MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 11, 2010, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner*
Arwen Bird*
Michael Brian*
Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Don Corson
Kristen David
Martin E. Hansen*
Hon. Robert D. Herndon
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Kathryn M. Pratt*
Hon. David F. Rees
Mark R. Weaver

Members Absent:

Hon. Mary Mertens James
Hon. Locke A. Williams
Hon. Charles M. Zennaché

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 1 • ORCP 9 • ORCP 21 • ORCP 36 • ORCP 38 • ORCP 43 • ORCP 54 • ORCP 69 • ORCP 71 • ORCP 83	• ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 64F • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • Moving venue to ORCP • Counterclaims in Domestic Relations Motions • Claim preclusion v. issue preclusion • Discord between ORCP 1 E and 83 A		• Standardizing time increments in ORCP • ORCP 68 - hearing on objection to attorney fees • ORCP 44 - medical examinations • ORCP 57 - alternate jurors • ORCP 55 - subpoenas for inmates • ORCP 54 - allow dismissal of specific claims • Claim preclusion v. issue preclusion • Discord between ORCP 1E and 83A

I. Call to Order (Mr. Buckle)

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

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of June 5, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft June 5, 2010, minutes (Appendix A) which had been previously circulated to the members. A motion was made and seconded, a voice vote was taken, and the minutes were approved with no amendments or corrections.

IV. Administrative Matters (Mr. Buckle)

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the website report (Appendix B) and noted that the website now includes all historical materials (including subcommittee work which was included in the original Council legislative history materials) for each biennium from 1993 to the present. She stated that the process of scanning documents and uploading them to the website is time-consuming but that the program to include all Council materials since the inception of the ORCP is progressing.

B. Council Timeline/Expiring Terms (Mr. Buckle)

Mr. Buckle asked whether all Council members had had an opportunity to look at the term matrix (Appendix C) which was circulated in the meeting packet. Council members indicated that they had done so and no members had any revisions. There are two members with terms expiring in August, 2011, who are not eligible for another term, and six members with terms expiring in August, 2011, who are eligible for reappointment to another four-year term.

C. ACTION ITEM: Election of Officers per ORS 1.730(2)(b) (Mr. Buckle)

Mr. Buckle noted that, although officers traditionally serve two one-year terms, they must be re-elected each September. Mr. Corson moved to nominate Mr. Buckle as chair, Mr. Cooper as vice chair, and Ms. Bird as treasurer. Judge Holland seconded the motion and it passed via voice vote with no objections.

D. Moment of Silence

At Mr. Bachofner's request, the Council spent a moment in silence in remembrance of those who lost their lives on September 11, 2001.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

Mr. Buckle reminded the Council that the purpose of the meeting was to vote on whether to publish amendments to the ORCP. He noted that the published amendments will appear on the Council's website and in the Advance Sheets and that, during the period leading up to its December meeting, the Council will accept comments from the public regarding the proposed amendments. Mr. Nebel added that he will arrange for the Bar to put a link on its website and a notice in the Bar Bulletin regarding the published amendments.

Prof. Peterson stated that Council practice has been for any member who receives feedback to report it to the entire Council so that all members see each comment. He stated that, if the comments indicate that more work needs to be done on a particular amendment, that committee can meet again to consider making additional changes prior to the December meeting. Prof. Peterson also pointed out that a simple majority of a quorum is required to publish an amendment, and that a super majority of a quorum is required to promulgate rule changes in December.

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner stated that the suggestion for the amendment of ORCP 36 originated from one of the many suggestions regarding discovery which the Council received as a result of a poll taken last biennium. He noted that the proposed change is in regard to discovery in insurance cases and is intended to prevent parties from moving forward with expensive litigation when a plaintiff does not realize that there may be a denial of coverage or a reservation of rights which would result in the unavailability of any funds from an insurance company.

Mr. Bachofner stated that the committee had looked at Washington's rule, CR 26(b)(2), which allows discovery of certain insurance company letters. He indicated that the committee had weighed the issues and, after careful deliberation, arrived at the modifications contained in Appendix D. He observed that the amendment requires disclosure if there is a reservation of rights or denial of coverage, and that this will allow the opposing party to do an independent investigation to determine whether

coverage exists and whether the litigation is worth pursuing to trial. Mr. Bachofner reported that the committee had received comments that the language in the rule resembles an interrogatory, but he noted that this exists in other aspects of discovery as well. He observed that the amendment does not say that an attorney cannot disclose or produce a coverage letter but, if there is some privilege associated with the letter, the opposing party will still receive the essential information. He observed that the committee felt that the language was a good compromise, and proposed that the Council vote on whether to publish the suggested amendment.

Mr. Cooper stated that the Council should be absolutely clear that the insurance company and its defendant insured have a privilege claim to this sort of information, and the Council is in fact making a rule that requires its provision, which is within the Council's power. Mr. Cooper emphasized that the amendment does not make anything else discoverable that is otherwise privileged. He observed that furthering settlement of cases that ought to settle sooner rather than later is a good thing, but that some who are more protective of their insurance company client and defendant insured's rights might find this change a little uncomfortable. Mr. Cooper pointed out that this tension is one we find in all of the ORCP and that the Council is balancing it appropriately. Mr. Bachofner stated that the rule change specifically preserves the privilege associated with the actual reservation of rights or denial of coverage letter, and pointed out that the opposing party has a right to know the issue exists in order to act accordingly.

Mr. Buckle expressed a technical, rather than a substantive, concern that the rule requires the production of what might be privileged information, and privileges are set out in the rules of evidence. Judge Miller noted that there would be nothing to prevent a party from making an objection based on privilege and asking the court for a protective order. Mr. Cooper stated that the committee looked specifically at the privilege issue and that the language in the amendment is the product of that research. Judge Miller pointed out that a party could provide a letter with everything redacted except for the sentence that deals with a reservation of rights or denial of coverage. Judge Herndon observed that the information that a party does not have coverage is likely not privileged. Mr. Bachofner noted that, if the denial was based on an intentional act, the insurer would not want this document produced to the other side if it is part of the defense of the underlaying case. He stated that this is similar to a case of requesting all documents identifying names of witnesses. He noted that, most of the time, attorneys send a list of names and addresses rather than the documents containing that information which could be privileged. Mr. Bachofner observed that an attorney can comply by sending the letter if he or she chooses but that, if the attorney feels the

letter contains privileged information, he or she can simply state: "There is a reservation."

Judge Miller remarked that the existing rule requires the disclosure of all insurance agreements or policies, but that those documents have no utility whatsoever if the attorney does not disclose that the policy or agreement does not apply. Mr. Buckle noted that a plaintiff's attorney would be able to perform a coverage analysis based on the facts and reach his or her own conclusions, which may or may not be the same ones as the insurance company. He stated that the rule change encourages settlement, which is good, but was concerned about technical matters. He observed that there are three elements to any case: liability, damages, and how the damages will be paid. Mr. Buckle noted that liability and damages are in the legal arena of the lawsuit, but that how the damages will be paid or if they can be paid is not part of the structure of the lawsuit, even though it is important. He stated that whether there is a denial of coverage or reservation of rights affects settlement but not the actual lawsuit. Judge Miller stated that the whole idea behind requiring disclosure of the existence and contents of an insurance policy, which was adopted long ago, was to encourage people to be realistic about whether there will be that third part, payment, after the case is over. Mr. Buckle asked whether he can respond to a request by saying "there is a denial letter, and the provisions that were relied on for the denial are paragraph 8, section 4, in the policy." Judge Miller stated that, if an attorney did not want to disclose, for example, that the insurance company based a denial on an intentional act, an attorney could apply to a judge to keep that privileged.

Mr. Brian noted that the Council has three options: 1) leave the rule in its current state; 2) craft an amendment stating that the letter should be produced (which would remove the concern about interrogatories); or 3) move forward on the compromise of the amendment which is currently before the Council. He stated that he does not like the idea of interrogatories and would prefer not to go down that path, but that he understands that, as a plaintiff's lawyer, there are times that he will not get to see the denial letter even though he may want to. He stated that he believes that the amendment before the Council is a good compromise. He observed that the amendment would require an attorney to point to the policy language on which the insurance company relied, which would allow opposing counsel to determine the reason for the denial without production of the letter. Mr. Brian stated that there can be legitimate reasons on the defense side not to produce the letter, so the compromise is an appropriate mechanism to alert the plaintiff's side that there is a coverage issue and the basis of the coverage issue.

Justice Kistler asked how the term “provision” is defined, since some insurance policies stick to the definition of occurrence. He stated that, when the rule says to identify the provision in the policy on which the denial is based, one could refer to the definition of what is covered, which would refer to occurrence, and would not refer to the definition of occurrence which might mean acts that are “neither intended nor expected.” He expressed concern that litigation might arise over the definition of “provision.” He noted that “clause” is narrower than “provision,” and that a provision can have multiple clauses. He wondered whether there was consensus among the Council about how specific a party would need to be when identifying the “provision.” Mr. Cooper observed that would be the rationale behind requiring production of the letter itself, but that this is a compromise which allows an attorney to state the specific article, even if it is an article which is 75 pages long and provides no information to the plaintiff’s lawyer and requires him or her to hunt for the reason. He stated that he does not know how much litigation might result, or how many motions to compel might be filed as is done in requests for admission because the response is deemed insufficient. Justice Kistler stated that he wanted to get a sense of what people understand the word “provision” to mean and whether a party would need to identify the specific clause rather than the general provision, which could encompass a host of different grounds for a reservation or denial. Mr. Cooper stated that when an attorney is exercising his or her duty to defend the insurance company's insured, he or she will do what is in that client’s best interest, which may include careful crafting which is obfuscatory, and that this is appropriate exercise of one’s duty as a lawyer.

Mr. Buckle pointed out that there will be a denial or reservation of rights letter that has been issued for this to apply, and that this letter should refer specifically to the exclusionary provisions upon which the insurance company specifically relied, but that the insurance company reserves the right to rely on anything else too. He wondered whether he could include all of the exclusions in the provision, not just the ones in the letter. Justice Kistler stated that some people regard “neither intended nor expected” as an aspect of coverage, rather than as a specific exclusion, because there was no occurrence. He asked whether, in one’s answer, one could respond that there was no coverage under a particular section which then incorporates the definition of occurrence, since that definition would incorporate things that are neither intended nor expected. Mr. Buckle stated that, if the insurance company deemed the event not to be an occurrence, he would respond with the provision under which the definition of occurrence is included. Judge Miller noted that the answer would likely state that there was no occurrence.

Mr. Corson stated that this has not come up often in his practice and asked what others' experience has been. Judge Rees stated that the issue arises frequently in business and construction, where there may be many reservations of rights. Judge Herndon observed that, when there is a coverage issue in a settlement conference, it is never a surprise to the other side because discussions have been taking place. He stated that it is better to know earlier in order to allow for settlement and that he believes that the proposed amendment is a good one. Mr. Bachofner noted that, even if a specific clause is not identified, the other side will be put on notice that the issue exists. He stated that disclosure is a common practice now but that the change will make it clear that the plaintiff is entitled to be put on notice if the plaintiff asks for the information. Judge Rees suggested that the word "provision" should be changed to "provisions" in the proposed amendment.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 36

Judge Herndon moved to publish the proposed amendment to ORCP 36, with Judge Rees' suggested amendment. Judge Miller seconded the motion and it passed unanimously by voice vote.

2. Uniform Interstate Depositions and Discovery Act Committee (Mr. Corson)

Mr. Corson noted that the proposal for this amendment came from the Oregon Law Commission (OLC) and the National Conference of Commissioners on Uniform State Laws. He stated that the OLC had created several drafts and forwarded its final draft to the Council. Mr. Corson stated that the committee had also refined the amendment and had gone through nine drafts before finally crafting the latest draft amendment (Appendix E), which incorporates the most recent feedback from Council members.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 38

Mr. Corson moved to publish the proposed amendment to ORCP 38. Judge Holland seconded the motion.

DISCUSSION ON THE MOTION:

Mr. Brian asked what specific problems the amendment addresses. Mr. Corson stated that using letters rogatory or commissions to get a subpoena in an out-of-state case is an antiquated method, and that the amendment makes the issuance of a subpoena for a deposition a function of the clerk

as opposed to a function of the judge. Prof. Peterson observed that this makes litigation less expensive and faster. Mr. Cooper stated that this will allow judges to spend less time on ministerial acts.

After discussion, a vote was taken on Mr. Corson's motion, which passed unanimously by voice vote.

3. Rule 54 Issues Committee (Ms. Leonard)

Rule 9

Ms. Leonard stated that the primary focus of the committee's suggested amendment of ORCP 9 (Appendix F) is related to the ORCP 54E offer of compromise. She stated that the proposed change to ORCP 9 makes it clear that offers of compromise should not be filed with the court except when they are accepted.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 9

Mr. Corson made a motion to publish the amendment to ORCP 9. Judge Miller seconded the motion, which passed unanimously by voice vote.

Rule 54

Ms. Leonard discussed the proposed amendments to ORCP 54 (Appendix G), which deal with technical changes, primarily timing on the offer of compromise. She noted that the change to ORCP 54 A(1) requires the parties to submit a form of judgment, because the court does not draft judgments. Ms. Leonard stated that the committee had changed the time to make an offer in ORCP 54E from 10 to 14 days, and recalled that some Council members wanted to increase it even more. She noted that the committee proposed to increase the time for a response to an offer of compromise from 3 to 5 days. Ms. Leonard wondered whether the "notwithstanding Rule 9" language in the amendment was still necessary. Prof. Peterson observed that the amendment to ORCP 9 should fix this problem. Prof. Peterson stated that another issue the committee looked at in ORCP 54 A(1) was the ability to dismiss individual claims. He noted that the committee thought this was too cumbersome, but that the committee agreed that parties could be dismissed, and that this change is included in the draft before the Council.

b. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 54

Ms. Leonard moved to publish the amendment to ORCP 54, with deletion of the “notwithstanding Rule 9" language. Mr. Cooper seconded the motion.

