DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 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
Don Corson
Kristen David
Jennifer Gates
Martin E. Hansen
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary*
Hon. David F. Rees
Mark R. Weaver*
Hon. Locke A. Williams*
Hon. Charles M. Zennaché

Members Absent:

Brooks F. Cooper
Hon. Lauren S. Holland
Hon. Mary Mertens James

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 9 • ORCP 21 • ORCP 38 • ORCP 43 • ORCP 54 • 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 • Claim preclusion v. issue preclusion • Discord between ORCP 1 E and 83 A	• ORCP 9 • ORCP 21 • ORCP 38 • ORCP 43 • ORCP 54 • ORCP 69 • ORCP 71	• 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)

II. Introduction of Guests

There were no guests present requiring introduction. Mr. Buckle introduced Jennifer Gates, the newest member of the Council.

III. Approval of September 11, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft September 11, 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 process of scanning documents and uploading them to the website continues. She also pointed out that the inquiry from an attorney in Eastern Oregon without close access to a law library with Council materials shows that the website is proving to be a valuable resource for attorneys throughout the state.

B. Expiring Terms (Mr. Buckle)

Mr. Buckle noted that Mr. Corson's and Mr. Hansen's terms on the Council will expire in August of 2011. He thanked them for their valuable years of service on the Council.

Mr. Buckle also stated that there are six Council members with terms expiring in August who are eligible for reappointment: Mr. Campf; Ms. David; Mr. Weaver; Judge Hodson; Judge James, and Judge Miller. All of these members except for Judge James were present, and none indicated that they wished to retire from the Council. Prof. Peterson stated that he will contact Judge James to ask whether she wishes to be reappointed.

V. Old Business (Mr. Buckle)

A. Voting on Promulgated Amendments

1. ORCP 36

a. Discussion

Mr. Bachofner explained that the amendments to ORCP 36 (Appendix C-7) allow limited discovery of insurance denial of coverage and reservation of rights information, as detailed in the amendments themselves. He noted that the Council had received no comments on the published amendment.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 36

Mr. Bachofner made a motion to promulgate the amendment to ORCP 36. Mr. Corson seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

2. ORCP 38

a. Discussion

Mr. Corson explained that the amendment to ORCP 38 (Appendix C-10) is Oregon's verison of adopting the current uniform laws on interstate foreign depositions and subpoenas.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 38

Mr. Corson made a motion to promulgate the amendment to ORCP 38. Mr. Bachofner seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

3. ORCP 9

a. Discussion

Judge Rees stated that the amendment to ORCP 9 (Appendix C-3) is a technical amendment relating to ORCP 54. Ms. Leonard explained that the amendment states that offers of judgment which are not accepted should not be filed with the court.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 9

Mr. Hansen made a motion to promulgate the amendment to ORCP 9. Judge Armstrong seconded the motion, which passed 19-0 by roll call vote, with no abstentions.

4. ORCP 54

a. Discussion

Ms. Leonard stated that the amendment to ORCP 54 A (Appendix C-16) makes it clear that a party, not the court, needs to submit a form of judgment of dismissal. Prof. Peterson added that the amendment also provides the ability to dismiss one or more parties without dismissing the entire case.

Mr. Buckle noted that Nicole DeFever from his office had sent in a comment regarding the analogous federal rule (FRCP 68), which states "the number of days prior to the date set for trial," rather than "prior to trial." Mr. Buckle stated he believes the Council's amendments are adequate and did not need further revision. Ms. Leonard stated that amendments to subsection E change the timing

on offers of judgment, and that subparagraph E(2) gives more time to respond to an offer of judgment. Judge Zennaché also asked about using the language "prior to trial" rather than "prior to the date set for trial." Prof. Peterson replied that there can be an offer that an attorney disregards because it came too late but, if the trial gets re-set, that unaccepted offer would no longer be untimely and could affect a party's entitlement to court costs and attorney fees if the judgment did not exceed the offer. He noted that cases are frequently set over, but that the offer is still out there. Mr. Hansen suggested "*a* date set for trial," rather than "*the* date set for trial." Mr. Buckle pointed out that an offer is made and is either accepted or not. Mr. Bachofner noted that an attorney might ignore an offer because it is not timely. Mr. Buckle acknowledged that this could be a trap for the unwary. Mr. Bachofner stated that best practice dictates that an attorney always looks at an offer, consults with the client, and responds. Mr. Hansen remarked that if an attorney is not passing offers to the client merely because it is the day before trial, that attorney has a bigger problem. Council members agreed not to make any further changes to the rule.

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

Ms. Leonard made a motion to promulgate the amendment to ORCP 54. Judge Hodson seconded the motion, which passed 20-0 by roll call vote, with no abstentions. (Mr. Brian joined the meeting late and therefore did not vote on the previous three amendments.)

5. ORCP 43

a. Discussion

Ms. David pointed out that Legislative Counsel had also suggested a few minor changes since the Council's published amendment, and that these are reflected in the version of ORCP 43 now before the Council (Appendix C-13). Mr. Buckle mentioned Sheila Potter's comments (Appendix F) to the Council's published changes to ORCP 43. He noted that she raised concerns that the amendment seemed to suggest that the requesting party will dictate the format of electronically stored information (ESI) and the responding party must provide the ESI in that format. Ms. David acknowledged that, in ORCP 43 E, there could still be a question about permissive vs. mandatory production and the form in which a party is required to produce information. Mr. Campf stated that FRCP 34 contains language similar to that proposed in subsection E, but that the federal rule states that a party must produce ESI in the form in which it is usually maintained. He pointed out that the Council's amendment uses the word "may."

Judge Zennaché stated that, earlier in the federal rule, it states that the requesting party may designate the form in which they would like ESI to be produced and, if it does not, the responding party must produce ESI in a form in which it is ordinarily maintained. Mr. Camp noted that the federal rule does use the word "must," and did not recall whether the committee had discussed in depth the implications of using "may" or "must." Mr. Buckle wondered how many different forms exist in which ESI can be produced. Ms. David replied that there are more than one might think. She stated that the committee talked

about the permissive nature of giving the responding party the option of producing ESI in the form in which it is usually maintained or a reasonably useful form. She noted that a concern is, if the federal rule uses "must" and the ORCP uses "may," there is the potential for litigation to make a distinction between the two words. Judge Miller asked whether the committee would recommend changing the word. Mr. Campf stated that he had not given it enough thought to make a recommendation. He noted that the first use of "may" is equivocal, so that if the word is used again, it can be construed as not being a requirement.

