MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 5, 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*
Jay W. Beattie
Arwen Bird
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
Jennifer L. Gates*
Hon. Timothy C. Gerking*
Robert M. Keating
Hon. David Euan Leith
Maureen Leonard
Hon. Leslie Roberts
Derek D. Snelling
Hon. John Wolf
Hon. Charles M. Zennaché*

Members Absent:

Michael Brian
Hon. Roger J. DeHoog
Hon. Jack L. Landau
Shenoa L. Payne
Deanna L. Wray

Guests:

Amy Zubko, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
Electronic Discovery ORCP 7/9/10 ORCP 22 ORCP 44 ORCP 45 ORCP 47 ORCP 79-85	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

Ms. Bird called the meeting to order at approximately 9:30 a.m.

II. Minutes

A. Revisit October 3, 2015, Minutes (Appendix A)

Prof. Peterson stated that, at the November Council meeting, an amendment was made to the October 3, 2015, minutes concerning a statement attributed to Justice Landau that was believed to have been made by Judge Armstrong. Prof. Peterson explained that the statement that was amended was actually referring to a statement made by Justice Landau at the September meeting. He suggested amending the sentence in paragraph two of page four of the October minutes to more accurately read, "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 reported that the Office of Legislative Counsel had also contacted Council staff about a misstatement in the October minutes. On page 15, the sentence that reads, "Prof. Peterson reported that Legislative Counsel had decided to amend ORCP 69 C in a revisor's bill to add the missing conjunction "or" between paragraphs C(2)(a) and C(2)(b)." should be amended to read, "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)." Prof. Peterson explained that Legislative Counsel can use a master copy correction to fix minor errors, and that a revisor's bill would not be effective until January 1, 2018, whereas a master copy correction is effective upon passage.

Judge Zennaché moved to amend the approved minutes as proposed. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

B. Approval of November 7, 2015, Minutes (Appendix B)

No corrections or additions to the November 7, 2015, minutes were suggested. Judge Bachart moved to approve the November 7, 2015, minutes. Judge Armstrong second the motion, which was approved unanimously by voice vote.

III. Administrative Matters

A. Contacting Legislators

Ms. Bird stated that she wanted to briefly follow up regarding the last few unassigned

legislators and to remind Council members to contact the ones with whom they had agreed to correspond. Judge Zennaché stated that he had volunteered to contact the other Lane County members to split up the remaining Lane County legislators, but had not yet had a chance to do so. He stated that he will send an e-mail to his fellow Lane County Council members this week. Prof. Peterson observed that there may be a few legislators left in other districts who will not get updates, and that this is probably all right since we will be contacting legislators in key leadership positions as well as those who are personally known by Council members or those of whom Council members are constituents. He stated that he will write a second e-mail that recaps the Council's activity since the first updates were sent. Mr. Crowley asked where to find his legislators' e-mail addresses, and Mark recommended the legislature's website. Judge Leith stated that he sent his correspondence as letters through the regular mail rather than by e-mail, and that he believes it is more likely to make the legislators feel respected.

B. Staff Comments

Judge Leith asked for an update on the status of staff comments. Prof. Peterson stated that he had made the changes to last biennium's comments that were recommended by individual Council members, including changing the word "intent" to "intention," as well as adding the disclaimer agreed upon by the Council at the October meeting. He stated that he had re-circulated the comments via e-mail, and asked that Council members read them over and send individual comments to Council staff by the end of the year so that they can be put on the Council's website. Prof. Peterson explained that he has also attempted to get back in contact with Marisa James at Legislative Counsel about whether they will publish the ORCP in one of their specialty volumes and whether the comments will be included.

IV. Old Business

A. Committee Reports

1. ORCP 7/9/10 Committee

Prof. Peterson reported that the committee had met the previous day. He stated that they had intended to have someone who works with the Oregon Judicial Department's (OJD) Odyssey e-Court system participate because of the Council's discussion at the November meeting regarding documents apparently not being served contemporaneously with filing, and sometimes not showing up at all in the Odyssey system. Unfortunately, no one from the OJD was able to participate; however, the committee will reach out again to try to have a representative at the committee's next meeting.

Prof. Peterson stated that the committee had discussed some other matters, including a fairly thorough discussion of whether committee members trust e-mail service in all instances, and he reported that members of the committee are not quite at that point yet. He reported that, during the committee meeting, Mr. Brian had reminded committee members that the Council's previous change to Rule 9 allowing service by e-mail was made applicable only to lawyers who consented because the Council knew that some lawyers would be resistant to being served by e-mail. The thought was that this would both satisfy those who wanted to serve by e-mail and protect those who did not. Prof. Peterson stated that Mr. Brian had also pointed out that a party cannot complete a certificate of service for e-mail service until that party receives confirmation from the intended recipient that the document(s) have been received; consequently, if someone really does not want to accept service by e-mail, they can merely refuse to confirm receipt and the serving party will not be able to complete a certificate of service. Prof. Peterson noted that, in such cases, service will probably have to be made by regular mail or facsimile. He stated that this is a loophole that essentially allows the technologically impaired or the unwilling to opt out of e-mail service, and that this may be something the Council will have to live with.

Prof. Peterson also reported that the committee is working with section G regarding service by e-mail because that section contains language regarding certificates of service that might be more appropriately placed in section C. He stated that section C mentions certificates of service for facsimile service that can be signed by an attorney or sheriff, but noted that the committee was not aware of sheriffs ever serving by facsimile He stated that, if this is something that is happening, the sheriffs should also be given the right to serve by e-mail and, if it is not happening, the language should perhaps be removed. He explained that he had reached out to the Oregon Sheriff's Association to inquire about whether they serve by facsimile, but that he had not yet heard back.

Prof. Peterson stated that the committee has gone through two internal drafts and that they are not quite ready to present a draft to the full Council yet.

2. ORCP 15 Committee

Ms. Nilsson stated that she believed that the committee had completed its work, but that the Council was waiting for a final report. Prof. Peterson asked that someone on the committee assume responsibility for writing a final report for the record, and stated that he would e-mail Judge DeHoog, who was acting as chair of the committee.

3. ORCP 17 Committee

Judge Armstrong referred the Council to the committee's final report (Appendix C) and made a motion to take no further action on the questions presented to the committee. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

4. ORCP 22 Committee

Judge Bachart referred the Council to the committee's report (Appendix D). She reported that Mr. Beattie and Ms. Payne had done research on potential unintended consequences and had been unable to find any. She stated that the proposal from the committee is to amend ORCP 22 C to identify that "any party" may assert a claim, rather than just the plaintiff. Judge Bachart stated that, to the extent that there are some courts that have interpreted Rule 22 to limit a third party defendant's ability to assert claims, this amendment would clarify it. She explained that the e-mails with Mr. Beattie and Ms. Payne's research are attached to the committee report and that they refer to similar language in the federal rules and address concerns about timelines.