DISCUSSION ON THE MOTION:

Mr. Corson pointed out that, with regard to drafting the judgment in section A, sometimes parties will not cooperate. Ms. Leonard stated that the intention was to make clear that one or the other party needs to submit a form of judgment, not that they need to agree. Mr. Corson suggested modifying the language in ORCP 54 A(1) to require “submission of a form of judgment” rather than “the parties shall submit a form of judgment.” He alternately suggested replacing “the parties” with “a party.” Mr. Bachofner observed that, pursuant to UTCR 5.100, any party can submit a proposed judgment within three to seven days after providing the other party with a copy of the judgment and, if it is a voluntary dismissal, there would likely be cooperation from the other side. Mr. Corson stated that the idea is to make it clear that someone has to do something in order for a judgment to be entered. Judge Miller observed that, if the voice is too passive, it will not be clear that one of the parties must submit the judgment. Judge Rees agreed with Mr. Corson’s "a party" language so that it cannot be misconstrued that both parties are required to agree. Prof. Peterson suggested “any party” or “a party.” Mr. Buckle also agreed with "a party.” Judge Miller noted that the party that is most motivated will likely be the one to submit the form of judgment. The Council agreed that "a party" was a good change.

Mr. Brian stated that he believes that 14 days is too short a time period, since it is too close to the trial date, and thinks it should be changed to 28 days. He noted that, from the court's standpoint, the further from the trial date that an offer is accepted, the more quickly the court system removes that case from its docket and can move on to other cases. Mr. Brian also remarked that, from a plaintiff's standpoint, costs start escalating the closer one gets to trial, so settlement further away from the trial date saves plaintiffs money and preparation time. He observed that actually getting the case settled is not necessarily the problem, but that it takes time to deal with reimbursement claims and negotiating with those who may be entitled to some portion of the judgment. He stated that getting all of those parties to agree takes time and that five days is insufficient. Mr. Bachofner stated that the committee looked at that issue a number of

times, and that his analysis is that the change will have the greatest impact on smaller cases with fewer costs. He suggested that the overwhelming majority of attorneys have a lot of cases and that, right or wrong, they may not have looked carefully at the next case that is coming up until very shortly before the trial. He stated that, if the time is changed to 28 days, the impact of the upcoming trial is not there. He remarked that the attorney may not have talked to witnesses yet and may miss the opportunity to settle because the plaintiff would be liable for costs if the defendant beats the offer.

Mr. Bachofner pointed out that nothing in the rule prohibits lawyers from making offers to allow judgment early on but that, if you put the date too far out, a lot of people will be prejudiced. He stated that he believes that the compromise between the two views is to increase the time somewhat, but not excessively.

Mr. Weaver stated that the rule states that one can make an offer for the sum or the property, and wondered whether it would apply in FED (eviction) cases or smaller cases. Judge Miller stated that residential FED cases have such a short statutory timeline that it could not apply. Mr. Weaver asked whether, if we moved it to 35 days and it could apply in other cases where property is at issue, might we be shortening the timeline so that those people could not use the rule at all. Prof. Peterson stated that he assumed that the rule referred to property in claim and delivery cases.

Mr. Buckle observed that the reality is that busy lawyers start looking at the file late in the game, and that the Council should not craft an amendment to reward procrastination. He stated that he agrees with the five and 14 day changes. Ms. David noted that five days is effectively seven days, and asked whether the time should be changed to seven days now in anticipation of the possible change of all ORCP time increments to multiples of seven. Mr. Bachofner stated that the committee had considered this and found a unique situation in which a seven day rule could actually give less time than a five day rule if there is a three-day weekend involved. Mr. Buckle stated that documents must be filed on a court work day and that the response would be due seven days from that date, so it would never fall on a weekend. Prof. Peterson pointed out that an offer of judgment is not filed with the court. Judge Holland stated that there is currently a pilot project in certain counties that attempts to expedite civil trials and that, while it is a benefit to settle cases as quickly as possible, there is a large number of smaller cases that would be affected negatively by expanding the time and requiring settlement 35 days beforehand, especially when the courts are trying to move trials up as

quickly as possible, which changes discovery rules as well. She stated that she felt it should be left five days.

Prof. Peterson stated that, with expert witnesses, it may be too late if one waits until 14 days before trial, and that an attorney may have to spend that money and not get it back. Judge Miller noted that the committee had discussed that concern at great length, and that this is a hazard that the defense will suffer if they make their offer of compromise too late, but she would imagine that good practitioners will be having settlement discussions earlier in the game, be aware that an expert witness needs to know whether the trial will happen by a certain date, and be committed to pay, say $5,000, after that date. Judge Miller stated that her court holds settlement conferences about a month in advance of trial, and agrees with Mr. Brian that the earlier a settlement offer is made the better, because she sees a lot of plaintiffs that get so far into the hole cost-wise that they cannot afford to settle.

Ms. David recommended staying with five days for the moment, because it would be easy to change it to seven if the multiples-of-seven change is made next biennium. Mr. Buckle observed that seven days would be more advantageous to the plaintiff's side and that, if the Council intends to change to a multiples-of-seven system, it may as well make the change now. Prof. Peterson pointed out that five days sounds shorter, but that it is not necessarily shorter.

Mr. Brian made a motion to amend the proposal to change the number of days from five to 14 and from ten to 28. No Council member seconded the motion. Mr. Buckle moved to amend five days to seven days. Mr. Corson seconded the motion. The motion passed by voice vote with one dissenting vote.

Prof. Peterson pointed out for the record that another change included is amendment of ORCP 54 A(1) to allow for the dismissal of parties. A motion was made to publish the amendments to ORCP 54 with the changes outlined above. The motion was seconded and the motion passed unanimously by voice vote.

4. Electronic Discovery & Filing Committee (Ms. David)

Ms. David noted that the committee had considered a number of different draft changes to several rules regarding electronically stored information (ESI), and that the committee addressed the fact that Oregon is one of the only states in the nation that currently has no rules in this regard. She stated that, ultimately, the committee decided to adopt the “less is better”

philosophy and amended only ORCP 43 (Appendix H). Ms. David pointed out that the committee spent a lot of time on the new Rule 43 E section, and that there was a lot of discussion on what "ordinarily maintained" and "reasonably useful" mean. She stated that the committee felt that it cannot provide for every type of example, and wanted to emphasize that, when there is a dispute, the parties need to confer and to go to the court if necessary. She stated that ESI will likely not be an issue in run-of- the-mill cases, but that it can be a significant issue in large business litigation.

Ms. David pointed out that the committee had previously provided the Council with a memo outlining all of the things the committee took into consideration in drafting the rule change. She noted that she has had about twenty requests in the last month asking for the committee's latest draft. Prof. Peterson observed that the impetus of the change were reports that some courts had ruled that ESI was not something that could be discovered under rule 43. He stated that the goal was to make it clear that ESI is a "document" that can be discovered. Mr. Buckle asked whether the committee had received feedback on how ESI is working now and whether there are a lot of disputes. Ms. David replied that she received one hundred thirty-six responses to the two drafts that were published on the website. She stated that the responses came from a wide spectrum of practitioners, some who think that there is no need for a change, and some who think that detailed rules about conferral are necessary. She pointed out that the memo to the Council gives guidance about the committee's intent. Ms. David noted that one overriding theme in the comments she received is that Oregon does not need to follow the federal rules, since attorneys here can just pick up the telephone and confer.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 43

Ms. David made a motion to publish the amendment to ORCP 43. Judge Armstrong seconded the motion, which passed unanimously by voice vote.

5. Default Judgment Committee (Ms. David)

Rule 69

Ms. David stated that the proposed changes to ORCP 69 (Appendix I) stemmed from a Council survey last biennium which asked circuit courts, among other things, whether court clerks were issuing default judgments. She noted that the survey results showed that clerks are no longer doing this. Ms. David explained that, during this review of ORCP 69, the committee decided to attempt to update and streamline the rule, since

different attorneys submit orders and judgments of default differently, and many miss the step of preparing an order of default. She stated that the committee decided to re-order the entire rule to provide a step-by-step procedure for attorneys to follow, and to make it easy for judicial assistants to read through the rule and check off that each of the elements has been met.

Ms. David stated that the committee is open to additional discussion, but that its intention was to lay out the rule in an orderly fashion so that a practitioner who does not apply for a default judgment often will have an easier time with the process. Mr. Buckle asked whether, under the amended rule, one can file a motion for an order of default and motion for judgment by default and schedule the *prima facie* hearing at the same time. Ms. David stated that one can. Mr. Corson stated that he does not read the rule that way as proposed. Ms. David stated that someone could go to *ex parte* and present a motion for an order of default with affidavit, with a proposed order, get the order signed, and then submit the motion for judgment by default. She stated that one could prepare all of the documents in one's office at the same time, but that of course the motion for an order of default has to be submitted before the motion for judgment. Mr. Corson observed that it cannot be done in one step, because an attorney cannot declare in an affidavit that the order of default has been obtained unless it has already been obtained. Mr. Cooper stated that one can take a signed declaration and not file it if one does not get the order. Judge Miller stated that her court does not get a separate affidavit with the general judgment, but a motion, affidavit, order of default, and general judgment. Mr. Corson stated that, as he reads the rule, this is not allowed.

Ms. David stated that the moving party must show that an order of default has been granted, and what the committee envisioned is similar to the language currently being used. She noted that the current practice is for an attorney to say "we are submitting the judgment at the same time as the motion and order for default, we have met all the requisites, and we believe it will be entered." She observed that the rule could possibly be more clear, but that another procedure would be that an attorney would send in the motion for default, wait and get the order signed, and then send in the rest. Ms. David pointed out that some attorneys do not obtain a separate order of default but, rather, they just go straight for a default judgment. Mr. Buckle stated that the issue concerns him because there is a different standard for setting aside a default order from setting aside a judgment by default. Judge Holland said there is definitely a different standard. Mr. Buckle stated that, as a defaulted defendant, he would like the opportunity to set aside a default order rather than a default judgment.

He observed that, if it is allowed to all be done at the same time, and he does not see why it could not be since it says "order granted" rather than "default order entered," it would be nice to have a gap. Judge Miller observed that, in Mr. Buckle's practice, there would be a gap because the court has to conduct a *prima facie* hearing. Mr. Buckle asked whether he could set up a *prima facie* hearing with Judge Miller's court at the same time. Judge Miller stated that these hearings are only set after a default order has been entered in the record, and that they cannot get them on the docket that fast.

Ms. David stated that the committee contemplated a spectrum where some cases might be simple and everything could get done at one appearance, and others would require a multi-step process. Mr. Buckle stated that the amendment is not eliminating anything in the current system. Judge Miller stated that it does not seem like there is any good reason not to enter a general judgment on a liquidated sum where the party has not appeared, and that these are done simultaneously. She noted that setting aside a judgment may be more difficult, but that it theoretically always comes down to whether a person had adequate notice or a reasonable excuse. Mr. Bachofner stated that he agrees with Mr. Corson's concerns that the draft of ORCP 69 D(1)(a) requires the affidavit to say that an order of default has been granted, and that it is not appropriate to fill it out beforehand. He proposed starting subsection D(1) with the language: "After a default order has been granted" and eliminating paragraph D(1)(a). Ms. David stated that having the declaration required when the judgment is sought is intended to deal with the relief sought, the amount, and whether costs and attorney fees are available. Judge Miller stated that her experience is that attorneys put it in the same affidavit that is used for the default order. Ms. David noted that this is why the committee wanted to separate it. She suggested leaving proposed Rule 69 D(1)(a) as it is, but adding: "has been granted or has been applied for herein." She observed that there is no need to generate more attorney fees and that, if everything is put together and sent, attorney fees are cut off. Mr. Bachofner stated that eliminating the language in paragraph D(1)(a) of the proposal and moving the language to subsection D(1) accomplishes this.

Mr. Cooper stated that he believes that the moving party needs to show in the "judgment packet" that the order has been granted, perhaps by including a copy of the order with the clerk's entered stamp or a declaration stating that the judge signed the order at *ex parte*. He noted that there have been cases where a judgment had not been docketed into OJIN although it was signed two weeks prior. Mr. Cooper pointed out that, if he wants to get a default judgment as fast as possible, it is his burden to

show that the order has been signed. Mr. Cooper stated that he likes seeing that requirement in the rule. Judge Armstrong stated that he sees no problem in preparing a declaration, not signing it before *ex parte*, then signing it when the first step has been completed, and handing the judge the rest of the documents. He observed that there is no impediment to doing everything at the same time. He stated that he does not believe that the language in subsection D(1) imposes a problem that lawyers cannot perfectly and ably address. Mr. Bachofner asked about what would happen if a different lawyer than the one who prepared the declaration is presenting it at *ex parte*. Judge Armstrong stated that anyone can sign a declaration.

Prof. Peterson stated that Mr. Corson has a good point and that he likes Mr. Bachofner's suggestion. He suggested the language: "An order of default has been granted or has been contemporaneously submitted to the court." Judge Miller stated that she likes this language, since the practice is to submit all of the documents contemporaneously. Judge Armstrong suggested "will be contemporaneously submitted." Judge Miller agreed. Mr. Bachofner suggested that, instead of stating what has been done, attaching a copy of an order of default that has been granted or submitted contemporaneously. Judge Rees stated that he feels that the way the amendment is written deals with all of the issues that have been raised. He noted that it does not say a party has to show by affidavit, only that the party must show it. Judge Rees explained that, if an attorney presents an order of default and a judgment by default simultaneously, the judge is signing both and the judge can take judicial notice that he or she has just signed the order. He acknowledged that an attorney can present an affidavit that is ready to sign, but stated that things can be proven in more ways than just by an affidavit. He wondered whether these concerns were creating more confusion than necessary.