Judge Herndon noted that, if the word "may" in the subsection were changed to "shall," it would not significantly change what happens. He suggested that it is a distinction without difference. Mr. Hansen observed that, in the worst-case scenario, an aggressive person might say, "I *may* do it in a reasonable way, but I do not have to, so I will not." Mr. Bachofner pointed out that, if the ESI is provided in an unusable form, the parties will end up going to the court to resolve the dispute. Mr. Hansen noted that the rule does not require a person to be reasonable, and that not making this distinction could tie up a lot of court time over disputes. Justice Kistler asked whether the second word "may" is limited by either/or. Judge Rees asked if there is a downside to changing to the word "must." Judge Zennaché stated that there is none, and that this would eliminate any argument. Judge Herndon stated that, if there is a dispute, a judge would still have to hold a hearing about the reasonableness of the format whether the word "may" or "must" is used. Judge Miller stated that she believes that using the word "must" is the better idea. She noted that is does not substantively change the obligation, but that it will avoid future arguments. Judge Armstrong stated that he understands the first use of the word "may" in the subsection to mean must, and that if the requester states a format, the producer is stuck. Judge Rees pointed out that a party can seek a protective order.

Ms. David noted that the committee had over 100 responses when it first put out the changes for comment, and that people understand that if a request is too financially burdensome, they will go to the court. She pointed out that there will always be debates, but that the Council is trying to give guidance. Ms. O'Leary opined that it is a good idea to use shall or must instead of may, because there will always be one lawyer who will take a hyper-technical interpretation of the rule and say it is entirely voluntary. She stated that she would prefer consistency with the federal rule to remove any ambiguity. Mr. Bachofner agreed. Ms. David stated that many of the comments received by the committee stated, "do not do what the federal rule does." Mr. Bachofner noted that the federal rule uses the word "useable" and the Council's amendment uses "useful," and wondered if there is a difference. Ms. David stated that she interprets"useful" to mean it is useful for the case, and "useable" to mean that a party can use the data to go back and track something. Prof. Peterson observed that "useful" is a friendlier term than "usable." Mr. Corson concurred.

Ms. David stated that the amendment helps point people in the right direction, and that it will likely not be the last time Council will have to deal with ESI. Mr. Corson proposed a friendly amendment to change the second use of the word

"may" to "must" in the amendment to ORCP 43 E. Ms. David seconded the motion, which passed by voice vote.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 43

Mr. Corson made a motion to promulgate the amendment to ORCP 43, as amended. The motion was seconded and passed 20-0 by roll call vote, with no abstentions.

6. ORCP 69

a. Discussion

Prof. Peterson stated that the Council had received one comment regarding the published amendment to ORCP 69 (Appendix C-20). He noted that the comment (Appendix H) was from attorney Gil Feibelman, who was concerned that the changes would require Rule 7-type service of the notice of intent to apply for the order of default. Prof. Peterson stated that he responded to Mr. Feibelman to let him know that Rule 9 service with a first class stamp still applies. He added that Mr. Feibelman did not respond to that explanation, and that the comment stated that the Council had otherwise done a good job on the amendment.

Mr. Buckle pointed out that there are two alternate versions to consider (Appendices D & F). Prof. Peterson reminded the Council of the discussion at the last meeting regarding section D(1)(a). He recalled that there were concerns about presenting both a motion for an order of default and a motion for judgment by default at the same time, and that a lawyer cannot sign an affidavit stating that the order has been granted when it has not yet been. Prof. Peterson stated that the Council had agreed to publish the amendment as written but to discuss it further before promulgation. He stated that Version 1 (Appendix D) was suggested by Mr. Bachofner and Version 2 (Appendix E) came from multiple suggestions at the September meeting.

Ms. David observed that the problem around the state is that parties submit just a judgment without submitting an order. She noted that many courts actively tell parties to send the motion and order and judgment at the same time so that it is quick and easy, especially where attorney fees are an issue. She pointed out that, based on this "normal practice" of sending all documents together, Version 2 would really help clarify the necessity to submit the affidavit to comply with the rule. Judge Miller stated that many attorneys leave a space to write in the date that the order was entered, so there has already been contemplation that there needs to be some type of reference made. She noted that, based on her experience, version 2 is a good idea. Ms. Leonard asked why version 1 is not workable. Mr. Hansen replied that version 1 presupposes a two-step process, whereas version 2 allows it to be one step. Judge Zennaché stated that, given current staffing levels and budget cuts, he would prefer having a litigant indicate that they have gotten or are getting the order, since the process of entering orders and judgments into the Oregon Judicial Information Network (OJIN) is slow and judges cannot verify entry of the order of default by merely looking in

OJIN. Mr. Bachofner stated that his first concern is that people do not have to go back a second time, and that version 2 solves this problem. Judge Armstrong suggested changing the words “applied for” to "sought.” Prof. Peterson noted that the current language in ORCP 69 A uses "sought." Mr. Hansen stated that the word "sought" makes it seem as though a party would apply to one judge for the default order and another for the judgment. He pointed out that another part of ORCP 69 A uses the language "intent to apply for an order of default." Mr. Corson observed that ORCP 69 C(1)(b) uses “sought,” while 69 C(1)(c) uses "apply for.” Mr. Bachofner remarked that the word “sought” is used when informing another party that you are seeking an order, while “apply for” is used to specifically refer to the process of presenting the order to a judge for signature.

A motion was made to amend the published version of amendments to ORCP 69 to make the changes outlined in version 2 (Appendix E). The motion was seconded and passed by voice vote.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 69

Ms. David made a motion to promulgate the amendment to ORCP 69, as amended. Mr. Bachofner seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

7. ORCP 71

a. Discussion

Judge Zennaché stated that the amendment to ORCP 71 (Appendix C-27) eliminates the distinction between intrinsic and extrinsic fraud. He noted that no comments to the published amendment were received by the Council.

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

Ms. Leonard made a motion to promulgate the amendment to ORCP 71. Judge Zennaché seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

8. ORCP 21

a. Discussion

Prof. Peterson stated that the amendment to ORCP 21 (Appendix C-6) removes the last line in ORCP 21 A which refers to ORCP 54 B. He noted that the court already has the power to dismiss stale cases in the UTCR and that the language in ORCP 21 A was confusing.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 21

Mr. Hansen made a motion to promulgate the amendment to ORCP 21. Mr.

