CORRECTED MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, October 3, 2015, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Arwen Bird*
Michael Brian
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Hon. Roger J. DeHoog*
Travis Eiva
Jennifer L. Gates*
Robert M. Keating
Hon. David Euan Leith
Maureen Leonard
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. John Wolf

Members Absent:

Hon. Sheryl Bachart
Hon. Timothy C. Gerking
Hon. Jack L. Landau
Deanna L. Wray
Hon. Charles M. Zennaché

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 9, 9 G ORCP 10 ORCP 15 ORCP 21 B ORCP 22 B, C ORCP 27 B ORCP 44 ORCP 47 ORCP 57 F(3) ORCP 69 C	ORCP 20 A ORCP 21 A ORCP 21 D ORCP 21 E ORCP 23 ORCP 25 ORCP 27 B ORCP 32 ORCP 43 B(2) ORCP 55 ORCP 57 F(5) ORCP 68 C(5)	ORCP 27 B ORCP 57 F(3)	

I. Call to Order (Mr. Brian)

Mr. Brian called the meeting to order at 9:33 a.m.

II. Approval of September 12, 2015, Minutes (Mr. Brian) (Appendix A)

Mr. Brian asked whether any members had corrections to the draft September 12, 2015, minutes, which had been previously circulated to the members. Hearing none, he called for a motion to approve the minutes. Judge Roberts made a motion to approve the minutes, Mr. Bachofner seconded, and the minutes were approved unanimously by voice vote.

III. Administrative Matters (Mr. Brian)

A. Introductions

Everyone present, and those on the telephone, introduced themselves to the Council.

B. Website

Ms. Nilsson showed Council members a preview of the upcoming Council website that will soon be launched. She explained that the content will largely remain the same, but that the format will be more user-friendly, particularly to users of mobile devices. She stated that the design incorporates photographs of the state's county courthouses, as well as a site map at the bottom of every page for easier navigation. Mr. Brian asked when Ms. Nilsson thought the website would be live. She explained that she thought it would be in the next few weeks. He asked how much work she had put into the new website; she estimated about 2 months of work, on and off. Mr. Brian stated that he wanted to express his appreciation for her hard work.

C. Contacting Legislators

Prof. Peterson explained that, as one of the two smallest state agencies, during economic hard times the Council has sometimes had difficulties with funding. The Council is now receiving its traditional funding, currently in the amount of a little more than $53,000 per biennium, which covers the basic expenses. He stated that Council members started corresponding by e-mail with legislators to inform them about the Council's good work partly so that, when funding issues come up, the Legislature is aware of what the Council does. He observed that it is a good idea for Council members to contact legislators if they are constituents or work in a legislator's district, as well as if they have a personal relationship with a legislator. Further, it is especially important to be in contact with legislative leaders. Mr. Shields distributed a list of legislators and asked that Council members indicate those legislators with whom they would like to correspond. Mr.

Bachofner asked about the frequency of correspondence. Prof. Peterson stated that, in past biennia, Council members had attempted to send an e-mail after each meeting, which may have been too ambitious. Mr. Bachofner stated that it may depend on each Council member's relationship with the legislator. Prof. Peterson stated that he would draft the first e-mail for members to modify, as appropriate, for their correspondence.

D. Mileage Reimbursement

Prof. Peterson explained that the Oregon State Bar, which generously funds Council travel reimbursement, operates on a calendar year and appreciates receiving reimbursement requests during the same calendar year in which the expenses were incurred. He asked Council members to submit their forms to Council staff as soon as possible after the meeting for which they are seeking reimbursement.

E. Readability Programs

Ms. Nilsson stated that Council staff had looked into programs that analyze text to determine its reading level. She stated that there are numerous free, web-based programs available that give various levels of detail using different grade-level analysis scales. She explained that Microsoft Word 2010 has a very basic grade-level feature in its grammar check that also counts the number of sentences in the passive voice. Prof. Peterson observed that, if the Council would like to use such software, it should probably come to a decision on what approximate grade level would be the goal.

F. Meeting Locations

Mr. Brian reiterated that all Council meetings are currently scheduled to take place at the Oregon State Bar offices but that, if anyone would like to schedule a meeting outside of the Portland metro area, the venue and date should be planned as soon as possible so that Council members can check their calendars and check with their families regarding weekend travel.

IV. Old Business (Mr. Brian)

A. Staff Comments (Appendices B and C)

Mr. Brian stated that he would like to have a robust conversation about staff comments, both from those who think they are a good or a bad idea. He reminded the Council that Prof. Peterson had prepared staff comments for each rule change from last biennium, and that those are Prof. Peterson's thoughts about the rule changes. The question is what to do with those comments. Prof. Peterson explained that, in some publications, staff comments follow each of the rules. He stated that, at the inception of the rules of civil

procedure, there were comments on pretty much every rule, and these comments gave some guidance as to what the Council's thinking was and the origin of each rule. As biennia went by, staff comments became relatively short, basically explaining why a change was made (e.g., because of case law, because of a change in another rule, etc.). Prof. Peterson stated that, before he became Executive Director of the Council, staff comments had been discontinued. He stated that Judge Richard Barron of Coos County was a former Council member who recalled that the Council likely stopped writing staff comments because of *PGE v. Bureau of Labor and Industries* [116 Or App 356, 842 P2d 419 (1992)]. Judge Barron suggested to Prof. Peterson that, since that case has been rethought, it might be a good idea to revive staff comments. Judge Barron's suggestion was related to the last biennium's Council, which thought it was a good idea.

Prof. Peterson noted that comments have not been written in a long time, and staff was not sure exactly what the process should be. Prof. Peterson recalled that, at the September meeting, he suggested that perhaps the Council should vote on them; but Justice Landau pointed out that this Council is not the last Council. Prof. Peterson stated that he believes comments can be helpful because they are not the authoritative word but, rather, just a hint as to why the amendment was promulgated and whether someone would want to dig deeper. He noted that, even with the Council's new website, minutes will still be tedious to research. This is particularly true when someone is attempting to learn why, for example, the Council added a disjunctive or a comma to a rule when the intent was not to make a meaningful change but, rather, to insert it because it was accidentally left out. Prof. Peterson recalled that, at last biennium's publication meeting, Judge Gerking asked that a word in a certain rule be changed simply because it had always bothered him, and he is not sure of the degree to which the minutes reflect that type of change. He observed that, lawyers being lawyers, they are inclined to think there must have been a reason – so the intent of the staff comments is not to say "here is what the rule means" but, in some instances, to put up a sign saying "this did not really mean anything." Mr. Bachofner pointed out that the statutory construction rule presumes that the intent was to make some type of change. Prof. Peterson stated that, at Mr. Brian's suggestion, he drafted a disclaimer that basically states that the comments are the opinion of one person with no vote and that they are not legislative history but, rather, a recollection of the impetus for the rule changes by someone who was there when the rule changes occurred.

Judge Armstrong compared staff comments to staff summaries of legislation. He observed that the legal effect of these staff summaries is somewhat nebulous because they are not formally part of legislative history, nor approved by anyone, but he stated that they are nonetheless useful. He observed that the Court of Appeals has cited these summaries occasionally and, while they do not represent formal legislative action, they nonetheless represent someone's suggestion of what the Legislature was doing. Judge Armstrong stated that he believes that staff comments would be useful, and sees no harm

in them.

Mr. Brian asked whether anyone believes it is a bad idea in any way to have staff comments. Mr. Bachofner stated that he feels that the only potential way that comments could be bad is if there was inaccuracy in the staff comments, but by the Council at least looking through them before they go out and making sure there are none, that is solved. Mr. Beattie asked whether the first comments at the Council's inception were committee commentary or staff commentary. Prof. Peterson stated that he checked and it actually says staff comments. Mr. Beattie stated that, as long as they are circulated at the same time as the promulgation of amendments and the same group of people agrees on them, he thinks they could be helpful for users. Judge Leith agreed, as long as they are available to and reviewed by the same Council that promulgated the amendments. Mr. Brian observed that, as it relates to these staff comments, that is not going to happen. He stated that, going forward, the Council would have to draft them during the biennium. Mr. Eiva asked whether we would need a super majority vote as to the accuracy of staff comments. Judge Armstrong stated that we do not. Mr. Beattie stated that, if you look at the minutes, there is not usually an ambiguity about why the Council is doing something. He stated that it is fairly easy to summarize why something was done.

Mr. Bachofner liked the idea of a preface before staff comments. Judge Armstrong agreed with Prof. Peterson's draft preface, except suggested replacing the word "intention" for "intent." Mr. Bachofner appreciated that the preface also directs people where to go to find the legislative history. Mr. Crowley wondered how people will have access to the comments. Prof. Peterson stated that they would be available on the Council's website, but noted that he has also been in discussions with the Office of Legislative Counsel about publishing a less expensive and more timely book than West that would include the ORCP with comments, along with the Uniform Trial Court Rules (UTCR) and the Rules of Evidence. The book would be available in December so that attorneys would have it when the new rules go into effect in January, rather than the West book that does not come out until April. Presumably the book would be available and in the public domain, so any publisher that wants to publish the ORCP would also have access to the comments.

Ms. Payne pointed out that, in the comment to Rule 1, the language "not intended as a substantive change," is used. She cautioned against such language, since the Council does not make substantive law changes. Ms. Payne observed that other comments use the language, "not intended to effect a change to the rule's meaning or operation" and she wondered whether that language could also be used in the comment to Rule 1. Prof. Peterson explained that the Legislature had already made a change and that the Council was inserting the Legislature's language into the rule, and that this is why he had chosen to specify that the Council, as opposed to the Legislature, was not making a substantive change. Mr. Bachofner pointed out that the Council's role is not to make a substantive

change in the law, but that the Council is allowed to make substantive changes to procedure. He agreed that it is a fine line, but he hates to see the Council retreat from making changes because something is labeled "substantive" because making substantive changes to court procedures is what the Council is charged to do.

Mr. Brian reiterated that the Council needed to decide as a policy: whether to have staff comments; and, if so, what is the best mechanism to let people know they are not legislative history, not the comments of the Council as a whole. He stated that this is important so that, in the heat of battle in a particular case, a lawyer does not rely on staff comments as the final word. Mr. Eiva wondered where the substance of the comments derive from if it is not legislative history. Mr. Brian explained that it is the staff's understanding of what the Council did. Judge Roberts stated that it is a helpful observation by someone who was there.

Mr. Shields stated that, in the Legislature, committee staff write summaries of bills and boilerplate language is included at the bottom that says that the summaries were written by staff and have not been endorsed by the Legislature. He observed that this is adequate for the purpose. Judge Armstrong stated that Council members can review the comments and be helpful if something seems not prudent or right. Prof. Peterson stated that he would appreciate such informal suggestions to inform and make the comments better. Mr. Brian agreed and stated that it would not be the Council talking to staff but, rather, individual members. Mr. Beattie agreed that there should be some oversight so that there is no unnecessary ambiguity. Judge Armstrong opined that he would be surprised if legislators do not focus on the language in staff summaries. Mr. Shields agreed that legislators give deference to staff, and stated that he expects that legislators care more about the summary than what is in the actual legislation because the summary is the clearest statement. He observed that legislators do not sign off on the summaries because they would take on a very different meaning in that case – if there is oversight or some kind of vote, you cannot go into court any more and say this was just a summary, because it is now part of legislative history. Mr. Eiva suggested that Council members who are on a committee that see problems with a comment should be able to submit a comment on a comment. Prof. Peterson worried about complications with minority reports and suggested that, in such a case, that committee member could express his or her concerns and that he or she could come to an agreement with Prof. Peterson as an individual Council member.