Prof. Peterson agreed that Judge Rees made an excellent point for simple cases where the order of default and judgment are sought at the same time, that the court could take judicial notice, and that the language in the proposed amendment allows for that. Ms. David noted that the point of the revisions is to help the practitioner who does not ask for a default very often. She suggested amending paragraph D(1)(a) of the proposal to state that an order of default has been granted or is being contemporaneously submitted. She noted that it would let these practitioners know it can be placed in the declaration, and the court can take judicial notice and sign the judgment. Mr. Buckle asked whether a record would be needed if there is an appeal. Judge Miller stated that if she were to overlook a judgment and sign the order, the judgment would come back to her. She noted that she is troubled by requiring two affidavits or declarations

because it creates more work in small cases. Judge Rees asked if one affidavit would be sufficient. Prof. Peterson stated that one affidavit or declaration can be used to support both motions. Ms. David pointed out that the rule does not state that two separate declarations or affidavits are required, and that in simple cases one could reference the same declaration that would cover all of the issues. Mr. Buckle suggested voting to publish the amendment in its current form and seeing what comments are received. Mr. Corson agreed that this is a good idea.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 69

Mr. Bachofner moved to adopt Prof. Peterson's suggested language, with Judge Armstrong's change of the word "is" to "will be." Mr. Cooper seconded the motion. Judge Hodson asked whether this would mean that an order of default is not legally required. Judge Rees suggested leaving the language in its current form. Judge Miller worried that changing the language would make the rule less clear. Mr. Bachofner's motion failed by voice vote. Justice Kistler moved to vote to publish the amendment in its current form. Judge Miller seconded the motion and it passed unanimously via voice vote.

<u>Rule 71</u>

Ms. David stated that Judge Zennaché had worked on the changes to ORCP 71 (Appendix J). She noted that the only change is to eliminate the distinction between extrinsic and intrinsic fraud.

b. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 71

Ms. David made a motion to publish the amendment to ORCP 71. Judge Miller seconded the motion, which passed unanimously by voice vote.

6. ORCP 21 (Prof. Peterson)

Prof. Peterson explained that the only change to ORCP 21 (Appendix K) was to remove reference to subsection B(3) of ORCP 54. Mr. Corson stated that these words at the end of the section 21 A are superfluous and unnecessary.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 21

Judge Rees made a motion to publish the amendment to ORCP 21. Judge Herndon seconded the motion, which passed unanimously by voice vote.

B. Communication with Legislators (Ms. David)

Ms. David suggested sending a brief e-mail update to legislators now, then reassigning Council members once the outcome of the election is known. Mr. Corson proposed waiting until after the election to send any updates, since there is no point in sending updates to legislators who may be out of office next session. The Council agreed to wait until after the election to take any action.

VI. New Business (Mr. Buckle)

A. The Oregon Supreme Court's opinion in *English v. Multnomah County*, SC S057387 (June 17, 2010) (Ms. David)

Ms. David stated that she merely wanted to put this case (Appendix L), which deals with claim preclusion v. issue preclusion, on the Council's radar for consideration next biennium. Ms. Nilsson agreed to put it on next biennium's agenda.

B. New Proposal for Amendment of ORCP 1 (Mr. Cooper)

Mr. Cooper discussed this proposal received from Sean Currie at Greene and Markley (Appendix M). He stated that the proposal makes a good point about the discord between ORCP 1 E and 83 A, whether declarations are based on "knowledge and belief" or "knowledge, information, and belief." He noted that there may be other places in the ORCP that specify what a declarant must say and that it may be worth looking into. He proposed placing this on the agenda for next session. Ms. Nilsson agreed to place this item on the agenda for next biennium.

VII. Next Meeting Date/Place (Mr. Cooper)

Mr. Cooper noted that, traditionally, the Council holds no meetings in October or November of even-numbered years. He stated that the next meeting is scheduled for December 11, 2010, at 9:30 a.m. at the Oregon State Bar. Mr. Cooper emphasized the importance of this meeting, as the Council will be voting on which rules to promulgate and a quorum is needed, so Mr. Cooper asked if members are not available in person that they attend by telephone. Prof. Peterson stated that, if the Council needs to rethink any of its published amendments after considering

comments from the bar and bench, this work can be done by e-mail and by telephone contact.

VIII. Adjournment

Mr. Buckle adjourned the meeting at 11:28 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 5, 2010, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

ATTENDANCE

Members Present:

John R. Bachofner
Michael Brian
Brian S. Campf
Brooks F. Cooper
Don Corson*
Kristen David
Martin E. Hansen*
Hon. Jerry B. Hodson
Hon. Lauren S. Holland*
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Kathryn M. Pratt
Hon. David F. Rees
Mark R. Weaver
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

Members Absent:

Hon. Rex Armstrong
Arwen Bird
Eugene H. Buckle
Hon. Robert D. Herndon
Hon. Mary Mertens James

Guests:

David Nebel, 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 Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 21 • ORCP 36 • ORCP 38 • ORCP 43 • ORCP 44 • ORCP 54 • ORCP 55 • ORCP 68 • ORCP 69 • ORCP 71	• ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 64F • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • Moving venue to ORCP • Counterclaims in Domestic Relations Motions		• Standardizing time increments in ORCP • ORCP 68 - hearing on objection to attorney fees • ORCP 44 - medical examinations • ORCP 57 - alternate jurors • ORCP 55 - subpoenas for inmates • ORCP 54 - allow dismissal of specific claims

I. Call to Order (Mr. Cooper)

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

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of May 8, 2010, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft May 8, 2010, minutes (Appendix A) which had been previously circulated to the members. A motion was made and seconded, a voice vote was taken, and the minutes were approved with no amendments or corrections.

IV. Administrative Matters (Mr. Cooper)

A. Website Report (Prof. Peterson)

Prof. Peterson noted that the website report (Appendix B) shows that there has been continued activity on the website and that 61% of the visitors are new visitors who are finding and using the resource. He stated that the information on the website continues to become more comprehensive and more helpful, and encouraged Council members to review the website and let Ms. Nilsson know if they have any suggested changes.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Bachofner)

Mr. Bachofner stated that the committee had met several times since the last Council meeting and drafted a proposed amendment to ORCP 36 (Appendix C). He stated that everyone on the committee had agreed that some expansion of insurance coverage discovery would be helpful in order to make certain that plaintiffs are aware of any reservation of rights or denial of coverage, in the hope that this would move parties toward resolution of their cases. Mr. Bachofner reported that the committee had looked at three different proposals: one that mirrored Washington's rule [CR 26(b)(2)]; one that included very different protections for work product; and the proposal currently before the Council, which the committee felt was the best compromise.

Mr. Bachofner noted that Mr. Buckle had received feedback from two attorneys who opposed the amendment because it made the procedure more like an interrogatory. Judge Miller stated it was her understanding that those attorneys felt that it is not appropriate to ask a party to identify the specific provision that

the insurance company relied upon, but that they did not object specifically to disclosure that a reservation of rights or denial of coverage exists. Ms. David indicated that she agreed that the change would require the responding attorney to interpret what happened in the past, which could be difficult. Mr. Bachofner commented that he had e-mailed one of the lawyers who provided the initial feedback to explain the committee's reasoning, but had no response. He stated that his understanding of the objection is that it would require a defense attorney to explain a coverage denial to the plaintiff's attorney. He noted that the intent of the committee was to identify what the insurance company has identified as the policy provision in their coverage denial letter, not to require anyone to reveal that letter. Mr. Bachofner stated that this change would give the plaintiff's attorney the tools needed to make an independent investigation. Mr. Cooper suggested that the proposal is an attempt to balance the privilege of the insured, the insurance company, and their defense attorney with the desire for judicial efficiency. He agreed that this is the closest thing to an interrogatory in the ORCP, but that this proposal is a compromise between the more broad Washington rule, which requires production of the letter, and existing Oregon law. Judge Miller noted that Mr. Cooper has spoken with Washington attorneys who indicated that they had never had a problem with the Washington rule which requires disclosure of the actual letter. Mr. Bachofner stated that there may be cases where the contents of the letter would reveal a confidentiality between the insured and the insurance company which could compromise the insured's defense, and this is why the committee chose not to require disclosure of the actual letter.

Ms. Pratt stated that, by choosing not to adopt the Washington rule, the intent of the committee is that the substantive law of work product and privilege will apply to the question of whether the reservation of rights letter is discoverable, and that this amendment is in no way intended to address that question. She asked whether the committee can draft a memorandum that makes this clear for the record. Judge Holland commented that the history of the Council has been to ensure that amendments are drafted so that no additional explanation from the Council is needed. Mr. Cooper noted that the meeting minutes will serve as a record of the Council's intent. Prof. Peterson stated that, at one point, the Council did include editorial comments for each rule, but that was prior to *PGE v BOLI*, 317 Or 606, 859 P2d 1143 (1993), and is no longer the Council's practice. He observed that the reason for the amendment will be articulated clearly at the September meeting and reflected in those minutes as well.

Mr. Cooper asked for general consensus that the proposed amendment be considered for publication at the September Council meeting. There were no objections.

2. Uniform Interstate Depositions and Discovery Act Committee (Mr. Corson)

Mr. Corson stated that the committee has made no further changes and that he anticipates that the committee's draft (Appendix D) will be submitted at the September meeting for the Council's vote on whether or not to publish. Judge Zennaché asked about the title of ORCP 38C, "Foreign Depositions," since the paragraph does not refer to depositions but, rather, to foreign subpoenas. Mr. Corson replied that the existing language of ORCP 38C is entitled "Foreign Depositions," and that the committee had not considered the title. Prof. Peterson pointed out that the title of the rule also states "Foreign Depositions." Judge Holland noted that the main reason for a foreign subpoena being issued is for a deposition. Judge Miller observed that someone looking for how to issue a foreign subpoena might miss it if it is not listed in the title or index. Mr. Cooper stated that ORCP 55 talks about subpoenas and that ORCP 38 does not. He asked the committee to meet again to consider whether to change the title or subtitle in question. Mr. Corson agreed.

Justice Kistler asked whether the second sentence in ORCP 38C(4) is intended to limit jurisdiction regarding other problems that might arise regarding a subpoena or the deposition process. He was concerned that, the way the sentence is worded, someone could read it as limiting jurisdiction if other issues or claimed abuses were present. Mr. Corson replied that the concern was making the out-of-state attorney subject to jurisdiction in Oregon, and that the intent was to make the act of obtaining a subpoena in Oregon an administrative act. He stated that the intent of the second sentence was an attempt to carve out an exception to that general rule if an abuse were to take place. Mr. Bachofner wondered whether the committee had considered violations of the Rules of Professional Conduct. Mr. Corson stated that it had not. Prof. Peterson suggested changing the language to "violation of the Oregon Rules of Civil Procedure or other applicable law."

Judge Miller asked whether there is anything in the statutes or the ORCP which generically covers misconduct, so that this issue would not specifically need to be included in each ORCP. Ms. Pratt replied that the inherent powers of the court to sanction are limited to the extent that the court has some authority over the party or the attorney. Judge Miller noted that there are many instances in which people abuse process and it is addressed in some way and that, each time the Council creates a rule, it does not necessarily need to include a remedy for a person or party alleging abuse. Mr. Cooper stated that the only reason he sees for including it specifically in ORCP 38 is to make it clear that a person cannot use Oregon courts and claim Oregon courts cannot control that person's conduct. Mr. Corson observed that the idea was that, if someone were to bring a problem or objection to the court, the situation would revert to "normal" court mode and would no longer be an administrative matter. Mr. Hansen stated that

the Uniform Interstate Deposition and Discovery Act Committee's concern was to make clear that out-of-state lawyers obtaining subpoenas are not practicing law in Oregon and do not need *pro hoc vice* counsel unless something goes wrong in the process.

Judge Zennaché posited that, if an out-of-state party were to abuse the process by filing repeated subpoenas in Oregon, this language may preclude the party being wronged from bringing some type of abuse of process claim against the harassing out-of-state party. Mr. Cooper responded that ORCP 38C(5) specifically states that one can file a motion for a protective order or a motion to quash. Judge Zennaché pointed out that this is different from a suit for damages for emotional distress or financial costs for hiring a lawyer, and wanted to make clear that there is no intent to preclude that kind of action. Judge Rees stated that the rule does not say that those activities would not be relevant to an inquiry on whether there is jurisdiction but, rather, that they do not constitute an appearance in court. He noted that, if someone engaged in a series of abusive tactics in Oregon, a judge would go through the normal constitutional analysis on whether those activities were sufficient to constitute either specific or general jurisdiction. Justice Kistler stated that his concern was that the words "conferring jurisdiction" imply that there may not be jurisdiction otherwise, and wanted to make clear that the committee did not intend to preclude that normal inquiry. Judge Rees asked whether changing "confer jurisdiction" to different language would solve the problem. Mr. Corson suggested language such as "allows a court to impose an sanctions" rather than using the word jurisdiction. He stated that the committee will consider these issues and circulate a new draft to the Council for consideration well before the Council's September meeting.

