

COUNCIL ON COURT PROCEDURES
ANNOTATED AGENDA & MEETING PACKET

Saturday, December 13, 2025, 9:30 a.m.

Zoom Platform: See Footer for Contact Information

- I. Call to Order (Mr. Goehler)
- II. Approval of November 8, 2025, Minutes (Mr. Goehler) **(ATTACHMENT A)**
- III. Administrative Matters (Mr. Goehler)
 - A. Staff Comments (Judge Peterson)
- IV. Old Business (Mr. Goehler)
 - A. Committee Reports
 - 1. Attorney Fees/Rule 68 (Mr. Goehler)
 - 2. Joinder/Rule 24 (Judge Oden-Orr)
 - 3. Judgments/Rule 67 (Mr. Kekel)
 - 4. Out-of-State Depositions/Rule 38 C (Ms. Wilson)
 - 5. Post-Judgment Subpoenas/Rule 55 (Mr. Whitman)
 - 6. Service/Rules 7, 9 & 10 (Judge Raschio)
 - 7. Third Party Practice/Rule 22 (Ms. Dahab) **(ATTACHMENT C)**
- V. New Business (Mr. Goehler)
 - A. Rule 47 E (Judge Peterson) **(ATTACHMENT B)**
- VI. Adjournment (Mr. Goehler)

Attachments not included with initial meeting packet will be added to the website as soon as they are available. If it is very close to the meeting date, late materials may be e-mailed to ensure their receipt.

Teleconference/Videoconference Information

From your PC/laptop, for a videoconference:

- Click on this link:
 - <https://us06web.zoom.us/j/82377203749?pwd=NrzKPpbkaJvbos2b8xcEqAF0BkarQa.1>
 - Meeting ID: 823 7720 3749
 - Passcode: 193329
 - Dial-in audio option: 1-253-215-8782

From your smartphone, using the Zoom app to videoconference:

- Download the app (search for Zoom Meetings" in the iOS, Google Play Store, or Amazon Appstore
- Open the app and click on "Join Meeting"
- Enter the meeting ID: 823 7720 3749
- Passcode: 193329

Problems?

From your phone, like a regular teleconference:

- 1-253-215-8782 / Meeting ID: 823 7720 3749/ Passcode: 193329

Shari's cell phone number: 315-454-1280
Mark's cell phone number: 503-544-7022

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
 Saturday, November 8, 2025, 9:30 a.m.
 Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
 Hon. Andrew Erwin
 Hon. Christopher L. Garrett
 Barry J. Goehler
 Hon. Jonathan R. Hill
 Melissa Hopkins
 Ryan Jennings
 Lara Johnson
 Eric Kekel
 Julian Marrs
 Hon. Thomas A. McHill
 Hon. Michelle McIver
 Hon. Melvin Oden-Orr
 Hon. Robert Raschio
 Hon. Scott Shorr
 Tom Spooner
 Hon. Todd Van Rysselberghe
 Bryce Whitman
 Alicia Wilson

Members Absent:

Nadia Dahab
 YoungWoo Joh
 Derek Larwick
 Michael Shin

Guests:

John Adams, Oregon Tax Court
 Sean Glinka, Elevate Law Group
 Kevin Sasse, Dunn Carney
 Matt Shields, Oregon State Bar
 Troy Sexton, Elevate Law Group
 Rachel Trickett, Oregon Judicial Dept.

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 9 • ORCP 10 • ORCP 24 • ORCP 36 • ORCP 38 • ORCP 54 • ORCP 55 • ORCP 67 • ORCP 68	• ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Clarity • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery • Ex Parte	• Federalization • Guardians Ad Litem • “How To” Guides • Offers of Judgment • Pleadings • Receiverships • Remote Appearance • Security Bonds • Self-Represented Litigants • Subpoenas • Summary Judgment	• Timelines • Trial Practice • Uniform Collaborative Law Act • UTCR		

I. Call to Order

Mr. Goehler called the meeting to order at 9:30 a.m.

II. Approval of September 13, 2025, Minutes and October 11, 2025, Minutes

Mr. Goehler reminded the Council that there had been a question regarding a statement made by Mr. Kekel in the September 13, 2025, minutes (Appendix A). Ms. Nilsson stated that she had double checked the recording and corrected the statement. Mr. Goehler asked whether any Council members had any changes to the revised draft minutes. Judge Peterson made three suggestions:

- Page 6, paragraph two, fourth line, change the word “wants” to “want
- Page 9, paragraph three, last full line, change the word “that emails” to “those emails”
- Page 10, first line, change “the party, through their motion,” to “the party filing the motion”

Judge Raschio made a motion to approve the draft minutes with the corrections suggested by Judge Peterson. Judge Bloom seconded the motion, which was approved unanimously by voice vote.