Mr. Bundy stated that, the more complicated the comments get, the less he likes the idea. He observed that the reality is that people like shortcuts, so they are likely to rely on the staff comments as a shortcut. He opined that if such a shortcut is going to exist, it needs to be reviewed in some fashion. He compared the situation to medical malpractice cases where there are long, detailed radiology reports with many comments and descriptions but, also, a one or two sentence impression, and stated that most providers rely on the

short impression rather than read the entire report. He suggested just sending an e-mail asking whether anyone disagrees with the comments. Mr. Beattie suggested making it simple and delegating it as an obligation of the chairperson of each committee to read the pertinent staff comment. Prof. Peterson felt that the entire committee should look at the comment and have an opportunity for input, because there are always different positions that get worked out in the committee process and we want to be certain that nothing gets accidentally misrepresented. He noted that, going forward, it would be prudent to have the staff comments created in tandem with the drafts of the amendments. He thought that Judge Wolf's suggestion that they are staff comments is appropriate, and suggested actually adding the language, "These comments are not legislative history for purposes of construction" to the disclaimer.

Mr. Brian suggested deferring the issue for another month to give members time to think a bit more about it. Mr. Bundy asked whether proposed comments from last biennium can be sent to the members who are no longer on the Council for input. Mr. Brian stated that they do not have any ability to approve them. Judge Wolf pointed out that they would be merely reviewing for accuracy, not for approval. Mr. Beattie asked whether the Council would be deciding next month about just doing comments going forward, or whether it would be dealing with last biennium's comments as well. Prof. Peterson stated that, last biennium, the Council had made the decision to have staff comments, but it just did not specify how. Judge Conover asked whether, if the Council had already decided to do staff comments last biennium, it would be revisiting that issue again next month. Mr. Brian stated that the issues he sees for next month were as follows:

1) staff comments applied to rules promulgated last biennium: what will they be and what language will precede them that limit their impact on legislative history; and
2) how to deal with staff comments going forward.

B. Committee Reports

1. ORCP 7/9/10 Committee (Appendix D)

Mr. Bachofner explained that he had an emergency arbitration on Monday so Prof. Peterson ran the committee meeting. Prof. Peterson stated that the committee discussed primarily Rule 7 and Rule 9 with regard to service by e-mail. He stated that there was one suggestion that service by publication be made more flexible, without the need to go to court, and that the committee thought this was not a good idea. He also stated that the committee did not think that completely rewriting Rule 7, another suggestion, was necessarily a good idea, since such reorganization can make research more challenging if sections are renumbered. The committee decided to review the rule to see if more lead lines can be added

to make it more user friendly. Prof. Peterson observed that Rule 7 is a long rule, but there is some structure to it: it outlines what the summons has to include, what the constitutional standard is, what kinds of service there are, every conceivable kind of defendant that could be served, return of service, and what happens if a mistake is made. Prof. Peterson observed that it would be a large undertaking to rewrite it.

Prof. Peterson stated that the committee talked about service by e-mail and noted that some people are not going to be very happy with a change to make service by e-mail an equal option for service of pleadings and documents. The committee discussed electronic service and eCourt, and that electronic service will be imposed on lawyers in counties that transition to eCourt. He noted that service by e-mail is currently restricted to attorneys and they must opt in, and the questions are whether service by e-mail should be open to self-represented litigants and whether it should be made an opt-out process. He noted that those ideas got considerable traction in the committee. Mr. Shields stated that there are currently technical impediments to making electronic service available to self-represented litigants, but that may change. He noted that it is a security issue, because there is no way for the system to identify whether someone is who they say they are, except for bar members, and there is no ability for self-represented litigants to set up an account in the system. Judge Wolf stated that, theoretically, it would be possible to allow self-represented litigants to serve and be served by e-mail. Mr. Shields agreed that, in theory, it is possible, but explained that there are still some security concerns; for example, unlike with a mailing address, there is no easy way to positively identify an e-mail account as belonging to someone.

Mr. Brian wondered how the system deals with lawyers appearing *pro hac vice*. Mr. Shields stated that he did not know, but that he can ask. Mr. Bachofner stated that there has been another proposed amendment to UTCR 5.100 that deals with self-represented litigants, and that this amendment is a bit more favorable than the last one proposed. Prof. Peterson stated that before its next meeting the committee will take a look at Chapter 21 of the UTCR and see if that will help them with their thinking. He noted that the committee would like other Council members to contact them with comments so that the committee will have their collective wisdom before their next meeting.

2. ORCP 15 Committee

Judge DeHoog reported that the committee had a teleconference and reached some preliminary recommendations. He observed that the committee is really dealing with both ORCP 15 and ORCP 21 B, which deal with the same issue: the time allowed for filing an amended pleading after a motion to make more definite

and certain is granted. He stated that there was some uncertainty in his mind as to what exactly the concern was – one question was whether the time should run from entry of an order rather than from service, but the September 12, 2015, minutes also make reference the possible confusion between circulation of the proposed order and service of an actual order. Judge DeHoog stated that the committee addressed both of those potential problems. He stated that the current rule states that, once there has been a successful motion to make more definite and certain, the non-movant party has 10 days after service of the order, and that is consistent between Rule 15 and Rule 21 B. He stated that committee felt that there should be no confusion as to what an order is – something reviewed and issued by the judge – and that the preliminary circulation should not constitute service in any way.

As to the question of whether the timeline should run from entry as opposed to service of the signed order, the committee felt that it would probably need to do a major review of the ORCP and look at every place that references service of an order and possibly amend at every place. Judge DeHoog wondered whether that would be appropriate or feasible. He stated that the tradition has been to file a notice card with the proposed order to be mailed by the court after an order is signed but, at this time, there is no process under eCourt to send a notice to the parties that an order has been signed. He stated that he believes a change is being made on a statewide basis, but there is currently no formal process. The committee therefore felt that it would be premature to suggest changing to entry of an order as starting the 10 day deadline as opposed to current language that refers to service of the order. The committee recommends not making any change but, rather, looking further at the issue of what is service. Judge DeHoog observed that the practice in the past has been that the court issues an order, and he does not know how many parties actually take that signed order and serve it on the other party. He stated that he was unsure whether there should be something in the rule that says "upon service or issuance by the court" or words to that effect. However, the preliminary recommendation of the committee is to not do anything with ORCP 15 or 21 B, as the rules are relatively clear and any tinkering could lead to further problems than those perceived.

Mr. Brian agreed that this was a good summary of the committee meeting and stated that the real question is when does service occur under eCourt, since lawyers do not know when judges have signed an order. Judge DeHoog pointed out that the state is not through with the transition to eCourt, and the Council may want to wait until the transition is complete. He expected that in about a month or so there will be a semi-automated process for notifying parties by e-mail once a judge has signed an order and stated that, given that, the Council might not need to make any changes.

Mr. Bundy observed that the rule appears fine the way it is. He stated that, if there were an actual punishment for failing to get amendments in within the time prescribed by the rule, he might be more concerned but, as it is, there are no teeth. He stated that a party can file a motion for sanctions, but that he has not been successful. Judge DeHoog agreed that Rule 15 has no clear teeth, but stated that Rule 21 B does provide that the court can strike a faulty pleading after a motion to make more definite and certain if an amended pleading it is not timely filed, so there is the potential for a significant sanction there. Mr. Eiva pointed out that, under the rule, anything not denied can be deemed admitted as well, so that usually gets the answer in. Judge Roberts expressed concern that, since not everyone has transitioned to e-Court, it is wise to be really careful not to require things without knowing whether they can be done. She stated that, in several instances, the courts were promised that the technology could do something but the later response from the technology experts providing the filing system has been that it is not possible. She pointed out that the Council must know before it creates a rule that requires something that the requirement can actually be complied with.

3. ORCP 17 Committee

Judge Armstrong reported that the committee had not yet met.

4. ORCP 22 Committee (Appendix E)

Ms. Payne stated that the committee had met. She explained that the complaint is that Rule 22 does not provide a procedural mechanism for a defendant to assert a cross-claim against an added third party defendant. She noted that the federal rules provide such a procedural mechanism and that the person who suggested an amendment would like the rule changed to be more like the federal rule. Ms. Payne stated that section B of the rule currently provides that a defendant can allege a cross-claim against any other defendant, whereas the federal rule provides that a party can assert a cross-claim against any other party. The committee discussed whether the rule should be amended to be more like the federal rule, and initial discussions included whether other sections of Rule 22 actually do provide a procedural mechanism for this. Ms. Payne stated that section C of the rule, which addresses third party complaints, limits bringing third party complaints against non-parties, so the committee did not think section C provided such a mechanism. Once that third party defendant exists, section C talks about plaintiffs being able to bring cross-claims against third-party defendants, but does not discuss existing defendants being able to bring cross-claims against third-party defendants. Ms. Payne stated that the committee is going to take a deeper look into the rule, but that it appears that the person who

suggested the amendment is correct. She stated that Judge Bachart had raised the question of whether there might be any unintended consequences in amending Rule 22 B to read "a party against any other party" like the federal rule.

Mr. Keating stated that, since the committee meeting, he had reviewed a case [*Eclectic LLC v. Patterson*, 357 Or 25, 346 P3d 468 (2015)] that includes some language appropriate to this issue, but in a much broader context, in that the court basically stated that the comparative negligence statute sort of eliminates contribution claims and indemnity claims. He stated that the opinion also comments about how the comparative negligence analysis and the contributory negligence statute are inconsistent. He stated that the committee may want to examine this inconsistency. Mr. Keating spoke about one of his cases in which he wanted to bring in a third-party defendant on a contribution claim and encountered the decision in *Lasley v. Combined Transport, Inc.* [351 Or 1, 261 P3d 1215 (2011)]. He stated that have been many changes in terms of what law is applicable compared to what used to be, and the *Eclectic LLC* case basically says that *Fulton Insurance Co. v. White Motor Corp*. [261 Or 206, 210, 493 P2d 138 (1972)], does not apply any more. Mr. Keating felt that the committee should perhaps look at both comparative negligence and the third party practice rule and see if anything needs to be done to bring our procedures into conformity with this case law.

Mr. Beattie stated that, in most comparative fault cases, there is no longer common law indemnity, and in other cases the court has been very clear that ORCP 23 does not create claims for relief but is just a procedural mechanism for asserting them. He stated that he does not believe that the substantive case law is going to make a change in the procedural rule, but thought that there should be a procedural rule that is clear that everybody has the right to bring whatever claims they think they have to a lawsuit. Mr. Bachofner stated that it does not necessarily eliminate contribution claims. He pointed out that, unless someone is actually a party to lawsuit, there is still a right to contribution if you can establish you paid more than you should have paid when you resolve the claim that would have been against another party. He pointed out that the jury cannot compare the fault of a non-party, and that there can potentially be a contribution claim later on in his view. Mr. Keating stated that it is interesting where there is a statute and a rule that do not jibe, and the Council has some role procedurally to play in it.

Mr. Crowley asked whether there have been instances where litigants have been denied the opportunity to assert the cross-claim. Judge Leith answered that apparently there was a Washington County case that the person who suggested the rule amendment was concerned about. Judge Conover asked whether anyone was aware of any other cases besides that one. He stated that he understood Mr.

Keating's point that no one should be precluded from bringing a claim against someone who is not already a party, but he wondered whether there have been cases where parties are without that remedy. Mr. Brian mentioned an employer's liability law claim where he sued a general contractor and several subcontractors. The general contractor filed a cross-claim against one of the other defendants and, based on the Court of Appeals decision, they disagreed that this was no longer a claim that was available. He stated that he believes this is consistent with the Washington County situation described by the person who made the suggestion.

Judge Roberts pointed out that the question is not really about denying the ability to bring a claim but, rather, whether there is an efficient procedure. She observed that a party can always file a separate lawsuit and move to consolidate, but that might be more cumbersome. Judge Armstrong stated that, after a party makes a claim that has no legal basis, there can be a motion for judgment on the pleadings or to strike on the basis that it does not state a claim, but the debate underlying the issue is the "Frank Pozzi Rule": third party practice just complicates the plaintiff's claims and litigation becomes more cumbersome. Judge Armstrong noted that, if you allow any claim against any party that has any basis in law or not, you are allowing a case to become more of a mess, but by the same token you are asking to move everything along as a lump, which may be more efficient. He noted that it is a policy issue of how readily do you allow cases to become absorbed as an exercise to resolve all possible disputes among all parties in the case.