3. Rule 54 Issues Committee (Ms. Leonard)

Ms. Leonard discussed the committee's proposed changes to Rule 54 (Appendix E). She stated that the committee had made a change to Rule 54A(1) to give direction that one of the parties needs to submit a judgment, because the court does not do it. She stated that the committee expanded the timeline for an offer of judgment in Rule 54E (from 10 to 14 days) and acceptance of an offer of judgment (from 3 to 5 days). Ms. Leonard noted that the committee had considered the issue of making Rule 54 reciprocal, but had come to the conclusion that this would not serve any clear purpose. She stated that she and Mr. Bachofner had contacted the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC), respectively. She reported that she had received 17 responses from OTLA regarding the timelines and reciprocity, and noted that the almost-uniform response was that increasing the time for offer and acceptance was appropriate and that the majority had agreed with the times proposed by the committee. She stated that a few had suggested increasing the time for offer of judgment to 30 days. Ms. Leonard observed that

there are some OTLA members who felt that reciprocity would be a good idea, but none who could give an example of how it would work. She stated that some were using the California rule [California Code of Civil Procedure Section 998] as their reference point, but that this is a very different rule dealing with shifting discovery costs and enhanced costs, not attorney fees. Mr. Bachofner stated that OADC members agreed that increasing the timelines was a good idea, but that they saw no benefit to allowing the rule to be reciprocal. He reported that one attorney had suggested increasing the time for offers of judgment to 30 days.

Judge Miller stated that Clackamas County has a practice of having pre-trial settlement conferences about a month ahead of trial and, most of the time, the attorneys have discovery completed and would be prepared to go to trial. Mr. Bachofner remarked that he feels that the opportunity to present the offer to allow judgment is best after the settlement conference because information comes up for both sides to consider, so it is another opportunity for people to offer to settle. Mr. Brian stated that he would like 30 days for the offer for two reasons: 1) if you get it too close to trial, all the work has already been done and getting the offer of judgment earlier will allow for cost savings; and 2) from the court's standpoint, it should be done more than a few weeks before trial so that other trials can be scheduled in its place. Judge Miller stated that she would be willing to ask her court to schedule pre-trial settlement conferences 45 days ahead of trial if the time for offers of judgment was increased to 28 or 30 days. Mr. Bachofner pointed out that this has a real effect on smaller cases, where costs create a larger impact, as the amount of costs relative to the expected damage award is much higher. He suggested that, in the overwhelming majority of personal injury cases, attorneys do not prepare until a few days before trial and, if making an offer of judgment is required too early, parties may not take a legitimate hard look at the offer and settlement may not be encouraged. He stated that he feels that 30 days is too far out. Judge Miller observed that, in terms of offers of judgment, the earlier the better, since many times parties will not settle a few weeks before trial because they already have too much money and time invested in trial preparation.

Judge Zennaché stated that this change would not preclude other settlement structures or strategies to settle earlier since ORCP 54 is the "last-ditch offer" situation. Mr. Cooper noted that the rule does not prevent a party from sending an offer of judgment on the day they get served. Ms. Leonard reported that the committee had a discussion with a practitioner who had a high-volume, small-case practice who advocated for a 30 day period for offer of judgment. She stated that practices with regard to offers of settlement are practice-sensitive, but noted that different practitioners with the same type of practice may have different styles. Ms. Pratt stated that the Council needs to assume that lawyers will do their jobs properly and not necessarily tailor its amendments to different

practice styles. Mr. Brian stated that, in a personal injury case, settling the case is the easy part; the difficult part is dividing the money between the lien holders and subjugation right holders. He remarked that it is nearly impossible to get those calculations worked out in 3 or 7 or even 10 days, and proposed allowing 30 days before trial to make the offer and 10 days to accept. Mr. Bachofner countered that he feels that there is a stronger likelihood to have a resolution if an offer is made closer to trial rather than 30 days out. Judge Miller agreed and stated that this is because discovery is usually done by that point and people start to "get real." Ms. Pratt noted that ORCP 54E is not really intended for situations where everyone agrees on settlement but, rather, it can be used as a tactical weapon to force the other side to evaluate its case.

Judge Zennaché asked whether ORCP 54A(1) could be amended to allow dismissal of specific claims; Ms. Leonard replied that investigating that issue was one of the committee's charges, and that it was determined that it may not be feasible because limited judgments can be used to dismiss parties but not claims. Judge Zennaché suggested that the Council re-evaluate this issue next biennium.

Judge Miller suggested that, since the Council has been contemplating standardizing the time increments in the ORCP, the committee consider 7 days rather than 5 days for acceptance of the offer of judgment. Mr. Bachofner stated that the committee had considered this but determined that there was a situation in which 7 days would be less than 5. Mr. Cooper remarked that changing to either 5 or 7 would be fine at this point, since they will all be revisited next biennium. He asked the committee to reconsider the time increments and to provide the Council with a modified amendment (if they so choose) before the September meeting.

4. Electronic Discovery & Filing Committee (Ms. David)

Ms. David referred the Council to the committee's report (Appendix F) and stated that, after much discussion and deliberation regarding more extensive changes to the rules governing electronic discovery, she and the committee agreed to make more minimal changes only to ORCP 43 (Appendix F) because it seemed to be a good fit for Oregon practitioners. She noted that, if it appears that later modifications are necessary, those can be made next biennium. Judge Hodson noted that he liked many of the drafts that the committee considered, but that he supports this baby step in clarifying the rules on electronically stored information (ESI). Mr. Cooper asked who would pay if a party insisted that information be provided in a certain format. Judge Zennaché replied that this would be handled in the same manner as any other cost dispute; if the parties cannot agree, they will ask for a ruling from the judge. Mr. Cooper asked that the minutes reflect that the Council did not intend the rule to require a party to provide any ESI in a particular format, regardless of cost. Ms. Pratt reiterated

that this issue is for the courts to decide.

Mr. Hansen noted that there appears to be a conflict between the first sentence in the proposed ORCP 43E, which states that "electronically stored information may be produced in printed format unless specifically requested in an electronic form," and the third sentence. He stated that the rule does not state that the ESI must be produced in writing if requested. Ms. David indicated that the committee contemplated the "may" in the first sentence to be permissive, and that the third sentence was merely to acknowledge that the person providing the ESI may determine that it can only be provided in a certain form. Mr. Hansen stated that he does not mind having an exception if it is not feasible to provide the information in printed format but that, if a party could easily print out a document, it does not appear that the party could be required to provide it in this format because the first sentence states that it "may" be printed. Ms. Pratt noted that the last sentence states that the requestor can specify the form, which would include paper. Judge Zennaché related that the committee was attempting to distinguish between ESI generally and requests to receive ESI in an electronic form. He stated that the last two sentences only apply when ESI is sought in electronic form, not in paper form. Mr. Hansen stated that he merely wanted to ensure that a simple request for an item in paper form would be responded to with documents provided in paper form. Judge Zennaché pointed out that the format should be specified in the request.

Mr. Bachofner observed that the amendment only addresses requests for ESI, and that ORCP 43B(1) already provides that a party may designate a reasonable place and manner for the inspection and copying; a party can thus designate they would like the information on paper. Judge Rees suggested eliminating the words "in electronic form" from 54E. Judge Zennaché stated that the intention of the committee was to make a distinction between things that happen to be stored electronically, such as photographs, and those that a party would specifically want to have in electronic form. Judge Hodson agreed that Judge Rees' suggestion to remove the words "in electronic form" would work and not change the intent of the committee. Mr. Bachofner replied that this does not accomplish the purpose for which this section was designed. Ms. David noted that the committee could possibly break the section into two subparagraphs, with one to specifically address ESI. Ms. Pratt stated that the committee intended to preserve flexibility in the rule for people to ask for what they need rather than to automatically receive more information than necessary or information in an electronic format that they cannot read.

Mr. Cooper asked whether, in light of these comments, it would be worth the committee taking another look at the language of the proposed rule. Ms. David replied that the committee can meet one more time to determine whether refining the existing language would create further clarity to assist practitioners.

Judge Zennaché reminded the Council that the committee arrived at the simplified form after considering far more specific and complicated versions and rejecting them in favor of simplicity. Mr. Cooper stated that he would not necessarily expect a different version, but asked that the committee give additional consideration. Judge Miller suggested keeping the proposed amendment in its current form, as the committee has already been over the issue. Mr. Bachofner again stated that he believes that ORCP 43B(1) already addresses the issue that Mr. Hansen raised.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper stated that the committee had reported at the previous Council meeting and recommended issues to put on the agenda for the next biennium. He noted that the committee had nothing more to report at this time.

6. Counterclaims in Domestic Relations Motions (Judge Miller)

Judge Miller stated that she had asked for this item to be added to the agenda only because she wanted to bring to the attention of the Council an e-mail she received from Bruce Miller regarding this issue (Appendix G). She pointed out that no further action or discussion was necessary.

7. Default Judgment Committee (Ms. David)

Ms. David referred the Council to the committee's memorandum on the "appearance v. pleading" issue (Appendix H). She noted that the committee had carefully considered the rules and determined that the current rules provide a mechanism to get the case at issue without the need for further clarification. She noted that three Oregon counties have been routinely ruling that, even though a motion had been filed and a first appearance fee had been paid, the defendant has not "appeared" because an answer had not been filed. She stated that it is a bench and bar education issue but that, if the problem continues, it is likely a Uniform Trial Court Rules fix rather than an ORCP fix. Judge Miller asked whether the issue has been addressed in an appeals court. Ms. Pratt replied that there is case law on the issue and that she routinely points it out to the court and gets the case reinstated. Ms. David suggested that there is no need for further action on this issue.

Ms. David stated that the committee had drafted a memorandum regarding the "extrinsic v. intrinsic fraud" issue (Appendix H) which provides the reasons that the committee feels that ORCP 71B should be modified to remove this distinction. Mr. Bachofner asked whether this is a substantive issue. Ms. Pratt pointed out that the federal rules long ago included this distinction, and that many states including Oregon adopted the distinction as part of their rules. She

stated that, over time, courts across the country have come to realize that this creates a morass in the case law because nobody really knows what extrinsic and intrinsic fraud are. She noted that the federal courts removed the distinction from their rules, that state courts have been systematically removing it from theirs, and that Oregon is in a very small minority that still include it. Mr. Bachofner observed that Oregon does not explicitly state the distinction in its rule right now, but that it is a court-imposed distinction. Ms. David stated that case law in Oregon has interpreted ORCP 71B to have that distinction, which means that something needs to be done to fix it. Ms. Pratt observed that case law developed the way that it has because Oregon originally adopted the federal rule and our case law was following the federal rule; when the federal rule changed, Oregon's case law never caught up.

Mr. Corson asked whether line 13 needs to include the words "previously called." Prof. Peterson concurred. Ms. David stated that the committee had likely pulled it from case law discussion but that the language may be redundant. Mr. Bachofner suggested instead inserting the words "intrinsic or extrinsic" in front of "fraud" on line 13. Judge Zennaché noted that the committee was trying to eliminate the entire distinction. Ms. Pratt stated that a lot of time and money is wasted by attorneys and the courts on the distinction. Mr. Corson remarked that he is not arguing with the concept, just the word smithing. Ms. David suggested eliminating the words "previously called." Ms. Pratt noted that the committee had not researched whether there are other types of fraud, so Mr. Corson's suggestion may have unintended ramifications. Judge Zennaché stated that the committee was trying to make it clear that the distinction is being killed. Prof. Peterson pointed out that the fact that the Council has made an amendment and that the minutes reflect this should make clear that the distinction has been abolished. Mr. Cooper noted that adding the words "whether previously called" should be a clear signal that the previous distinction no longer matters because it is in a parenthetical and referred to in the past tense.

Ms. David stated that the other charge of the committee was a reorganization of ORCP 69 to assist practitioners with the proper procedure, and that the resulting reorganization breaks the procedure into distinct steps:

> ORCP 69A: when a party has given a notice that they intend to appear
> ORCP 69B: when a party wishes to take default, it first needs to file and serve a notice of intent to take default
> ORCP 69C: motions for orders of default
> ORCP 69D: motions for judgments by default
> ORCP 69E: motor vehicle cases
> ORCP 69F: setting aside default judgments.

Ms. David noted a correction that should be made to line 13 of Appendix H, page 11: "unless shortened by the court, prior to [*entry of*] **applying for** the order of default." Ms. Pratt stated that, under Oregon statutory mandate, the effective date of the default is actually upon the entry of the default, not the signing of the order. She noted that, in counties where entry of the order occurs a long time after the order is signed, keeping the "entry of" language would effectively make the 10 day rule ineffective. Judge Miller observed that the time between filing and actually having something entered and docketed is getting longer and longer with budget cuts.

Ms. David reiterated that much of the language is the same or very similar to the existing ORCP 69, but that the format is more chronological and provides a sort of checklist so that the court can determine that all of the elements have been met. She stated that this makes the process more efficient for practitioners, judges, and court staff. Ms. David reported that the committee had debated whether there was a need to create a new mechanism for parties to directly ask for costs, disbursements, and attorney fees and to receive them quickly and efficiently under the default judgment request, or whether a party would need to prepare a statement of costs, disbursements, and attorney fees pursuant to ORCP 68 and wait for those timelines. She stated that the committee ultimately determined that ORCP 68 states that, if a party is in default, it does not need to be served, and attorney fees and costs can be included in the default judgment; however, ORCP 68 needs to be followed for any remaining parties in the case. Ms. David pointed out that a court would not assess all of the costs and fees to the defaulted party if there are other defendants still in the case, so it would not act until the issue is ripe and there is a determination by general judgment. Judge Miller stated that, as a practical matter, she did not believe that attorneys ask for attorney fees when they are seeking a limited judgment based on a default of one party. Judge Holland stated that Lane County sees it a lot and that it causes problems such as each plaintiff seeking a limited judgment for attorney fees against each defaulted defendant. Judge Miller reiterated that it seems inappropriate to address attorney fees until the entire case is resolved and they can either be apportioned or assessed to one party. Ms. David stated that, under the proposed ORCP 69D(3), the court may conduct a hearing as it deems necessary and proper to address any of the issues in determining the amount of the judgment, and that the committee determined that this would include any issues about attorney fees, costs, and disbursements. She noted that the committee wanted to leave the issue as much as possible with the discretion of the court. Judge Miller observed that educating the courts that they do not have to address the attorney fee issue until they deem it necessary may alleviate some of the current problems.

