

**NOTICE OF PUBLIC MEETING  
COUNCIL ON COURT PROCEDURES**

Saturday, September 12, 2015, 9:30 a.m.

Oregon State Bar

16037 SW Upper Boones Ferry Rd, Tigard, Oregon

**AGENDA**

- I. Call to Order (Ms. David)
  
- II. Introductions (all)
  - A. Guests
  - B. Welcome new members
  - C. Hand out current roster and note corrections
  
- III. Approval of December 6, 2014, Minutes (Ms. David)
  
- IV. Annual election of officers per ORS 1.730(2)(b) (Ms. David)
  - A. Chair
  - B. Vice Chair
  - C. Treasurer
  
- V. Council Rules of Procedure per ORS 1.730(2)(b) (Prof. Peterson)
  - A. Review
  - B. Council Timeline
  
- VI. Reports Regarding Last Biennium (Chair)
  - A. Promulgated Rules (Prof. Peterson)
  - B. 77<sup>th</sup> Legislative Assembly's ORCP Amendments Outside of Council Amendments (Prof. Peterson)
    - 1. ORCP 32
    - 2. ORCP 9 and 10
  
- VII. Administrative Matters (Chair)
  - A. Set Meeting Dates for Biennium
  - B. Funding (Prof. Peterson/Mr. Shields)
  - C. Suggestions to the Council from Survey Regarding Improvement (Prof. Peterson)
    - 1. Reject bad proposals more readily.
    - 2. Equal composition of CCP between plaintiff and defense bar. (Done by statute!)
    - 3. Continue to modernize to reflect technology (e.g., no page limits, use word limits). (Do we have any page limits?) Formatting and briefing

- requirements should assume electronic use.
4. Only change rules that need changing - all changes involve costs, e.g., training.
  5. Council is not representative of most lawyers. (See ORS 1.735.)
  6. Rules in one place - combine ORCP and UTCR.
  7. Appreciates CCP preventing litigation that is more paperwork and more expensive, e.g., no interrogatories or expert discovery.
  8. Refer to UTCR in the ORCP, even in an appendix.
  9. Accelerate biennial timeline for changes for ORCP. Need for more timely changes to ORCP and UTCR, e.g., electronic filing.
  10. Overhaul ORCP to provide step-by-step process maps. Write processes as opposed to rules and do not phrase in passive voice. Have rules reviewed by usability testers.
  11. Rules focus parties on trial and relevant aspects of cases but, as rules, have loopholes and cumbersome procedural requirements. Judges differ in ORCP interpretation. Parties can use to delay but may be no solution.
  12. CCP needs to include practitioners from plaintiffs' bar, defense bar, and family law bar. Needs to have attendance policy and shed members who do not show up, leaving topic unattended due to members' absences.

#### VIII. Old Business (Chair)

- A. Proposed Council Comments on Promulgated Rules from 2013-2015 Biennium (Prof. Peterson)

#### IX. New Business (Chair)

- A. Potential amendments carried over from last biennium
  1. **ORCP 7.** (reorganize to make process more clear, especially for self-represented litigants)
  2. **ORCP 10.** (repeal ORCP 10 B – terms of court)
  3. **ORCP 45.** (allow additional requests for admission that go only to authenticity of documents)
  4. **ORCP 47.** (align with FRCP 56 so that it is explicit that a party can move for summary judgment against a another party's affirmative defenses)
  5. **ORCP 55.** (Use of the word "officer" in sections C and H unclear - is it defined anywhere?)
  6. **Prejudgment Remedies.**
    - a. ORCP 79-85 (prejudgment procedural remedies; Council did not fully adopt changes to statutes made in 1972 post *Fuentes v. Shevin* [407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)])
    - b. ORCP 80-85 (review and revision)
    - c. No Specific ORCP (procedures to remove a wrongfully recorded lis pendens)

- B. Potential amendments received from Council Survey
1. **ORCP 7 D(6).** Allow service by publication more "flexibly" without a court order.
  2. **ORCP 7 - 9.** Re-draft for clarity, no substantive changes.
  3. **ORCP 9.** Need procedure for attorney to personally present documents to a judge ex parte. E-filing some matters can be dangerous to clients due to waste of time.
  4. **ORCP 9 A.** End absurd requirement to serve defaulted party with documents. (Current rule??)
  5. **ORCP 9 G.** Allow service by e-mail. (Current rule but only if consent to such service.) By text message.
  6. **ORCP 9 G.** Overhaul in light of prevalence of e-mail -- too cumbersome.
  7. **ORCP 9 G.** Permit service by e-mail.
  8. **ORCP 9 F and 10 C.** Eliminate 3 day rule for e-mail and fax.
  9. **ORCP 9 F, 10 C.** Clarify in one place 3 additional days to respond to service by fax. (Done! New ORCP 10 C. [Now 10 B.]
  10. **ORCP 15 B(2), 21 D.** If motion to make more definite and certain is granted, non-movant has 10 days (unless enlarged) after service of the order to file amended pleading. But can't file order allowing motion to make more definite and certain until UTCR 5.100 time period for opposing party to consent to its form has run. Need to re-serve entered order to start 10 day period. Change from service to entry??
  11. **ORCP 17 A.** Clarify when attorney is "attorney of record" in long cases (family law).
  12. **ORCP 20 A.** Allow plaintiffs to plead generally compliance with conditions precedent. (Current rule?)
  13. **ORCP 21 D/E.** Defendants file motion to make more definite and certain to force specific allegations as to each condition precedent.
  14. **ORCP 21 D/E.** Reduce frequency of motion to make more definite and certain and motion to strike by adding to rule that allegations do not limit or expand court's rulings on whether evidence is relevant and admissible. Motion to make more definite and certain only when allegations too indefinite or unclear to allow motion to dismiss under 21 A(8) - failure to state a claim.
  15. **ORCP 21 A, 23, 25.** Clarify trial judges' discretion to grant dismissal with prejudice -- no right to re-plead after Rule 21 motion to dismiss. Court of Appeals ignores discretion afforded by Rule 21 A and 25 A -- follows Rule 23.
  16. **ORCP 21 A, 23, 25.** Get judges to enforce sanctions and dismiss -- too many meritless cases get to trial.
  17. **ORCP 22 B(1).** No procedural mechanism for defendant to assert a