Mr. Goehler called the Council’s attention to the draft minutes from the October 11, 2025, meeting (Appendix B) and asked whether there were any suggestions for corrections. Hearing none, he asked for a motion to approve the minutes. Judge Oden-Orr made a motion to approve the draft minutes. Judge McHill seconded the motion, which was approved by voice vote with one abstention.

III. Administrative Matters

A. Staff Comments

This topic was carried over to the December agenda.

B. June Council Meeting

Judge Peterson explained that a conflict has arisen and that he will not be able to attend the Council meeting scheduled for June 13, 2026. After some discussion, the Council decided to change the date of the meeting to June 6, 2026.

IV. Old Business

A. Committee Reports

1. Attorney Fees/Rule 68

Mr. Goehler referred the Council to a memo from the ORCP 68 committee (Appendix C). He stated that the committee had looked at the application of the ORCP 68 procedures to a Family Abuse Restraining Order case with fees issued by an order. The case was brought to the attention of the Council by Senior Judge Eve Miller. Mr. Goehler noted that ORCP 68 is pretty explicit about when it does and when it does not apply. The committee's initial examination of the decision in question seems to indicate that the court merely applied the rule and that the decision should not be that much of a surprise. However, after the committee met and drafted the memo, Judge Peterson had shared some thoughts with Mr. Goehler and Judge Miller had also weighed in. Mr. Goehler's recommendation is for him to reach out to Judge Miller and to talk with Judge Peterson and to report back at the December Council meeting.

Judge Peterson noted that, the previous week, the, Oregon Supreme Court had accepted review of an insurance attorney fee case. He pointed out that the other suggestion received by the Council regarding ORCP 68 was in regard to insurance cases, and that it might be a good idea for the committee to take a look at that case. Mr. Goehler acknowledged that the other feedback on ORCP 68 dealt with an insurance-specific statute, ORS 742.061, but that the committee felt that was more of a statutory issue than an ORCP issue. However, he stated that could also be revisited.

2. Judgments/Rule 67

Mr. Kekel apologized for missing the October Council meeting and thanked Judge Peterson for reporting on behalf of the committee. He referred the Council to the two draft versions of Rule 67 that the committee had previously shared (Appendix D), both of which add a new subsection B(2) to address what has happened to other parties when there is a multiple-party case and one party is seeking entry of a general judgment.

Judge Peterson reminded the Council that the two versions are essentially the same, with one just using more passive language that he feels reads better. He noted that Mr. Joh had expressed concern at the last Council meeting that the language was not clear and that it could be interpreted to mean that the substance of each prior judgment needed to be included in the general judgment. Judge Peterson stated that this is not the intention and that the language could be tweaked to make the intention more clear.

Judge Peterson stated that it would be helpful to hear feedback from the Council about whether the words “limited judgment” and date of entry are sufficient or whether the judge who made the ruling should also be included, as well as any parties who were directly affected, such as parties that were dismissed in the limited judgment of dismissal. Mr. Goehler agreed that it would be helpful to pin down exactly what information is desired.

Judge Bloom noted that domestic relations cases and probate matters typically have a lot of limited judgments entered prior to the final judgment, so he wondered how this change would affect those cases, to the extent that the ORCP apply to them. He asked if there would be a carve-out for those cases. Mr. Kekel stated that he has not practiced much in that area and agreed that this is definitely something to consider. Judge Bloom stated that, as a practical matter, it could be helpful to the bench to list prior judgments when there are different judges handling cases and there are many. This could also be helpful to parties.

As a public member, Mr. Whitman asked for a better understanding of why one would not want to include the judges or the other parties that were originally listed on the case. Judge Peterson thanked Mr. Whitman for his question and for the opportunity to explain further. He stated that it is helpful to indicate any previous judgments and their dates. Including the names of judges who signed any previous judgment would probably be more helpful. Noting that certain parties had been dismissed would be even more helpful. However, the trade-off is how to keep all of this information in a relatively short paragraph that provides useful information but does not become overly burdensome.