Judge Holland wondered whether the language in ORCP 69D(3) that states "or order that issues be tried by a jury" might be seen as making a substantive

change that states that all parties are allowed a jury. Ms. David noted that this language was not changed from the existing ORCP 69. Mr. Brian asked to what the words "make an order of reference" in the proposed ORCP 69D(3) refer. Prof. Peterson replied that this is a reference to a special master. Ms. Pratt noted that, when the original rule was modeled on the federal rule, it included this reference. Judge Zennaché pointed out that this can also refer to a reference judge and asked whether some counties still use reference judges for juvenile or family law matters. Ms. David stated that Clackamas County does.

Ms. David noted that a rewrite of ORCP 69 was added to the Council's agenda at the end of last biennium, and the Council determined that there was not enough time to address the issue properly. She stated that the current version allows clerks of the court to enter default judgment in certain cases but that, when the Council polled the courts, they found that clerks do not do this on their own any longer. Ms. David noted that the committee eliminated that provision, but kept some of the language with additional requirements for contract or motor vehicle cases. She reiterated that much of the language of the proposed draft is similar to that in the old rule. Judge Zennaché recalled that the committee was going to research the language in the proposed ORCP 69C(1)(f) relating to contracts, and determine whether it should be included. Ms. Pratt stated that the current rule allows clerks to enter judgments only in certain cases where the court has jurisdiction because the party was personally served in Oregon, and that this language carried through to the new version. Prof. Peterson asked, if this specialized jurisdiction requirement was limited to judgments entered by the clerk, whether there is a need to keep it. Judge Zennaché opined that he feels the language should be removed. Ms. Pratt stated that this provision was designed to protect against huge judgments for a sum certain against a party that was not present in Oregon to defend themselves, and that it is unique to contract cases where a *prima facie* hearing on damages was not held because of the sum certain provision. She noted that, if the Council were to make a policy decision that it is permissible to serve someone in Alaska and get a default judgment in Oregon on sum certain, it would be changing a long-standing practice.

Judge Zennaché asked why those cases are being treated differently, since ORCP 69C(1)(a) already states that the party to be defaulted has to have been served by summons pursuant to ORCP 7 or has to otherwise be subject to the jurisdiction of the court. He noted that the old language made sense if the idea was to restrict when a clerk could enter a judgment but that, if it is a judge entering the judgment, the judge will determine if there is proof of proper service. Ms. David recalled that there was a case that specifically dealt with personal service for contract cases in Oregon. She stated that she will look for that case and that, if there is no such case, the language in C(1)(f) is redundant and the committee should remove it.

Justice Kistler observed that ORCP 69A(1) authorizes taking a default if a person fails to appear by motion or answer or fails to otherwise defend, and asked what actions would be included in "otherwise defend." Judge Zennaché noted that, by statute one can simply file an "appearance" in domestic relations cases, and that this alone puts the case in issue. Prof. Peterson stated that, in eviction actions, one appears merely by appearing in court at the day and time the summons indicates. Judge Zennaché remarked that writs can also be included in this category.

Justice Kistler asked about the requirement of E(2) that one must file either an affidavit or declaration that says a person was served by first class mail *and* by certified, registered, or express mail. He wondered whether service must be made by both first class and another form of mail. Ms. David stated that this is the procedure set out in ORCP 7. Mr. Cooper pointed out that, if someone in the home other than the defendant signs for the certified mail, that is the equivalent of sub-service on a resident in the home, and that mail properly addressed with first class postage and return address is presumed delivered because of the very low error rate of the post office. He stated that, if the attorney gets the U.S. Postal Service postcard back showing that someone in the house signed for the mail, and that the regular mail does not come back to the attorney's office, the court has told us that is a sufficient due process consideration. Mr. Bachofner also stated that there is typically a delay associated with receiving mail which requires a return receipt, but not with first class mail, and that there is case law that discusses the issue.

8. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Prof. Peterson related to the Council that Sen. Suzanne Bonamici had e-mailed him and let him know that she has been reading the Council minutes and that she understands that the Council believes that the issue is substantive but that, if the Legislature makes new law regarding this issue, the Council will make any necessary amendments to the ORCP. Mr. Cooper indicated that, if the senator contacts the Council regarding the steps that the Legislature is taking with this regard, the Council will be happy to designate a representative or two to attend committee meetings or do any other work that could be of assistance to the Legislature.

9. ORCP 21 (Prof. Peterson)

Mr. Corson reminded Council members that, pursuant to the discussion at the last Council meeting, he had drafted an amendment to ORCP 21 (Appendix I). Mr. Cooper stated that this amendment will be on the agenda for voting on whether to publish in September.

B. Communication with Legislators (Ms. David)

Ms. David stated that she did not have a chance to finalize a draft to send to legislators, but that she will do so as soon as possible.

VI. New Business (Mr. Cooper)

A. Drafts of Proposed Amendments (Prof. Peterson)

Prof. Peterson raised the issue of whether amendments drafted by committees and discussed only within those committees, as opposed to being presented to the full Council for discussion, should be made part of the Council's legislative history. Mr. Cooper opposed this. He pointed out that the Council is a statutorily created body and in effect a sub-branch of the Legislature because what it promulgates and publishes becomes law if the Legislature does not change or veto it. Mr. Cooper expressed concern about creating legislative history where that history was created by less than a full set of the Council and not considered or voted on by the entire Council. He stated that he believes that the only official business of the Council that occurs is during a full Council meeting. Judge Herndon agreed. Mr. Bachofner agreed that these drafts should not be made a part of the legislative history, but stated that he believes that committee meetings should be considered part of the work of the Council. Judge Miller stated that the mere fact that a committee considered an idea does not mean that a committee draft needs to be part of any legislative history.

Mr. Cooper asked whether, if the Council decides to adopt this policy, it should amend its bylaws to reflect this. He noted that there are strict requirements for amending bylaws, and asked whether the Council would like to further discuss instituting a requirement that committees produce some type of written document that becomes a part of the Council's official record. The Council demurred.

VII. New Proposed Amendments (Prof. Cooper)

Mr. Cooper referred the Council to the new amendments received from Judge Norby and Judge Pratt (Appendix J). Judge Miller stated that she had initially received these suggestions, along with an additional proposal from Judge Darling (Appendix K), and that they may have been prompted by a survey that she sent out for the general discovery committee regarding ORCP 44. She noted that she had replied to all three judges to let them know that it is late in the cycle and that any issues the Council considers next biennium would not become amendments to the rules until 2014, but that the Council would certainly consider them. Judge Miller also provided the Council with e-mails she had received (Appendix L) commenting on Rule 44 Medical Examinations outside of the Survey Monkey results which were included in the meeting packet (Appendix M).

Mr. Cooper stated that it is unlikely that the Council will be able to take any action on these proposals this biennium, given that the votes on whether to publish proposed amendments will be taken at the next Council meeting. Mr. Cooper suggested asking Prof. Peterson to write to all of the judges stating that these issues will be on our agenda for consideration at our first meeting in the next biennium. He also suggested considering drafting a generalized survey to be sent to the bench, OTLA, and OADC at the beginning of each biennium. He stated that this is a more proactive approach than relying on people going to the website and filling out the suggestion form. Ms. Pratt noted that there are bar members who are not members of OTLA and OADC. Judge Miller suggested including the litigation section, and Mr. Bachofner suggested sending the survey to the entire Bar. Prof. Peterson noted that Ms. Nilsson did research and found that Survey Monkey is only free for 100 respondents per survey. He stated that perhaps the Oregon State Bar can provide Survey Monkey assistance as it did last biennium. Mr. Nebel was uncertain as to the terms of the Bar's contract with Survey Monkey. Judge Miller noted that Ms. Nilsson split the ORCP 44 survey into two identical surveys and asked judges in the tri-county area to fill out one survey and judges in the rest of the state to fill out the other. She pointed out that the surveys were identical, but that splitting the respondents allowed the Council to stay under the 100 respondent limit.

Judge Miller spoke more specifically of the ORCP 44 survey and stated that it was sent to approximately 200 judges, with 36 responses. Mr. Cooper noted that this result was very good. Judge Miller remarked that surveys tend to get people thinking about issues and that, even if a respondent did not have a suggestion right away, he or she would know who to contact if one arose later. Judge Zennaché noted that the responses Judge Miller received from Judge Rasmussen and Judge Veloure were merely survey responses and did not suggest any rule changes. Mr. Cooper suggested that he, Mr. Buckle, Mr. Nebel, and Prof. Peterson think about the Survey Monkey idea between now and December and report their ideas to the Council at that time. He noted that the Council would then have the full legislative session to craft the survey.

VIII. Adjournment (Mr. Cooper)

Mr. Cooper adjourned the meeting at approximately 12:00 p.m. The next Council meeting will be on September 11, 2010, at which time Council members will vote on which proposed amendments to publish.

Respectfully submitted,

Mark A. Peterson
Executive Director

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 6/7/10 - 8/27/10

I. Inquires

The Council received an inquiry from an attorney wondering about the progress of the e-discovery proposals. Since the Council has not yet had the opportunity to approve the minutes of the June meeting, these minutes were not yet posted on the website. The attorney was forwarded a copy of the draft minutes for her perusal. Another attorney also inquired about receiving a copy of the draft minutes in order to prepare to give an e-discovery seminar for his firm's clients. The Council also received an inquiry about whether only attorneys may propose changes to the ORCP. The inquirer was informed that anyone is free to submit a proposal to the Council.

II. Website Statistics

Attached are analytical reports detailing visits made to the Council's website. The site had 382 visits from 291 unique visitors, and 1,156 page views in this period. This reporting period was just twice as long as the prior one, but the visits and page views increased by 288% and 396%, respectively. This may be a sign that visitors are paying attention to the Council's biennial cycle and seeking more information as the Council gets closer to voting on publication.

III. Website Improvements

The website now includes all historical materials (including subcommittee work which was included in the original Council legislative history materials) for each biennium from 1993 to present.

Respectfully submitted,

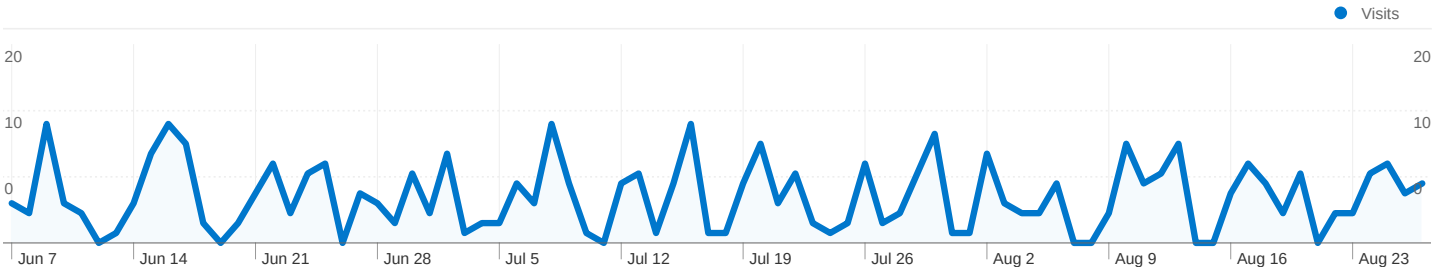
Shari Nilsson
Council Administrative Assistant

www.lclark.edu/~ccp

Dashboard

Jun 7, 2010 - Aug 27, 2010

Comparing to: Site



Site Usage

382 Visits

50.26% Bounce Rate

1,156 Pageviews

00:03:09 Avg. Time on Site

3.03 Pages/Visit

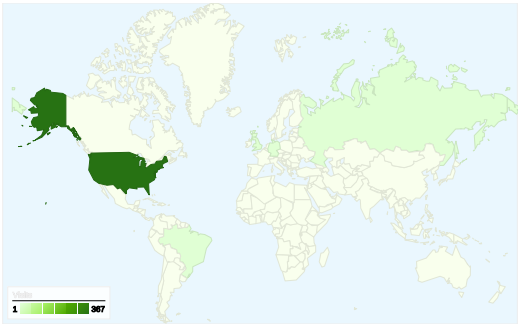
66.23% % New Visits

Visitors Overview

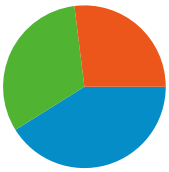
Visitors

291

Map Overlay



Traffic Sources Overview



- **Search Engines**
  157.00 (41.10%)
- **Referring Sites**
  122.00 (31.94%)
- **Direct Traffic**
  103.00 (26.96%)