5. E-Discovery Committee

Ms. Payne reported that the committee did not meet.

6. ORCP 44 Committee (Appendix F)

Mr. Keating stated that the committee had met and addressed the three issues put before them:

1) Require plaintiffs to attend independent medical exams (IMEs) without a formal motion. Mr. Keating stated that, the way ORCP 44 A reads now, the defendant must file a motion and submit evidence to establish the reasonableness of the examination. The suggestion was to dispense with that requirement and treat IMEs more like depositions, with notice and motion to quash.

2) Recording medical exams. The committee felt this proposal is really addressing the whole concept of what conditions can be imposed on IMEs, of which there have been many suggested. Mr. Keating stated that the suggestion seems to

propose that every IME should be required to be recorded so that all of the lawyers have access to exactly what was said.

3) Plaintiffs should more clearly have to provide medical records to the defendant upon filing the case. Mr. Keating stated that the committee spent a lot of time on this issue last biennium with a Council that was close to split down the middle, and the committee did not believe there was much of a chance that a different result could be obtained this biennium.

Mr. Keating stated that the committee recommends that issues 1 and 2 should be pursued together. He mentioned *Lindell v. Kalugen* [353 Or 338, 297 P3d 1266 (2013)], where plaintiffs were denied the right to have a party present during the examination and they mandamused the issue. He stated that the court issued a very detailed opinion that explored the history of ORCP 44 A back to when it was a common law court-recognized right to get an order for an examination, then when it was a statute, and then when it became a rule. He noted that the basic conclusion was that both granting the right to an IME and addressing any requested conditions on the IME have always been recognized as individual matters based on judicial discretion. The court denied mandamus that would have compelled the court to let people attend the IME. Mr. Keating stated that he recognizes that, for lawyers who have been practicing a long time, the idea of imposing a lot of conditions on the IME seems to be relatively new, and it seems relatively more common that there are disputes about the IME. He stated that the committee thought that it could look to see if anything that could be done procedurally to make the resolution of these disputes easier and perhaps get people back to the former practice where everyone recognized you had the right to an examination and any conditions to be placed on the examination were basically negotiated out between the lawyers.

Mr. Eiva stated that he has always worked it out and has never been involved in a motion. He agreed that, as general principle, lawyers should be working it out. Mr. Beattie stated that these issues are recurring and frequent in Multnomah County: what are the parameters of the IME; what sort of discovery by the examining physician is permitted; and what kind of financial records are available. Judge Leith noted that he only sees the issue when he has Multnomah County lawyers before him. Mr. Beattie opined that there is definitely value to having the rule looked at, but he was not sure whether the ORCP level or the UTCR level was more appropriate.

7. ORCP 45 Committee

Ms. Leonard reported that the committee had not met.

8. ORCP 47 Committee

Ms. Gates reported that the committee had met. She stated that the primary issue was that ORCP 47 does not actually specify that defenses, more particularly affirmative defenses, are pleadings that can be subject to a Rule 47 motion. She stated that the committee discussed whether it is an issue that needs to be addressed, but agreed that the Council can at least make it abundantly clear that a party can move for summary judgment against affirmative defenses, and the committee will attempt to craft such language.

Ms. Gates noted that another issue raised regarding Rule 47 suggested that the 60 day window before trial in which to file is too short and that the amount of time for the briefing is insufficient. The committee did not perceive that to be a problem that advance planning could not resolve. She also observed that this type of change could be substantive or require additional other changes, and stated that the committee recommends not pursuing such a change. Ms. Gates acknowledged the concern that, when a party moves to strike another party's declaration or evidence, the motion to strike could shorten the time for addressing everything else, but noted that the thoughtful attorney will include a motion to strike with his or her response or reply. She observed that extending the time could create many other problems.

Mr. Bundy had prepared a summary of some of the issues discussed by the committee that he forwarded to Ms. Nilsson for distribution to the Council; however, she did not receive it. Mr. Bundy forwarded the document to her during the meeting. Ms. Nilsson agreed to distribute it to the Council by e-mail. Ms. Gates stated that the committee will report again at the next Council meeting, and will perhaps at that time have drafted language regarding a right to file against affirmative defenses.

9. ORCP 79-85 Task Force

Prof. Peterson reported that the committee had not yet decided who is going to reach out to bar sections. He noted that Judge Conover had joined the committee. Prof. Peterson also asked if Council members could suggest lawyers experienced in this area to assist the committee. Mr. Bachofner suggested his partner, Russ Garrett, who is a trustee and an excellent resource. Mr. Bachofner also asked to be added to the committee.

C. Staff Report on Legislative Counsel Suggested Amendments

1. ORCP 9 G

Prof. Peterson reported that the Office of Legislative Counsel had decided to use a revisor's bill to fix the incorrect reference to section 10 C in ORCP 9 G that was caused by the Legislature's repeal (HB 2911) of section 10 B and renaming section 10 C as 10 B.

2. ORCP 27 B (Appendix G)

Prof. Peterson explained that, during the extensive revisions to ORCP 27 last biennium, the Council omitted a conjunction. He stated that the omission did not change the meaning of the text, but that the text will read better with an added conjunction. He referred the Council to this change in the staff's draft amendment (Appendix G, page 2, line 1). Prof. Peterson observed that the Council's procedure has been to vote to put a rule amendment on the publication docket for the September meeting once a committee has completed its work. Since there are no other foreseeable revisions to ORCP 27 this biennium, he suggested placing this amendment on the publication docket. Mr. Brian called for a motion to put the amendment to ORCP 27 on the publication docket for September. Judge Armstrong made such a motion; Mr. Bachofner seconded the motion; and the motion was approved unanimously by voice vote.

3. ORCP 57 F(3) (Appendix H)

Prof. Peterson explained that, when Rule 57 was amended two biennia ago, the Council included a sentence in subsection F(3) with the lettered headings (a), (b), and (c) (Appendix H, page 5, lines 16-18). This is contrary to Council format, which reserves that lettering for paragraphs [e.g., 7 B(1)(a)]. Legislative Counsel discovered this stylistic problem and recommended that the Council fix it. Mr. Brian called for a motion to put the amendment to ORCP 57 on the publication docket for September. Judge Leith made such a motion; Mr. Beattie seconded the motion; and the motion was approved unanimously by voice vote.

4. ORCP 69 C

Prof. Peterson reported that Legislative Counsel had decided to amend ORCP 69 C in an authorized master copy correction to add the missing conjunction "or" between paragraphs C(2)(a) and C(2)(b).

V. New Business (Mr. Brian)

No new business was raised.

VI. Adjournment

Mr. Brian adjourned the meeting at 11:13 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 12, 2015, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart
John R. Bachofner
Arwen Bird
Michael Brian
Troy S. Bundy*
Kenneth C. Crowley
Hon. Roger J. DeHoog
Travis Eiva*
Jennifer L. Gates
Hon. Timothy C. Gerking
Robert M. Keating
Hon. Jack L. Landau
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. John Wolf
Deanna L. Wray
Hon. Charles M. Zennaché

Members Absent:

Jay W. Beattie
Hon. R. Curtis Conover
Hon. David Euan Leith
Maureen Leonard

Guests:

Kristen S. David
Michael Fuller, OlsenDaines PC
Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 7 D(6) ORCP 9 ORCP 9 A ORCP 9 G ORCP 9 F ORCP 10 ORCP 10 C ORCP 15 B(2) ORCP 17 A ORCP 21 D ORCP 22 B(1) ORCP 22 C ORCP 27 B ORCP 32 ORCP 43 ORCP 44 ORCP 44 C ORCP 45 ORCP 47 E ORCP 47 ORCP 57 F(3) ORCP 69 C ORCP 79-85 Electronic Discovery	ORCP 20 A ORCP 21 A ORCP 21 D ORCP 21 E ORCP 23 ORCP 25 ORCP 27 B ORCP 32 ORCP 43 B(2) ORCP 55 ORCP 57 F(5) ORCP 68 C(5)		

I. Call to Order (Ms. David)

The outgoing chair (2013-2015) Ms. David called the meeting to order at approximately 9:30 a.m.

II. Introductions (all)

Everyone present, and those on the telephone, introduced themselves to the Council. Ms. David welcomed guests and new members of the Council. She gave a brief recap of her time on the Council, and emphasized to new members the importance of being prepared for Council meetings and committee meetings, showing up, and making good plans for progress. Ms. David explained that doing a lot of work in the fall and early spring makes the work leading up the publication meeting in September much easier. She stated that sometimes committees will determine that no action needs to be taken, but at other times there is a need for preliminary feedback from the bench and bar, and it is good to have that feedback by the end of the year so that there is enough time to use that information in the spring.

Ms. Nilsson asked that members look at the roster (Appendix A) and let her know of any necessary corrections.

III. Approval of December 6, 2014, Minutes (Ms. David)

Ms. David asked whether any members had corrections to the draft December 6, 2014, minutes (Appendix B), which had been previously circulated to the members. Hearing none, she called for a motion to approve the minutes. Judge Gerking made a motion to approve the minutes, Judge DeHoog seconded, and the minutes were approved unanimously by voice vote.

IV. Annual election of officers per ORS 1.730(2)(b) (Ms. David)

Prof. Peterson explained that, by tradition, an attorney from either the plaintiffs' bar or the defense bar serves as chair, with an attorney from the opposite side serving as vice chair. He stated that the chair is typically re-elected after his or her first one-year term, thereby serving for the entire biennium, after which the vice chair is typically nominated to become chair. The treasurer is traditionally the public member.

A. Chair

Ms. David asked the members for nominations for chair. Mr. Bachofner nominated Mr. Brian as chair, with Judge Gerking seconding the motion. The motion passed unanimously by voice vote.

B. Vice Chair

Ms. David asked the members for nominations for vice chair. Ms. David nominated Mr. Bachofner as vice chair, with Mr. Brian seconding the motion. The motion passed unanimously by voice vote.

C. Treasurer

Ms. David asked the members for nominations for treasurer. Ms. David nominated Ms. Bird as treasurer, with Judge Wolf seconding the motion. The motion passed unanimously by voice vote.

V. Council Rules of Procedure per ORS 1.730(2)(b) (Prof. Peterson)

Prof. Peterson briefly reviewed the Council's Rules of Procedure, as provided in ORS 1.730(2)(b) (Appendix C). He also pointed out the biennial timeline (Appendix D) that Council staff had prepared. Prof. Peterson noted that the timeline is legislatively dictated. He emphasized that getting work done relatively early is important because any amendments need to be prepared by June, since the Council does not meet again until the publication meeting in September.

VI. Reports Regarding Last Biennium (Mr. Brian)

A. Promulgated Rules (Prof. Peterson)

Prof. Peterson explained that the Council promulgated amendments to Rules 1,7, 9, 10, 27, 46, 54, 55, 67, 68, 69, and 73 last biennium. He stated that one reason for the large number of amendments is that the Office of Legislative Counsel had been maintaining a list of changes that office would like to see in the Oregon Rules of Civil Procedure (ORCP) in the form of"pink sheets," which they finally shared with the Council at the beginning of the 2013-2015 biennium. Some were minor and some more significant. The Council rejected some suggestions, such as a recommendation to reorganize Rule 4 to make it more consistent with the other rules – the Council determined that there was, in fact, no such consistency among the rules and that such a reorganization would, in fact, create a lot of work and potential expense for the bench and bar without providing significant benefit. The Council conveyed this decision to Legislative Counsel; no disagreement was raised.

All of the Council's promulgations were transmitted to the 77th Legislative Assembly, which held no hearings and asked for no input from the legislative advisory committee. The Council's promulgations therefore will become effective on January 1, 2016, except for one, which is discussed in item B.2. below.