Judge Peterson recalled that the issue of caption amendment had come up at the previous Council meeting. He noted that there was agreement that amending the caption to reflect parties added to or dismissed in a case can be done by court order, but he wondered about the practical process. If there is a named plaintiff or a named defendant who is no longer in the case, are those names removed from the caption, or should they be left in with some kind of indication that they have been replaced by someone else? He noted that judges and staff typically call cases by the named parties, not by case numbers, so it can be confusing if a case name changes midstream, so to speak. Judge Peterson pointed out that, in the appellate arena, they use the name of the original party, *sub nom*, and then the new party, but that does not quite apply in the trial court. Mr. Goehler stated that he thinks that this issue might even go beyond judgments and reach into the pleading rules. It is an issue that sometimes has inconsistent application. Judge Peterson noted that Rule 34 covers substitution of parties, and that might be the proper place for it. He stated that he has been pondering the issue since it came up at the last meeting because it does come up in cases before him. Judge Bloom stated that the parties listed in the caption cannot just be changed and parties just be substituted; a motion to modify must be filed. He noted that it is not popular, but he requires a motion to modify and

an amended pleading.

Mr. Jennings stated that his belief is that captions should accurately reflect who is currently in the case. When a motion to dismiss a party is filed, the caption is more of a summary than it is a substantive part of the case, because dismissals happen frequently. At trial, nobody wants parties that are no longer in the case in the caption. A multi-party lawsuit with three parties in the caption is really just suing three parties; it is like three separate lawsuits, so, to leave dismissed parties in the caption seems strange. He stated that it almost seems like it should just be a rule that it is automatic that, after an order is entered where a party is dismissed, the caption must change and be current.

Pivoting back to judgments, Judge Hill agreed with Judge Bloom that, in terms of volume, domestic relations cases could be impacted by this kind of change to Rule 67. A custody case, for example, could go on for 18 years, which could result in many, many judgments. In application, it could be, frankly, a lot of work for the practitioner as well. While he does think that the amendment to Rule 67 could be helpful, he expressed concern about the implications for the workload of domestic relations practitioners and self-represented litigants.

Mr. Spooner stated that, with regard to how much information is included, from his perspective this will lie with the preference of the bench and the bench's staff, who will derive most of the benefit from this information. He thought that the bare minimum would be sufficient, listing prior judgments and the dates of them, since it is possible to look them up in the case register to determine what they are for, who is being dismissed, and which judge signed them. If the bench thinks, that it would be helpful to have more information to eliminate that task, that makes sense to him.

Ms. Wilson stated that, when she was a domestic relations practitioner, she often needed to look back at prior judgments to determine whether a new judgment would affect the other ones. For example, custody might be changing, but no-contact provisions from the same judgment might be left in place. She stated that she actually does not think that it would be a huge burden and that it would actually help in terms of clarity for everyone.

Judge Erwin stated that he was not sure how helpful such a change truly would be to judges. He noted that it would depend on the court. Personally, he has a judge's edition PDF reader that he can use when he opens a case to open every judgment from that case. He does that for every case he deals with. He stated that he does appreciate the comments about domestic relations and probate cases and the large number of judgments that can exist there. That could make the first several pages of every judgment document useless to him, personally. He agreed that it could be useful to other judges and staff who do not use the PDF reader feature.

Mr. Jennings noted that Ms. Nilsson had asked a good question in the comments: was the actual goal of the suggestion in the first place just knowing who had been dismissed already? He stated that coming back to the problem we were trying to solve could be helpful in narrowing what might be required in the judgment. Judge Peterson stated that the staff that handles the civil judgments that are submitted in Multnomah County reported that it is a challenge for them to determine whether a judgment covers all issues and all parties, and to whom it should be routed. That was the original problem, and it seemed to him that, as a matter of practice, attorneys should want to make sure that they have covered all of the claims and all of the parties, and that there are no inconsistencies.

Judge Oden-Orr proposed the following language to help clarify the draft proposed by the committee:

". . .date of entry of each such judgment, and a brief summary of the effect of the judgment."

Judge Peterson noted that he has very seldom dealt with probate cases. However, he has become aware that there is a statute that makes certain ORCP applicable in probate and certain ORCP not. It might be possible to solve the problem of listing an inordinate number of judgments in probate cases by making the new subsection B(2) inapplicable to probate cases.

Mr. Goehler thanked the Council for the discussion and the committee for its work. He asked Council members to think further about the issue and stated that he looked forward to hearing the next committee report at the December meeting.

3. Service/Rules 7, 9, & 10

Judge Raschio reported that the committee had met and invited two of the lawyers who had made suggestions regarding service to attend that meeting. He stated that one of his takeaways was that there is some consideration to be done about whether or not the 3-day mailbox rule (ORCP 10 B) still needs to exist in Oregon's modern service process. One of the lawyers who attended the meeting expressed concerns that the three days are just being used as a tool of litigation delay and causing additional expenses to parties. It is a valid question that needs to be addressed by the committee. Another question is whether to make the email service rules post-summons more robust and create better accountability on both ends of that for how items are getting served, and whether attorneys should be encouraged to use that type of service to drive down litigation costs.