Judge Leith observed that, if the idea is to create a universal authority for cross-claims among parties, he is not sure that this amendment gives a third party defendant an unimpaired ability to cross-claim against any other party. He stated that the sentence prior to the committee's amendment allows a third party defendant to assert claims against the plaintiff, but noted that the third party defendant's ability to cross-claim is dependent on being cross-claimed against by one of the other parties, and that the language regarding this is contained in the sentence just after the one that was amended by the committee. Judge Leith stated that this may be too small of an issue for the Council to decide, or that it may be a bigger issue that should be taken up next biennium. He reasserted that, if the goal is universal cross-claim authority without impairment, this amendment falls short of the goal. Mr. Beattie asked whether Judge Leith's issue is covered by the last clause of the sentence: "and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule." Judge Leith replied that the third party defendant does not get to file cross-claims unless another party asserts a claim against the third party defendant and then they get to assert cross-claims against other defendants, but that the initial authority to assert claims in the sentence just before the committee's suggested amendment is limited to the plaintiff.

Judge Zennaché asked whether Judge Leith would suggest modifying that sentence to say a third party may also assert a claim against any party arising out of this transaction or occurrence. Judge Leith stated that this would appear to him to be the amendment that would establish universal cross-claim authority without impairment. Judge Zennaché wondered whether the committee had discussed this issue or whether it is something they should take up at their next meeting. Judge Leith stated that the committee did not discuss it because he had just noticed it the previous day. Mr. Beattie noted that the committee's assumption was that the third party defendant had free reign to file whatever claims it had, and suggested that perhaps the word "thereupon" is the problematic part of the sentence. Judge Leith agreed that removing this word might remove the implication that there is a contingency. Mr. Beattie observed that this was a particularly sensitive reading of the rule. Prof. Peterson thanked Judge Leith for his observation and explained that he is always in favor of removal of the word "thereupon."

Mr. Beattie suggested that the committee could meet again and look at the issue. Judge Bachart explained that it certainly was the committee's intent to clean up what some courts had interpreted as a barrier versus other courts that had not. She stated that she was not sure the committee needed to meet again to discuss removing the word "thereupon," as it was clear that the timelines would still apply, and the committee did not want to create an unnecessary barrier to third party practice. She proposed just removing "thereupon" from the draft with no further committee discussion. Mr. Beattie asked whether the Council was voting on putting the amendment on the publication docket for September at this point. Prof. Peterson stated that he believed the amendment is worth another look to make sure that the everything flows well. He noted that the Council's minutes will now reflect that the Council's intention is providing the universal authority to cross-claim. Judge Conover stated that he would like to discuss the issue further since there is time to do so.

Judge Zennaché stated that he would like the sentence before the amended portion examined as well. Mr. Eiva agreed. Mr. Beattie asked Mr. Eiva or Judge Zennaché to explain the issue with the sentence prior to the amended portion. Judge Zennaché observed that the language stating that a third party defendant may also assert a claim against the plaintiff arising out the transaction or occurrence seems to suggest that a third party defendant's claim can only be against the plaintiff. Mr. Bundy observed that it would be a claim because it could not be a counterclaim, and noted that he is not seeing where the rule falls apart. He agreed that the rule seems a little convoluted and long, but it states that a third party defendant can only assert a claim against the plaintiff as he understands it – because there is no claim by the plaintiff against the third party defendant, the third party plaintiff has the claim against the third party defendant. He stated

that, if a party wanted to assert a claim, that party is either going to have to become a third party plaintiff and assert a new claim against a new defendant, to assert a counterclaim against the third party plaintiff, or to assert a claim against the plaintiff. He noted that, because the plaintiff has no claim against a third party defendant, a third party defendant cannot counterclaim or cross-claim. Mr. Beattie stated that he believes he understands the issue and that the committee will discuss it at their next teleconference.

5. E-Discovery Committee

Judge Zennaché stated that, at the committee's first meeting, they discussed three issues related to e-discovery:

1. the wisdom of requiring some sort of conference early in the case to discuss e-discovery issues and how that might be done;
2. the notion of the rules incorporating some sort of duty to preserve electronic data or at least having that be part of the conference discussion; and
3. the notion incorporated in the Federal Rules of Civil Procedure about some degree of proportionality in the amount of discovery that can be done in a case in relationship to the issues involved in the case.

Judge Zennaché stated that the committee had tasked Mr. Crowley with an attempt to draft language to incorporate some of these ideas. He stated that there is not necessarily a consensus amongst committee members, but that the draft will get the discussion going. The next committee meeting is scheduled for December 16.

6. ORCP 44 Committee

Mr. Keating stated that the committee had met and submitted a report (Appendix E). He reported that, at a previous meeting, members had tasked themselves with exploring what might be done procedurally to facilitate more efficient resolution of disputes regarding independent medical examinations (IMEs). He stated that committee members had heard different things from different people about the scope and geographical impact of the issue; therefore, the committee concluded that they should contact the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) and survey practitioners who run into this issue. Mr. Beattie stated that he had contacted OADC members and received several responses. He stated that the criticisms varied, but that defense attorneys who had complaints were managing to resolve them without court intervention, essentially by relying on the consensus ruling by the Multnomah

County Circuit Court that limits what sort of information has to be produced and what sort of conditions can be placed on the examinations. Mr. Beattie stated that his take is that there is a problem in Multnomah County cases because issues come up with more frequency there. He observed that, if the Council modifies the rules statewide to make life easier in Multnomah County, it would partly be addressing a problem that does not exist elsewhere.

Mr. Beattie stated that one of the respondents made a suggestion that the Council has previously discussed – an absolute right allowing IMEs as a matter of course, similar to a request for production, with no requirement for a court order or stipulation. He observed that this may not be something the Council wants to address again. Mr. Keating reported that the committee had discussed this possibility in its first committee meeting, including discussion of a recent mandamus case that stated that it is within the discretion of the trial judge both as to the initial ordering of an IME (a defendant must make an application for good cause shown) and, when the plaintiff wants to add restrictions, it is the plaintiff's burden to come forward. Mr. Keating stated that a suggestion was made to do away with the first part, substitute a notice of IME, and then have the plaintiff file a motion if they object. He recalled that the plaintiffs' attorneys on the Council were of the mind that this would remove the burden of establishing the need for an IME from the defense, and it was clear that the proposal would not go far.

