiffs' lien claims, that plaintiffs' liens did not extend to Parcel 2, and then moved for summary judgment on that affirmative defense, among other issues. Plaintiffs filed a cross-motion for summary judgment as to the scope and priority of their liens.

The trial court granted LVCP's motion for summary judgment in part as to the scope of plaintiffs' liens, ruling that plaintiffs' liens were "invalid" as to Parcel 2. The trial court also granted plaintiffs' motion for summary judgment in part, ruling, among other things, plaintiff Sitework's lien had priority over LVCP on Parcel 1. The trial court subsequently ruled in LVCP's favor on its trust deed foreclosure claim, and then entered the first limited judgment in LVCP's favor on that claim. That limited judgment also "dismissed" plaintiffs' construction lien foreclosure claims "against Parcel 2" as a result of the summary judgment ruling that plaintiffs' liens were "invalid" as to Parcel 2.

LVCP then petitioned for attorney fees against Hooker Creek pursuant to ORS 87.060(5). It claimed that it was "the party who prevail[ed] on the issues of the validity and foreclosure of the lien" with respect to each of plaintiffs'

[3] Plaintiffs also alleged claims for breach of contract and quantum meruit recovery; those claims are not at issue on this appeal.

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liens, and entitled to fees under that statute. Plaintiffs opposed the petition, arguing that the court had ruled only that Parcel 2 was not subject to their liens, not that their liens were invalid. Plaintiffs also pointed out that the Supreme Court long has held that "the fact that plaintiff claimed more land than he was entitled to does not vitiate his lien," *Jackson v. Brown et al.*, 116 Or 343, 347, 241 P 59 (1925); *Erne v. Goshen Veneer*, 249 Or 357, 365, 437 P2d 479 (1968), and, from that proposition, argued that the trial court's ruling that the liens did not extend to Parcel 2 did not establish that LVCP had prevailed on "the issue[] of the validity" of their liens in and of itself. Plaintiffs also argued that LVCP had not adequately pleaded a right to recover attorney fees or otherwise alerted plaintiffs of LVCP's claimed entitlement to attorney fees, as required by ORCP 68. As noted, the trial court agreed with LVCP and awarded it $102,210. It then entered the second limited judgment purporting to award $102,210 to LVCP. At that time, the trial court had not entered a general judgment.[4]

ANALYSIS

Plaintiffs have appealed both limited judgments. With respect to the first limited judgment, they assign error to the court's determination that their lien was "invalid" as to Parcel 2. With respect to the second limited judgment, they assign error to the court's award of attorney fees.

We reject plaintiffs' first assignment of error on the ground that their arguments do not establish any basis for reversing the trial court's first limited judgment. Although plaintiffs argue that the trial court erred in finding that their lien was "invalid" as to Parcel 2, as we understand their argument, plaintiffs are not disputing on appeal the trial court's conclusion that Parcel 2 is not subject to their lien. Rather, plaintiffs are disputing the trial court's choice of the word "invalid" to describe its ruling that Parcel 2 is not covered by plaintiffs' liens: "As to parcel 2, plaintiff's liens were not 'invalid'. The court apparently did not agree

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[4] In fact, our review of the record suggests that, to date, the trial court has not entered a general judgment in this case. It is unclear whether the court has fully resolved all claims presented as of yet.

that parcel 2 was required for the convenient use and occupation of the improvement under ORS 87.015(1). That determination does not invalidate plaintiffs' liens."

In the absence of a developed argument that the trial court erred by determining that Parcel 2 was not subject to plaintiffs' liens, that argument about the trial court's choice of wording does not identify a reversible error by the trial court. ORS 19.415(2) (error is not reversible unless it substantially affects a party's rights); *Watson v. Dodson*, 238 Or 621, 623, 395 P2d 866 (1964) ("Not every technical error justifies reversal."). Although plaintiffs' concern about that word choice is understandable, given that entitlement to attorney fees depends upon prevailing on the issue of the "validity" of a lien, ultimately whether the trial court's ruling on the scope of plaintiffs' liens is one that entitles LVCP to attorney fees under ORS 87.060(5) is a question of what that statute means, a question that does not turn on the particular words used by the trial court to characterize its ruling regarding the scope of property subject to plaintiffs' liens.

