MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 13, 2025, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
Hon. Christopher L. Garrett
Barry J. Goehler
Hon. Jonathan R. Hill
YoungWoo Joh
Lara Johnson
Julian Marrs
Hon. Thomas A. McHill
Hon. Michelle McIver
Hon. Robert Raschio
Michael Shin
Hon. Scott Shorr
Tom Spooner
Hon. Todd Van Rysselberghe
Bryce Whitman
Alicia Wilson

Members Absent:

Nadia Dahab
Hon. Andrew Erwin
Melissa Hopkins
Ryan Jennings
Eric Kekel
Derek Larwick
Hon. Melvin Oden-Orr

Guests:

John Adams, Oregon Tax Court
Matt Shields, Oregon State Bar
Rachel Trickett, Oregon Judicial Dept.

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 9 • ORCP 10 • ORCP 22 • ORCP 24 • ORCP 38 • ORCP 47 • ORCP 54 • ORCP 55 • ORCP 67 • ORCP 68	• ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Clarity • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery • Ex Parte	• Federalization • Guardians Ad Litem • "How To" Guides • Offers of Judgment • Pleadings • Receiverships • Remote Appearance • Security Bonds • Self-Represented Litigants • Subpoenas • Summary Judgment	• Timelines • Trial Practice • Uniform Collaborative Law Act • UTCR		

I. Call to Order

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

II. Approval of November 8, 2025, Minutes

Mr. Goehler called the Council's attention to the draft minutes from the November 8, 2025, meeting (Appendix A) and asked whether there were any suggestions for corrections. Hearing none, he asked for a motion to approve the minutes. Mr. Spooner made a motion to approve the draft minutes. Justice Garrett seconded the motion, which was approved by voice vote.

III. Administrative Matters

A. Staff Comments

This topic was carried over to the January agenda.

B. Council Outreach Efforts

Judge Peterson reported that he had been asked to write two articles for the "Tips from the Bench" column in the Multnomah Bar Association's *Multnomah Lawyer* publication. The December issue will include his article about the Council's promulgation of Rule 35 last biennium, the first new rule that the Council has promulgated in 44 years. The January issue will include his article about the Council's amendments to Rule 55 last biennium. Mr. Goehler thanked Judge Peterson for contributing to the Council's outreach efforts.

IV. Old Business

A. Committee Reports

1. Attorney Fees/Rule 68

Mr. Goehler reminded the Council that Senior Judge Eve Miller had brought this issue to the Council regarding the Court of Appeals case [*A.N.A. v. Alexander*, 336 OrApp 369 (2024)] that held that ORCP 68 is plain on its face and stated that the procedural mechanisms of ORCP 68 do not apply when there is a separate provision for awarding attorney fees by order. Mr. Goehler spoke with Judge Miller after the November Council meeting. Judge Miller stated that she had solicited feedback from her colleagues regarding the fact that there may be a lack of understanding or clarity in the rule, but did not receive any response. Mr. Goehler stated that he and Judge Miller discussed the fact that the domestic violence statute at issue in *Alexander* provides not only for only attorney fees by order on motion of a party, but also for an order sua sponte by a judge. He observed that it would seem inappropriate to give a judge sua sponte authority

to order attorney fees but to also have the judge be bound by the procedural hurdles of ORCP 68. Mr. Goehler stated that Judge Miller seemed to understand that it may be best to not make any changes to ORCP 68 in this regard.

Mr. Goehler stated that Judge Miller had also mentioned that attorneys may not be aware of this issue and that there may be a need to educate practitioners that they may request attorney fees through the ORCP 68 procedures in normal cases when there is a fee-authorizing statute; however, when a statutory remedy concludes with an order, not a judgment, and attorney fees are allowed with that order, the requirements of Rule 68 do not particularly apply. Attorneys need to be aware that the provisions and notices in the statute in question need to be looked at.