Bachofner seconded the motion, which passed 20-0 by roll call vote, with no abstentions.

B. Communication with Legislators (Ms. David)

Ms. David referred to the matrix of legislators which includes new legislators to begin serving in January, 2011. She stated that we will need to choose new contacts for legislators who were being contacted by outgoing Council members. She asked Council members to look at the matrix and see if anyone knows any of these or the new legislators and would like to begin contacting them. A few members did so, and Judge Zennaché stated that he can take over Mr. Corson's legislative contacts. Ms. David stated that we will revisit this issue in September, 2011, and make any necessary adjustments at that time. She also stated that she will draft two e-mails to send to legislators in January – one for new legislators which includes an introduction, and one update for continuing legislators.

VI. New Business (Mr. Buckle)

A. Legislative Advisory Committee (Mr. Corson)

Mr. Corson reminded the Council that, by statute, the Council must form a Legislative Advisory Committee (LAC), which by custom consists of the chair, the vice chair, the public member, and two judges. He noted that any member of the Legislature or any legislative committee has the right to ask the Council for information and input, and that the LAC would be the body to respond. Mr. Corson stated that the LAC also deals with any budget issues relating to the Council.

Mr. Buckle noted that the current judge members of the LAC are Judge Herndon and Justice Kistler. Both agreed to remain on the committee. Mr. Corson nominated Mr. Buckle, Mr. Cooper, Ms. Bird, Judge Herndon, and Justice Kistler for the LAC. The motion was seconded and passed via voice vote.

B. Annual Legislative Sessions (Judge Zennaché)

Judge Zennaché noted the recent ballot measure which requires the Legislature to meet annually, and wondered how this would affect the Council's work. Mr. Buckle wondered whether the ORS requires the Council to submit amendments before every regular session. Justice Kistler noted that the Legislature may have to amend the statute to specify what an regular session is. Mr. Nebel stated that the even-year session will not be a "regular session" since the Legislature will not usually be considering non-fiscal matters during that session. Prof. Peterson stated that the Council could ask the Attorney General's office for an opinion. Mr. Nebel asked whether the Council is required to submit amendments every regular session if it meets and decides that no changes to the ORCP are necessary. Mr. Buckle asked whether the requirement is merely to meet and decide whether any changes need to be made.

Mr. Buckle suggested that he and Prof. Peterson look at the statute and get Mr. Nebel involved if necessary to resolve the question. Mr. Corson stated that he does not believe there is a requirement that the Council has to change its rules but that, if the intention is

to make a rule change, any changes would need to be submitted to the Legislative Assembly at the start of the regular session. He noted that the Council's Rules of Procedure may need to change to reflect this.

Mr. Bachofner expressed concern that the Council does not want an unintended perception that it is not interested or working if it does not submit amendments before every annual session. Ms. David suggested explaining to the Legislature that the Council understands that it will be meeting every year, but that the Council will still work on a two-year cycle because it takes that long to evaluate potential rule changes. Mr. Bachofner stated that the explanation could further state that the Council understands that the Legislature's focus during the even-year session will be primarily on budget/fiscal issues, and that the Council does not want to burden it with ORCP changes during that time.

Judge Miller noted that the Council is supposed to be meeting around the state and wondered whether it was meeting this duty. Prof. Peterson stated that the statute had been changed and that this is now more of an aspirational standard than a requirement.

VII. Next Meeting Date/Place

The next meeting is tentatively scheduled for September 10, 2011.

VIII. Adjournment

Mr. Buckle adjourned the meeting at approximately 11:15 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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Members Absent:

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

Guests:

David Nebel, Oregon State Bar

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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.

Rule 71

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

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 9/1/10 - 11/12/10

I. Inquires

A. ORCP Amendment Path through the Legislature

An attorney sent a question to the Council via Laura Orr of the Washington County Law Library. The question was in regard to the legislature's process once the Council has promulgated its amendments. The attorney wanted to know whether the Legislature holds hearings and votes, and if those hearings are recorded.

We sent an e-mail with the following explanation: The Council submits the promulgated rules or amendments to the leadership of the Legislature (senate president, speaker, and chair and ranking minority member of the house and senate judiciary committees) at the beginning of the session. The Legislature can schedule hearings on any promulgation or not. Unless the Legislature affirmatively votes to amend any promulgation, or to reject it, the amendments become effective the following January 1. Of all of the statutes in the 16 volumes of ORS, the ORCP are the only "laws" that become effective without an affirmative vote of both the house and senate and the signature of the governor (or an override of his or her veto).

B. Material regarding amendment to ORCP 21 in 1982 and relationship between ORCP 21, 23, and 25

An attorney in Ontario with no access to a law library with Council materials asked about the materials relating to the 1982 amendment to ORCP 21 and the relationship between ORCP 21, 23, and 25. Since the materials from that biennium are not yet available on the Council's website, as a starting point we e-mailed the attorney some pages from the book *Oregon Rules of Civil Procedure: 1986 Handbook* which contained the Council's "staff comments" about the rule change to which he was referring. The attorney thanked us and we have not heard from him with other questions.

C. Effective date of changes to ORCP 69 A(1)

An attorney asked for information about the effective date of amendments to ORCP 69 A(1) that were promulgated in December of 2008. He was having a disagreement with opposing counsel who believed that written notice of intent to take default in the form required by UTCR 2.010 was required in December of 2009. We replied that the amendment to ORCP 69 A(1) was promulgated on December 13, 2008, and took effect on January 1, 2010, and that, until that date, the prior version of ORCP 69 A was the effective rule.

D. Miscellaneous Inquires

We continue to receive the occasional letter requesting legal assistance (often from inmates) and reply with the Council's standard letter stating that it does not provide legal services and referring the writer to the Lawyer Referral Service.

II. Comments to Published Amendments

We have received only two comments to the amendments published on September 11, 2010. Those comments are included in the meeting packet for this meeting and will be discussed during the meeting.

III. Website Statistics

Attached are analytical reports detailing visits made to the Council's website. The site had 365 visits from 262 unique visitors, and 1,041 page views in this period. These numbers are comparable with the last website report, which was for approximately the same period of time.

III. Website Improvements

We are continuing to scan materials and upload them to the website, biennium by biennium.