Mr. Eiva stated that he had surveyed the plaintiff's side and received many responses, which he is trying to synthesize for a more formal presentation to the Council. He reported that, generally, those he surveyed believe that the idea of a straight notice of an IME creating a burden to appear is problematic, because ORCP 44 A is an exception to a very long-held principle in American society and in the common law of the privacy of health information and of the sanctity of the body from intrusion. He stated that ORCP 44 A makes a narrow exception to those principles, requiring good cause, and that he understands that good cause often exists in physical injury cases, but the nature of the intrusion also has to be defined within that good cause. Mr. Eiva pointed out that the idea of a notice of an IME that is basically conditionless until the plaintiff, who has no idea who the examiner is, moves for some type of protective order seems to be putting the burden in the wrong place. He stated that one of the reasons that the need for conditions is happening is not because plaintiffs are being stubborn but, rather, because their clients deserve protection from a cottage industry of charlatans that currently exists within the ranks of independent medical examiners. He noted that, in the Council's 1999-2001 biennium records, there are hundreds of pages of documents about abuse by these examiners, where IMEs are changed from mere interviews to rigorous, unrepresented cross-examination of patients. He opined that these are not independent examiners but advocates for a particular side. Mr. Eiva stated

that the idea that a defendant might have to move to require such an examination and have a court decide what the conditions of that examination will be is not offensive, nor should it be done away with. He stated that these motions can be dealt with by judges who can deal with them promptly on a case-by-case basis. Mr. Eiva stated that he is hearing from the plaintiffs' side that, when they end up litigating these exams, the court is not giving the defense everything they want. The process is working and creating well-reasoned protections, and he is not sure we should do away with that. He stated that in the 1999-2001 biennium there was a push to amend ORCP 44 to have plaintiffs be allowed a representative at the examination, like Washington State does. He observed that we would do away with a great deal of these disputes if a representative were allowed, because IME physicians would avoid nefarious conduct if they knew their conduct was under true scrutiny.

Mr. Beattie stated that it sounds like Mr. Eiva is suggesting sending a circuit court judge to each IME to mediate or moderate between the representative and the doctor. He noted that such changes could result in the process becoming so Byzantine that IMEs would never occur. Judge Roberts asked whether anyone had heard of an IME being denied if there are medical claims. Mr. Bundy stated that he had heard of limitations, but not denials. Judge Roberts asked why, if there has never been a denial, a party would go through the steps other than just to throw up roadblocks for the other party. Mr. Keating replied that the issue is always the conditions. Judge Roberts suggested that perhaps we can have a discussion about the conditions, but noted that there are issues about conditions at depositions as well and we do not require parties to file a motion in court for that.

Mr. Snelling pointed out that one of the responses to Mr. Beattie's survey was that our rule seems to be modeled on the federal rule. He stated that one of the benefits of having Oregon's rule modeled on the federal rule is that we can use the federal case law to help solve disputes here. He noted that this perhaps suggests not tinkering too much with the rule. Mr. Beattie stated that a peculiarity is that there is a disconnect between federal practice and Oregon practice in terms of general discovery of expert opinions. He pointed out that prior medical records are discoverable in federal court to the same extent they are in state court because the federal courts follow our privilege rule, but that Oregon is one of maybe four or five states where the filing of a personal injury claim does not waive the physician/patient privilege. Mr. Beattie explained that, in most states, when a plaintiff files a lawsuit, his or her medical records, subject to HIPAA, are subject to discovery. In Oregon it is more like trial by ambush, not producing medical records, and locking down what can be learned about a plaintiff prior to trial. He stated that he understands the frustration on the defense side that their hands are being continuously tied and that the ropes are getting tighter with the conditions

plaintiff's counsel is trying to place on IMEs, which is really one of the defense's only tools for getting medical information, apart from chart notes and written records of the injury itself. He stated that he also understands Mr. Eiva's point about bodily integrity but explained that, prior to becoming an attorney, he was a claims adjuster doing worker's compensation cases, and he sent people for exams all of the time and it was not a big deal. Mr. Beattie stated that he sees the issue from different perspectives. Mr. Keating stated that the rule is different in Oregon and in every other state, when you file a claim for personal injury, you waive the physician/patient privilege – of course that is entirely within the control of the plaintiff, but with it comes the right of the defendant to get necessary information to be able to defend the claim. Mr. Beattie stated that, in an ordinary personal injury case, the defendant does not get to depose the treating physician prior to trial and, in fact, does not even get to talk to the doctor. All the defendant can do is to hope that the doctor is going to testify consistently with chart notes.

Mr. Eiva noted that these exams are mostly happening in lesser injury cases. Mr. Beattie stated that he would not necessarily agree. Mr. Eiva stated that the issue often arises in soft tissue cases and that, while the defendant cannot do a deposition of the plaintiff's physician, they can request a report under ORCP 44 C. He stated that there is still access to information from the plaintiff's own physician, and that defendants should be using that, and that he does not feel that the defense is being left in the dark that much.

Ms. Leonard observed that this discussion sounds like the same discussion the Council had last biennium. She noted that Oregon has a privilege that lawyers have to work with and work around, and that we cannot ignore that and have open season on injured people's privacy. Prof. Peterson stated that Judge Roberts correctly pointed out that the exams are going to happen anyway, and agreed that it would be nice to come up with a procedure. He stated that Oregon has consultation as a part of discovery, and observed that it would be nice to come up with procedure that would force a little more agreement before people need to go before a judge. Judge Leith stated that, with the exception of Multnomah County matters, he has never had to hear an issue of whether a plaintiff would be subject to an IME and has never had to hear a case defining what conditions should apply. Judge Bachart stated that she has had hearings on it, but they have been very claim-specific and driven by that. She stated that modifying a rule may not address some of the concerns here, and she does not see it as an issue clogging the docket. She feels that, since the issue is driven by the claims in any given case and the exams are not going to be denied, there should not be a modification of the rule. Judge Leith agreed that this is a case of "if it's not broke, don't fix it." He observed that parties are working these issues out and, if an issue comes up that needs litigation, standards are readily adapted and applied. He stated that he

feels that an amendment would be fixing a Multnomah County issue at the risk of breaking something that is not a problem elsewhere.

Mr. Bundy noted that one of his partners had just argued a three hour motion concerning physician/patient privilege and whether or not it allows the plaintiff to prevent the discovery of medical records concerning a body part that is at issue. He stated that they had reviewed the case law in *State Ex Rel. Grimm v. Ashmanskas* [298 Or 206, 690 P2d 1063 (1984)], which states that the privilege is not waived until the defendant's doctor's deposition is taken. He stated that some plaintiffs have taken the position that defendants do not get any medical records in the case before then and, if they never depose the doctor, the defense never receives any discovery. Mr. Bundy observed that, if a party is going to sue somebody for injury, that party needs to be able to produce the medical records that relate, but he did not believe that there is any specific rule other than the "body part rule" in the Multnomah County consensus statement that states that these records are discoverable. He suggested that this may be an issue for the Legislature rather than for the Council.