- cross-claim against an added third party defendant. See FRCP 13(g).
18. **ORCP 27 B.** Allow incapacitated defendant to be represented by person with durable power of attorney where co-defendant had power of attorney but did not disclose the incapacity until after losing and is now attacking judgment.
  19. **ORCP 27 B.** Court shall appoint guardian ad litem for incapacitated plaintiff or defendant. Can court appoint on own motion? (Yes, existing.) Okay to let power of attorney appear?
  20. **ORCP 36-45.** Favor granting parties authority to waive/modify various rules.
  21. **ORCP 36-45.** Greater limits on discovery - grant judges authority to limit discovery - it is out of control. (Judges have such authority, Rule 36 C.)
  22. **ORCP 43.** E-discovery burdens need to be addressed.
  23. **ORCP 43.** Plaintiffs' side hides the ball in producing medical records.
  24. **ORCP 43.** Require plaintiffs to obtain health records, not just say they do not have them.
  25. **ORCP 43.** Require plaintiffs to timely produce health documents, including films.
  26. **ORCP 43 B(2).** Documents must be labeled and organized to identify request to which they respond. Time consuming, sometimes unclear as some documents may respond to multiple requests. Produce in "native order." At least provide opt-out procedure.
  27. **Discovery.** Pattern discovery - more efficient to craft and to respond to uniform requests.
  28. **Discovery.** Allow interrogatories as the feds allow.
  29. **Discovery.** Expert discovery.
  30. **Discovery.** Limited interrogatories.
  31. **E-Discovery.** Improve e-discovery rule to prevent non-searchable PDFs. (Adobe?)
  32. **ORCP 44.** Require plaintiffs to attend independent medical exams without motion.
  33. **ORCP 44.** Recording medical exams - no uniformity as to whether plaintiff can record.
  34. **ORCP 44 C.** Plaintiffs should more clearly have to provide their medical records to defendant upon filing case.
  35. **ORCP 47.** Expand time limits in which to file response to motion for summary judgment.
  36. **ORCP 47.** Procedure to challenge affidavits/declarations filed supporting/opposing motion for summary judgment. Currently a motion to strike is used. Not appropriate under 21 E, as not pleadings. The fixed timelines for motions for summary judgment then have motions to strike overlaid on them. Also rule should address admissibility of evidence in

support/opposition to motions for summary judgment so court can schedule accordingly. Enlarge current 60 day before trial window in which to file motions for summary judgment. Need more time.

37. **ORCP 47 E.** Eliminate it. Ripe for abuse.
  38. **ORCP 57 F(5).** Allow alternate juror to replace a deliberating juror who cannot continue. (Current rule!)
  39. **ORCP 68 C(5).** Attorney fees awarded by an order in middle of case, not collectible or appealable until end of case and less effective to assist with settlement.
  40. **Effective Date of Rules.** Annual? Rules effective if legislature fails to act? (Current!)
  41. **Federalize Rules**
  42. **Trust & Estate Cases.** Clarify when and which ORCP apply to these cases (*See, e.g.,* ORCP 68 C(1)(c))
  43. **UTCR 5.100.** Require "winning" movant's attorney to submit order to court within set amount of time -- with consequences.
  44. **UTCR 21.** Need notice as to when filed orders are signed.
- C. Potential amendments suggested by Legislative Counsel
1. **ORCP 9 G.** Update reference to ORCP 10 C (now 10 B) – may be resolved by Legislative Counsel’s editorial authority.
  2. **ORCP 27 B.** Add conjunction between sections B(3) and B(4).
  3. **ORCP 57 F(3).** Omit lettered list (e.g., (a)) that conflicts with Council’s preferred style.
  4. **ORCP 69 C.** Add conjunction between sections C(2)(a) and C(2)(b).
- D. Appointment of committees regarding any items listed in IX A, B, and C
- X. Adjournment