B. 77th Legislative Assembly's ORCP Amendments Outside of Council Amendments (Prof. Peterson)

1. ORCP 32

Prof. Peterson stated that the 77th Legislative Assembly enacted three ORCP changes outside of the Council's promulgations. The first change was to Rule 32 (Appendix E). This is a change that could only have been made by the Legislature, and not by the Council, because it was a substantive rather than a procedural change. The change established a procedure for *cy pres* or fluid recovery in class action litigation.

2. ORCP 9 and 10

Prof. Peterson explained that the Legislature removed subsection 10 B in a cleanup bill to remove archaic language from various rules and statutes (Appendix F). The Legislature included an emergency clause that made the revised Rule 10 effective on the date it was passed – June 2, 2015. He stated that, since the Legislature did not modify Rule 9, that rule now includes an incorrect reference to Rule 10 C, which no longer exists. Rule 9 will continue to have this incorrect reference until it is amended, either by the Legislature or by the Council. He stated that the Council staff was caught by surprise and only found out about this change when a practitioner contacted Council staff about it.

Mr. Crowley asked whether there was a question as to whether the three extra days for responding to pleadings served by mail remained effective. Prof. Peterson replied that the three additional days are still in the rule, but the references are just a bit garbled. Mr. Bachofner explained that it was not the Council's intent to get rid of the three day rule, but it is just that the content of Rule 10 C has now been moved to 10 B. Mr. Shields apologized that the Bar staff missed the house bill that made this change when it was introduced; the OSB monitors bills for changes to the ORCP and simply did not catch this one. He asked whether this will resolve itself in January, or whether it will need to be fixed. Prof. Peterson stated that the cross-reference will still need to be changed. Mr. Shields stated that he had spoken to Legislative Counsel in July and that Legislative Counsel offered to potentially clean up the reference in some type of scrivener's clean up bill in February. Ms. Nilsson stated that Council staff had spoken to Legislative Counsel about the possibility of addressing this in a revisor's bill as well.

VII. Administrative Matters (Mr. Brian)

A. Set Meeting Dates for Biennium

Mr. Brian stated that Council meetings have traditionally been held on the first or second Saturday of each month. He proposed the second Saturdays, as that would work better for his schedule. Council staff stated that they had not found any significant conflicts (e.g., holidays) on the second Saturdays, and Council members agreed to set the meetings on the second Saturday of each month. Prof. Peterson noted that the Council's authorizing statute once required that the Council meet in all (then four) congressional districts, but that it now states that we should endeavor to do so. He stated that the Council has held meetings outside of the Portland metropolitan area in the past but that it is important to make sure that enough members can attend in person to make it worthwhile. He pointed out that the Council's travel budget can usually pay for mileage but not lodging or meals. Mr. Brian suggested for now that we set all Council meetings at the Bar offices but that we consider scheduling some meetings in other locations as the biennium progresses, particularly if there are interesting events occurring in a particular location at a certain time. Council members agreed.

B. Funding (Prof. Peterson/Mr. Shields)

Prof. Peterson reported that the Legislature funded the Council at slightly more than $53,000 for the 2015-2017 biennium, and that the Council had received a check. He explained that Lewis and Clark Law School administers a restricted account for the Council that pays the Director's stipend and the Assistant's salary, along with other various expenses. He stated that member travel expenses are generously paid by the Oregon State Bar in the amount of $8,000 per biennium. Mr. Bachofner explained that it has been the tradition of the Council to pay the judges and the public member first and then, if there are any funds remaining, to ask other members to submit expense reports. He asked whether there were any funds left over from last biennium for members to do so. Prof. Peterson stated that there were not.

C. Suggestions to the Council from Survey Regarding Improvement (Prof. Peterson)

Prof. Peterson noted that the survey sent to bench and bar during the summer of 2015 yielded a number of general suggestions regarding improvement to the Council. (Appendix G).

1. Reject bad proposals more readily.

Prof. Peterson stated that he believes that the Council does this fairly well, but that we should continue to be mindful of this suggestion throughout the biennium.

2. Equal composition of CCP between plaintiff and defense bar.

Prof. Peterson observed that the composition of the Council is set by statute and that the attorney members represent the plaintiffs' and defense bars in equal numbers.

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.

Prof. Peterson noted that the ORCP do not contain page limits, but the Council agreed that modernization to reflect technology is important.

4. Only change rules that need changing - all changes involve costs, e.g., training.

Prof. Peterson stated that the Council has been and must continue to be mindful of not changing rules just for the sake of changing them if it will create difficulties for practitioners.

5. Council is not representative of most lawyers.

Prof. Peterson reiterated that the Council's make-up is dictated by statute, but suggested that if an attorney felt that the Council did not represent him or her, he or she could fill out the Bar's volunteer form to ask to be appointed to a position on the Council.

6. Rules in one place - combine ORCP and UTCR.

Prof. Peterson observed that, while it is outside of the Council's purview to combine these two sets of rules, the Council has suggested to the Office of Legislative Counsel that it would be very helpful to practitioners if Legislative Counsel would publish a book that includes the ORCP, the Uniform Trial Court Rules (UTCR), and the Rules of Evidence that would be available for purchase by the end of December. Since the new ORCP become effective in January of even-numbered years, and the Thomson Reuters publication "Oregon Rules of Court" does not usually become available until late March or early April of even-numbered years, many practitioners are relying on obsolete rule books for several months. Legislative Counsel is considering such a publication.

7. Appreciates CCP preventing litigation that is more paperwork and more expensive, e.g., no interrogatories or expert discovery.

Prof. Peterson noted that it is the charge of the ORCP to promote the just, speedy, and inexpensive determination of every action.

8. Refer to the UTCR in the ORCP, even in an appendix.

Prof. Peterson reminded the Council that the subject of internal references has been discussed in the past and the decision has been to minimize them, because it is too burdensome to keep them up to date. Further, the consensus of the Council last biennium was that lawyers simply need to read the rules.

9. Accelerate biennial timeline for changes to ORCP. Need for more timely changes to ORCP and UTCR, e.g., electronic filing.

Prof. Peterson stated that, given the Legislature's recent adoption of annual sessions, Council staff has examined the possibility of changing to a yearly rather than a biennial timeline for ORCP promulgation. Given the amount of work that goes into each rule change, particularly those rules that involve work groups or task forces of expert attorneys outside of the Council, it does not appear feasible.

10. Overhaul the 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.

Prof. Peterson stated that the Council has tried to make some of the rules more "checklist-like" to make it easier for practitioners to follow the procedures involved but, ultimately, they are rules. The Council's limited budget would preclude hiring usability testers.

Mr. Bachofner mentioned that there are free apps that examine text and determine the grade level of the writing, and that this might be something that would be useful to the Council's work this biennium. Prof. Peterson stated that Council staff will look into it. He remarked that, typically, committees do their work and submit amendments to staff, who put that work product into a uniform format and make suggestions about word changes, but this might be a good additional resource.

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.

Prof. Peterson stated, and the Council agreed, that this is probably not something that the Council can prevent.

12. CCP needs to include practitioners from the 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.

Prof. Peterson agreed that there has been a dearth of family law practitioners on the Council in the last few biennia, and that frequently judges have helped to fill that gap, as well as outside attorneys who volunteer to assist committees. He noted that Council members should be aware of their commitments to both Council meetings and committee meetings.

VIII. Old Business (Chair)

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

Prof. Peterson stated that the Council has in the past discussed the possibility of reviving the practice of preparing staff comments to the rules. He stated that a former Council member, Judge Richard Barron, believed that Council staff had ceased to write comments in response to *PGE v. Bureau of Labor and Industries* [317 Or 606, 859 P2d 1143 (1993)], and Judge Barron had suggested that bringing back comments would help lawyers to know why a change was made, particularly whether the reason was to make the rule more clear and to modernize language versus whether it was a significant change to a practice or procedure. Prof. Peterson stated that the staff had prepared some draft comments and asked the Council to look at them carefully and provide feedback. He stated that the comments were not intended to explain the rule but, rather, to explain what the Council's process was, and that they are intended to be accurate and balanced.

Mr. Brian asked whether there should be a motion to approve the comments, or whether we should give the Council more time to review them and come back to them at the next meeting. Prof. Peterson asked that the issue be put off until the next meeting. He posited that a vote to adopt the comments might require a super majority. He asked that Council members read the comments, see if they generally agree with them, look for inaccuracies, and provide feedback. He stated that Council staff can then submit a revised set of comments for the next meeting.

Justice Landau wondered whether the new Council is in a position to approve what the last Council intended. Prof. Peterson suggested that perhaps new members should not participate and, if the Council decided that a super majority is required, in that case we would pretty much need unanimity for that super majority. Judge Zennaché observed that part of the reason the Council publishes minutes is to make a record of what the intent of the committees and the Council was, and those minutes are there for people to look at as legislative history. He stated that he has a problem with this Council approving

the comments relating to a previous Council's amendments He suggested the possibility of adopting official comments for any amendments made this biennium, but abandoning the idea for the previous biennium. Mr. Bachofner agreed. Judge Armstrong thought it would be all right to adopt comments for last biennium if the comments are innocuous. Judge Zennaché suggested that it might be all right to put the comments on the website unofficially. Prof. Peterson observed that the Council's legislative history is painstaking to go through, and that comments could be a time saver for people using the rules.

Judge Wolf noted that they are staff comments, not Council comments. Judge Zennaché stated that, if they are staff comments, they should not be approved by the Council. Prof. Peterson agreed that this is a possible solution, but that he would still appreciate the Council's input, since staff comments have not been published since before he became Executive Director. Mr. Brian suggested that he and Prof. Peterson would discuss how the comments should be either proposed to the Council or withdrawn and that the issue be tabled until the next meeting.

IX. New Business (Mr. Brian)

A. A. through D. Potential amendments from various sources (Appendices G, I, J, K, L)

1. Because there were so many suggestions for potential amendments on the agenda, the Council grouped them together by subject matter and assigned committees on this basis. The following committees were formed:

ORCP 7/9/10 Committee

Issues:

- **ORCP 7.** (reorganize to make process more clear, especially for self-represented litigants).
- **ORCP 10.** (repeal ORCP 10 B – terms of court)
- **ORCP 7 D(6).** Allow service by publication more "flexibly" without a court order.
- **ORCP 7 - 9.** Re-draft for clarity, no substantive changes.
- **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.
- **ORCP 9 A.** End absurd requirement to serve defaulted party with documents. (Current rule??)
- **ORCP 9 G.** Allow service by e-mail. (Current rule but only if consent to such service.) Service by text message.
- **ORCP 9 G.** Overhaul in light of prevalence of e-mail -- too

cumbersome.

- **ORCP 9 G.** Permit service by e-mail.
- **ORCP 9 F and 10 C.** Eliminate 3 day rule for e-mail and fax.
- **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.])

Members:

John Bachofner (convener)
Mike Brian
Judge Gerking
Mark Peterson
Judge Roberts
Judge Wolf
Judge Zennaché

Discussion Recap:

Judge Armstrong stated that there is confusion on how Rule 7 is structured in terms of categories of people versus mechanisms. He stated that it may not be feasible to make it more sensible, but that it may be worth an attempt. Judge Zennaché agreed that it is a good idea to have a committee look at Rule 7.

Judge Zennaché stated that he understood one of the complaints regarding ORCP 9: when one files electronically, it goes into a queue where a staff member decides whether it complies before it ever goes to a judge; whereas if a party walks into ex parte and talks to the judge, that party can get an immediate decision. A related comment is that the Oregon eCourt system does not have a mechanism to notify parties when the paperwork (orders) has been signed, unlike the federal system, so it is incumbent on the parties to continually check back. Mr. Shields stated that the eCourt technical staff is well aware of this problem and is actively working on it, but that it is much more technically difficult than one would imagine.