Mr. Eiva pointed out that ORCP 44 C carves out a modification of the privilege and that is the authority to get the overall records the defense needs. He asked whether Mr. Bundy had lost the motion. Mr. Bundy stated that there has been no ruling yet, but the issue is what is a "body part" – what does that really mean? Mr. Beattie stated that the "injury for which recovery is sought" has become shorthand for the "same body part rule" in Multnomah County, but not in every county. He stated that, in the federal courts, it is not uncommon for the court to order the disclosure of all medical records for a particular time frame, believing that those records (at least on some plausible showing) are relevant to what the injuries are, particularly in a case where there is a pre-existing condition that has been aggravated or a condition that could be caused by some other bodily condition. Mr. Keating pointed out that, when there is a claim of permanent injury, the jury instruction states that the patient's health must be considered. He also wondered why the defense would not be able to explore a patient's heart disease, even if he or she had died from a surgical error, to assess the question of life expectancy. Mr. Beattie stated that the federal courts have recognized that, and other Oregon courts will allow defendants more leeway, but it is really another Multnomah County construct that is causing some problems.

Mr. Eiva observed that ORCP 44 C is a rewording of a statute that created the incursion into the privilege, and he is not sure we can do anything to the scope of ORCP 44 C anyway. Mr. Bundy stated that he will let the Council know what the court decides, but that this has become quite an issue in his firm. He stated that, even five years ago, it was not nearly the problem that it is now. He has heard

people saying that they do not have to produce post-accident medical records in other counties as well. Mr. Eiva stated that it is reasonable to say that someone's hurt foot is not related to the injuries sought for recovery if the claim is a broken arm. Mr. Beattie asked how one would know if he or she is not a doctor. Mr. Eiva pointed out that the fact that a plaintiff objected to producing particular records is not a basis to say that the plaintiff was wrong. Mr. Bundy stated that it is more subtle than that; for example, if someone has an injured foot, are records relating to diabetes discoverable? Mr. Eiva agreed that a defendant should win that one every time. Mr. Bachofner raised the issue of an extremely minor accident where the plaintiff gets shoulder surgery and the defendant wants to find out about any earlier issues or later issues relating to the upper extremity and any post-accident treatment with any provider, because it is highly unlikely in an accident where the plaintiff does not even move or strike their shoulder that they have rotator cuff surgery six to ten months later.

Mr. Keating stated that the committee will wait for Mr. Eiva's information so that the record is complete, and will have another meeting if necessary.

7. ORCP 45 Committee

Ms. Leonard reported that the committee had not met.

8. ORCP 47 Committee

Ms. Gates reported that the committee had already looked at sections A and B, which make it clear that a party can move for summary judgment against affirmative defenses, or any defense for that matter. She stated that the committee was now dealing with the ORCP 47 E process by which a party can submit a declaration in response to a motion for summary judgment that says the non-movant will have an expert that will provide testimony that will create a disputed fact or an issue of law. Ms. Gates reported that the committee had just started talking about the issue and realized that the plaintiffs' lawyers on the committee do not encounter it frequently enough to provide meaningful input. She stated that she had also done some research and found some concerning cases about what would happen if more detail were required in a declaration. Ms. Gates stated that Mr. Eiva and Ms. Payne are going to join the committee at its next meeting to weigh in on these issues before the committee brings the discussion to full Council for deliberation. She observed that she is not sure it will be a hotly contested issue, but that the committee feels that input from more experienced practitioners is important.

Prof. Peterson stated that the committee was also charged with determining

whether affirmative defenses were subject to summary judgment and whether one should be able to knock out an affirmative defense based on a summary judgment motion. Ms. Gates stated that the committee has language drafted regarding that change and that they will present it when they have a final report. Prof. Peterson asked that the committee send the draft amendment to Council staff when they are close so that staff can put the amendment in proper format.

Mr. Beattie observed that, prior to the addition of ORCP 47 E in 1981 or 1982, for a bright shining moment in 1978 we actually had expert discovery in Oregon. He stated that Frank Pozzi approached the Legislature and asked it to change the rule to eliminate the provision that allowed for expert discovery, then became a Council member and encouraged the passage of ORCP 47 E which further contracted any sort of potential for expert discovery via the summary judgment rule. Mr. Beattie pointed out that there is a fairly abundant Council history as to where ORCP 47 E came from and that the committee may want to take a look at it.

9. ORCP 79-85 Task Force

Judge Zennaché stated that the task force has not yet met. Prof. Peterson will contact attorney Russ Garrett next week and will call the executive officers of the Consumer Law and Debtor/Creditor sections and see if they can get more participants in the task force. Mr. Bachofner stated that he will mention it to Mr. Garrett, as he may have missed Prof. Peterson's e-mail, having been out of the office for a period of time.

V. New Business

Mr. Bundy stated attorney Larry Brisbee had raised an issue regarding some plaintiffs who take the position they do not need to number responses to requests for production of documents and requests for admission, which makes things difficult and confusing. He observed that the rule does not require it. Mr. Bachofner pointed out that the rule does say that responses need to be organized. Mr. Beattie stated that the rule requires that you identify your response to the specific request. Mr. Bundy asked about requests for admission Mr. Keating stated that these need to be numbered because there is a cap on the number that can be made. He noted that some plaintiffs' lawyers ask a question with multiple subparts to stay within the limits. Mr. Beattie asked how one would answer a request for admissions without doing it specifically by number – would it be just a blank paper saying "yes, yes, no"? Mr. Bundy stated that attorneys Don Corson and Lara Johnson have experience with this, and it usually looks like, "Response: Response: Response:" if the request said "Request: Request: Request:" Judge Roberts stated that it seems like an issue of professional courtesy, and a practitioner could merely respond by putting numbers in brackets before the responses. Council members agreed that it did not seem like an issue that should be taken up formally by the Council.

VI. Adjournment

Ms. Bird adjourned the meeting at 10:50 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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. At the last meeting, he suggested that perhaps the Council should vote on them; and Judge Armstrong 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.

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 a revisor's bill 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.

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 7, 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
Jay W. Beattie
Michael Brian
Kenneth C. Crowley
Hon. Roger J. DeHoog
Travis Eiva*
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Jack L. Landau
Hon. David Euan Leith
Maureen Leonard
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. John Wolf
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

Arwen Bird
Troy S. Bundy
Hon. R. Curtis Conover
Robert M. Keating

Guests:

Matt Shields, Oregon State Bar

Council Staff:

Mark A. Peterson, Executive Director

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Ready for Publication	ORCP/Topics to be Reexamined Next Biennium
ORCP 9 ORCP 17 ORCP 22 ORCP 45	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 called the meeting to order at approximately 9:30 a.m.