Mr. Spooner stated that it seemed that the bigger issue for both of the attorneys who attended the committee meeting was the 3-day rule that is

currently in the ORCP that applies to service by any means other than personal service. He stated that his recollection is that the rule originated with mailing and delays in mailing but, the way the current rule is written, it applies to facsimile transmission and email. Secondary concerns were clarifying e-service and email service and looking at the way the FRCP is written on service versus the current ORCP.

Judge Raschio stated that the committee would report again after its next meeting.

4. Third Party Practice/Rule 22

Mr. Kekel reported that the committee had been unable to meet, but that it would do so prior to the next Council meeting.

5. Joinder/Rule 24

Judge Peterson reminded the Council that the issue in question was raised by former Council member Judge Susie Norby. He noted that Rule 24 has not been modified since it was originally promulgated, and the language in question is not only imprecise, but also probably incorrect. Judge Peterson stated that the most recent change to the Oregon Residential Landlord-Tenant Act (Act) had defined non-payment much more clearly. It includes rent, utilities, late fees, and other fees provided by ORS 90.302 and other statutes, or the rental agreement. He pointed out that the eviction process is a summary process. If a plaintiff is entitled to bring a claim for some other relief, other than possession of the property, including it in the summary eviction process would be problematic, given the speed with which the process proceeds. A plaintiff can join their other claims, but that would convert it to a regular civil case. In the memo to the Council (Appendix E), Judge Peterson noted that the statute says that a judgment is only for possession of the premises. There are two other statutes within the Act that make it quite clear that for two specialized areas, return of personal property and return to a group home, the only issue that can be raised is possession. Any side issues must be raised separately in a different action. It is true that the defendant can enlarge the jurisdiction in a residential eviction case by filing counterclaims, which can cause the plaintiff to lose a little bit of control of their case. The intent of the draft amendment to section B is to make it more clear that, if you bring an action for possession, you get the benefit of the very summary procedure and, if you want to bring an action for possession plus any kind of other relief, injunctive or monetary, you will proceed on the regular civil track.

Judge Oden-Orr stated that he had reviewed Judge Peterson's proposed changes to Rule 24 and thought they had the effect that he just mentioned of making it clear that, if you join claims, you are out of the FED world in terms of

summary determination. Mr. Goehler stated that he believed that was the original intention, but it would be nice to bring the rule up to date and have it be accurate in terms of what kinds of other claims may be involved. He stated that he did not think that the Council was ready to vote on the rule. His suggestion was to ponder the issue some more and look at the statutes and consider any unintended consequences.

Judge Oden-Orr stated that there may be value in getting input from regular landlord-tenant practitioners. Judge Hill agreed. Judge Peterson stated that he would be happy to reach out to some of the lawyers who appear frequently in landlord-tenant court in Multnomah County to get their opinions.

Judge Peterson noted that he and Judge Oden-Orr were the only two people working on this issue; a true committee had not been formed. He asked for volunteers to join a formal committee. Mr. Whitman stated that his business relates to landlord-tenant matters and that he would be happy to join a committee. Mr. Goehler also joined the committee.

B. Suggestions for Amendments to the ORCP

1. ORCP 38 C

Mr. Goehler stated that Kevin Sasse, an attorney from Dunn Carney, was present at the meeting to explain further his suggestion regarding ORCP 38 C. Mr. Sasse thanked the Council for giving him the opportunity to speak about the issue. He stated that the issue seems to be rare, which may be why it has not come up a lot. ORCP 38 C governs depositions in Oregon for matters pending in other states, and the relevant related Uniform Trial Court Rule (UTCRC) is 5.140. He explained that there is an expedited procedure under UTCRC 5.140(1) and a more lengthy procedure that requires an ex parte appearance in UTCRC 5.140(2).

In the issue that came up for his firm, they were local counsel for a matter that was pending in Missouri, which is one of the very few jurisdictions that has not enacted the Uniform Interstate Depositions and Discovery Act (UIDDA). Depositions were going to be taken in Oregon. Although the first couple of subpoenas for depositions were actually issued by the court under UTCRC 5.140(1), the court refused to issue the last subpoena and required them to undertake the procedure in UTCRC 5.140(2) and appear in person at ex parte. Mr. Sasse noted that the process was not particularly painful. However, considering that subpoenas had been previously issued under the more expedited procedures, he looked at both the ORCP and the UTCRC. It was not clear to him that there is actually a limitation in either ORCP 38 C or UTCRC 5.140 that requires the other jurisdiction in which the matter is pending to have also enacted the UIDDA. He observed that there are some jurisdictions that actually do impose such a requirement, such as West Virginia, where it is contained in a

statute which specifies that, as long as the foreign jurisdiction is also subject to the UIDDA, the expedited procedure is allowed. Mr. Sasse stated that he thought this may be what ORCP 38 C(6) might be implying with the following language:

In applying and construing this section, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it.