Mr. Bachofner asked whether there is a particular reason why we cannot amend Rule 9 to allow ex parte in certain circumstances. Judge Gerking stated that many counties do not have an ex parte docket. Judge Zennaché stated that there is a procedure through the UTCR, and that the Council needs to respect the UTCR Committee's turf rather than to enact procedures that address that committee's issues. Mr. Bachofner stated that the Council is charged by the legislature to do certain things. Judge

Zennaché replied that he would argue that this is more of a court process – how the court deals with paperwork, not how the practitioner does it.

Judge Zennaché wondered what other states are doing regarding service by e-mail and thought it was worth examining. Ms. Payne stated that her understanding of the comment regarding e-mail service is that it refers to service to lawyers, and that the current rule is that lawyers have to consent to it, but that the commenter is asking for this consent to not be required. Judge Armstrong observed that not everyone wants to check e-mail all of the time or check to see if e-mails went to junk mail but, as it stands now, if a lawyer likes that process, he or she can agree to it.

Prof. Peterson noted that the potential unreliability of e-mail delivery is one reason the Council made service by e-mail an opt-in process. Judge Zennaché pointed out that, if you file electronically, you are consenting to email service. Mr. Shields agreed that, once you have filed a case electronically, you have consented to receive things by e-mail for that case. Judge Roberts observed that this refers to documents that are filed, not discovery requests.

ORCP 15 Committee

Issues:

- **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"??

Members:

Mike Brian
Judge DeHoog (convener)
Jennifer Gates
Judge Gerking
Deanna Wray

Discussion Recap:

Prof. Peterson explained that the question is whether the time period should be from the entry of the order or the service of the order - there is a disconnect. He stated that problems can also arise with the new electronic process where an attorney submits an order and does not know when it has been approved and entered. Mr. Bachofner stated that there was a recent proposed change to UTCR 5.100 which he felt was extremely convoluted because it took a small rule and turned it into something three pages long. He stated that he was not sure of the current status of the proposed rule. Judge DeHoog stated that the first comment period expired and, based on the comments received, the UTCR Committee revised the rule and re-circulated it for further comment. He believes that period has also expired. Mr. Bachofner stated that, if the proposed UTCR change happens, this will create a whole other problem where it could be 30 days before a party can get an order signed.

Judge Gerking stated that he thought we should examine the issue for the sake of consistency. Judge DeHoog agreed and stated that he would be on such a committee.

ORCP 17 Committee

Issues:

- **ORCP 17 A.** Clarify when an attorney is "attorney of record" in long cases (especially family law).

Members:

Judge Armstrong
John Bachofner
Arwen Bird
Troy Bundy

Discussion Recap:

Prof. Peterson stated that it has come to his attention in collection and enforcement of judgment matters that some attorneys do not think they have to serve the attorney for the judgment debtor if the case was decided some time ago, and that struck him as odd. In family law, it is his understanding that a smart practitioner will do a withdrawal from the case at the end, but he wondered if attorneys of record in other civil litigation are entitled to be served on behalf of their client as long as a judgment is in

effect. Judge Armstrong stated that he does not think so. He wondered whether, when the case is ended and the judgment is entered, there is some concept that an attorney is still an attorney of record. Mr. Bachofner stated that the judgment requires you to enter the attorney of record for the creditor and debtor, and he always errs on side of giving notice to the attorney listed, but he wondered how one would practically withdraw as attorney after the case is over. Judge Armstrong suggested that, when a judgment is entered, the case is over regardless of whether one is the attorney of record at the time the judgment is entered. Prof. Peterson suggested that one would typically remain attorney of record at least 30 days after entry of judgment.

Judge Armstrong recalled that there may be a statute providing guidance but could not recall which one. Judge Roberts noted that criminal cases are governed by the ORCP in most cases and, once judgment is entered, the court appointed attorney is done, even though the client might continue to be on probation. She stated that, if the ORCP suggested otherwise, it would be cataclysmic. Judge Zennaché stated that he has never entered an order in a criminal case terminating an attorney from the case; it just happens. Judge Armstrong observed that what evolved in the family law world is the concern that someone would think an attorney is still the party's lawyer because the cases persist so long. Judge Zennaché agreed that problems arose because people were serving lawyers with modification papers years after the end of a divorce case because they were still listed on the court's record. Judge Bachart stated that the Professional Liability Fund should advise family law attorneys to withdraw as a matter of best practice.

Mr. Bachofner observed that it may be as simple as a notification to opposing counsel that the file is closed and you are no longer involved. Judge Roberts indicated that the trouble with providing notification is the negative implication that somehow, by overlooking sending a notification, the attorney is still on the hook. Mr. Bachofner pointed out that the Fair Debt Collection Practices Act may require service of the attorney for the judgment debtor. In a recent case dealing with tapping a safety deposit box, he knew that the opposing attorney was no longer involved, but served him because he was the attorney of record on the judgment – even though he had not represented the judgment debtor for four years, Mr. Bachofner wanted to be sure. Prof. Peterson stated that it is clear that there are sometimes disputes and we ought to at least talk about Rule 4.2 of the Rules of Professional Conduct. He stated that he does not know whether this is a Rule 17 fix. Judge Bachart noted that there is nothing in

Rule 17 A that defines attorney of record, and opined that it would be a substantive change to insert it there. Prof. Peterson agreed that Rule 17 might not be the right placement. Judge Bachart stated that this seems like more than a clarification. Mr. Bachofner stated that he does not see this as substantive because it deals with the procedures of how the case is handled. Judge Armstrong stated that the term "attorney of record" is used so that one knows what the rules require from that attorney as opposed to the attorney who actually is representing someone – that is a different, substantive question. Prof. Peterson suggested that, if the Council passed a rule requiring attorneys to remain as the attorney of record for three years after a judgment, that would be substantive.

Judge Gerking stated that an attorney could file a motion for withdrawal, or make it a part of the judgment, or file a notice. Mr. Brian suggested forming a committee and getting input from family law practitioners. It was decided that it was worth forming a committee to look into these issues.

ORCP 22 Committee

Issues:

- **ORCP 22 B(1).** No procedural mechanism for defendant to assert a cross-claim against an added third party defendant. See FRCP 13(g).
- **ORCP 22 C.** Add provision for the unilateral addition of a third party claim in the event the plaintiff amends the complaint to add a new claim for relief.

Members:

Judge Bachart
Travis Eiva
Bob Keating
Shenoa Payne

After a brief discussion, a committee was formed.

E-Discovery Committee

Issues:

- **ORCP 43.** E-discovery burdens need to be addressed.
- **E-Discovery.** Improve e-discovery rule to prevent non-searchable PDFs. (Adobe?)

Members:

Judge Bachart
Kenneth Crowley
Travis Eiva
Bob Keating
Shenoa Payne
Derek Snelling
Judge Zennaché (convener)

Discussion Recap:

Mr. Eiva stated that, in this day and age, everyone's private life has a digital footprint, and it would be nice to have some kind of direction to deal with the fact that we are looking at people's private lives and that record is different than it ever has been before. Perhaps we could address this in the discovery rules, or perhaps it is a legislative issue. Mr. Bachofner stated that this is more of a Rule 21 or 22 issue. Prof. Peterson stated that the Council amended the rules with regard to electronic discovery to encourage the parties to talk. That committee was left open last biennium and did not receive any feedback to the effect that the rules were not working. Judge Zennaché stated that this issue is worthy of having a standing committee. Mr. Crowley noted that e-discovery is evolving every day, and the state is dealing with massive cases on that front, and that it would be a good idea to re-establish a committee to address the issue.

There was a brief discussion between Ms. Nilsson, Ms. Gates, and Mr. Bachofner about searchable PDFs, metadata, and whether the Council should keep the rule the way it is now (generic, requiring the attorneys to confer on how they would like to receive electronic discovery). Judge Zennaché stated that the committee last biennium decided to keep the rule generic, but agreed that it is worthy of further discussion.

ORCP 44 Committee

Issues:

- **ORCP 44.** Require plaintiffs to attend independent medical exams without motion.
- **ORCP 44.** Recording medical exams - no uniformity as to whether plaintiff can record.
- **ORCP 44 C.** Plaintiffs should more clearly have to provide their medical records to the defendant upon filing case.

Members:

John Bachofner
Arwen Bird
Travis Eiva
Judge Gerking
Bob Keating
Shenoa Payne
Derek Snelling

Discussion Recap:

Mr. Bachofner stated that the recording of medical exams is an issue worth exploring, particularly regarding neuropsych exams. Judge Bachart observed that some issues that have arisen in motion hearings include the recording of exams and the number of exams a plaintiff is required to attend. Judge DeHoog stated that another issue that has arisen in his court is whether someone should be able to be with the plaintiff at a medical exam. Judge Gerking mentioned the possibility of requiring the independent medical examination doctor to turn over a variety of things like curriculum vitae, income tax returns, documents referring to other IMEs performed, and how often they have testified. Mr. Keating noted that, in one of his cases this year, there was a witness for the other side who had testified for plaintiffs 541 times. He did not even know who the witness was until he walked through the door at trial. Mr. Keating expressed concern that discovery is unbalanced.

ORCP 45 Committee

Issues:

- **ORCP 45.** (allow additional requests for admission that go only to authenticity of documents)

Members:

John Bachofner
Maureen Leonard
Judge Wolf
Deanna Wray

Discussion Recap:

Mr. Bachofner explained to the Council that this issue was brought up late last biennium, and that the idea was to retain a limited number of requests on substantive issues, but expand the number of admissions regarding authenticity of documents because most times attorneys can agree on that issue. He suggested that his proposal would streamline the process for the trial court and, if a party is going to play games, that party should have to pay. Prof. Peterson stated that there was an interesting discussion last biennium about whether a party would be admitting authenticity or admissibility.

ORCP 47 Committee

Issues:

- **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).
- **ORCP 47.** Expand time limits in which to file a response to a motion for summary judgment.
- **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 the court can schedule accordingly. Enlarge current 60 day before trial window in which to file motions for summary judgment. Need more time.

- **ORCP 47 E.** Eliminate it. Ripe for abuse.

Members:

Judge Armstrong
Mike Brian
Troy Bundy
Judge DeHoog
Jennifer Gates
Bob Keating
Judge Roberts

After a brief discussion, a committee was formed.

ORCP 79-85 Task Force

Issues:

- **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)]).
- **ORCP 80-85** (review and revision).
- **No Specific ORCP** (procedures to remove a wrongfully recorded lis pendens).

Members:

Mark Peterson
Judge Zennaché

Discussion Recap:

Judge Zennaché remarked that, although we had interest from the Bar's Debtor-Creditor and Consumer Law sections last biennium, scheduling issues prevented the formation of a work group. He and Prof. Peterson will attempt to create a work group again this biennium.

2. Council staff was assigned to work with Legislative Counsel on the following issues and report back to the Council:

- **ORCP 9 G.** Update reference to ORCP 10 C (now 10 B) – may be resolved by Legislative Counsel's editorial authority.
- **ORCP 27 B.** Add a conjunction between sections B(3) and B(4).
- **ORCP 57 F(3).** Omit a lettered list (e.g., (a)) that conflicts with Council's preferred style.
- **ORCP 69 C.** Add a conjunction between sections C(2)(a) and C(2)(b).

3. No committees were formed regarding the following issues:

- **ORCP 55.** (Use of the word "officer" in sections C and H is unclear - is it defined anywhere?)

  After a brief discussion regarding the context of the word as used in the various sections of the rule, Judge Armstrong moved to take no action on the issue noted above. Judge Zennaché seconded the motion, which was approved unanimously by voice vote.

- **ORCP 20 A.** Allow plaintiffs to plead generally compliance with conditions precedent. (Current rule?)
- **ORCP 21 D/E.** Defendants file a motion to make more definite and certain to force specific allegations as to each condition precedent.
- **ORCP 21 D/E.** Reduce frequency of motions to make more definite and certain and motions to strike by adding to the rule that allegations do not limit or expand the court's rulings on whether evidence is relevant and admissible. Motions to make more definite and certain only when allegations are too indefinite or unclear to allow motion to dismiss under 21 A(8) - failure to state a claim.