II. Approval of October 3, 2015, Minutes (Appendix A)

Mr. Eiva pointed out an apparent error on page four of the draft minutes: a comment attributed to Justice Landau, who was not present at the October meeting. ("At the last meeting, he suggested that perhaps the Council should vote on them; and Justice Landau pointed out that this Council is not the last Council.") He suggested that Judge Armstrong may have been the one to make the statement. Judge Armstrong agreed that he may have said it. Prof. Peterson observed that the statement was made by him and may have been referring back to the September meeting, but agreed that it is not clear. Mr. Eiva made a motion to amend the minutes accordingly and to adopt the minutes as amended. The motion was seconded and passed unanimously by voice vote.

III. Administrative Matters

A. Contacting Legislators

Mr. Brian asked for additional Council members to volunteer to contact legislators for whom no one has yet spoken. The list of legislators (Appendix B) was discussed and volunteers were noted. Judge Zennaché, Judge Conover, Mr. Eiva, and Mr. Snelling agreed to divide the remaining Lane County-area legislators. Mr. Brian stated that he will divide any remaining legislators among Council members who have not yet volunteered. Prof. Peterson stated that he will have Ms. Nilsson re-send to the listserv his draft introductory e-mail to legislators so that members can edit it and send it to their legislative contacts.

B. Mileage Reimbursement

Prof. Peterson asked that Council members send mileage reimbursement requests to Council staff for approval, rather than directly to the Bar. He explained that the Council has used all but a minuscule amount of its travel budget from the Bar for this year, so Council staff will send the forms to the Bar for processing in January of 2016.

C. Council Website

Prof. Peterson announced that the Council's updated website is now live, and he asked Council members to let Ms. Nilsson know if they find any non-functioning items. He stated that all legislative history from the Council's first biennium is now available for the first time, including some documents that have not been seen since the 1970s that were

hidden in a banker's box in the Council's archives. Prof. Peterson stated the Council's research assistant should have the second and third biennia organized and scanned soon. Mr. Eiva remarked that he had recently used the legislative history from the first biennium and that it was very helpful, but he did not realize it was new. He stated that he will find out if he prevails on the issue for which he did the research on the following Friday.

IV. Old Business

A. Staff Comments

Mr. Brian began an open discussion about staff comments to the Council's amendments to the Oregon Rules of Civil Procedure (ORCP). Judge Zennaché wondered whether he was referring to comments for past amendments or for this biennium's amendments and going forward. Mr. Brian stated that he does not believe staff comments on past amendments are appropriate if staff comments are going to consist of more than pure staff comments. Judge Zennaché stated that he is fine with the idea of having staff comments on rules going forward, and that becoming a part of the Council's legislative history, but that he is not a big fan of the idea of going back and having the Council create them for past rules. Judge Leith stated that he did not see a downside to having staff comments as an available resource for someone who wants to do the research and go to the Council's website, but he felt that there are potential downsides to having them in the published volumes: 1) the book becomes bulkier; and 2) having them there may overemphasize the comments' significance. He agreed that they are a good tool to shed light and that they should be available if someone wants to search for them, with an appropriate caveat or disclaimer. He stated that they are analogous to staff summaries in the legislature, which are not available in the Oregon Revised Statute volumes but are available upon search. Mr. Brian asked for Judge Leith's opinion on comments for past rules. Judge Leith observed that he is fine with them as long as there is an extra caveat.

Judge Gerking asked about the practicality of recreating comments for so many past Council amendments. Mr. Bachofner replied that the staff comments under discussion relate only to the last biennium. He stated that his opinion is that, as long as the entire Council does not vote on whether to adopt them, he has no problem with the staff commenting on what the Council did last biennium or going forward. Judge Armstrong, Ms. Payne, and Judge Gerking agreed. Justice Landau stated that he has no problem with the staff making comments, as it very common to have reporters' notes on proposed uniform rules, for example, but his only concern is the current Council trying to retroactively create legislative history since it is not the same Council that promulgated the amendments. Prof. Peterson suggested that, going forward there be no Council vote on staff comments, but that staff will circulate them for feedback as to balance and accuracy. He stated that they will include a disclaimer stating that, for legislative history, one must go to Council website or, alternatively, to the legislature's website if the

legislature has made a change to the ORCP. Mr. Bachofner asked where the comments would be located. Prof. Peterson stated that they would be published on the Council's website and, as such, in the public domain if West or anyone else decided to publish them.

Mr. Bachofner moved that the Council allow the staff to make comments as to the last biennium's amendments, and that staff comments be allowed going forward without the Council voting on them as a whole as any type of legislative history. Judge Wolf reiterated that the motion should include that any collection of comments published by the Council should include a caveat that indicates that the Council did not approve them. Mr. Beattie reiterated that they should at least be circulated to Council members so that any potential concerns can be raised with staff on a one-to-one basis. Mr. Bachofner agreed that it is important for Council staff to get the benefit of collective wisdom. Judge Gerking asked what exactly the scope of the comments would be. Prof. Peterson noted that, historically, comments would indicate if there was a particular reason for a change, and in some cases comments were used to highlight staff changes that were not intended to change the operation of the rule. He noted that has already received some input on the comments that were circulated for the last biennium.

Mr. Brian asked Mr. Bachofner to restate his motion. Mr. Bachofner moved that staff be allowed to publish their comments for last biennium's rule changes and that staff comments be allowed to be prepared going forward, as long as they include the caveat that the staff comments are not legislative history and that the language in the staff comments is not voted on or approved by the Council, just reviewed. Judge Gerking seconded the motion, which passed unanimously by voice vote.

Mr. Brian noted that Prof. Peterson has already circulated comments on last biennium's rule changes and has received input from a few Council members. Prof. Peterson stated that he will make the suggested changes and re-circulate the comments one more time. Mr. Brian stated that the comments will be put on the Council's website after they have been re-circulated. He agreed that it is appropriate to only put them on the Council's website, and if other organizations choose to publish them, they can. Mr. Bachofner hoped that such other organizations would include the Council's caveat if they did publish the comments. Prof. Peterson stated that the caveat could be included at the top of every comment if the Council felt it was appropriate. Judge Leith stated that he believes that having them just once at the top of the comments is sufficient.