Content Overview

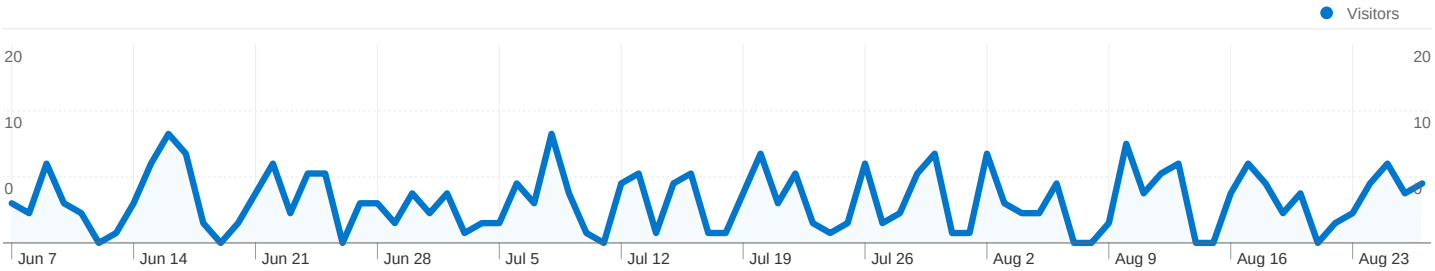
Pages	Pageviews	% Pageviews
/~ccp/index.htm	351	30.36%
/~ccp/Past_Biennia.htm	234	20.24%
/~ccp/LegislativeHistoryofRules	141	12.20%
/~ccp/Current_Biennium.htm	92	7.96%
/~ccp/resources.htm	65	5.62%

www.lclark.edu/~ccp

Visitors Overview

Jun 7, 2010 - Aug 27, 2010

Comparing to: Site



291 people visited this site

382 Visits

291 Absolute Unique Visitors

1,156 Pageviews

3.03 Average Pageviews

00:03:09 Time on Site

50.26% Bounce Rate

66.23% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	220	57.59%
Firefox	127	33.25%
Safari	18	4.71%
Chrome	16	4.19%
Mozilla	1	0.26%

Connection Speed	Visits	% visits
T1	102	26.70%
Unknown	100	26.18%
Cable	98	25.65%
DSL	69	18.06%
Dialup	12	3.14%

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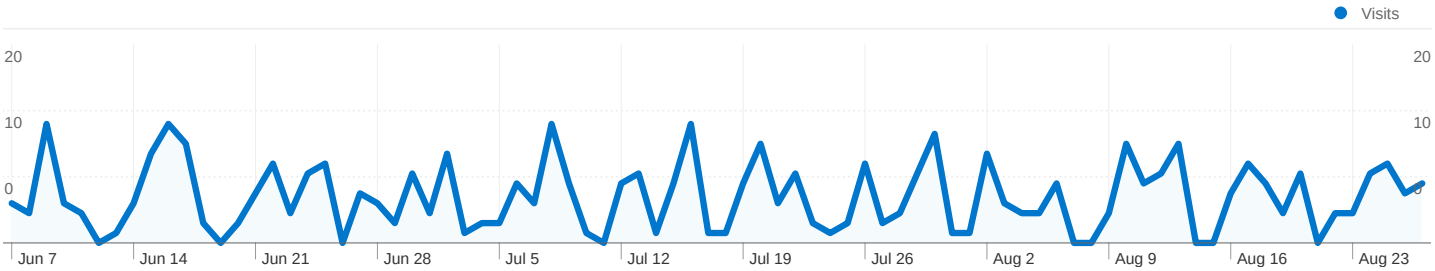
Traffic Sources Overview

Jun 7, 2010 - Aug 27, 2010
Comparing to: Site



All traffic sources sent a total of 382 visits

26.96% Direct Traffic

31.94% Referring Sites

41.10% Search Engines

Search Engines
157.00 (41.10%)
Referring Sites
122.00 (31.94%)
Direct Traffic
103.00 (26.96%)

Top Traffic Sources

Sources	Visits	% visits
google (organic)	139	36.39%
(direct) ((none))	103	26.96%
courts.oregon.gov (referral)	44	11.52%
counciloncourtprocedures.org	15	3.93%
osbar.org (referral)	11	2.88%

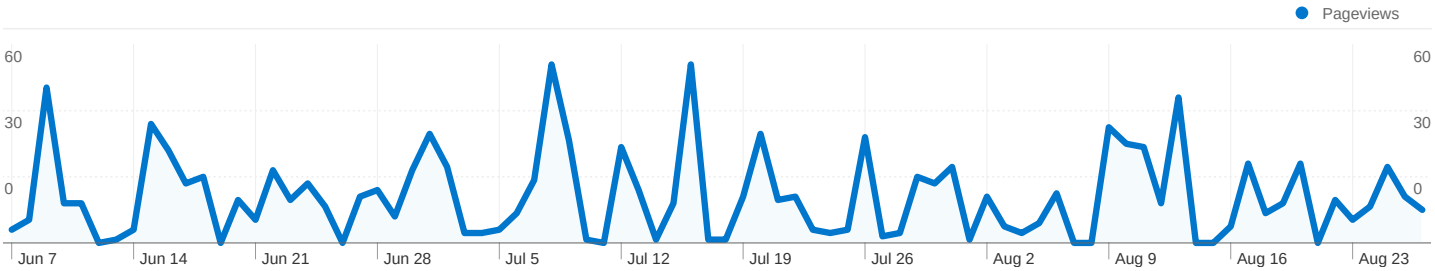
Keywords	Visits	% visits
oregon council on court	25	15.92%
council on court procedures	16	10.19%
council on court procedures	11	7.01%
oregon rules civil procedure	5	3.18%
oregon rules of civil procedure	5	3.18%

www.lclark.edu/~ccp

Content Overview

Jun 7, 2010 - Aug 27, 2010

Comparing to: Site



Pages on this site were viewed a total of 1,156 times

1,156 Pageviews

730 Unique Views

50.26% Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	351	30.36%
/~ccp/Past_Biennia.htm	234	20.24%
/~ccp/LegislativeHistoryofRules.htm	141	12.20%
/~ccp/Current_Biennium.htm	92	7.96%
/~ccp/resources.htm	65	5.62%

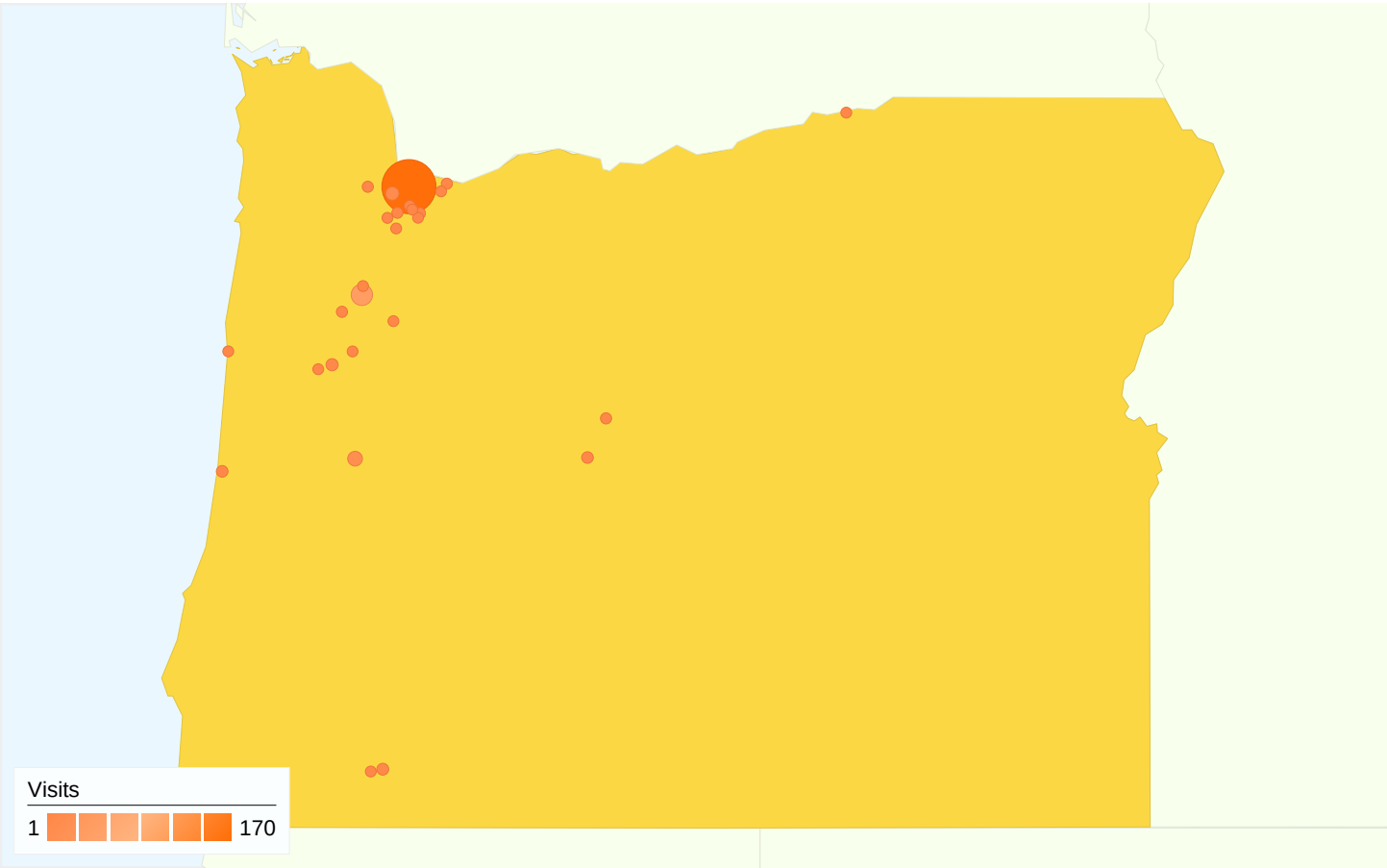
www.lclark.edu/~ccp

State Detail:

Oregon

Jun 7, 2010 - Aug 27, 2010

Comparing to: Site



This state sent 286 visits via 27 cities

Site Usage

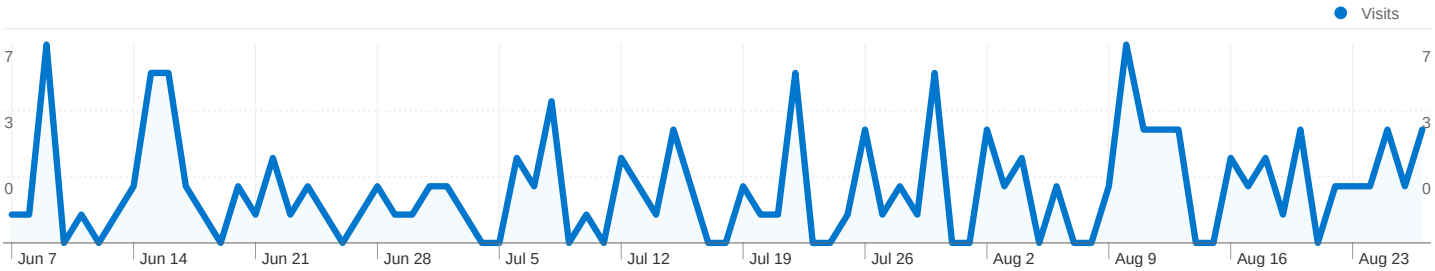
Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
286 % of Site Total: 74.87%	3.12 Site Avg: 3.03 (2.95%)	00:03:39 Site Avg: 00:03:09 (16.19%)	63.29% Site Avg: 66.23% (-4.44%)	48.60% Site Avg: 50.26% (-3.30%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	170	3.54	00:04:52	53.53%	44.71%
Salem	42	3.00	00:02:13	64.29%	30.95%
Eugene	16	2.12	00:03:52	81.25%	56.25%
Beaverton	11	2.09	00:01:37	90.91%	72.73%
Corvallis	6	1.00	00:00:00	100.00%	100.00%
Medford	5	2.20	00:00:56	60.00%	20.00%
Gladstone	4	1.50	00:00:32	100.00%	75.00%
Bend	4	1.00	00:00:00	100.00%	100.00%
Florence	4	1.75	00:01:45	75.00%	50.00%

Independence	2	1.50	00:00:14	50.00%	50.00%
Hillsboro	2	1.00	00:00:00	100.00%	100.00%
Troutdale	2	3.50	00:03:32	50.00%	0.00%
Lake Oswego	2	14.50	00:04:14	50.00%	50.00%
Redmond	2	1.00	00:00:00	100.00%	100.00%
Tualatin	2	1.00	00:00:00	100.00%	100.00%
Oregon City	1	1.00	00:00:00	100.00%	100.00%
Newport	1	4.00	00:04:02	100.00%	0.00%
Marylhurst	1	1.00	00:00:00	100.00%	100.00%
Umatilla	1	1.00	00:00:00	100.00%	100.00%
Jacksonville	1	1.00	00:00:00	100.00%	100.00%
Gresham	1	1.00	00:00:00	100.00%	100.00%
Sherwood	1	1.00	00:00:00	100.00%	100.00%
Philomath	1	1.00	00:00:00	100.00%	100.00%
Albany	1	1.00	00:00:00	100.00%	100.00%
Wilsonville	1	3.00	00:00:50	0.00%	0.00%
Keizer	1	11.00	00:09:08	100.00%	0.00%
Stayton	1	1.00	00:00:00	100.00%	100.00%
					1 - 27 of 27