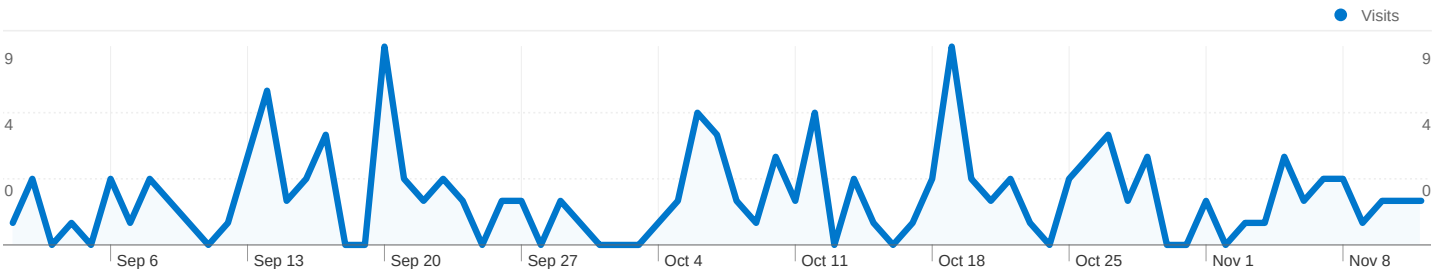
Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

www.lclark.edu/~ccp

Keywords

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



Search sent 159 total visits via 71 keywords

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
159	3.31	00:03:11	64.15%	40.25%
% of Site Total: 43.56%	Site Avg: 2.85 (15.99%)	Site Avg: 00:02:40 (19.42%)	Site Avg: 59.73% (7.41%)	Site Avg: 46.58% (-13.58%)

Keyword	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
oregon council on court procedures	38	4.50	00:02:33	47.37%	13.16%
council on court procedures	25	4.96	00:05:12	36.00%	8.00%
oregon council court procedures	9	6.22	00:13:00	44.44%	0.00%
council on court procedures oregon	7	4.14	00:04:24	71.43%	0.00%
court procedure	5	1.00	00:00:00	100.00%	100.00%
"council on court procedures" oregon	3	2.33	00:02:56	33.33%	33.33%
council court procedures	2	2.50	00:00:08	50.00%	50.00%
court procedures	2	1.00	00:00:00	100.00%	100.00%
orcp	2	6.50	00:19:34	50.00%	0.00%
orcp 22	2	1.00	00:00:00	100.00%	100.00%

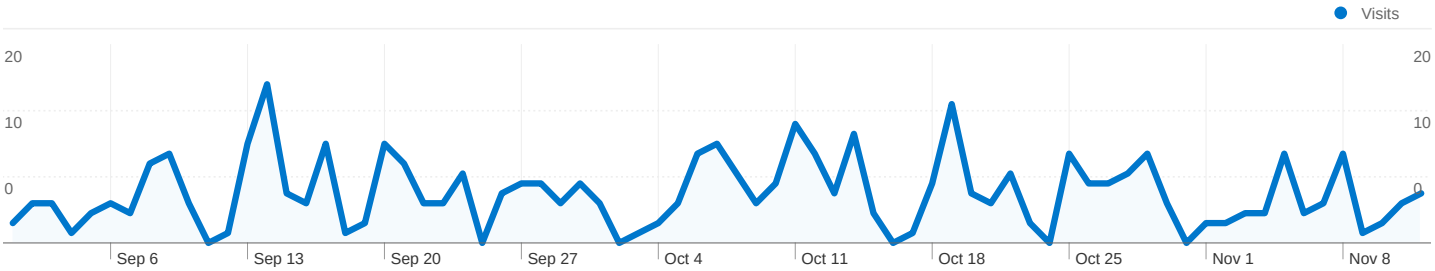
1 - 10 of 71

www.lclark.edu/~ccp

Dashboard

Sep 1, 2010 - Nov 12, 2010

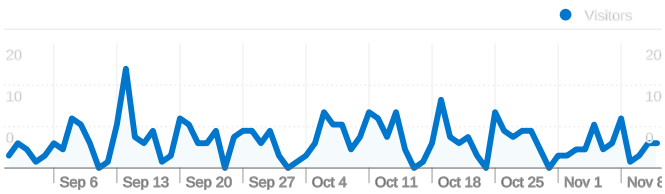
Comparing to: Site



Site Usage

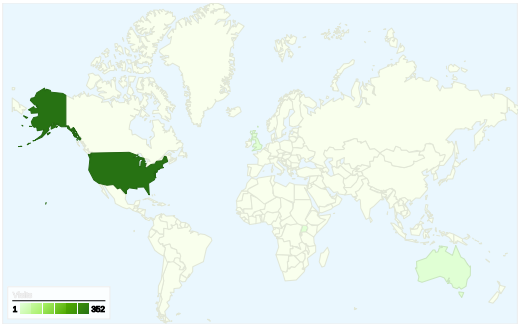
365 Visits	46.58% Bounce Rate
1,041 Pageviews	00:02:40 Avg. Time on Site
2.85 Pages/Visit	59.73% % New Visits

Visitors Overview



Visitors
262

Map Overlay



Traffic Sources Overview

- Search Engines
  159.00 (43.56%)
- Direct Traffic
  138.00 (37.81%)
- Referring Sites
  68.00 (18.63%)

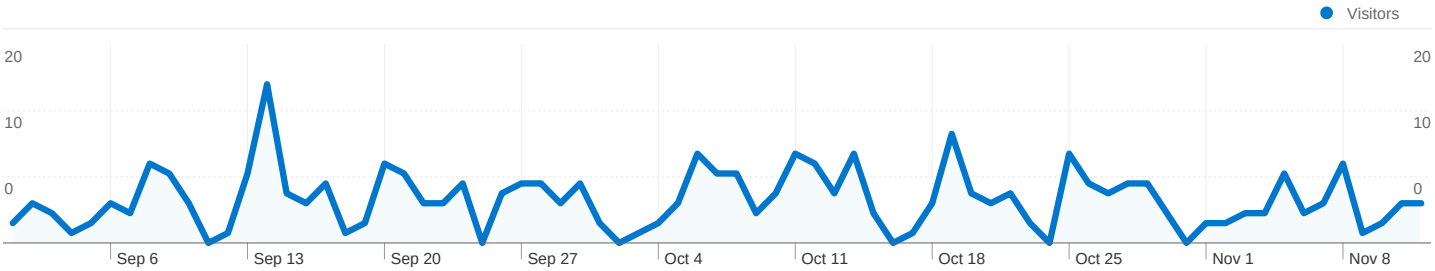
Content Overview

Pages	Pageviews	% Pageviews
/~ccp/index.htm	364	34.97%
/~ccp/Past_Biennia.htm	172	16.52%
/~ccp/Current_Biennium.htm	128	12.30%
/~ccp/LegislativeHistoryofRules	124	11.91%
/~ccp/resources.htm	57	5.48%

www.lclark.edu/~ccp

Visitors Overview

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



262 people visited this site

365 Visits

262 Absolute Unique Visitors

1,041 Pageviews

2.85 Average Pageviews

00:02:40 Time on Site

46.58% Bounce Rate

59.73% New Visits

Technical Profile

Browser	Visits	% visits
Internet Explorer	230	63.01%
Firefox	87	23.84%
Safari	26	7.12%
Chrome	18	4.93%
Mozilla Compatible Agent	2	0.55%