However, that was unclear to him. In addition, UTCR 5.140(1) and 5.140(2) state that, in trying to determine which one applies, one should look at whether the matter is pending in a state as defined in ORCP 38 C, but that is defined broadly and Missouri qualifies under that definition. Mr. Sasse stated that he is not taking a position on exactly what the fix might be, but stated that the situation is confusing so some clarity would be helpful.

Mr. Goehler stated that he has not dealt with this situation personally; however he agreed that it does not seem very clear and stated that this may be a good rule to look at and clarify. He asked whether the Council is interested in forming a committee. Judge Peterson stated that, if the ORCP and UTCR are inconsistent, it is something that should be addressed. Ms. Wilson agreed to join and chair a committee. Judge McHill also joined the committee. Mr. Goehler thanked them for taking a preliminary look and stated that additional committee members could be added if needed. Judge Peterson noted that there are many Council members who have not yet joined a committee. He encouraged them to take a look at the committees that have been formed and to join any that interest them. Mr. Goehler agreed that the committees are where the hard work of the Council happens and also encouraged members to join committees.

2. Post-Judgment Subpoenas

Mr. Goehler introduced attorney Troy Sexton and asked him to give more details about the issue regarding post-judgment subpoenas that he had brought before the Council. Mr. Sexton referred the Council to the memo he had submitted (Appendix F). He hoped that the citations in the memo would be helpful to Council members in understanding the issue.

Mr. Sexton stated that, after he obtains a judgment, judgment debtors are many times not very cooperative. The issuance of third-party subpoenas is an extremely helpful tool for finding assets that have been transferred or bank account information in order to ensure compliance with the judgment and to limit costs. ORS 18.268 explicitly allows for the issuance of subpoenas in aid of execution of judgments. However, there is no further connection with how those subpoenas get issued. He then looks to ORCP 55, the subpoena rule. The language in ORCP 55, though, presumes that a claim has to be pending. The

general discovery rules also refer to discovery being available in aid of claims and defenses, not in execution of a judgment. Mr. Sexton explained that some practitioners and some judges argue that post-judgment subpoenas are not allowable. Therefore, there is a clash between a statute saying post-judgment subpoenas to examine witnesses are allowed and ORCP saying that subpoenas can only be issued when a claim is pending or in aid of discovery for a claim or defense.

Mr. Sexton clarified that the bar books regarding this issue make it clear that the longstanding practice has been to issue post-judgment subpoenas in aid of collections. He stated that he has issued many of these and, for the most part, they go uncontested. If they do get contested, it is a rare event where that contest is successful. However, in his view, if this is the practice and it is endorsed by statute, any potential roadblocks to the practice should be eliminated. If there is a question of the scope, or who can issue a subpoena, or to whom a subpoena should be issued, those are perfectly appropriate questions to bring before the court, but the basic issue of whether or not this type of discovery is allowable should not be. His proposal would be to take language from FRCP 69 ("if a tool of discovery is available to a party pre-judgment, it is available post-judgment") and insert similar language limited to subpoenas into ORCP 55.

Mr. Goehler asked whether the problem is with ORCP 36 that says that the discovery has to be relevant to a claim or defense, or whether it is with ORCP 55. Mr. Sexton stated that his experience has been that most people have objected on the basis of ORCP 55. He noted that there is case law that says that the language in ORCP 36 is limited to the scope of discovery, rather than the ability to discover. He stated that people are able to point to the post-judgment subpoena statute, ORS 18.268, that refers to issuing subpoenas to examine witnesses, and state that a subpoena to obtain documents cannot be issued. He gave the example of a judgment debtor who rents property. He would send a subpoena to their landlord asking for payment records to find out their bank account information for later garnishment. There is no need to haul a landlord into court for a debtor's exam hearing to ask them how the debtor pays their rent. More efficient document discovery is a much more cost-efficient for everybody.