B. Committee Reports

1. ORCP 7/9/10 Committee

Mr. Bachofner reported that the committee is working on language to make sure the ORCP are consistent with the Uniform Trial Court Rule (UTCR) changes with regard to eCourt. He stated that, in the current ORCP, parties must opt in for e-mail service and the rules distinguish between consent for e-mail and electronic service. Mr. Bachofner observed that when something is filed electronically, the party that files it automatically consents to electronic service, and the committee is trying to ensure that the language of the ORCP conforms to and does not conflict with the UTCR. He stated that the committee is currently working on two drafts of ORCP 9. The Council previously made a change [effective in 2012] that the parties had to opt in to e-mail service and that there had to be an agreement between lawyers, because many lawyers did not want to use e-mail. However, as of some time in 2016, all counties in Oregon will be using eCourt, so people are going to have to get accustomed to accepting service by e-mail anyway. Mr. Bachofner stated that one question is whether to allow self-represented litigants the same right. He noted that, with eCourt, that decision seems to be made by chapter 21 of the UTCR that says that parties must accept electronic service unless a party is opted out by a court order. He also pointed out that we must keep in mind that there is a difference between electronic service and e-mail. He noted, for example, that e-mail might be an appropriate response to a request for production; such discovery is not a part of eCourt as it does not get filed. He stated that the goal is to make the systems complement each other rather than conflict with each other. Mr. Bachofner stated that the committee should have a draft by the next meeting.

Prof. Peterson stated that the committee made a change to the rule regarding leaving a service copy with the court if someone does not have an address for service, because it seemed a little strange these days to leave a paper copy as the person in the clerk's office could just hit the print button. He stated that the committee talked about certificates of service, which are contained partly in section B and partly in section C, and decided to make sure there is clear language in section B to cover certificates of service for all of the various possible kinds of service. Mr. Bachofner stated that he encountered a case this week where, instead of sending him a copy of a request for admissions, the opposing party filed it with the court. He did not find out about it until five days later when his paralegal was in the court's system and happened to see it. He stated that he does not understand why this happened, because normally the court would send him a copy of anything filed in the case. He observed that this raises the question: if one is going to file something with the court, shouldn't they send an e-mail as well?

Mr. Eiva stated that he has also had several cases where the act of e-filing did not result in service on the opposing party, so he has made it practice to e-mail the other party as well. Mr. Bachofner posited that this could be made a part of the rule: that a party must send a courtesy copy to the other side of documents that are electronically filed. Judge Roberts stated that there may be a problem with the Odyssey case management system. Mr. Bachofner agreed and stated that perhaps the failsafe for that is that we have people e-mail a courtesy copy.

Ms. Payne asked whether Mr. Bachofner was referring to sending an e-mail courtesy copy, even if a party has not consented to e-mail service. Mr. Bachofner observed that, if a party is part of the eCourt system, they have consented to electronic service under the UTCR. Filing a document in that system is deemed to be service on the people who have consented to being part of the system. He stated that he is contemplating that when a party electronically files and serves a document, that party must also send it by e-mail. He noted that official service is electronic service but, if parties are not receiving documents, by having a certificate of service stating that the document was also e-mailed, the likelihood of receipt is increased. Ms. Payne asked if the rule would allow some alternative service like mail. Mr. Bachofner stated that he anticipated that it would include mail or facsimile. Judge DeHoog asked whether using the word "serve" would be accurate. Mr. Bachofner suggested using the words "provided by," and noted that he is just brainstorming. He asked Council members whether it sounded like a reasonable backup system.

Judge Armstrong stated that it seems kind of strange to have an admonitory rule saying that something is a good practice. Prof. Peterson replied that it would be a requirement as a part of the certificate of service. Council members expressed concern that this might be a premature step to address a problem that hopefully will not exist by the time the rule change goes into effect. Ms. Payne stated that we should be able to trust electronic service. Mr. Bachofner wondered what the downside would be. Ms. Payne pointed out that, if there is a problem with electronic service, there should be other ways to deal with it, including getting the system fixed or going to the court for relief if a party did not receive a document in time. She felt that asking people to serve in multiple ways because of a technological problem might be problematic. Mr. Bachofner explained that the rules do this in other places; for example, in Rule 7, if one serves by one method that party sometimes needs to use a backup method to better ensure receipt. He stated that, practically speaking, it is a very low burden, and that the best practice is to send a courtesy copy anyway. Mr. Bachofner opined that it is a benefit to justice to require it. Judge Gerking pointed out that, on the other hand, it will likely be a temporary modification.

Mr. Eiva stated that he had a motion with a shortened deadline and a brief for the defendant was filed. He believed he would be served through electronic filing but it did not happen, and six to seven days passed before he realized it had been filed when the other side e-mailed it. He stated that the strange thing was that it did not show up in the Odyssey system either. He stated that he likes the idea of a failsafe. He also observed that the Court of Appeals system works wonderfully, and that he assumes that at some point Odyssey is going to work wonderfully, but it is not there yet. Judge Zennaché stated that, before we try to solve this problem, we should have some discussion with the people who are running the system. Mr. Bachofner proposed that someone from the committee should contact a representative. Mr. Shields asked whether it would be helpful to get someone from the system to a Council meeting. Mr. Bachofner stated that perhaps someone from the Oregon Judicial Department could first attend a committee meeting.

Mr. Beattie stated that, as it currently stands under Rule 9, filing in eCourt is not sufficient service on your opponent. Mr. Bachofner pointed out that the UTCR changed it so that, by filing with the eCourt, the court serves the document on everyone in the eCourt system and that is considered to be service under the UTCR. Mr. Beattie wondered how this is service under Rule 9. Mr. Bachofner stated that Rule 9 and the UTCR do not agree, and this is the problem the committee is trying to fix. Mr. Beattie stated that he has not experienced this problem. Mr. Bachofner stated that he had not either, until this week, but apparently Mr. Eiva has experienced it repeatedly. Mr. Crowley stated that the Department of Justice has also experienced it but, from his perspective, it is a technology problem. Judge DeHoog stated that it may not be a technology problem. He observed that, because of practice in federal court, there is an assumption that when documents are filed electronically they are automatically distributed, but with the state system when documents are electronically filed, they go to a person who reviews them, and they have stacks of documents that they review before they are accepted, and they are not distributed until after acceptance, which can take at least several days in some courts. Mr. Bachofner agreed that there is a huge lag and, if that is the case, why not have a redundancy that protects everyone involved. He stated that the committee will discuss it further and let the Council know what it concludes.

2. ORCP 15 Committee

Judge DeHoog stated that the committee's preliminary conclusion was that no changes need to be made. He stated that the committee has not had an additional meeting but is working on scheduling one. He did not anticipate that the committee would change its position that no changes will need to be made to

either Rule 15 or Rule 21.

3. ORCP 17 Committee

Judge Armstrong stated that the committee had met and concluded that there was no need to take any action. He stated that he will prepare a report summarizing the committee's conclusions. Prof. Peterson noted that he had sent an e-mail to the committee stating that a statute [ORS 9.380] seems to say that an attorney can leave a case voluntarily by consent without leave of the court. Judge Armstrong replied that the issue, as the committee understood it, was should Rule 17 be changed in such a way as to make that process more clear and help people understand when they are of record and when they are no longer of record. He stated that the statutes already answer that question, and that the committee did not feel that there was anything that could be added to Rule 17 or any other rule to supplement the statute.