Connection Speed	Visits	% visits
Cable	108	29.59%
T1	103	28.22%
Unknown	92	25.21%
DSL	49	13.42%
Dialup	10	2.74%

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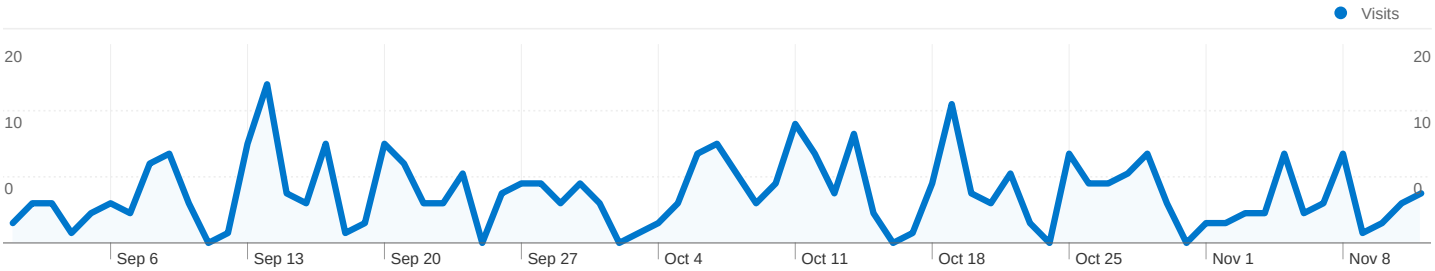
Traffic Sources Overview

Sep 1, 2010 - Nov 12, 2010
Comparing to: Site



All traffic sources sent a total of 365 visits

37.81% Direct Traffic

18.63% Referring Sites

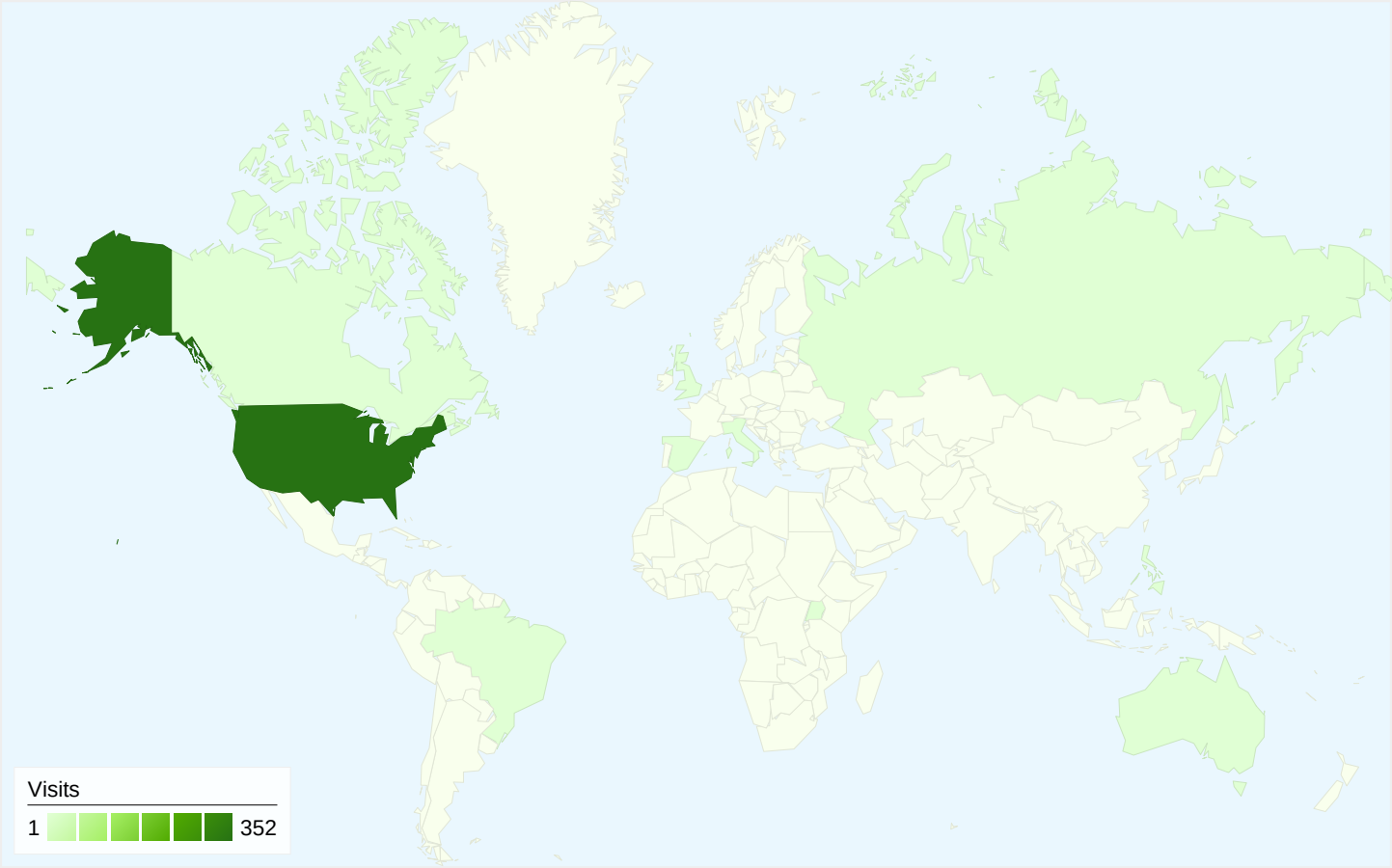
43.56% Search Engines

Search Engines
159.00 (43.56%)
Direct Traffic
138.00 (37.81%)
Referring Sites
68.00 (18.63%)