Mr. Jennings suggested that a simple fix might be to state that a claim is still pending until a judgment is satisfied or there is a general judgment of dismissal filed. He stated that he may just be ignorant of how the rules work but, to his mind, the claim is still pending until the judgment is satisfied. Mr. Sexton stated that would be one possible workaround. It would satisfy a lot of the arguments, but maybe not all of them. It does not address the issue about whether subpoenas are explicitly available for a subpoena duces tecum rather than for examining witnesses.

Judge Peterson thanked Mr. Sexton for the memo, which is very helpful in explaining the issue and suggesting specific potential fixes. He stated that it seems clear to him that the court has authority to render judgments and, also, to enforce its judgments. He noted that the Council had amended Rule 68, adding subsection C(7), to make it clear that a litigant can collect attorney fees post-judgment on their collection and enforcement efforts. He stated that, between the statute that Mr. Sexton cited and common sense, it seems clear to him that the court has jurisdiction. He appreciated Mr. Sexton's discussion about administrative closure as opposed to loss of jurisdiction. It seems to him that there may be a simple fix to this, perhaps the one Mr. Sexton suggested or amendments to both Rule 36 and Rule 55. Mr. Sexton stated that he had attempted to craft a simple solution, but that he would not claim that his solution was the perfect one. He was not certain of the potential consequences of a modification to Rule 36 or Rule 55.

Judge Bloom stated that he would be willing to join a committee to take a look at the issue. He observed that Mr. Sexton's suggestion seems to make sense, but stated that he would want to look at potential unintended consequences, including the potential of exposing people not related to the action to subpoenas in what has essentially become a closed case. Judge Erwin, Judge Hill, Ms. Johnson, Mr. Marrs, Judge Peterson, and Mr. Whitman also joined the committee, with Mr. Whitman chairing.

V. New Business

A. Motions within Responses

Judge Peterson explained that attorney Brandon McKay had written to the Council (Appendix G) regarding the issue of motions combined within a response to a motion, wondering if that was allowed under the ORCP. Mr. McKay had suggested that this practice is confusing and can interfere with deadlines, and he pointed to Local Rule 7.1 for the Federal District of Oregon, which states that every motion must concisely state the relief sought, and be listed in a separate section, and that motions may not be combined with any response, reply, or other pleading.

Judge Peterson noted that, in the email exchange, he stated that, if one cannot include a motion in a response, one could simply file the motion contemporaneously with the response. However, because the exchange caused him to ponder a bit, he wanted to bring it before the Council to see if anyone had experience with this issue and whether any action needs to be taken.

Mr. Goehler stated that he has sometimes found that the federal rules tend to create more pleadings and more paper rather than getting to the issue. A motion to dismiss with an alternate motion to strike is something that comes up in initial pleadings. Saying that only one thing can be done at a time and requiring a separate motion to dismiss

and motion to strike does not make sense from a practice perspective. However, that is just his experience.

Judge Oden-Orr pointed out that motions within responses are actually fairly typical. In addition to motions in the alternative, a response to a motion often includes a motion to strike something that was in the moving papers. In a response, there is often a request for leave to amend. He opined that Oregon's current practice is pretty efficient.

Mr. Goehler stated that there may be issues about timing of responses and who gets the last word; however, filing separately will not change those times. Mr. Spooner noted that this also occurs in motions for summary judgment where a responding party files a cross-motion for summary judgment with their response. Mr. Goehler stated that this is also the nature of counterclaims and contingent counterclaims. Judge Shorr stated that the only issue that he could see, which may already be addressed in the UTCR, is that the motion should be separately stated in the caption and denominated, and not hidden within a paragraph, just so everyone understands what is at issue.

The Council did not feel the need to create a committee to look at this issue.

B. E-Mail Service

Judge Peterson raised an issue that was not precisely new business, but was something for the Rule 7, 9, and 10 committee to think about. He pointed out that, after the signature line in Mr. McKay's email regarding the issue discussed in Item V.A., there is a disclaimer that states, in part:

“Pursuant to ORCP 9G this firm does NOT consent to service under Oregon Rules of Civil Procedure by e-mail.”

Mr. Goehler stated that he had noticed that as well. He pointed out that this does not mean that they *cannot* be served by email. It means that service is not automatic upon sending. He stated that perhaps part of what the committee can do is make sure that Rule 9 is crystal clear so that everybody knows what the effect of this disclaimer is. Judge Peterson agreed and stated that he believes that the committee has its work cut out for it to create this clarity.