4. ORCP 22 Committee

Ms. Payne stated that the committee had met and submitted a report (Appendix C). They discussed whether Rule 22 needs to be amended to allow defendants to bring cross-claims against third party defendants, and agreed as a committee that the rule should be amended to allow this to occur. She stated that the committee is proposing an amendment to change the words "the plaintiff" to "any party." Ms. Payne explained that the committee believes that this will solve the problem and that it is the simplest amendment that could be made to the rule. She stated that the committee discussed whether this change would bring any unintended consequences and concluded that, since this is how the federal rule works, it probably would not, but stated that the committee is planning on doing more legal research before its next meeting to make sure the proposed amendment will work. She asked that Council members advise the committee if they could think of any potential problems.

Mr. Bachofner observed that there is currently a 90 day period where it is presumed that one can file a third party claim, and wondered if there would be some unintended effect and whether the rule needs to spell out a time period during which any party may assert a cross-claim. For example: can a party do it a week before trial; should there be a presumed period of time after a third party complaint gets filed and is responded to in which any other party can file a cross-claim or counterclaim? Mr. Snelling stated that this would be a problem already with cross-claims that are permitted by a plaintiff. Ms. Payne pointed out that a plaintiff can already bring a claim against an existing third party defendant without a time limit. She stated that adding timelines would be a different discussion. Mr.

Eiva stated that he does not believe it would be necessary because the 90 day period exists in which to file the third party claim, so every defendant is on notice of that time period. He stated that this is not creating any added burden but, rather, an added advantage. It was observed that the 90 day period just applies to a third party complaint. Mr. Bachofner agreed, but stated that he would like to have some time limitation after the third party complaint is filed during which a party is allowed to file another claim. He opined that, at some point, it may make sense to have a limitation. Ms. Payne stated that after a third party complaint is filed a party has an additional 30 days to bring a cross-claim, and wondered why they would bring it 60 or 90 days after. Mr. Eiva asked whether we are still calling it a cross-claim rather than third party practice because we are amending Rule 22 C and allowing any party to file. Ms. Payne stated that it is still a cross-claim. Mr. Beattie stated that as more defendants are brought to the party and as all of the defendants can cross-claim, he assumes that if one party has already answered it would be a motion to amend to add a cross-claim, so he believes that the court would have oversight at that point in terms of allowing cross-claims. Mr. Bachofner asked whether one would have to do a motion to amend to add a new claim against a new party to the case. Mr. Beattie stated that this would be the case if a party has answered and wants to add a new party to their answer.

Judge Armstrong pointed out that, if we look at some of the other rules that bear on how cross-claims and other claims occur, there could be some other time provisions that are already in play. Mr. Bachofner agreed that rules like the 10 day rule could have an impact, and stated that it should be looked at. Ms. Payne agreed that the committee should look at whether there are already time provisions in play for filing cross-claims. Prof. Peterson asked that the committee please copy Council staff with the next iteration of its proposed rule change so that it can be put into standard Council editing format.

Mr. Beattie asked how a person would end up with a situation where there was an automatic obligation to respond since, if a party adds a defendant and that defendant wants to cross-claim against an existing defendant, if that existing defendant has answered, it would have to amend. Mr. Bachofner stated that, if a party filed an affirmative defense of comparative fault of another defendant, that other defendant would have to reply to the third party defendant's pleading and there would be a timeline associated with that and that party would have a right and an obligation to reply to the affirmative defense. Mr. Beattie pointed out that this is not a cross-claim. Mr. Bachofner replied that a cross-claim could be asserted in the response. He stated that he does not know if this is a problem, but it should be looked at.

5. E-Discovery Committee

Judge Zennaché stated that the committee had not met but would convene in the following month.

6. ORCP 44 Committee

Mr. Beattie stated that the committee had not yet met but would be meeting in the near future.

7. ORCP 45 Committee

Ms. Wray reported that the committee had met but had not yet issued a report. She stated that the committee is considering a draft amendment that Mr. Bachofner submitted at the end of last biennium regarding amending the number of requests for admission allowed if the ones above the current limit of 30 are only dealing with the authenticity of documents. Mr. Bachofner stated that this would be an attempt to streamline the process for trial. Ms. Wray pointed out that the text of the rule change that Mr. Bachofner submitted mixes the authenticity concept with a hearsay exception concept and that the committee needs to divide those concepts and decide whether it is trying to address authenticity or hearsay or both. Mr. Bachofner stated that he prefers to do both because the idea is to not require the records custodians to appear in court unless it is absolutely necessary, and he feels that this change gives the incentive for parties to not play games.

8. ORCP 47 Committee

Ms. Gates stated that she has draft changes submitted to the committee for comment, but has not yet been able to schedule a meeting.

9. ORCP 79-85 Task Force

Judge Zennaché reported that Prof. Peterson had sent an e-mail to the executive committees of the Debtor-Creditor section and Consumer Law section of the Oregon State Bar and was waiting for a response. He stated that he has spoken to a few local members of the Debtor-Creditor section who have said they would pass along the Council's desire to create task force. He has also printed a list of both sections' executive committees and the dates of their next meetings and may try to get some time on their schedule to set something up. Prof. Peterson stated that attorney Mike Fuller is on the Consumer Law section's executive committee and had volunteered to be on the task force. He also contacted Mr. Bachofner's partner, Russ Garrett, but has not yet heard back.

V. New Business

No new business was raised.

VI. Adjournment

Mr. Brian adjourned the meeting at approximately 10:30 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Memorandum

To: Council on Court Procedures

From: Rule 17 Committee

Date: December 2, 2015

Re: Possible clarification of rule regarding attorneys of record in court cases

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Our committee was asked to assess whether the Council should propose an amendment to Rule 17, or to any other civil procedural rule, to clarify who is an attorney of record in cases that result in general judgments but that become the subject of post-judgment or subsequent proceedings. We concluded that ORS 9.380(2) governs the process by which an attorney may terminate the attorney's relationship with a client in an action or proceeding that has resulted in a judgment or other final determination, and ORS 9.390, in turn, governs how such an attorney may terminate the attorney's designation as the attorney of record for the client in the action or proceeding. ORS 9.380(2) provides:

> "The relationship of attorney and client may be terminated after the entry of a judgment or other final determination in an action or proceeding by the filing of a notice of termination of the relationship in the action or proceeding. The notice must be signed by the attorney and must state that all services required of the attorney under the agreement between the attorney and the client have been provided."

ORS 9.390 provides, in turn:

> "When an attorney is changed, or the relationship of attorney and client is terminated, as provided in ORS 9.380, written notice of the change or termination shall be given to the adverse party. Until the notice is given, the adverse party is bound to recognize the former attorney."