Top Traffic Sources

Sources	Visits	% visits
google (organic)	141	38.63%
(direct) ((none))	138	37.81%
courts.oregon.gov (referral)	36	9.86%
bing (organic)	10	2.74%
councilonc ourtprocedures.org	7	1.92%

Keywords	Visits	% visits
oregon council on court	38	23.90%
council on court procedures	25	15.72%
oregon council court	9	5.66%
council on court procedures	7	4.40%
court procedure	5	3.14%



365 visits came from 11 countries/territories

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
365 % of Site Total: 100.00%	2.85 Site Avg: 2.85 (0.00%)	00:02:40 Site Avg: 00:02:40 (0.00%)	59.73% Site Avg: 59.73% (0.00%)	46.58% Site Avg: 46.58% (0.00%)

Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
United States	352	2.91	00:02:45	59.09%	45.17%
Hong Kong	2	1.00	00:00:00	100.00%	100.00%
Australia	2	1.00	00:00:00	100.00%	100.00%
United Kingdom	2	1.00	00:00:00	100.00%	100.00%
Russia	1	1.00	00:00:00	100.00%	100.00%
Canada	1	2.00	00:00:00	0.00%	0.00%
Uganda	1	1.00	00:00:00	0.00%	100.00%
Brazil	1	2.00	00:00:00	0.00%	0.00%
Spain	1	1.00	00:00:00	100.00%	100.00%

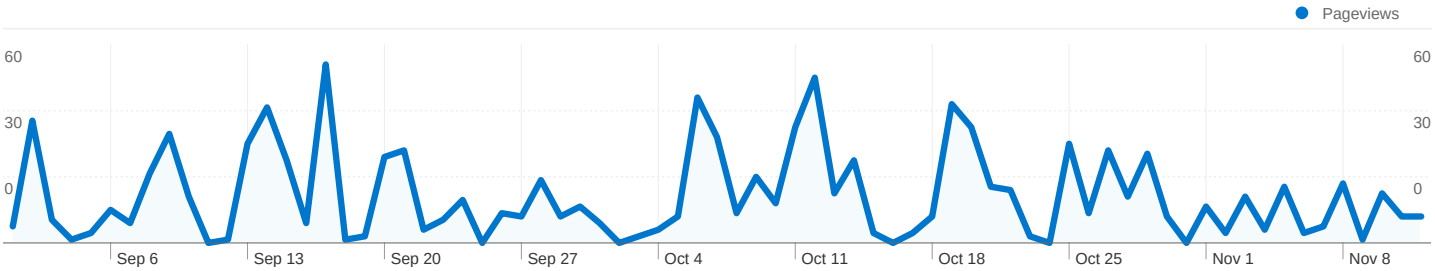
Philippines	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 10 of 11

www.lclark.edu/~ccp

Content Overview

Sep 1, 2010 - Nov 12, 2010

Comparing to: Site



Pages on this site were viewed a total of 1,041 times

1,041 Pageviews

725 Unique Views

46.58% Bounce Rate

Top Content

Pages	Pageviews	% Pageviews
/~ccp/index.htm	364	34.97%
/~ccp/Past_Biennia.htm	172	16.52%
/~ccp/Current_Biennium.htm	128	12.30%
/~ccp/LegislativeHistoryofRules.htm	124	11.91%
/~ccp/resources.htm	57	5.48%

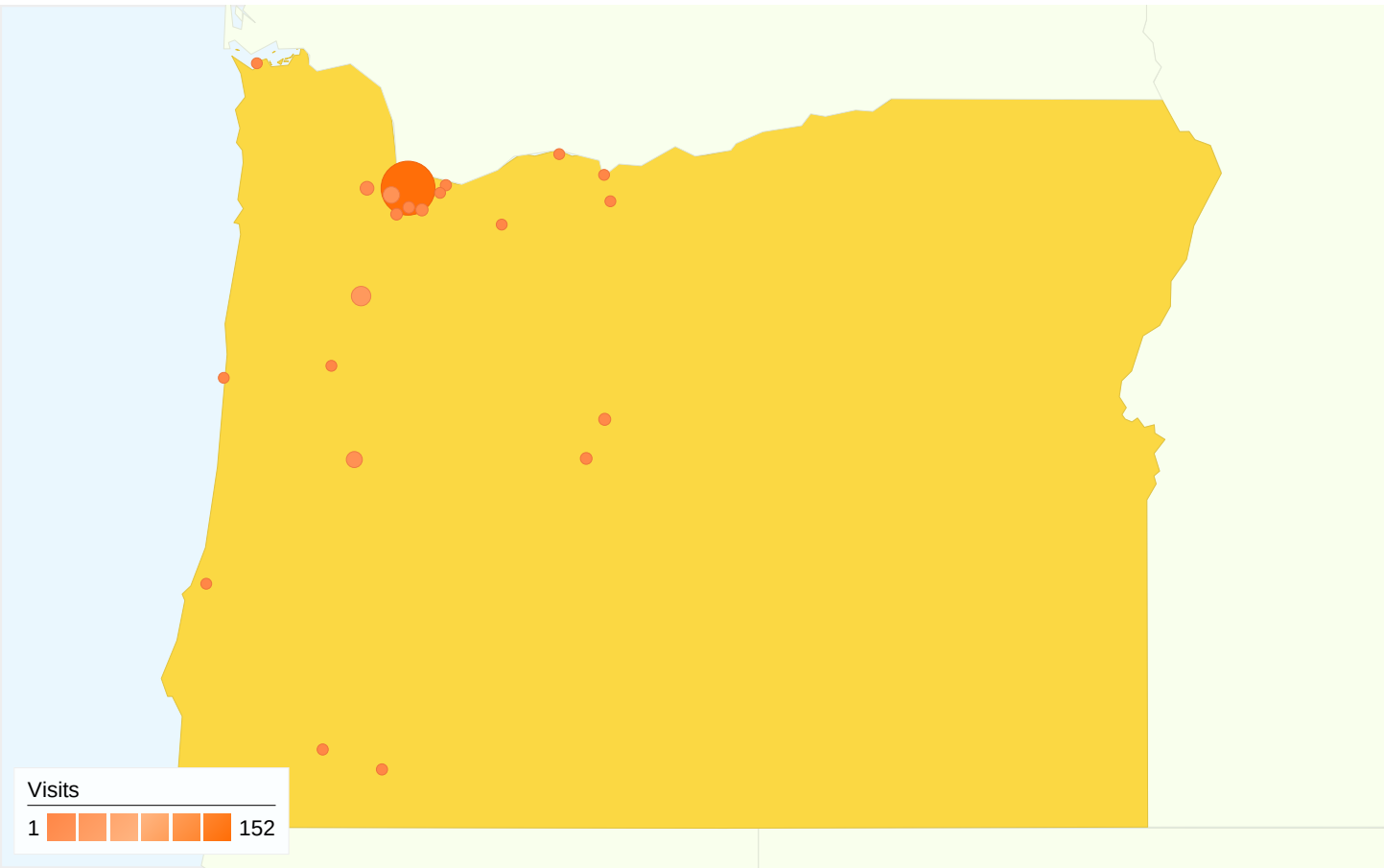
www.lclark.edu/~ccp

State Detail:

Oregon

Sep 1, 2010 - Nov 12, 2010

Comparing to: Site



This state sent 272 visits via 22 cities

Site Usage

Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
272 % of Site Total: 74.11%	3.17 Site Avg: 2.85 (11.19%)	00:02:59 Site Avg: 00:02:39 (12.57%)	54.41% Site Avg: 59.67% (-8.82%)	41.54% Site Avg: 46.59% (-10.84%)

City	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate
Portland	152	3.23	00:03:09	46.71%	40.79%
Salem	31	3.65	00:03:25	48.39%	35.48%
Beaverton	21	2.52	00:01:20	52.38%	52.38%
Eugene	19	3.00	00:01:55	84.21%	36.84%
Hillsboro	11	4.27	00:10:45	63.64%	27.27%
Clackamas	6	2.33	00:01:20	33.33%	16.67%
Redmond	5	2.20	00:00:33	60.00%	60.00%
Bend	4	3.75	00:01:50	75.00%	25.00%
Lake Oswego	4	2.75	00:00:28	75.00%	50.00%

Tualatin	**4**	2.25	00:00:53	100.00%	50.00%
Troutdale	**2**	1.50	00:00:02	50.00%	50.00%
Grants Pass	**2**	1.00	00:00:00	100.00%	100.00%
Medford	**2**	9.50	00:02:56	100.00%	50.00%
Hood River	**1**	1.00	00:00:00	100.00%	100.00%
Dufur	**1**	1.00	00:00:00	100.00%	100.00%
Gresham	**1**	2.00	00:11:09	100.00%	0.00%
Corvallis	**1**	5.00	00:02:00	100.00%	0.00%
Welches	**1**	4.00	00:02:52	100.00%	0.00%
Astoria	**1**	1.00	00:00:00	0.00%	100.00%
The Dalles	**1**	1.00	00:00:00	100.00%	100.00%
Coos Bay	**1**	1.00	00:00:00	100.00%	100.00%
Seal Rock	**1**	1.00	00:00:00	100.00%	100.00%
					1 - 22 of 22

PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail, by e-mail, or through the form available on the Council's website:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Administrative Assistant

Council on Court Procedures
310 SW 4th Avenue, Suite 1018
Portland, OR 97204
ccp@lclark.edu
www.counciloncourtprocedures.org

or by mail to:

Eugene Buckle
Chair, Council on Court Procedures
Cosgrave, Vergeer & Kester
805 SW Broadway, 8th Floor
Portland, OR 97205

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 11, 2010 — Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 11, 2010, meeting.

PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

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

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 54 E shall not be filed with the court except as provided in Rule 54 E(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.

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*].

* * * * *

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 provisions 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 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.

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

RULE 38

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 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 ~~S~~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 this 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~~55 A but may otherwise incorporate the terms used in the foreign subpoena as long as 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 ~~S~~subpoena. A subpoena issued by a clerk of court under subsection (2) of this rule shall be served in compliance with ~~ORCP~~Rule 55.

C(4) Effects of ~~R~~request for ~~S~~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 ~~A~~application and ~~C~~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.

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

RULE 43

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 ~~there- on~~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

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 ~~S~~stored ~~I~~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.

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, **a party 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.

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. The 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*] **seven** 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.

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 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 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;

C(1)(d) 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; and

C(1)(e) whether the 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.

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 party against whom the order is sought 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 party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears the motion and affidavit or declaration have 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. Specifically, the moving party must show:

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

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

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case 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);

E(2) 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. If a judgment by default has been entered, the court may 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

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.

Subject: Comment on ORCP 54 proposed changes
From: DeFever Nicole <nicole.defever@doj.state.or.us>
Date: Wed, 13 Oct 2010 13:55:36 -0700
To: ccp@lclark.edu

Dear Council,

The text of the analogous federal rule, FRCP 68, was amended to say the number of days "prior to the date set for trial" instead of prior to trial. See 12 Fed. Prac. & Proc. section 3004 (2d Ed.) This prevents the following scenario: the offer is served late; served party ignores it because it will have no impact on the attorney fee issue; trial is reset; now offering party uses this against other party when attorney fees and costs are considered. Adding the "date set" language is a reasonable clarification of the rule which prevents an unfair situation if the trial date is reset. Further, it appears that the proposed changes in ORCP 54 from 10 to 14 days mirrors the federal changes in FRAP 68 back in 2009, so it makes sense to consider incorporating this federal clarification as well.

I hope this comment is helpful.

Sincerely,

Nicole

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. The 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.

J. Nicole DeFever, Assistant Attorney General
Oregon Department of Justice, Trial Division
Commercial, Condemnation & Environmental Law Section
1515 SW Fifth Ave., Ste 410, Portland, Oregon 97201
Tel (971) 673-1880 Fax (971) 673-5000

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Amendments received to 7-15-2010.

END OF DOCUMENT

Subject: ORCP Comment
From: Gil <Gil@feiblemancase.com>
Date: Mon, 08 Nov 2010 14:39:13 -0800
To: ccp@lclark.edu
CC: rlipetzky@qwestoffice.net

Website not working so I am sending this email.
I have a comment and suggestion on the amendments

Re: changes to ORCP 69B

I am concerned that we have to “serve” the petition but then have to “serve” the notice of intent to take a default which seems a wrongheaded expense.
We already “served the pleading”.
We don’t have to “serve” the motion for default, so why “serve” the notice?
One “service” is enough.

We should say the notice of intent to take default should be by mail (certified or not).

Other than that, good job.