C. Offers of Compromise

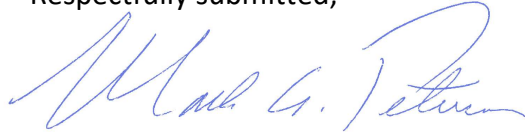
Judge Peterson again raised an issue that was not exactly new business, but related back to the Council's prior decision not to form a committee related to offers of compromise under Rule 54 E. He wanted to clarify for Council legislative history that the person making the suggestion did not just want to “make attorney fees reciprocal,” but to change the language in the rule to say that not only does the party that did not accept the offer of judgment not get attorney fees after the offer that they did not beat was made, but also that the other side should get attorney fees from that point forward

as well as costs. He stated that he just wanted to make sure that the Council said that it was not forming a committee on what the suggestor was asking it to form a committee on: to shift not only costs, but attorney fees, so that the party that declined the offer would then be subject to both court costs and attorney fees for rejecting the offer. He stated that he did not even know that the Council had the authority to do this. Mr. Goehler agreed and stated that the conclusion was that anything dealing with reciprocity of fees would need to be a statutory change.

VI. Adjournment

Mr. Goehler adjourned the meeting at 10:51 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director



RE: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations

1 message

Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>

Tue, Nov 11, 2025 at 12:21 AM

To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, "ccp@lclark.edu" <ccp@lclark.edu>

Cc: Mark Peterson <mpeterso@lclark.edu>

Mark – yes, I made a suggestion on this general topic a number of years ago. To be clear, I am not against the concept of ORCP 47E, especially in light of the reason that it was enacted, which was defense lawyers being almost certain that the other side had an expert to create a question of fact but nonetheless filing MSJs to force disclosure of experts. However, it does seem that the appellate courts have had a bit of “decision creep” wherein the “may or must” language seemingly randomly appeared in one case without explaining how that was consistent with the “required” language in the rule, and then have expanded further on the “may or must” language. If the Council determines that the appellate courts have correctly applied the rule, even without a traditional statutory interpretation analysis, then that is great; nothing would change about the current state of the law, but it seems that the rule should still be modified to reflect this because otherwise we are going to have the continual dispute of the case law adding language to the rule that does not exist.

However, regardless of whether that portion of the rule is changed or adhered to, it does seem that an enforcement (and deterrent) mechanism is needed and would be appropriate. I did not raise that issue in my prior communications with the Council because I had not thought about that before. The reason I am raising this issue now is that this issue came up in a recent case of mine where the defense was very suspicious that any expert could have legitimately offered an opinion that would create a question of fact, and I realized that without having plaintiff’s counsel somehow timestamp that opinion that it would be very difficult after trial to analyze whether it was proper to use a ORCP 47E declaration to defeat summary judgment. I did order that plaintiff’s counsel time stamp the opinion, which they chafed at because it took so much time to put that together. But the fact that the plaintiff’s counsel complained that it took an excessive amount of time to memorialize the opinion (I did not require a report, I just required that the opinion be documented based on what the expert had already provided to the lawyer, which could have been an email from the expert or a memo to file from the lawyer based on oral discussions etc.) further solidified my belief that there needs to be some mechanism in place to be able to prove later that *at the time of the ORCP 47E declaration* that the expert had actually rendered a particular opinion that would create a question of fact. I can’t

imagine that any attorney worth their salt would not have that opinion documented in some fashion at the time they made the ORCP 47E declaration, so they could simply copy and paste that and file it with almost no extra time. If attorneys are intentionally not documenting the opinions in any form but are nonetheless representing to the court that the expert has actually rendered an opinion that would create a question of fact, then that would make it almost impossible to determine what was known at the time of the ORCP 47E declaration, as opposed to what was developed later on as trial approaches. That seems to be antithetical to the rule.

If the Council is not amendable to adding an enforcement/deterrent mechanism to the rule, I would be curious to know why think the rule as written has sufficient tools.

Thanks for considering this, and for your many years of valuable service on the Council

Eric L. Dahlin
Circuit Court Judge

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Monday, November 10, 2025 1:41 PM
To: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>; ccp@lclark.edu
Cc: Mark Peterson <mpeterso@lclark.edu>
Subject: RE: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations

Thanks Eric. I believe that it was two biennia ago that you made a similar proposal, and the Council declined to form a committee and attempt a draft amendment of Rule 47 E. This is a new Council with many new members. Rule 47 is a procedural device that is important and often involves significant attorney time and judicial resources. The Council will consider your proposal at its December 13 meeting. If a committee is formed (an act that does not necessarily result in an amendment, but is a necessary first step) the committee will likely get back to you with additional questions. Thank you for the proposal and for your persistence in seeking clarification and improvements in summary judgment practice.