Keywords

Jun 7, 2010 - Aug 27, 2010
Comparing to: Site



Search sent 157 total visits via 81 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
157	3.65	00:03:48	68.15%	47.77%
% of Site Total: 41.10%	Site Avg: 3.03 (20.60%)	Site Avg: 00:03:09 (21.07%)	Site Avg: 66.23% (2.90%)	Site Avg: 50.26% (-4.96%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon court rule making	3	16.00	00:26:05	33.33%	0.00%
oregon counsel on court procedures	1	19.00	00:17:19	100.00%	0.00%
council for court procedures	3	3.33	00:14:56	0.00%	33.33%
oregon court procedure	1	2.00	00:14:15	100.00%	0.00%
history or oregon rule of procedure on defamation	1	5.00	00:12:56	100.00%	0.00%
"council on court procedures"	2	6.00	00:09:12	50.00%	0.00%
legislative history or orcp 63	1	1.00	00:09:08	100.00%	0.00%
oregon rules of civil procedure legislative history	5	8.00	00:07:25	60.00%	20.00%
orgon counsel on court procedures	4	4.75	00:07:24	25.00%	25.00%
oregon council on court procedure	4	4.50	00:06:38	100.00%	0.00%
oregon council on court procedures	25	4.16	00:05:34	60.00%	28.00%
oregon council of court procedures	1	5.00	00:05:09	0.00%	0.00%
oregon council on court proceedings	1	7.00	00:05:09	100.00%	0.00%
council on court procedures	16	3.69	00:04:34	56.25%	12.50%
council on court procedures oregon	11	6.82	00:04:30	54.55%	18.18%
council on court procedures, oregon	1	9.00	00:03:41	100.00%	0.00%
oregon "council on court procedures"	3	5.00	00:03:37	66.67%	0.00%
orcp 59	2	3.00	00:03:02	0.00%	0.00%
oregon rules of civil procedure council on court procedures comment	1	7.00	00:02:50	100.00%	0.00%
oregon rules civil procedure history	5	1.80	00:01:55	0.00%	80.00%

council court procedures	1	14.00	**00:01:23**	100.00%	0.00%
amended rules for oregon state courts	1	2.00	**00:01:10**	100.00%	0.00%
oregon rules of court	1	2.00	**00:00:32**	0.00%	0.00%
oregon rules of civil procedure notes	1	2.00	**00:00:27**	100.00%	0.00%
norma r ciarlo	1	3.00	**00:00:17**	100.00%	0.00%
oregon council court procedure	1	3.00	**00:00:16**	0.00%	0.00%
oregon council court procedures	2	3.00	**00:00:14**	100.00%	0.00%
council and court procedures	1	2.00	**00:00:05**	0.00%	0.00%
"oregon" orcp rrule 7	1	1.00	**00:00:00**	100.00%	100.00%
brooks cooper law portland oregon	1	1.00	**00:00:00**	100.00%	100.00%
brooks f cooper atty at law	1	1.00	**00:00:00**	100.00%	100.00%
brooks f cooper portland attorney	1	1.00	**00:00:00**	100.00%	100.00%
citing orcp in legal documents	1	1.00	**00:00:00**	100.00%	100.00%
civil procedure legislative history	1	1.00	**00:00:00**	100.00%	100.00%
council court procedure	1	1.00	**00:00:00**	100.00%	100.00%
council court procedures oregon	1	1.00	**00:00:00**	0.00%	100.00%
council of court	1	1.00	**00:00:00**	100.00%	100.00%
court procedures	3	1.00	**00:00:00**	100.00%	100.00%
current biennium	1	1.00	**00:00:00**	100.00%	100.00%
history oregon rules of appellate procedure	1	1.00	**00:00:00**	100.00%	100.00%
kathryn mary pratt attorney	1	1.00	**00:00:00**	100.00%	100.00%
kristen s. david attorney oregon	1	1.00	**00:00:00**	100.00%	100.00%
kristin david attorney oregon city	1	1.00	**00:00:00**	100.00%	100.00%
legislative history on orcp 63 2008	0	0.00	**00:00:00**	0.00%	0.00%
orcp	1	1.00	**00:00:00**	100.00%	100.00%
orcp 10	2	1.00	**00:00:00**	100.00%	100.00%
orcp 15	1	1.00	**00:00:00**	100.00%	100.00%
orcp 16	1	1.00	**00:00:00**	0.00%	100.00%
orcp 27	1	1.00	**00:00:00**	0.00%	100.00%
orcp 4 a	1	1.00	**00:00:00**	100.00%	100.00%

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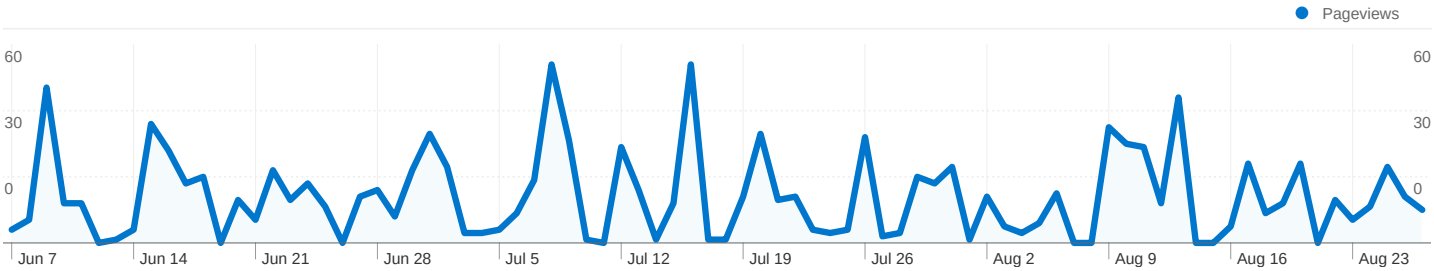
Top Content

Jun 7, 2010 - Aug 27, 2010
Comparing to: Site



17 pages were viewed a total of 1,156 times

Content Performance

Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
1,156	730	00:01:33	50.26%	33.04%	$0.00
% of Site Total: 100.00%	% of Site Total: 100.00%	Site Avg: 00:01:33 (0.00%)	Site Avg: 50.26% (0.00%)	Site Avg: 33.04% (0.00%)	Site Avg: $0.00 (0.00%)

Page	Pageviews	Unique Pageviews	Avg. Time on Page	Bounce Rate	% Exit	$ Index
/~ccp/index.htm	351	244	00:01:27	40.52%	37.61%	$0.00
/~ccp/Past_Biennia.htm	234	85	00:02:32	52.38%	24.36%	$0.00
/~ccp/LegislativeHistoryofRules.htm	141	118	00:02:02	80.88%	58.16%	$0.00
/~ccp/Current_Biennium.htm	92	46	00:01:24	100.00%	21.74%	$0.00
/~ccp/resources.htm	65	49	00:01:02	58.33%	36.92%	$0.00
/~ccp/Council_Membership.htm	64	49	00:01:47	90.00%	25.00%	$0.00
/~ccp/contact.htm	48	28	00:01:05	100.00%	27.08%	$0.00
/~ccp/LegislativeHistory.htm	36	25	00:00:33	0.00%	8.33%	$0.00
/~ccp/CurrentBienniumMeetings.htm	35	28	00:00:40	50.00%	25.71%	$0.00
/index.htm	25	11	00:00:00	27.27%	44.00%	$0.00
/~ccp/For_Council_Members.htm	21	17	00:00:08	0.00%	9.52%	$0.00
/~ccp/order.htm	21	16	00:00:09	75.00%	23.81%	$0.00
/~ccp/e-discoverydrafts.htm	14	7	00:00:38	66.67%	35.71%	$0.00
/Advisory_Board.htm	3	1	00:00:09	0.00%	33.33%	$0.00
/~ccp/AmendmentsPublishedforComment.htm	3	3	00:00:13	50.00%	33.33%	$0.00
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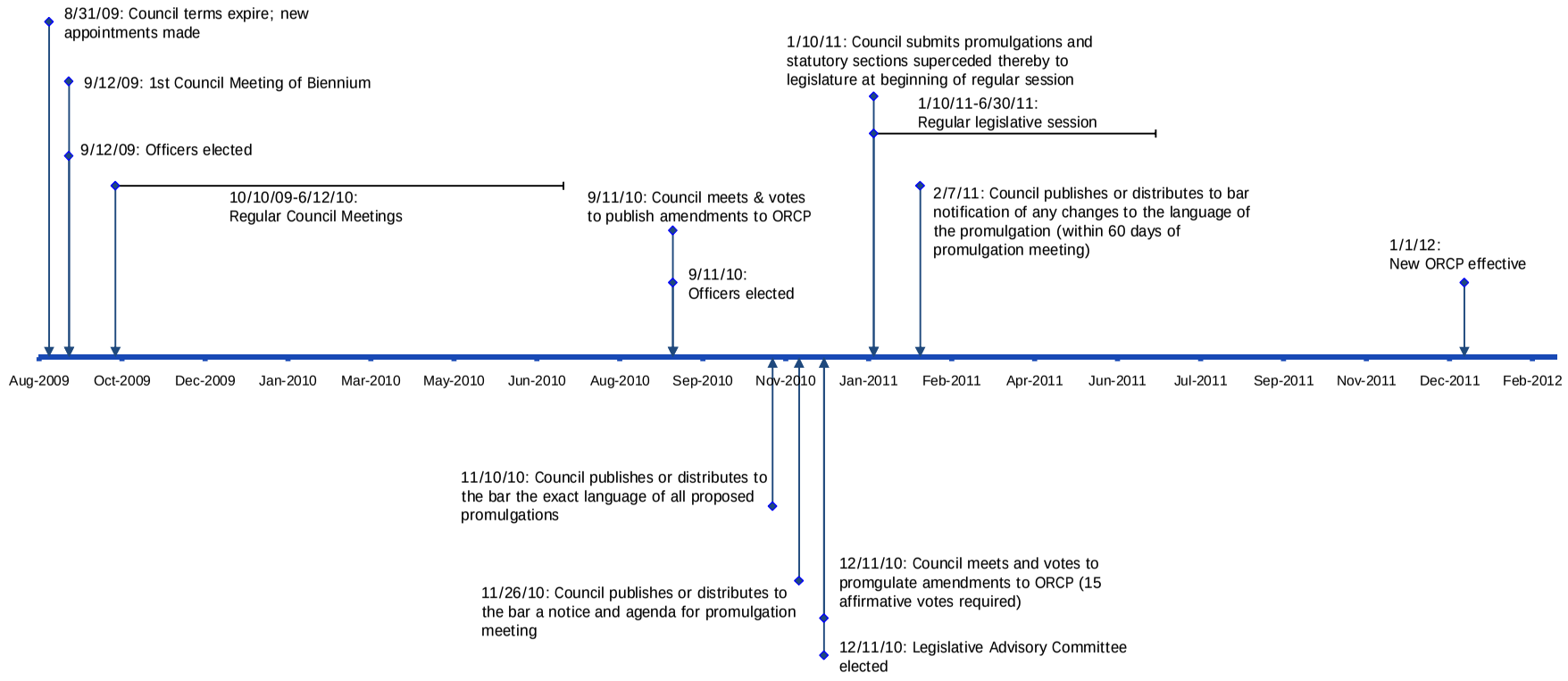
Council on Court Procedures Timeline, 2009-2011 Biennium



Council on Court Procedures
Term Expiration Matrix
2009-2011 Biennium

Attorneys/Public Member			
Name	Biennium Appointed	Current Term Expires	Can be reappointed?
John Bachofner	2009-2011	August 2013	In 2013, for another 4-year term
Arwen Bird	2009-2011	August 2013	In 2013, for another 4-year term
Michael Brian	2009-2011	August 2013	In 2013, for another 4-year term
Eugene H. Buckle	2001-2003 (appointed February 2002 to partial term to fill 2001-2005 vacancy left by John Folliard, Jr.)	August 2013	Not after 2013
Brian Campf	**2007-2009**	**August 2011**	**In 2011, for another 4-year term**
Brooks F. Cooper	2005-2007	August 2013	Not after 2013
Don Corson	2003-2005	August 2011	Not after 2011
Kristen S. David	**2007-2009**	**August 2011**	**In 2011, for another 4-year term**
Martin E. Hansen	2003-2005	August 2011	Not after 2011
Maureen Leonard	2009-2011	August 2013	In 2013, for another 4-year term
Leslie W. O'Leary	2005-2007	August 2013	Not after 2013
Kary Pratt	2009-2011	August 2013	In 2013, for another 4-year term
Mark R. Weaver	**2007-2009**	**August 2011**	**In 2011, for another 4-year term**

Council on Court Procedures
Term Expiration Matrix
2009-2011 Biennium

Judges			
Name	Biennium Appointed	Expires	Can be reappointed?
Hon. Rex Armstrong	2009-2011	August 2013	In 2013, for another 4-year term
Hon. Robert D. Herndon	2005-2007	August 2013	Not after 2013
Hon. Jerry B. Hodson	**2005-2007** **(appointed March 2006 to partial term fill 2003-2007 vacancy left by Judge Thom)**	**August 2011**	**In 2011, for another 4-year term**
Hon. Lauren S. Holland	2005-2007	August 2013	Not after 2013
Hon. Mary Mertens James	**2007-2009**	**August 2011**	**In 2011, for another 4-year term**
Hon. Rives Kistler	2005-2007	August 2013	Not after 2013
Hon. Eve L. Miller	**2007-2009**	**August 2011**	**In 2011, for another 4-year term**
Hon. David F. Rees	2009-2011	August 2013	In 2013, for another 4-year term
Hon. Locke A. Williams	2005-2007	August 2013	Not after 2013
Hon. Charles Zennaché	2009-2011	August 2013	In 2013, for another 4-year term

GENERAL PROVISIONS GOVERNING DISCOVERY

RULE 36

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

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

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

B(2) Insurance agreements or policies.

B(2)(a) A party, upon the request of an adverse party, shall disclose**:**

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

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

B(2)(b) The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may

supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

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

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

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

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a

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transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

ORCP 38

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken**:** (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States[,]**;** [*or*] (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony[,]**;** or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for

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depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

[C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.]

C(1) Definitions. For the purpose of this rule:

C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.

C(1)(b) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

C(2) Issuance of Subpoena.

C(2)(a) To request issuance of a subpoena under this rule, a party or attorney shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.

C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure and requirements, shall assign a case number and promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed. If a party to an out-of-state proceeding retains an attorney licensed to practice in this state, that attorney may assist the clerk in drafting the subpoena.

/////

C(2)(c) A subpoena under subsection (2) shall:

(i) conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55A but may otherwise incorporate the terms used in the foreign subpoena as long those terms conform to these rules; and

(ii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

C(3) Service of Subpoena. A subpoena issued by a clerk of court under subsection (2) of this rule shall be served in compliance with ORCP 55.