Judge Peterson agreed that, like many of the issues brought before the Council, this may be a matter of education for the bench and bar. He did note that restraining orders and other protective proceedings result in an order, not a judgment, so Rule 68 does not apply. However, many judges use Rule 68 as a guideline on how to handle fees, because several matters are taken care of rather nicely under that rule. He stated that he was not aware of whether the Oregon Judicial Department (OJD) includes a claim for attorney fees among the allegations in its petitions for elder abuse protective orders, family abuse restraining orders, or stalking protective orders so that information giving the other side notice is provided. That information, as well as the timing to file the statement, objections, and response, is included in Rule 68 and is really worthy. He asked any lawyers and judges on the Council who have worked in the protective proceedings area whether there would be any problems with a civil action that results in an order rather than a judgment. Mr. Goehler stated that he did not believe that there would be. He noted that another important point is that Rule 68 is really procedural, and the substantive factors (ORS 20.075) that go into making an attorney fee award are called out in Rule 68, but they are also adopted as part of the Family Abuse Protective Act (FAPA) statute. Even with a FAPA order, one would still have to run through the six or seven factors that are statutory for making a fee award. He did not think that there would be an issue with substantive rights but, rather, that it is a matter of whether the procedure is adequate for the situation.

Judge Peterson brought up a matter regarding Rule 68 that is unrelated to the issue Judge Miller presented. He noted that, a number of years ago, the Council had amended Rule 68 to require that the statement for attorney fees address factors set forth in ORS 20.075 so that there would be a better basis for determining the applicable amount of fees. Judge Peterson pointed out that this new, required process seems not to be being routinely followed. Many attorneys check a checkbox for “yes” or “no” next to the various factors, at best, which is not particularly helpful. He stated that one of the least pleasant tasks for him as a judge is to hold hearings on contested fee petitions. Judge Peterson

recalled that, several years ago, the then-Oregon State Bar Practice and Procedure Committee suggested including some kind of a conferral requirement on attorney fees. He stated that he did not know whether this is a good idea but, as long as Rule 68 is being discussed by the Council, it may be worth considering. He noted that there may be some timing issues if a conferral requirement were to be added, because the statement of attorney fees must be submitted within 14 days of entry of the judgment. However, it may be beneficial, because the fact that someone files a statement for attorney fees and the opposing party fails to object to it does not mean that the fees will be awarded, as the court has discretion to eliminate the fees or to reduce them. Judge Peterson wondered whether this idea would be feasible and help with reducing the number of disputes over attorney fees.

Mr. Spooner stated that he did not know about other practice areas but, in the area of insurance defense where he and Mr. Goehler practice, when fees are at issue, the savvy practitioner does confer with their opposing counsel to try to avoid having to hold a fee hearing with the court. Usually it only gets to the point of a hearing when the attorneys have not been able to work out an agreement on what the appropriate amount of fees and costs would be. Mr. Goehler agreed. He stated that it has been a decade or more since he had a contested attorney fee hearing. Usually, if there is an entitlement to fees, it can be negotiated, and a fee hearing will only be needed if one side is asking for an unreasonable rate or an unreasonable amount of time expended for certain tasks. Mr. Goehler stated that, the way Rule 68 currently works, there is an incentive for the liable party to be reasonable and agree to a decent award, because fees can also be awarded for contesting fees, causing the total fee award to be even higher. He stated that he did not think that adding more to Rule 68 would necessarily change current practice.

Judge Bloom opined that a conferral requirement would be more appropriately added to the Uniform Trial Court Rules (UTCR). He also stated that he thinks that the current ORCP process works pretty well. The court has discretion on fees, and ORCP 68 just provides the procedure for filing for them. There will be cases where a statute authorizes discretionary attorney fees, like in a divorce or FAPA case, and the court can use the ORCP 68 process to analyze the fee statement. Many times, a judge can head that off that process and let the parties know that the court will award some fees considering factors, including the difference in income between the two parties, and award one party a portion of their fees, foregoing the Rule 68 process. Then the parties can argue about that amount if they want. Judge Bloom stated that he did not think that Rule 68 needs to be changed.