Mark

From: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>
Sent: Monday, November 10, 2025 1:17 PM
To: ccp@lclark.edu
Cc: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations

Dear Council on Court Procedures members:

I would like to suggest that the Council re-evaluate ORCP 47E to determine if the appellate decisions applying the rule in fact reflect the Council's intent. The rule currently provides that a declaration can be used when expert testimony is "required" to create a question of fact, but the appellate courts have used a "may or must" standard instead. Even though the application of that rule should be a matter of statutory interpretation, I am not aware of a single appellate case that has conducted a traditional statutory interpretation analysis, nor a traditional legislative history analysis, to interpret the text of the rule and the intent of the drafters.

The current state of the rule effectively allows the submitting attorney to usurp the role of the court in determining whether there is a question of fact, and in determining whether expert testimony is even required in the first instance. While I believe that the vast majority of attorneys appropriately use ORCP 47E declarations and only submit them when they have retained an expert whose testimony unquestionably would create a question of fact, I suspect there are some attorneys who sometimes make a questionable use of the declarations in order to get past summary judgment and then hope to settle the case.

It may be that after such evaluation the Council determines that ORCP 47 E does not need to be substantively modified because the appellate courts have applied the rule precisely as the Council envisioned. But even if that is the case, the Council may want to update the language of the rule to remove the "required" language and replace it with a "may or must" standard used by the appellate courts, because the courts may have inadvertently read language into the rule that does not exist.

On a separate but related matter, at a minimum it may make sense for the Council to modify the rule to provide a mechanism to evaluate *after trial or other resolution* whether an ORCP 47E declaration was, *at the time it was filed*, made in good faith and supported by an adequate opinion. The appellate courts routinely refer to the ability to obtain sanctions for an ORCP 47E declaration made in bad faith as being sufficient to ensure that the declarations are made in good faith. However, there is no formal mechanism in place by which such an evaluation can be made because a contemporaneous expert report is not required to be submitted when the ORCP 47E declaration is filed, and if the case is resolved short of trial, the expert's opinion would never otherwise be disclosed. Perhaps the Council could update the rule to require that when an ORCP 47E declaration is filed that the party

simultaneously file *under seal* the precise basis on which the ORCP 47E declaration is made. This would be consistent with the rule’s purpose to not allow summary judgment to be used as a discovery device, because the information could only be unsealed later after the case had been tried or otherwise resolved. Such a requirement would require minimal additional effort for the lawyer because the rule already requires that the expert “has actually rendered an opinion or provided facts” that would create a question of fact, so presumably the lawyer could just copy and paste the expert’s opinion into a document and then file that document under seal. This would also avoid the situation where an attorney who did not at the time of submitting the declaration have an expert retained that would create a question of fact could later retain an expert and have that person testify at trial and then argue there need not be any inquiry about what was known by the attorney at the time the declaration was submitted.

Please let me know if you have any questions.

Eric L. Dahlin
Circuit Court Judge
Multnomah County Circuit Court
1200 SW 1st Ave.

11th Floor
Portland, OR 97204
(971) 274-0666

eric.l.dahlin@ojd.state.or.us

[Judge Biography](#)

Him/He

MEMO

To: Council on Court Procedures

From: Rule 22 Committee

Date: 12/4/25

Re: Committee Update

The committee (Nadia Dahab, Mike Shin, Eric Kekel, Judge Bloom, Lara Johnson) met on 11/18 and reviewed the proposed idea, which was submitted for consideration by council and committee member Eric Kekel. The committee did not have before it any proposed wording, but Eric Kekel will draft proposed wording for consideration at the committee's December meeting.

The proposal, generally speaking, would be to eliminate the requirement under ORCP 22C that all parties consent to addition of a third-party defendant after the 90-day period set forth in that rule. Eric expressed concern that the current practice for adding third-party claims after the 90-day period - which, in the absence of consent, often involves filing a separate action and seeking consolidation - potentially creates a Lara Johnson offered, and the committee discussed, the various additional "malpractice traps" that exist for both sides under several procedural rules and statutes, and Lara observed that this rule does not appear to be different in kind. Lara also provided background material about the current rule, including about its original enactment and prior proposals to amend it. The committee further discussed the concern that the proposal may result in prejudice to potential third-party defendants who do not wish to be joined in an action late in the litigation, and the idea that the current rule was developed to preserve some control for plaintiffs in the determining the course of their case. There was no resolution on whether the committee ultimately will propose any amendment.

Next steps: the committee will meet again on 12/17 at noon. Nadia Dahab and Mike Shin will research the history of the rule and the current practice in other jurisdictions. Eric Kekel will draft proposed wording for the committee's consideration.