C(4) Effects of Request for Subpoena. A request for issuance of a subpoena under this rule does not constitute an appearance in the court. A request does allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) Motions. A motion to the court, or a response thereto, for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this rule is an appearance before the court and shall comply with the rules and statutes of this state. The motion shall be submitted to the court in the county in which discovery is to be conducted.

C(6) Uniformity of Application and Construction. In applying and construing this rule, 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.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

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

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

C Filing; proof of service. Except as provided by section D of this rule, all papers required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of

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service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers. Where service is made by telephonic facsimile communication device or e-mail, proof of service shall be made by affidavit or declaration of the person making service, or by certificate of an attorney or sheriff. Attached to such affidavit, declaration, or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine, if facsimile communication is used. If service is made by e-mail under section G of this rule, the person making service must certify that he or she received confirmation that the message was received, either by return e-mail, automatically generated message, telephonic facsimile, or orally.

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

E Filing with the court defined. The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or document the time of day, the day of the month, the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless the name of the court, the title of the cause and the document, the names of the parties, and the attorney for the party requesting filing, if there be one, are legibly endorsed on the front of the document, nor unless the contents thereof are legible.

F Service by telephonic facsimile communication device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an

attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.

G Service by e-mail. Service by e-mail is prohibited unless attorneys agree in writing to e-mail service. This agreement must provide the names and e-mail addresses of all attorneys and the attorneys' designees, if any, to be served. Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. Service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or otherwise unavailable.

DISMISSAL OF ACTIONS; COMPROMISE

RULE 54

A Voluntary dismissal; effect thereof.

A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this state, **a plaintiff may dismiss** an action **in its entirety or as to one or more defendants** [*may be dismissed by the plaintiff*] without order of court**:** (a) by filing a notice of dismissal with the court and serving such notice on [*the defendant*] **all other parties not in default** not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, **the parties shall submit a form of judgment and** the court shall enter a judgment of dismissal.

A(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by **contract, statute, or** rule [*or statute*]. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

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B Involuntary dismissal.

B(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice[,] that a judgment of dismissal will be entered in each such case by the court for want of prosecution[,] unless**,** on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time[,] for want of prosecution of any action upon motion of any party thereto.

B(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication without prejudice.

C Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D Costs of previously dismissed action.

D(1) If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

D(2) If a party who previously asserted a claim, counterclaim, cross-claim**,** or third party claim that was dismissed with prejudice subsequently [*makes*] **files** the same claim, counterclaim, cross-claim**,** or third party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim**,** or third party claim and may enter a judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining the dismissal.

E Offer to allow judgment; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, [*the*] **any** party against whom a claim is asserted may, at any time up to [*10*] **14** days prior to trial, serve upon [*the*] **any other** party asserting the claim an offer to allow judgment to be [*given*] **entered** against the party making the offer for the sum, or the property, or to the effect therein specified. **Notwithstanding Rule 9C,** [*T*]**t**he offer shall not be filed with the court clerk or provided to any assigned judge, except as set forth in subsections E(2) and E(3) below.

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon[,] and file the same with the clerk before trial, and within [*three*] **five** days from the time [*it*] **the offer** was served upon such party asserting the claim; and thereupon judgment shall be given accordingly[,] as a stipulated judgment. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence at trial and may be filed with the court only after the case has been adjudicated on the merits and only if the party asserting the claim fails to obtain a judgment more favorable than the offer to allow judgment. In such a case, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

F Settlement conferences. A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion. Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.

ORCP 43

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

A Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy[,] any designated documents (including **electronically stored information,** writings, drawings, graphs, charts, photographs, [*phono-records,*] **sound recordings, images,** and other **data or** data compilations from which information can be obtained[,] and translated, if necessary, by the respondent through detection devices **or software** into reasonably usable form)[,] or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B Procedure.

B(1) A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property upon which entry is requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and related acts.

B(2) A request shall not require a defendant to produce or allow inspection, copying, entry, or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or the parties may

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agree upon in writing, a party shall serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request**,** which items shall be organized and labeled to correspond with the categories in the request;

B(2)(b) as to any requested item not in the party's possession or custody, a statement that reasonable effort has been made to obtain it, unless specifically objected to, or that no such item is within the party's control;

B(2)(c) as to any land or other property, a statement that entry will be permitted as requested unless specifically objected to; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control.

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

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

D Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided

in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter upon land.

E Electronically Stored Information.

A request for electronically stored information may specify the form in which the information is to be produced by the responding party, but if no such specification is made the responding party may produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A [*Entry of order of default.*] **In general.**

A(1) [*In general.*] When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to [*plead or*] **appear by filing a motion or answer, or** otherwise **to** defend as provided in these rules **or applicable statute**, the party seeking affirmative relief may apply for an order of default **and a judgment by default by filing ~~a~~ motions and affidavits or declarations in compliance with this rule.**

A(2) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to an order of default and judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a counterclaim or cross-claim.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

[*If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, notice, in the form prescribed by Uniform Trial Court Rule 2.010, of the intent to apply for an order of default must be filed and served upon the party against whom an order of default is sought at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, declaration, or otherwise and, upon such a showing, the clerk or the court shall enter the order of default.*

A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(I) unless the plaintiff submits an affidavit or a declaration showing:

A(2)(a) that the plaintiff has complied with Rule 7 D(4)(a)(I); and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail with return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.]

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, or cross-claimant.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then ~~formal~~ notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

[*B Entry of judgment by default.*

B(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party seeking judgment submits an affidavit or a declaration stating that, to

the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005;

B(1)(e) The party seeking judgment submits an affidavit or a declaration of the amount due;

B(1)(f) An affidavit or a declaration pursuant to subsection B(4) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(I), 7 D(3)(b)(I), 7 D(3)(c)(I), 7 D(3)(d)(I), 7 D(3)(e), or 7 D(3)(f).

B(2) By the court. In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. The party seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit or a declaration under this subsection, a default judgment may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits or declarations.

B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by the affidavit or declaration, and may include costs and disbursements and attorney fees entered

pursuant to Rule 68.

B(4) Non-military affidavit or declaration required. No judgment by default shall be entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the defendant is or is not a person in the military service, or stating that plaintiff is unable to determine whether or not the defendant is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended, except upon order of the court in accordance with that Act.]

C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must be accompanied by an affidavit or declaration to support that default is appropriate and contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days (or any shortened period of time ordered by the court) prior to filing the motion ~~or verification that the court shortened the time~~;

C(1)(d) ~~that~~ whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005~~. If the party seeking the order of default cannot submit an affidavit or a declaration under this subsection, an order of default may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another~~

~~person as described in Rule 27~~; and

C(1)(e) ~~that~~ whether the ~~defendant~~ party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended~~., except upon order of the court in accordance with that Act.; and~~

~~C(1)(f) that, if the action arises upon contract, that the summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7D(3)(c)(i), 7D(3)(d)(i), 7 D(3)(e), or 7 D(3)(f);~~

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

(C)(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27;

(C)(2)(b) is a person in the military service, an order of default may be entered against the other party only in accordance with the Servicemembers Civil Relief Act.

C~~(2)~~(3) The court may grant an order of default if it appears the motion and affidavit or declaration haves ~~been~~ filed in good faith and good cause is shown that entry of such an order is proper.

D Motion for Judgment by Default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration, establishing the relief to be awarded as follows:

D(1)(a) stating that an order of default has been granted;

D(1)(b) stating the relief sought, including any amounts due as claimed in the

pleadings;

D(1)(c) if costs, disbursements, and/or attorney fees are allowable based on a contract, statute, or rule, or other legal provision, a party may include costs, disbursements, and attorney fees to be awarded pursuant to Rule 68.

D(2) The form of judgment submitted shall comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

[*C Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.*]

[*D Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.*

E "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.]

E Certain Motor Vehicle Cases. No order of default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i); ~~and~~

E(2) ~~either, if~~ whether the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation

accessible to the plaintiff.~~:~~ ; and

E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less than 30 days prior to the application for an order of default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail, return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

F Setting aside an order of default or judgment by default.

For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

RELIEF FROM JUDGMENT OR ORDER

RULE 71

A Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected as provided in subsection (2) of section B of this rule.

B Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud **(whether previously called intrinsic or extrinsic)**, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B(2) When appeal pending. A motion under sections A or B may be filed with and decided by the trial court during the time an appeal from a judgment is pending before an appellate court. The moving party shall serve a copy of the motion on the appellate court. The moving party shall

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file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.

C Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, or the power of a court to grant relief to a defendant under Rule 7 D(6)(f), or the power of a court to set aside a judgment for fraud upon the court.

D Writs and bills abolished. Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment [*pursuant to subsection B(3) of Rule 54*].

* * * * *

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Subject: COCP - New Or Sup Ct Case - discussing claim preclusion and issue preclusion
From: Kristen David <kristen@bowermandavid.com>
Date: Thu, 17 Jun 2010 09:28:08 -0700
To: '
CC: "Shari C. Nilsson" <nilsson@lclark.edu>

The Oregon Supreme Court's opinion in English v. Multnomah County came out today.
http://www.publications.ojd.state.or.us/S057387.htm

While the majority of the decision deals with a Measure 37 judgment and the subsequent passage of Measure 49, there was an interesting analysis from the Oregon Supreme Court regarding claim preclusion and issue preclusion. (see below)

I know this is an issue that comes up from time to time and we may want to put it on our agenda for next biennium.

Kristen.

B. Claim Preclusion

Having determined that Measure 49 did not void the trial court judgment, we turn to whether the county is prohibited by principles of claim preclusion from asserting certain defenses in this mandamus proceeding. We begin with a brief overview of the principles concerning the preclusive effect of a final judgment. As this court noted in Drews v. EBI Companies, 310 Or 134, 139, 795 P2d 531 (1990), the overarching principle of preclusion "comprises two doctrines: claim preclusion, also known as res judicata, and issue preclusion, also known as collateral estoppel."(8) (Footnotes omitted.) Further, the doctrine of claim preclusion can be separated into two concepts: the rule of merger and the rule of bar. See Restatement (Second) of Judgments § 17 (1982) (describing merger, bar, and issue preclusion); see also Ira v. Columbia Food Co. et al, 226 Or 566, 570, 360 P2d 622 (1961) ("The term res judicata is frequently used in a broad sense as including merger, bar, [and issue preclusion].").

Issue preclusion prevents parties from relitigating issues that were actually litigated and determined in a prior action. Nelson v. Emerald People's Utility Dist., 318 Or 99, 103-04, 862 P2d 1293 (1993). See also Restatement at § 27 (describing issue preclusion). Claim preclusion is broader than issue preclusion in that it may bar litigation of an issue that could have been raised, even if that issue was not actually raised, in an earlier proceeding. Drews, 310 Or at 140. As noted, claim preclusion can be separated into two concepts: the rule of merger and the rule of bar.

We turn first to the rule of merger.(9) As discussed above, once a plaintiff obtains a valid, final judgment, the plaintiff's underlying claim merges into the final judgment and is extinguished. For that reason, the plaintiff can no longer maintain an action on the underlying claim. See Barrett, 320 Or at 378 (describing principles). The plaintiff may, however, be able to maintain an action to enforce and effectuate the judgment, and, in that action, "the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." Restatement at § 18; see also Security Inv. Co. v. Miller, 189 Or 246, 251, 218 P2d 966 (1950) (describing merger and conclusive effect of judgment). In other words, when a plaintiff seeks to enforce a valid judgment, the defendant may not collaterally attack

the judgment as being erroneously issued.

The second aspect of claim preclusion, known at common law as the rule of bar, is the principle most often described by the term "claim preclusion." That rule prohibits parties from splitting claims by requiring plaintiffs to "bring all claims arising from the same factual transaction or circumstances in a single action." Peterson v. Temple, 323 Or 322, 327, 918 P2d 413 (1996). Thus, a plaintiff who has brought an action against a defendant and obtained a final judgment in that action is prohibited from later bringing an action against the same defendant based on the same factual transaction or circumstances.

In past cases, this court has referred to the foregoing concepts collectively as claim preclusion, often without distinguishing between merger and bar. In Drews, for example, after describing the rule of bar, the court noted that "[c]laim preclusion applies equally to a defendant's defense."(10)> 310 Or at 140. For that proposition, the court cited section 18 of the Restatement, the section dealing with the rule of merger. Id. It is true, as discussed above, that the rule of mergerapplies to a defendant's defense: a defendant cannot raise defenses in an action to enforce a judgment that he or she did raise or could have raised in the action in which the judgment was entered. However, the statement from Drews can create confusion, because, in Oregon, the rule of bar does not apply in the same way; instead, under the rule of bar, if, in one action, certain facts create both a defense and a counterclaim, "failure to assert such facts, either as a defense or as a counterclaim, does not preclude [the] defendant from thereafter bringing a separate action based upon those facts." Buck v. Mueller, 221 Or 271, 277, 351 P2d 61 (1960).(11) That is because, in Oregon, unlike in the federal courts, there are no compulsory counterclaims. Compare FRCP 13(a) (pleading "must state" certain claims as counterclaims) with ORCP 22 A (defendant "may set forth" counterclaims). We therefore refer to the rule at issue in this case as the rule of merger, rather than the more generic term of "claim preclusion."

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Proposal for Amendment to Oregon Rules of Civil Procedure

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Describe the amendment you are proposing for the Council's consideration:

ORCP 1 E appears to ignore requirements of some declarations required under the ORCPs, particularly ORCP 83 A.

A declaration under ORCP 1 E requires that a declarant state: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." Meanwhile, ORCP 83 A requires that any declaration for provisional process requires a declarant to make a declaration to the best of the declarant's "knowledge, INFORMATION, and belief."

Thus, perhaps ORCP 1 E should reflect the additional requirements of declarations under ORCP 83 A.