  Mr. Eiva posited that the first two issues are appellate issues. He stated that a party files a pleading and Rule 21 determines whether or not the pleading needs to be more definite or certain or whether the pleader has plead ultimate facts, and that perhaps one day the case will get to the Court of Appeals and the Court of Appeals will decide one way or the other. Ms. Gates noted that, every time this happens, an attorney is granted leave to amend, so it is a time and money issue. She stated that plaintiffs plead generally that they complied and they have to go through a motion process where, if a

judge is inclined to interpret the rule to require specific allegations, he or she will.

Mr. Bachofner mentioned a recent Court of Appeals case (*Kiryuta v. Country Preferred Ins. Co*., 273 Or App 469 (2015)] that confirms that pleadings do matter in Oregon. The court held that if there was a pleading with specific allegations and an affirmative defense, those pleadings control what evidence is permitted to be introduced in court. Ms. Gates pointed out that this is true for affirmative defenses, but asked whether one could do this for conditions precedent. Prof. Peterson observed that Rule 20 A says it is sufficient to allege generally that all conditions precedent have been performed or have occurred. Mr. Bachofner stated that people do that all of the time. Ms. Gates posited that this is likely an issue of judges misinterpreting the rules. Judge Armstrong observed that a misunderstanding or misapplication of a rule cannot be solved with a rule change.

Judge Armstrong moved to take no action on the issues noted above. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

- **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.
- **ORCP 21 A, 23, 25.** Get judges to enforce sanctions and dismiss -- too many meritless cases get to trial.

After a brief discussion, Ms. Payne moved to take no action on the issues noted above. Ms. Gates seconded the motion, which was approved by voice vote with one dissenting vote (Judge Zennaché). Judge Zennaché wanted to note for the record that he is not an expert on the area mentioned in the first suggestion, but at some point a judge needs to be able to say “you’ve pleaded this 5 times, we’re done.”

- **ORCP 27 B.** Allow incapacitated defendant to be represented by a person with a durable power of attorney where the co-defendant had a power of attorney but did not disclose the incapacity until after losing and is now attacking the judgment.
- **ORCP 27 B.** Court shall appoint guardian ad litem for incapacitated plaintiff or defendant. Can the court appoint a GAL on its own motion? (Yes, existing.) Is it okay to let a power of attorney appear?

  Prof. Peterson observed that the first suggestion appeared to stem from a very specific situation. He noted that Rule 27 was completely rewritten last biennium to avoid abuses. Judge Zennaché moved to take no action on Rule 27. Judge Armstrong seconded the motion, which was approved unanimously by voice vote.

- **ORCP 36-45.** Favor granting parties authority to waive/modify various rules.

  Prof. Peterson observed that this already happens. Mr. Bachofner stated that there are certain issues that need to be taken care of by the court but, otherwise, parties can do this. Judge Roberts agreed that this can be done by applying for a stipulated order. Judge Armstrong moved to take no action on the issue noted above. Mr. Bachofner seconded the motion, which was approved unanimously by voice vote.

- **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.)

  After a brief discussion, Mr. Bachofner moved to take no action on the issue noted above. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

- **ORCP 43.** Plaintiffs' side hides the ball in producing medical records.
- **ORCP 43.** Require plaintiffs to obtain health records, not just say they do not have them.
- **ORCP 43.** Require plaintiffs to timely produce health documents, including films.

Ms. Payne noted that some people have problems following the rules, but that this is not a rules issue. After a brief discussion, Ms. Payne moved to take no action on the issues noted above. Ms. Gates seconded the motion, which was approved by voice vote with two dissenting votes (Mr. Bachofner and Mr. Keating).

- **ORCP 43 B(2).** Documents must be labeled and organized to identify the 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.
- **Discovery.** Pattern discovery - more efficient to craft and to respond to uniform requests.
- **Discovery.** Allow interrogatories as the feds allow.
- **Discovery.** Expert discovery.
- **Discovery.** Limited interrogatories.

Mr. Keating stated that the Council's previous amendment requiring organized responses that correspond with requests has proven very helpful; a lawyer can retrieve and demonstrate what he or she has provided in response to each request number. Mr. Brian asked Mr. Keating whether he felt there was any need to change the rules in this regard. Mr. Keating did not think so. Mr. Bachofner did not know if a rule change would be effective, but he stated that he sure would like to receive more documents.

Mr. Bachofner compared his practice in Washington to his practice in Oregon and noted that the interrogatories in Washington are more expensive and make litigation cumbersome.

Mr. Bachofner moved to take no action on the issues noted above. Ms. Wray seconded the motion, which was approved unanimously by voice vote.

- **ORCP 57 F(5).** Allow alternate juror to replace a deliberating juror who cannot continue.

  After a brief discussion, including the fact that the Council had already made this change in a previous biennium, Judge DeHoog moved to take no action on the issue noted above, since this is the existing rule. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

- **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.

  Judge Gerking stated that he thought that the Council had already addressed this issue. Prof. Peterson stated that the last Council had made a change that it is now in the court's discretion, that a party can get a limited judgment for attorney fees on a limited judgment. He wondered if the person who submitted this suggestion was confusing orders and judgments, or whether they were talking about orders like a discovery order imposing fees, in which case the rules do not authorize entry of a judgment. Mr. Bachofner noted that a party can still apply for a limited judgment. Judge Zennaché thought that the suggestion was to award a limited judgment of attorney fees as a sanction. He did not think that should be allowed.

  Judge Armstrong moved to take no action on the issue noted above. Judge Roberts seconded the motion, which was approved unanimously by voice vote.

- **Effective Date of Rules.** Annual? Rules effective if legislature fails to act? (Current!)
- **Federalize Rules**
- **Trust & Estate Cases.** Clarify when and which ORCP apply to these cases (*See, e.g.,* ORCP 68 C(1)(c))

  Prof. Peterson remarked that it is his understanding that the ORCP apply to all civil cases, including trust and estate cases. After a brief discussion, Judge Armstrong moved to take no action on the issues noted above. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

- **UTCR 5.100.** Require the "winning" movant's attorney to submit an order to court within set amount of time -- with consequences.
- **UTCR 21.** Need notice as to when filed orders are signed.

Judge Zennaché asked Council staff to refer the proposers of UTCR changes to the UTCR Committee, if those people had identified themselves in the survey. Mr. Bachofner noted that Judge Gerking is a member of that committee and suggested that he raise it there. Mr. Bachofner moved to take no action on the issues noted above. Judge Gerking seconded the motion, which was approved unanimously by voice vote.

X. Administrative Matters

A. Website

Prof. Peterson reported that the Council is almost ready to launch a new website which will be easier to use and more friendly to mobile devices. He stated that Council staff had been uploading the Council's legislative history to the website and had gotten as far back as the 1991-1993 biennium, but that the legislative history that would really have significant impact is the history from the inception of the Council and the creation of the rules. He observed that the first biennium's history was poorly organized and difficult to navigate, but that he had hired law student Chasta Pyle to organize and scan the material and that there will now be documents available on the web that have never been available to the public before, even in the history material available in the state archives or the law libraries around the state. Mr. Brian asked where the new material was found. Prof. Peterson stated that it was found in boxes marked "miscellaneous" that were received with the Council records from the University of Oregon and now reside at Lewis and Clark Law School.

XI. Adjournment

Mr. Brian adjourned the meeting at 12:10 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

PROPOSED STAFF COMMENTS TO

AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

PROMULGATED 12-6-14

Rule 1

Section E is reorganized in light of the Legislature's enactment of ORS 194.800-194.835 to incorporate the Uniform Foreign Declarations Act into the Oregon Revised Statutes. ORCP 1 E had been amended by the Legislature to refer to that Act; however, the suggested language for foreign declarations found in ORS 194.825 was not incorporated into Rule 1. With this amendment, subsection E(2) retains the approved language for domestic declarations under penalty of perjury and subsection E(3) now contains the approved language for foreign declarations. The amendment in this respect is not a substantive change but, rather, guides attorneys and litigants to the required language that would precede the declarant's signature without reference to the statute or any other source.

A single amendment to section A and two amendments to section F removes or replaces more archaic language with no intent to effect a change in the rule's meaning or operation.

Rule 7

Rule 7 is amended in two respects that change existing procedures:

1. in paragraph C(3)(b), the notice language to be included in the summons directed to a party to be joined in the original action is amended, consistent with Rule 22 D(1), to include a cross-claim, as well as the counterclaim provided for in the existing rule; and

2. a service requirement is added; paragraph F(2)(a) now requires the server to specify in the certificate of service the specific documents that were served.

Numerous other changes are made to improve accuracy, clarity, or consistency. From paragraph C(1)(b) through paragraph D(6)(g), 24 internal references to the rule are amended for accuracy and consistency with the Council's format. A comma is added in paragraph C(1)(b). The word "which" is replaced by "that" three times in subsection C(3) and once in subparagraph D(2)(d)(i) and in paragraph D(6)(a). In paragraph C(3)(b), the reference to Rule 22 D(1) is reformatted for consistency. The word "will" in paragraph C(3)(c)'s notice language is amended to read "may." One comma is deleted from subsection D(1) and three commas are deleted from paragraph D(2)(b). Four archaic uses of "such" in paragraphs D(2)(b) and D(2)(c) are eliminated by rephrasing and two more extraneous commas are deleted from paragraph D(2)(c). Subparagraph D(2)(d)(i) is amended to include the clarifying phrase "service by mail is." Thirteen archaic uses of the word "such" in paragraph D(3)(a) are rephrased or eliminated. Subparagraph D(3)(a)(i) is amended in two places to make clear that service of the summons may be had on the defendant or on some other person authorized to receive service to be consistent with the first sentence of the subparagraph. In subparagraph D(3)(a)(ii), the specified

age of the person to be served is amended to be consistent as used within the rules and with statutory conventions. Also in subparagraph D(3)(a)(ii), the sentence is amended to clarify who must be served in addition to the minor. The references to Rule 27 in subparagraphs D(3)(a)(ii) and D(3)(a)(iii) are amended to reflect the correct section of the Rule 27 that was concurrently amended. Four additional words are added and a comma is deleted to clarify service requirements on incapacitated persons in subparagraph D(3)(a)(iii).

Subparagraphs D(3)(a)(iv) through D(3)(d)(ii) are reformatted to properly and consistently set off the parts that are included within the subparagraphs. Further, a comma is added in subparagraph D(3)(a)(iv); a colon, a semicolon, and two commas are added and one comma is deleted in part D(3)(b)(ii)(C); and a colon, two semicolons, and two commas are added and one comma is deleted in parts D(3)(c)(ii)(C) and D(3)(d)(ii)(C). The word “association” is made plural in the lead line in paragraph D(3)(f). In subparagraph D(4)(a)(iii), reference to the appropriate section of Rule 69 is added. In paragraph D(4)(b), the word “person’s” replaces “defendant’s.” The second and third sentences of paragraph D(6)(c) are revised for clarity. In paragraph D(6)(d), the second placement of the word “ascertain” is changed to be consistent with the first sentence of the paragraph. Reference to Rule 20 in paragraph D(6)(e) is amended to conform with Council formatting and a comma is deleted and the sentence is revised for clarity.

A comma is deleted from paragraph D(6)(f). In paragraph D(6)(g), the existing sub-listing (using i and ii) is inconsistent with the rules' format and is revised to eliminate the sub-listing and to add correct punctuation. In subparagraphs F(2)(a)(i) and F(2)(a)(ii), the words "if any" are added and a semicolon replaces a comma in subparagraph F(2)(a)(ii). A comma is

added to the lead line in paragraph F(2)(d). In section G, the articles "a" and "the" are added three times and once respectively, and the word "that" is added to improve readability.