In addition, we note that, to the extent that the limited judgment on LVCP's trust deed foreclosure claim purports to *dismiss* plaintiffs' lien claims as to Parcel 2—as distinguished from simply declaring that plaintiffs' liens do not apply to Parcel 2—it is a nullity. ORS 18.005 requires that to qualify as a valid judgment, a decision must be "the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document." ORS 18.005(8). Although the limited judgment conclusively resolves LVCP's request to foreclose its trust deed, and is, therefore, a valid judgment as to LVCP's claim to foreclose its trust deed, the limited judgment does not conclusively resolve plaintiffs' requests to foreclose their construction liens. For that reason, the limited judgment simply is not valid to the extent that it ostensibly operates as a partial dismissal of those yet unresolved claims.

For those reasons—the fact that plaintiffs have not demonstrated any error in the trial court's conclusion that their liens do not apply to Parcel 2 and the fact that the limited judgment is a nullity to the extent it purports to dismiss plaintiffs' lien claims—we reject plaintiffs' first assignment

of error and affirm the limited judgment in favor of LVCP on its trust deed foreclosure claim.

We turn to the limited judgment awarding attorney fees. That judgment is problematic, for reasons not identified by the parties. Specifically, at the time the trial court entered that judgment, the trial court did not have the authority to award attorney fees on a claim resolved by a limited judgment by a second, supplemental limited judgment. *Shelter Products*, 257 Or App at 384 n 3 (concluding that supplemental limited judgment awarding attorney fees based on a limited judgment is not a valid, appealable judgment); *see also Eagle-Air Estates Homeowners Assn., Inc. v. Haphey*, 272 Or App 651, 653 n 2, 354 P3d 766 (2015), *rev den*, 359 Or 166 (2016); *White v. Vogt*, 258 Or App 130, 144, 308 P3d 356 (2013). Where a court has purported to award fees by a supplemental limited judgment entered before entry of a general judgment, we have held that the supplemental limited judgment is neither valid nor appealable, and that an appeal from such a "judgment" must be dismissed. *Shelter Products*, 257 Or App at 384 n 3. Here, our own review of the record has confirmed that no general judgment had been entered at the time the trial court entered its second limited judgment awarding fees. Our case law, then, would appear to require the dismissal of the appeal from the limited judgment of attorney fees, with a direction to the trial court to vacate that invalid "judgment." *Id.* (dismissing appeal from invalid supplemental limited judgment awarding attorney fees); *Lindsay*, 203 Or App at 757 (dismissing appeal from invalid limited judgment with directions to trial court to vacate invalid judgment on remand).

In the interest of efficiency, we consider whether there is a way to avoid this result; the parties' dispute regarding LVCP's entitlement to attorney fees is a live one that is almost certain to resume in the trial court. Although we ultimately conclude that there is not, in reaching that conclusion we address an issue that may assist the trial court's assessment of the parties' attorney fee dispute when it resumes in that court.

We observe that ORS 19.270(4) confers upon us the authority to grant leave to the trial court to enter an

appealable judgment or order, if the trial court intended to enter one, and if "the judgment or order from which the appeal is taken is defective in form[.]" We observe further that the Council on Court Procedures recently amended ORCP 68 to permit a trial court to enter a limited judgment awarding attorney fees under some circumstances. Specifically, as of January 1, 2016, ORCP 68 C(5)(b)(ii) now expressly authorizes a trial court to enter a limited judgment awarding attorney fees on a claim resolved by previous limited judgment: "Attorney fees or costs and disbursements may be awarded or denied following entry of a limited judgment if the court determines that there is no just reason for delay. In such cases, any award or denial of attorney fees or costs and disbursement shall be made by limited judgment." ORCP 68 C(5)(b)(ii) (eff. Jan 1, 2016).

The amendment to ORCP 68 does not save the trial court's limited judgment because it was not in effect at the time the trial court entered that judgment. However, as noted, ORS 19.270 gives us the discretion to grant the trial court leave to enter a limited judgment in compliance with the procedures established by the newly-amended ORCP 68 C(5)(b)(ii). The question for us is whether to exercise that discretion under ORS 19.270.

We decline to do so for reasons that are, we acknowledge, intertwined with issues relating to the merits of the court's attorney fee award. Specifically, we decline to employ the leave procedure authorized by ORS 19.270 because the trial court's ruling in the first limited judgment that plaintiffs' liens are "invalid" as to Parcel 2 is not a ruling that entitles LVCP to an award of attorney fees under ORS 87.060(5) on the current state of the record. In other words, it would be futile for us to employ the leave procedure authorized by ORS 19.270 to permit the trial court to enter a limited judgment awarding attorney fees under ORS 87.060(5) because, as yet, no party is entitled to a fee award pursuant to that statute.