Judge Hill suggested that it might be a good idea to refer the issue to the OJD's Law and Policy workgroup. Some of the concerns might be able to be addressed on the forms OJD provides for petitions, orders, or judgments. Ms. Trickett

stated that she is responsible for the workgroup and that she would be happy to take on that referral. With that, the Council disbanded the Attorney Fees/Rule 68 committee.

2. Joinder/Rule 24

Judge Peterson reported that the committee had not met since the last Council meeting. He stated that he had sent the committee's draft amendment (Appendix B) to a group of attorneys who regularly practice law in the landlord-tenant arena, as suggested at the last Council meeting. He reminded the Council that Rule 24 B was intended as a special carve-out for forcible eviction and detainer (FED) practice so that, if the plaintiff joins a claim for, e.g., rent as well as possession, the summary FED procedures do not apply. However, that section of the rule is written a little oddly and has never been changed since it was initially promulgated.

Judge Peterson noted that he had sent the draft amendment to practitioners at all of the firms that regularly appear in front of him in FED court, both for the plaintiffs' side and the defense side, as well as to a couple of attorneys he knows who practice landlord-tenant law in Lane County and Jackson County. He received two responses, which he takes as a sign that the suggested change would not be too significant. The attorney from Jackson County suggested that the draft amendment may make it appear that there is a preemption issue where, if one does not bring a claim for unpaid rent or utilities, those claims are waived. Judge Peterson does not think that the draft reads that way; it just states that, if one is going to join a claim with money damages with a claim for possession, a Rule 7 summons will be used, the defendant will have 30 days to file an answer, and the case will be on the regular civil trial track. He thought that it was an excellent idea to run the draft past people who would be directly impacted by the change to see if any of them had concerns about the proposed change, and opined that the near silence was sort of deafening.

Mr. Goehler thought that the proposed change would be an update and clarification to the rule. He stated that it may be a relatively simple fix, and asked whether the committee needed to meet again and do any redrafting. Judge Bloom stated that the draft looks good to him and thanked Judge Peterson for his work. Judge Peterson suggested leaving the topic on the agenda for one more month to allow Council members to review it again and to ensure that there are no unintended consequences from the proposed change. If the Council approves of the changes, a vote can be held in January to move the draft amendment to the September agenda for a publication vote. The Council agreed. Ms. Nilsson stated that she would include the draft in the January meeting packet.

3. Judgments/Rule 67

Mr. Spooner reported that the committee had met. He noted that, prior to the committee meeting, Mr. Kekel had a meeting with trust and estate attorneys at his firm to get their take on things, and they pointed out to him that the Oregon Revised Statutes (ORS) already dictate what portions of the ORCP apply to probate proceedings and protective proceedings, and what ones do not. Those attorneys also pointed to various sections that inform their practice area on judgments and limited judgments, and indicated to Mr. Kekel that they do not follow ORCP 67 in much of their practice area. They also emphasized that, if there was a change made, it would need to include clarifying language maintaining a carve-out that ORCP 67 continues to not apply to probate proceedings. Mr. Spooner stated that the committee also discussed Judge Peterson's two versions of a proposed draft amendment (Appendix C) that were previously shared with the Council.

Mr. Joh stated that he was not present at the November Council meeting, but that he had reviewed the draft minutes and draft amendments. His understanding is that one of the concerns that is relevant to probate practice is that, in some cases, the practice can be messy and unruly. He stated that there is already an inherent authority by the courts to waive certain rules, but wondered whether a solution would be to incorporate within the rule express language that the judge can waive this requirement to give some flexibility.

Judge Peterson stated that he took another look at the relevant statute. ORS 112.200(2) indicates which rules are not applicable to probate practice, and ORS 112.200(3) states which of the ORCP are applicable. He pointed out that it is interesting that probate practitioners stated that Rule 67 does not apply in probate cases, because it is included in subsection 3, which enumerates the rules that *are* applicable. However, if it makes sense to make a change, it might be appropriate to make a request to the Legislature to move Rule 67 from ORS 112.200(3) to ORS 112.200(2), which would mean that it does *not* apply to probate cases. This would mean that no carve-out would be necessary in Rule 67 itself.