The listed changes, other than those identified in the first paragraph that specifically refer to a change in existing procedure, are not intended to effect changes to the rule's meaning or operation

Rule 9

Section H is added to define and section B is amended to authorize electronic service to complement electronic filing on the system provide by the Oregon Judicial Department as part of the statewide transition to eCourt. In light of these changes, the word "papers" is replaced by the word "documents" in section C. The term "e-mail" was retained over "electronic mail" to differentiate service by e-mail in section G from electronic service provided for in section H. Further, section G now requires attorneys who have consented to service by e-mail to notify other parties in writing of a change in the attorney's e-mail address.

Facsimile service is redefined in sections B, C, and F to reflect current technology without intent to otherwise effect a change in the rule's meaning or operation. Section G's provision that an automatically generated message advising that an intended recipient of e-mail is out of the office is insufficient to support proof of service has been amended for clarity with no intent to change the section's meaning or operation and has been added to section C to apply also to facsimile service. Section F's reference to Rule 10 C [now Rule 10 B due to HB 2911 (2015)], adding three days for service by facsimile communication, is amended for clarity without intent to change the section's meaning or operation. The same addition of three days is made applicable to service by e-mail in section G, a change from the prior rule.

References to offers to allow judgment in sections A and D are amended to be consistent with previous amendments to Rule 54 E, with no intent to change either rule's meaning or operation. Likewise, language describing service on a person 14 years of age or older in section B is amended to be consistent with other rules, e.g., Rule 7 D(2)(b) and Rule 27 A (now Rule 27 B (1)), with no intent to change the section's operation or meaning.

Section E relating to the requirements for documents to be filed is amended for clarity and consistency with Uniform Trial Court Rule 2.010(7) and (11) and now requires certain contact information for the attorney or the document's author, but does not otherwise intend to change the section's meaning or operation.

Finally, there are additions or changes in word usage (one in section A, ten in section B, eight in section C, and four in section E) and punctuation (two in section B and five in section E) that are intended to replace archaic or imprecise language and to improve clarity and consistency without intending to change the rule's operation or meaning.

Rule 10

The amendment of section C continues the allowance of three additional days in computing the time in which to respond following service of a document by mail or by facsimile service with no intent to change the previous practice under Rule 9 F (facsimile service) and this section. The same three day extension is now made applicable to documents served by e-mail and by the newly available electronic service, providing equal treatment of these forms of service and specifying that treatment in one provision. The description of the additional time in section C is amended to improve clarity with no intent to change the rule's meaning or operation. With the establishment of eCourt, the word "paper," appearing twice in section C, is replaced with "document."

Two punctuation changes are made in section A and a less accurate or archaic word is replaced in sections A, B, and C to improve clarity and consistency with no intent to change the rule's meaning or operation.

Rule 27

Rule 27 is substantially rewritten and reorganized. Three significant changes are incorporated into the amended rule:

1) absent a waiver authorized by the court, notice of the request for appointment of a guardian ad litem must be provided to the party for whom the guardian ad litem is sought and to other persons or entities (taken largely from ORS 125.060) with the opportunity for objections to be filed and a hearing to be held;

2) a new section C authorizes the discretionary appointment of a guardian ad litem for a party who is disabled but for whom the appointment of a guardian ad litem is not required; and

3) direction is provided in section I on the procedures necessary to obtain court approval of any settlement that will involve the receipt of money or property by the party for whom the guardian ad litem was obtained.

Section E's requirement of providing notice to the party and to other listed persons or entities can be waived or modified by the court under section H for good cause shown. The notice and related procedures specified in sections D through G are not applicable when the appointment is made on the court's own motion or pursuant to a statute that provides for a different procedure.

The reorganization of Rule 27 includes changes to section A and section B to make those sections applicable to minors, incapacitated persons, or financially incapable parties; previously section A pertained to minors and section B pertained to incapacitated and financially incapable persons. The requirement that the court appoint a suitable person (in sections A and B) is now

found in section D. The procedures in the former subsections A(1) and A(2) applicable for minors who are plaintiffs or defendants of various ages are now found in subsections B(1) and B(2). The procedures applicable for parties who are incapacitated or financially incapable formerly found in subsections B(1) and B(2) are now found in subsections B(3) and B(4).

The list of those persons who may apply for appointment of a guardian ad litem in subsections B(1) and B(2) now includes other interested persons, consistent with case law. The terms "plaintiff" and "defendant" are amended to include their equitable counterparts "petitioner" and "respondent" for clarity.

Section D requires the filing of a motion supported by one or more affidavits or declarations that will provide the court with a factual basis to determine whether the appointment is appropriate. Section E identifies persons or entities, taken from ORS 125.060, in addition to the party for whom the appointment is sought, to be served with notice of the motion. Unless the court waives or modifies the required notices, service must occur within 7 days of the filing of the motion for the appointment of a guardian ad litem. Section F describes the content of the notice, including a description of the procedure for filing any objection to the appointment within 14 days from the date of the notice. Section G specifies that a hearing on any objection shall be held as soon as practicable. Section H authorizes the court to waive or to modify the requirements and procedures for providing notice. Section I outlines the procedures for obtaining court approval when a proposed settlement will result in the receipt of money or property by the person for whom the guardian ad litem was appointed.

Rule 46

Rule 46 was amended to improve clarity. In section A, use of "apply" and "application" are changed to the correct terminology, "motion." Likewise, "submitted" is changed to "served." Language describing the court is changed to "circuit court." Discovery methods are more accurately described. An extraneous comma is deleted and three commas are added. References to rules 39 and 40 are separately stated for consistency. One archaic "such...as" is replaced. The article "an" is added twice and the phrase "attorney's fee" is altered to avoid a possessive. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

Subsection A(2) now requires that the items a party seeks to discover be "identified," rather than "set out," at the beginning of the motion.

In section B, lead lines are added. Three internal references to the rules are consistently and separately stated. Four archaic uses of the word "such" have been modernized. A preposition is corrected in subsection B(1). Paragraph B(2)(a) is rewritten for clarity. Punctuation between the paragraphs in section B(2) is corrected. Paragraph B(2)(d) and subsection B(3) are rewritten for clarity. "Attorney's fee" in subsection B(3) is amended to not require a possessive form. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

Section C is amended to make the words "admissions" and "grounds" singular rather than plural, and "attorney's fee" is amended to not require a possessive. The existing sub-listing by number within the section is inconsistent with the rules' format and is eliminated, and proper punctuation for a series is added. One archaic use of "such" is eliminated. The listed

amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

Section D's lead line is amended to read more clearly and to remove a reference to language previously moved to Rule 36. The existing sub-listing by number within the section is inconsistent with the rules' format and is eliminated. "To," "or," and "where" are added to or substituted for existing language. Two archaic uses of "such" are modernized. An internal reference to the rule is amended to be consistent with other rules. Two commas are added and "attorney's fees" is made non-possessive. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

Rule 54

The title of Rule 54 is amended to follow and correctly reflect previous changes to section E. In subsection A(1), the existing alphabetical sub-listing is deleted as inconsistent with the rules' format and the Arabic numeral "5" replaces the word "five" to achieve consistency. Two archaic uses of "such" are reworded. One internal reference to the rule is restated to achieve consistency. The listed changes are not meant to effect a change in the section's meaning or operation.

In section B, two archaic uses of "such" are modernized. The correct term, "motion," replaces "application" and the second sentence of subsection B(3) is amended for clarity. The listed changes are not meant to effect a change in the section's meaning or operation.

Lead lines are added to section D and one archaic use of "such" is modernized. The listed changes are not meant to effect a change in the section's meaning or operation.

Lead lines are also added in section E. References to statutes and internal references to the rule are amended to achieve consistency. Three archaic uses of "such" are modernized. The word "seven" is replaced with the Arabic number "7" to be consistent with other rules. Two amendments, "accepted offer" for "same" and "from" for "of," are made for clarity. The listed changes are not meant to effect a change in the section's meaning or operation.

Rule 55

Rule 55 is amended for improved clarity. In section A, two archaic uses of "such" are reworded, one comma is deleted, and three commas are added. The phrase, "title of the action" is amended to read "the case name, and the case number" to improve accuracy. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

In section B, one archaic use of the word "such" is reworded. Four commas are added. An existing numerical sub-listing is deleted as inconsistent with the rules' format. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

Section C is reorganized for clarity. Lead lines are amended and expanded. An amended paragraph C(1)(a) now identifies the purposes for which subpoenas may be issued, provisions that were found in the former subsection C(1). New paragraph C(1)(a) describes how subpoenas require attendance of persons or production of things in civil actions. New paragraph C(1)(b) refers to foreign depositions. New paragraph C(1)(c) describes subpoenas requiring attendance out of court. Subsection C(2) specifies who has authority to issue subpoenas, provisions that were found in the former subsection C(1). New paragraph C(2)(a) authorizes issuance of a subpoena by the clerk of the court or by judges, justices, and attorneys, and was moved from the former subsection C(1). Subparagraph C(2)(a)(i) restates (from former subsection C(2)) that subpoenas may be issued in blank but now includes a better defined requirement that the attorney or party requesting the subpoena must, before service, include the name of the person to appear or the things to be produced and the time and the location for the appearance or

production. Subparagraphs C(2)(b) through C(2)(d) authorize clerks, judges, justices, and attorneys to issue subpoenas in specified categories of proceedings: foreign depositions, out-of-court, and in civil actions. The listed amendments are not meant to effect a change to the section's meaning or operation, but now specify what is required of an attorney or party to "fill in" a blank subpoena.

In subsection D(1), an internal reference to the rule is amended to be consistent with the rules' format. Two commas are added and another comma is deleted. The articles "the" and "a" are added. "Copies" is made singular to be in agreement with the verb. The phrase "that is" is added. The word "seven" is replaced with the Arabic numeral "7" to achieve consistency.

Lead lines are added or amended in subsections D(2) through D(5). The articles "an" and "a" are added three times in paragraph D(2)(a) and an internal reference to the rule is amended to be consistent with the rules' format. In paragraph D(2)(b), the phrase "the officer's" is added for clarity and an archaic use of "such" is reworded. An internal reference to the rule in paragraph D(2)(c) is made consistent with the rules' format. Two commas are deleted from subsection D(3). "Designation" is changed to "form," "that is" is added, and "three" is replaced with the Arabic numeral "3" in paragraph D(3)(c).

In subsection D(4), the article "a" is added and in subsection D(5), two semicolons and a comma are added and a comma is deleted. The listed amendments in section D are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

In section E, a comma is added and two archaic uses of "such" are reworded with no intent to change the section's meaning or operation.

An internal reference to this rule and references to Rule 39 C and Rule 40 C are amended in section F to be consistent with the rules' format. Five archaic uses of "such" are deleted or reworded. "As" is replaced with "that" twice. The article "the" is added as is the preposition "of." "The word "all" is replace by "any." The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the section's meaning or operation.

In section G, the word "to" is deleted from the lead line. The word "to" is added twice and one archaic use of "such" is reworded without intent to change to the section's meaning or operation.

Lead lines are added in section H. In subsection H(1), "which" is amended to "that" five times. One comma is deleted and one comma is added. Two archaic uses of "such" are reworded. In subsection H(2), two archaic uses of the word "such" are reworded and the word "to" is added. The word "and" is moved, a period is deleted, and a semicolon is added to reflect a reorganization of subparagraphs H(2)(a)(i) to H(2)(a)(iii) within the subsection, and moving a formerly unattached sentence to subparagraph H(2)(a)(iv). Subparagraph H(2)(a)(iv) is reworded to flow with the immediately preceding subparagraphs. In paragraph H(2)(c), two internal references to the rule are amended to be consistent with the rules' format. The archaic "therewith" is reworded. The word "five" is replaced with "5" to be consistent with the rules' format.

In paragraph H(2)(d), the word "title" is amended to specify the "name of the court, case name" and an extraneous comma is deleted. In paragraph H(2)(e), "which" is replaced with "that." In paragraph H(2)(f), an internal reference to the rule is amended to be consistent with

the rules' format. Another internal reference to the rule in paragraph H(3)(a) is amended for consistency with the rules' format. A colon, a comma, and two semicolons are added and two commas are deleted; the article "the" is added twice; and the word "prepared" is repeated in subparagraph H(3)(a)(iii.)