ORS 87.060(5) provides for an award of attorney fees in a construction lien foreclosure suit to "the party who prevails on the issues of the validity and foreclosure of the lien." The statute means what its plain terms state. To be

entitled to fees, a party must prevail on two distinct issues: (a) the validity of the lien and (b) the foreclosure of the lien. *Bones Construction Co. v. En Stone I, Ltd.*, 89 Or App 530, 532, 749 P2d 1217 (1988). The statute does not authorize an award of fees to a party who prevails on other grounds but does not prevail on those two issues. *HGC Limited v. Cascade Pension Trust*, 174 Or App 464, 470, 26 P3d 842 (2001); *Bones Construction Co.*, 89 Or App at 533-34.

Although LVCP argues otherwise in its arguments addressing the merits of the fee award, the trial court's ruling that plaintiffs' liens are not "valid" as to Parcel 2 has not—as yet, anyway—made LVCP "the party who prevails on the issues of the validity and foreclosure of the lien." ORS 87.060(5). The trial court's ruling that plaintiffs' liens were not "valid" as to Parcel 2 was not a ruling that plaintiffs had no valid liens at all. *See Jackson*, 116 Or at 347 ("[T]he fact that plaintiff claimed more land than he was entitled to does not vitiate his lien."); *Erne*, 249 Or at 365 (where lien-claim plaintiff has valid lien but claims that lien should cover more land than proper, "[t]he lien may be made applicable to such area in its description to which it properly applies"). In other words, as noted above, the trial court's ruling regarding the scope of plaintiffs' liens did not conclusively resolve plaintiffs' lien claims and, thus, it did not eliminate the possibility that plaintiffs might ultimately prevail on those claims. On the record as it stands, each plaintiff may yet become "the party" that prevails on the issues of the validity and foreclosure of the two liens, making any determination regarding entitlement to attorney fees premature. For that reason, we decline to exercise our discretion under ORS 19.270 to grant the trial court leave to enter a new limited judgment awarding fees to LVCP under the procedures authorized by the newly-amended ORCP 68 C(5)(b)(ii), and we instead dismiss the appeal as to that judgment and direct the trial court to vacate it on remand.

Limited judgment of foreclosure affirmed. Appeal of limited judgment for attorney fees dismissed; remanded with instructions to vacate that judgment.

Shari Nilsson <nilsson@lclark.edu>

Fw: ORCP 71B relief

Leslie.Roberts@ojd.state.or.us <Leslie.Roberts@ojd.state.or.us> Fri, Jun 10, 2016 at 12:26 PM
To: mpeterso@lclark.edu, nilsson@lclark.edu

Attached is a little email string -- an inquirey from one of our judges, and my response, regarding inconsistent language in ORCP 71 which, in the fulness of time, we should address.

Judge Leslie M. Roberts
Multnomah County Circuit Court
1021 SW Fourth Avenue # 212
Portland, OR 97204-1223
Tel: (503) 988-6760
Fax: (503) 276-0976
E-Mail: leslie.roberts@ojd.state.or.us
----- Forwarded by Leslie Roberts/MUL/OJD on 06/10/2016 12:24 PM -----

From: Leslie Roberts/MUL/OJD
To: Patrick W Henry/MUL/OJD@OJD
Cc: MUL Judges
Date: 06/10/2016 12:20 PM
Subject: Re: ORCP 71B relief

I haven't had that problem, but it seems to me that (1) the time of one year "after receipt of notice by the moving party" is probably jurisdicitional; but (2) the time for service of the motion "within one year of the entry of the motion" is probably *not* jurisdictional; so I'd suppose the tie goes to the runner, and the motion should be heard and considered and, if well supported, granted. Just my impression. Meanwhile, I'll send this on to the staff of the Council on Court Procedures for (in due time) consideration of correction in the inconsistency.

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Patrick W Henry---06/10/2016 11:30:15 AM---I have a party who is seeking relief from a judgment under ORCP 71B(a) (i.e. excusable neglect). Opp

From: Patrick W Henry/MUL/OJD
To: MUL Judges
Date: 06/10/2016 11:30 AM
Subject: ORCP 71B relief

I have a party who is seeking relief from a judgment under ORCP 71B(a) (i.e. excusable neglect). Opposing party argues that she can't get that relief because she failed to file her motion within one year of entry of the judgment.

Council on Court Procedures
September 10, 2016, Meeting
Appendix O-1

The moving party counters that she has one year from receipt of the judgment and she never received notice of the judgment because of the other party's bad acts (she alleges he hid the notice from her).

ORCP 71 clearly says that a party has one year "after receipt of notice . . . of the judgment." It then says that a copy of the "motion filed within on year after the entry of the judgment shall be served on all the parties. . . "

Has anyone had an opportunity to weigh in on this apparent contradiction?

Thanks.

Patrick W. Henry
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