In light of those statutes--which specify how and when attorneys cease to be attorneys of record at the conclusion of cases--we concluded that there is no need to amend ORCP 17 or any other rule to clarify who is an attorney of record in cases that have resulted in a judgment or other final determination but that become the subject of post-judgment or subsequent proceedings. Hence, we recommend that the Council take no action on this issue.

Rule 22 Committee Report
December 2, 2015, 12:00 p.m.

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

The following amendment to subsection C(1) was proposed at the last meeting:

> "~~The plaintiff~~ **Any party** may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule." (**See attached for full text of rule).**

Before moving forward on the above proposal, the committee wanted to ensure that there weren't any unintended consequences of allowing *any party* to bring a cross-claim against a third-party defendant. Mr. Keating and Mr. Eiva conducted legal research on the issue and reported to the committee that they found no consequences that would be of concern.

Mr. Bachofner asked at the last council meeting that the committee also look into whether there were any existing timelines for such cross-claims, or whether the committee would need to address that in the proposed amendment. Ms. Payne and Mr. Beattie conducted research on applicable time lines that might apply to bringing a cross-claim against a third-party defendant after the third-party complaint is filed. They agreed that existing Rule 23 A – the rule on amending pleadings – would provide the applicable timelines.

Mr. Beattie noted that the federal rule limits cross-claims to co-parties. The committee was not concerned about extending cross-claims to all parties considering the above considerations.

To: Rule 22 Committee
From: Shenoa Payne
Date: 11/30/15
RE: Rules of procedure that address time limitations for a party to bring a cross-claim after a third-party complaint is filed

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Rule 22 does not contain any time limitation for bringing a cross-claim against a third-party defendant. However, a party would presumably have to amend its pleading (either its answer or complaint) in order to add its cross-claim. Thus, it appears that Rule 23 A would apply:

> **A Amendments:** A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* * * * .

ORCP 23 A (emphasis added)

Rule 23 A appears to address the concern that a party would be able to bring a cross-claim just prior to trial or at such a late time as to cause prejudice. Because the rule requires leave of court or written consent, the non-moving party would be able to object to late cross-claims.

From:	Jay W. Beattie
To:	Shenoa Payne; Sheryl.Bachart@ojd.state.or.us; Curtis.CONOVER@ojd.state.or.us; David.E.Leith@ojd.state.or.us; Robert Keating; Travis Eiva
Subject:	RE: ORCP 22 Committee --- Research on time limitations
Date:	Wednesday, December 02, 2015 11:51:27 AM

I agree with Shenoa's conclusions.

As an aside, the federal rules (FRCP 13 and 14) are peculiar and use the term "co-party." Under FRCP 13, a party may bring a cross-claim against a "co-party."

The courts have split on whether a claim brought by an original defendant against a third-party defendant (or vice versa) is a legitimate cross-claim, with some courts holding that defendants at different "levels" are not co-parties. We avoid that problem by using "any party."

There is abundant federal authority that a cross-claim cannot be asserted in a separate pleading, and that an existing defendant must amend its answer to add a cross-claim against a new third-party defendant, e.g.:

"14.140 Nature of Cross Claim
A cross-claim is an affirmative claim for relief against a co-party. A cross claim may, but need not always, assert a right to indemnification or contribution by the first party against the other. Cross-claims have thus been defined as any claims brought against a co-party to the current litigation.

A cross-claim is not a pleading but must be set forth in a pleading. For example, a cross claim is not a pleading such as the defendant's answer and should not be filed as a pleading. Thus, when a document that was labeled simply "Cross-Claims" was filed independently of any other pleading, the court properly struck the document, and the signing attorney was subject to a Rule 11 reprimand."

2-14 Moore's Manual--Federal Practice and Procedure § 14.140 (2015).

There are some odd federal cases stating that a cross-claim is an "original claim" and not an amendment to a previous pleading, but those cases went that direction to avoid "relation-back" under FRCP 15 (ORCP 23) – which is a whole other issue:

"The cross-claim filed by United Postal is, however, an "original" cross-claim against a co-party, not an amendment to a previously filed pleading. Accordingly, it does not appear to be within the province of Rule 15(c). Furthermore, Rule 13(g) governing cross-claims does not permit relation back of a cross-claim seeking affirmative and independent relief to the original complaint. See United States for the use of Bros. Builders Supply

Co. v. Old World Artisans, Inc., 702 F. Supp. 1561, 1569 (N.D.Ga.1988) (noting that the common law rule that "statutes of limitations do not run against pure defenses does not apply to setoffs, counterclaims or crossclaims that are affirmative, independent causes of action").

Kansa Reinsurance Co. v. Cong. Mortg. Corp., 20 F.3d 1362, 1367 (5th Cir. 1994)

The relation-back issue makes my head hurt, but I think it is pretty clear under the ORCPs that a cross-claim has to be contained in a pleading (answer/complaint (see ORCP 13B)) and that a defendant would have to amend its answer to add a cross-claim against a new third-party defendant – and that the right to amend would be subject to the usual rules in ORCP 23 – which may allow for "amendment as a matter of course" in some circumstances but generally require permission from the court.

Like Shenoa said, I think a court could prevent a last-minute addition of a cross-claim against a third-party defendant.

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From: Shenoa Payne [mailto:SPayne@HK-LAW.COM]
Sent: Monday, November 30, 2015 10:33 AM
To: Sheryl.Bachart@ojd.state.or.us; Curtis.CONOVER@ojd.state.or.us; David.E.Leith@ojd.state.or.us; Robert Keating; Travis Eiva; Jay W. Beattie
Subject: ORCP 22 Committee --- Research on time limitations

Attached is my research assignment for Wednesday's meeting. Jay has the same assignment and I look forward to seeing whether he agrees or finds something different.

Shenoa

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COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS
RULE 22

A Counterclaims.
A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.
A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.
B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.
B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.
B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C Third party practice.
C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. ~~The plaintiff~~ **Any party** may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.
C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.
D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.
D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.
D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter. [CCP 12/2/78; §D amended by 1979 c.284 §17; §A amended by CCP 12/13/80; §C amended by CCP 12/4/82; §C amended by CCP 12/10/94]

RULE 44 COMMITTEE REPORT

Tuesday, November 17, 2015

After our last meeting the committee was tasked with looking for ways to see if there were procedural changes we could make to the rule which would facilitate resolving or minimizing the increase in disputes with regard to IMEs being brought before the courts. At this meeting it was decided that the best way to approach this problem was to solicit from OTLA and OADC input on the extent of the problem and the nature of the issues and rulings. With that information we can seek proposed methods of resolution if needed. Efforts are being undertaken to contact each organization.