Gilbert B. Feibleman
Complex Asset, Custody and Support Cases
Fellow - International Academy of Matrimonial Lawyers
Fellow - American Academy of Matrimonial Lawyers

1815 Commercial St. SE
Salem, Oregon 97302
503.399.9218 (phone)
503.589.0159 (fax)

FEIBLEMAN & CASE
ATTORNEYS
www.feiblemancase.com

Subject: Comments to published draft of ORCP 69 amendments
From: Mark Peterson <mpeterso@lclark.edu>
Date: Wed, 24 Nov 2010 18:26:31 -0800
To: Gil@feiblemancase.com, Shari Nilsson <nilsson@lclark.edu>, cocp-list@lclark.edu

Gill Feibleman,

Thank you for your comment of November 8, 2010, regarding the published amendments to ORCP 69. As you noted, the amendment is intended to reorganize Rule 69 and to make it more user friendly in terms of identifying the requirements of obtaining a default and making it easier for court staff to check off whether those requirements have been met. It also makes clear that obtaining the order of default and the judgment by default are two separate steps, although in many cases they may be accomplished concurrently.

Your concern is what you read as a second notice requirement, serving the notice of intent to take default. The service of the notice of intent to take default in Rule 69 B(2) must be served in the Rule 9 sense, not the Rule 7 sense. This is current practice, which was formalized in the last biennium's amendment to ORCP 69 A. The non movant is already subject to the jurisdiction of the court (or else the order of default will not be granted). Note that Rule 69 B(2)'s requirement of serving the notice of intent to take default applies when the non movant has filed an entry of appearance with the court, and would be served as provided in Rule 9, as well as to non movants who have only given written notice of an intent to file an entry of appearance.

Does this response satisfy your concern? Please respond to me rather than "reply all" and I will make certain that Council members are apprised of any continuing concerns that you have.

Mark Peterson

--
Mark A. Peterson

Clinical Professor
Lewis and Clark Legal Clinic

Executive Director
Council on Court Procedures

503-768-6500

Submit via E-Mail | Print Form

Oregon Council on Court Procedures

Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date: November 24, 2010

Name: Sheila H. Potter

Firm (if applicable):

E-Mail: sheila,potter@doj.state.or.us

Phone: 971-673-5026

Proposed amendment(s) for which you are making comments

ORCP 43 E

Please provide your comments in this space

The proposed change provides that, "A request for electronically stored information may specify the form in which the information is to be produced by the responding party...," which seems to suggest that the requesting party gets to dictate the format that the responding party has to use. I wonder whether the rule should give a little more flexibility on that point, since the producing party may not be in a position to produce the data in precisely the requester's preferred format.

I'd rather see something more like: "The party requesting electronically stored information may ask for the information to be produced in a specific format. 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." Then, if a dispute arises over the format, the court clearly has the power to order the production in either the requester's or the producer's preferred format, depending on which is more reasonable under the specific circumstances in that case.

Thank you!

DEFAULT ORDERS AND JUDGMENTS

RULE 69

D Motion for judgment by default.

D(1) After an order of default has been granted, a party ~~must~~ may seek a judgment by default by filing a motion, supported by affidavit or declaration. Specifically, the moving party must show:

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

D(1)(~~b~~a) ~~the~~ what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(~~c~~b) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case 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.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for contemporaneously;

D(1)(b) ~~the~~ what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case 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.

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Oregon Council on Court Procedures

Comment on Proposed Amendment to ORCP

Pursuant to ORS 1.735(2), the Council on Court Procedures will publish or distribute to all members of the bar the exact language of any proposed promulgation, amendment, or repeal of an ORCP at least 30 days before the meeting at which the Council plans to take final action on the promulgation, amendment or repeal. This form allows the Council to receive comments on any such proposals.

Date: November 24, 2010

Name: Sheila H. Potter

Firm (if applicable):

E-Mail: sheila,potter@doj.state.or.us

Phone: 971-673-5026

Proposed amendment(s) for which you are making comments

ORCP 43 E

Please provide your comments in this space

The proposed change provides that, "A request for electronically stored information may specify the form in which the information is to be produced by the responding party...," which seems to suggest that the requesting party gets to dictate the format that the responding party has to use. I wonder whether the rule should give a little more flexibility on that point, since the producing party may not be in a position to produce the data in precisely the requester's preferred format.

I'd rather see something more like: "The party requesting electronically stored information may ask for the information to be produced in a specific format. 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." Then, if a dispute arises over the format, the court clearly has the power to order the production in either the requester's or the producer's preferred format, depending on which is more reasonable under the specific circumstances in that case.

Thank you!

Subject: Comment on ORCP 54 proposed changes
From: DeFever Nicole <nicole.defever@doj.state.or.us>
Date: Wed, 13 Oct 2010 13:55:36 -0700
To: ccp@lclark.edu

Dear Council,

The text of the analogous federal rule, FRCP 68, was amended to say the number of days "prior to the date set for trial" instead of prior to trial. See 12 Fed. Prac. & Proc. section 3004 (2d Ed.) This prevents the following scenario: the offer is served late; served party ignores it because it will have no impact on the attorney fee issue; trial is reset; now offering party uses this against other party when attorney fees and costs are considered. Adding the "date set" language is a reasonable clarification of the rule which prevents an unfair situation if the trial date is reset. Further, it appears that the proposed changes in ORCP 54 from 10 to 14 days mirrors the federal changes in FRAP 68 back in 2009, so it makes sense to consider incorporating this federal clarification as well.

I hope this comment is helpful.

Sincerely,

Nicole

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. The 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.

J. Nicole DeFever, Assistant Attorney General
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Commercial, Condemnation & Environmental Law Section
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Subject: ORCP Comment
From: Gil <Gil@feiblemancase.com>
Date: Mon, 08 Nov 2010 14:39:13 -0800
To: ccp@lclark.edu
CC: rlipetzky@qwestoffice.net

Website not working so I am sending this email.
I have a comment and suggestion on the amendments

Re: changes to ORCP 69B

I am concerned that we have to “serve” the petition but then have to “serve” the notice of intent to take a default which seems a wrongheaded expense.
We already “served the pleading”.
We don’t have to “serve” the motion for default, so why “serve” the notice?
One “service” is enough.

We should say the notice of intent to take default should be by mail (certified or not).

Other than that, good job.

Gilbert B. Feibleman
Complex Asset, Custody and Support Cases
Fellow - International Academy of Matrimonial Lawyers
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Council on Court Procedures
December 11, 2010, Meeting
Appendix H-1