In paragraph H(4)(b), an internal reference to the rule is amended to be consistent with the rules' format. The listed amendments to section H are made for the purpose of improved clarity and consistency and are not intended to effect a change in the rule's meaning or operation.

Rule 67

The lead line for section C is amended for clarity. In section D, one comma is deleted and one comma is added; six words are added; and the word "same" is deleted for clarity. The word "which" is amended to "that" twice and "such" is reworded three times in section E. In section F, "of" is replaced by "by," "which" is replaced by "that" twice, and "such" is replaced by "the." The first sentence in subsection F(2) is broken into two sentences.

The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the rule's meaning or operation.

Rule 68

Rule 68 is amended in three significant respects:

1. A new subparagraph [C(4)(d)(ii)] authorizes the court to exercise discretion to expand the 14 day period for filing and serving statements of attorney fees and objections thereto, and the 7 day period for filing and serving a response to any objection, and the court may in its discretion allow filing or service of those documents after the specified time has expired;

2. A new subparagraph [C(5)(b)(ii)] authorizes the court to exercise discretion to award attorney fees or costs and disbursements in the form of a limited judgment after the entry of a limited judgment that affects fewer than all of the parties or fewer than all of the claims or defenses in a case;

3. A new subsection [C(7)] is added to provide a procedure for a party to seek a supplemental judgment for attorney fees or costs and disbursements for those additional attorney fees and costs and disbursements incurred in collecting or enforcing the underlying judgment;

Other changes for clarification or consistency include a change to the title of the rule to more readily identify the rule as the procedure for drafting statements of attorney fees and the related objections and responses. Internal references to the rule are amended in subsection A(2), subsection C(3), subsection C(4), paragraph C(2)(a), and paragraph C(4)(g) for accuracy and consistency. Eight archaic or imprecise uses of "such" are deleted or reworded. The paragraphs within subsections C(1) and C(4) are amended to conform to the Council's format. Lead lines are added or amended from paragraph C(2)(b) through subparagraph C(5)(b)(ii). The word "or"

is substituted for “and” in subsection C(3) and in paragraphs C(6)(a) and C(6)(b). The article “a” is added in paragraph C(4)(a). References to Rule 67 are deleted in paragraphs C(4)(a) and C(5)(a) as unnecessary. Clarification is made that objections and responses to objections are to be filed as well as served within their respective timelines in paragraphs C(4)(b) and C(4)(c), and the word “seven” is replaced with the Arabic numeral “7" in subparagraph C(4)(c) for consistency. The word “title” is replaced with “caption” in paragraph C(4)(g). The words “or supplemental” are added in subparagraph C(5)(b)(i) to more properly describe the judgments to which the subparagraph refers. The amendments listed in this paragraph are made for the purpose of improved clarity and consistency and are not intended to effect a change in the rule’s meaning or operation.

Rule 69

The amendment of subsection B(2) is to make clear that the notice of intent to apply for an order of default cannot be served prior to the expiration of the time for filing a responsive motion or pleading. Some parties have been observed serving the notice concurrently with the summons or during the time for filing a response, in essence treating the 10 days afforded in Rule 69 B to be concurrent, not consecutive, with the time authorized in which to defend.

The citation to the federal statute in paragraph C(1)(e) is amended to conform with a preference for official citations.

Rule 73

The lead lines for sections A and C are amended for clarity. Two archaic uses of "such" are reworded and five uses of the word "which" are changed to "that." An article "the" is added and the punctuation and a disjunctive "or" are amended in subsection A(2). Subsections B(1) through B(4) are revised to confirm to the Council's format. In subjection B(3) and in section D, three uses of the indefinite pronoun "it" are replaced by the appropriate nouns. The word "debtors" is added in section D. The listed amendments are made for the purpose of improved clarity and consistency and are not intended to effect a change in the rule's meaning or operation.

"These Staff Comments are provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to why a particular amendment was made during the 2014-2015 biennium. For purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment as well as the meaning of any rule that has been amended, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at oregonlegislature.gov/bills_"

ORCP 7/9/10 Committee
Teleconference Notes
September 28, 2015

Present:

Mike Brian
Judge Gerking
Mark Peterson (note taker)
Judge Roberts
Judge Wolf
Judge Zennaché

Absent: John Bachofner

We reviewed the suggested changes to our three rules as reflected in the September meeting's agenda. There was no real enthusiasm for amending Rule 7 to allow for service by publication to be more flexible as in not requiring a court's order. That seemed to mirror the whole Council's response at the September meeting. There was little enthusiasm to redraft the rule for clarity or to reorganize the rule to make the process more clear. Mark even attempted to defend the rule as long but complete and with a structure that has been thought out, while acknowledging that he has been active in amendments to the rule for the last three biennia to make it more clear. I think Judge Zennaché agreed that the Council just did a re-write and it might be reasonable to see if the rule's current form will have any admirers. Mark also noted that reorganizing a rule makes legal research more challenging if the Council rearranges the rule's sections for improved "clarity" without intending to make substantive changes. However, at the end it was suggested, by Judge Gerking I think, that we look at Rule 7 as most recently amended and evaluate whether the sections and subsections have appropriately descriptive lead lines. If not, the Council could add them without disturbing the order of the rule.

On Rule 9 we dispatched two suggestions to the dustbin without much ado. Suggestion B. 5., to end the supposed requirement to serve defaulted parties with documents, seemed to be what Rule 9 A says. The existing reason to serve a defaulted party with new pleadings or other documents is if the party filing that document is seeking greater or different relief and all thought that was the way it should be. Committee members can look at the actual Bar survey results that were appended to the September meeting packet to see if my synopsis of the suggestion accurately stated the concern. There was a request to eliminate the three day extension to respond to documents served by e mail and another to consolidate the three day extensions in one place. It was remarked that the Council has been expanding the three day

extension to e mail and to fax so it seems like that train left the station and is heading the other way. All of the extensions are now in one place, thanks to John's committee last biennium and that place is now Rule 10 B, thanks to the Legislature.

I honestly do not recall the decision on item B.3. concerning ex parte and electronic filing. It was noted that courts handle these kind of motions in different ways and I think that the consensus was to punt this to the UTCR Committee. Someone correct me if I am wrong.

We had three survey responses to amend Rule 9 G to allow service by e mail. Mark noted that any change would not include the service of a summons. There was discussion about what eCourt was going to require of lawyers and that it would likely make e filing and e service mandatory or, at least, more prevalent. It was agreed to review chapter 21 of the UTCR and consider amendments to section G. There was discussion as to whether e service should be based on opting in or opting out. Mark wondered if requiring something uniform in the subject line would help alert heavy e mail recipients that some e mails are the important ones. Judge Roberts observed that lawyers might want to have a more restricted e mail account for these kinds of work-related e mails. It was agreed that, if e service is voluntary, any party can veto e service.

Also on e mail service, it was suggested by someone that, because of the prevalence of e mail, such service should be opened up to pro se parties. Mark noted that the pro se parties would then be empowered to serve as well as be served and would be more prone to communicate with everyone including the court and those parties do not have bar cards on the line for bad behavior. Mark also worried about e mail's reliability and how much gets caught up as spam and how to minimize parties not getting notice. The committee will consider expanding service by e mail and how to best implement e service,

No assignments were handed out so all committee members should look at last year's promulgated Rule 7 (available on the Council website) and at Rule 9 as well as chapter 21 of the UTCR to see if we have more concerns or some concrete proposals for moving forward.

Next meeting is Wednesday, October 14 at noon by teleconference.

Rule 22 Committee Report
September 29, 2015

Present: Shenoa Payne, Hon. David Leith, Hon. Sheryl Bachart, Hon. R. Curtis Conover, Bob Keating, Travis Eiva

The committee discussed the following item from the September Meeting Packet: IX.B.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)."

On Attachment F-12 of the Meeting Packet, the comment states:

> "I recently discovered that neither ORCP 22 B(1), nor any other provision I was able to find, expressly prescribes the appropriate procedural mechanism for a defendant to assert a claim against a party added solely as a third party defendant. Rule 22 B(1) only seems to allow a defendant to assert a cross-claim against any other 'parties.' Because Rule 22 was based on prior Oregon statutes, it apparently did not pick up the broader language of FRCP 13. It seems like a modest amendment could bring Oregon's rules in line with the federal rule, and would help clarify Oregon law."

ORCP 22 B(1) currently provides**:**

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

The federal rule, **FRCP 13(g)**, currently provides**:**

> "**Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

The committee discussed whether or not there actually was a procedural bar for a defendant to bring a claim against a third-party defendant. There was discussion that ORCP 22 C(1) provides a mechanism for complaints upon "a person not a party," but does not appear to provide a

mechanism for bringing a claim against existing third-party defendants. ORCP 22 C(1) also provides that a *plaintiff* may assert any claim against the third party defendant, but does not mention other defendants.

There was discussion among the committee about a Washington County case where a defendant was precluded from bringing a claim against a third party defendant.

There were concerns expressed that trial judges are pushing for early trial dates, so the ability to bring new claim against third-party defendant at the last minute could be prejudicial.

Further action: The committee has decided to take a good look at all of ORCP 22 to determine whether there is a procedural mechanism already in place and, if not, whether to amend the rule.

The committee wants to know from the Council, if ORCP 22 B(1) is amended to mirror the federal rule from defendant-only cross-claims to "any party," what unintended consequences might there be?

ORCP 44 COMMITTEE
1st Meeting September 22, 2015

Attending:
John Bachofner
Judge Gerking
Robert Keating
Shenoa Payne
Derek Snelling

Absent:
Arwen Bird
Travis Eiva

Discussion was had among those attending. The Comments identified in the agenda of the first Council meeting of September 12, 2015 relating to ORCP 44 were discussed. They are:

a) Require plaintiffs to attend IME without motion;

b) Recording medical exams; and

c) Plaintiffs should more clearly have to provide their medical records to defendant on filing the case.

The first two issues relate to IME obligations and procedures. Active discussion was had as to each issue. Reference was made to the Supreme Court opinion in a mandamus proceeding of *Lindell v. Kalugin*, 353 Or 338 (2013) which addressed the history of ORCP 44A and found that both the ordering of an IME and the imposition of conditions on the IME were matters of the trial judge's discretion.

It was noted that in the last several years this has become a heated issue at the bar with frequent disputes arising relating to IMEs. In the past requests for IMEs were handled informally by the bar. Since these disputes are relatively new, it was thought it would be worthwhile for the Council to look at the issue to see if any procedural adjustments might help facilitate resolution of these disputes.

With regard to dispensing with the requirement of obtaining a court order to obtain an IME an argument was made that the situation is analogous to taking depositions and a similar procedure could be implemented with regard to the obtaining of an IME. Defendant "notices" the IME and plaintiff can move for a protective order. It was also argued that sanctions could be sought by the losing party on such a motion to encourage both sides to return to the traditional collegial method of working it out. The counter argument was that if the requirement of an order supported by a showing of reasonableness was eliminated, that would relieve the defense of an obligation currently in the Rule as explained in *Lindell* while maintaining the requirement that a plaintiff, wishing to impose conditions, would have the burden of proving reasonableness of the conditions. That would upset an existing balance.

The issue raised in comment b) above of requiring that IMEs be recorded actually raises the whole idea of conditions and limitations. The issue then is should the Council draft a rule that dictates conditions in all IMEs? The committee thought that the issue of conditions rather is tied

together with the issue of requiring an order and each should be part of the committee's task.

Comment c) above seems to invite reevaluation of work done last session on the whole issue of plaintiffs' obligations to produce medical records. It was thoroughly debated in the last session and the Council was much divided. It did not appear that readdressing those issues would be likely to result in any change this term.

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

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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

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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

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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.

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D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges shall be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After 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

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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.