Judge Peterson recalled that Judge McIver suggested that one of the problems in her judicial district is that it takes a while to route judgments to the judge who is supposed to sign them. He noted that, in Multnomah County, there is a supplemental local rule (SLR) that requires the appropriate judge's name to be included in the caption. Judge Peterson stated that he had checked with the civil processing staff in Multnomah County to see to what degree the county's SLR is followed, and the answer was, "not regularly." There was some thought that, if this requirement was included in an ORCP, as opposed to a SLR, it might be followed more routinely. Civil processing staff thought that this could help speed up case processing by having the document directed to the person who will sign

it. Judge Peterson observed that this would not work in some cases. Typically, the judge who renders the decision will sign the judgment but, in the case of judgments by default and motions for summary judgment, it is unknown which judge will sign the judgment. Frequently, a senior judge will sign the order granting summary judgment, and then it will proceed to the presiding judge or her designee to sign the judgment. The person who submitted the judgment would not necessarily know which judge that will be.

Mr. Goehler stated that, whether the name of the judge is on the face of the document or not, it should be readily accessible in the Oregon Judicial Information System (OJIN). OJIN is set up to be able to find that information, but making the suggested change might eliminate the extra step of looking it up. Judge Hill stated that this would not make a difference in his district. As a presiding judge, he directs the signing of judgments. If the other judge is unavailable, he takes care of the judgments in her queue. There are different local processes with different docketing systems; some are centralized and some keep the same judge all the way through the case. Judge Hill did not think that such a change in the ORCP would be practical and suggested that this is instead an SLR issue.

Judge Peterson thanked Judge Hill for explaining why the idea would not be a good one statewide. Circling back to the original proposed change to ORCP 67, he noted that Mr. Kekel planned to take a closer look at what information, if any, other than the dates of limited judgments, should be included in a list of previous judgments enumerated in a general judgment. He explained that the committee does not have a new draft amendment yet, but that it would meet again and bring something before the Council in January.

4. Out-of-State Depositions/Rule 38 C

Ms. Wilson reminded the Council that the issue at hand is in regard to a potential practice trap that exists where there is a conflict between ORCP 38 C and the Uniform Trial Court Rule 5.140 on out-of-state depositions. She stated that the committee has not yet met, but that it would meet prior to the January Council meeting and would report back at that meeting.

5. Post-Judgment Subpoenas/Rule 55

Mr. Whitman stated that the committee had not yet met. He asked for assistance in setting up a committee meeting, as he is new to the Council and this is his first time as a committee chair. Judge Peterson noted that Council staff can help him set up a meeting and that he may reach out to Ms. Nilsson for assistance with scheduling and setting up a Zoom conference.

6. Service/Rules 7, 9 & 10

Judge Raschio reported that the committee had met and that the general consensus seemed to be to not make any changes to the service rules at this point in time. However, he noted that he received a note from Ms. Nilsson that morning noting that Mr. Joh wished to join the committee, so perhaps he has some fresh insight that the committee should consider. He recommended setting up another committee meeting in January.

Mr. Goehler asked what the committee's thoughts were about the misunderstanding by members of the bar about what it means to consent to email service. Judge Raschio stated that the committee thinks that it is not that difficult to understand and that, if one is looking for an opportunity to litigate, an opportunity can always be found. He thinks that the current rules provide clarity. Mr. Goehler asked about the committee's thoughts on the suggestion to eliminate the 3-day rule. Judge Raschio stated that the committee understands the reality that the 3-day rule does sometimes get used as a cudgel in litigation and that it can extend litigation. However, it exists for forms of service that still exist in the rules, and the committee generally felt that this is not an area in which there needs to be any type of change at this point in time. Mr. Spooner agreed with Judge Raschio's synopsis of the committee's viewpoint. He stated that the committee had also re-reviewed comparisons between the Federal Rules of Civil Procedure that the practitioners who brought the issues to the Council had pointed out. When reviewing that language in conjunction with the ORCP, the committee actually found there not to be really that significant of a difference in the current wording.

Judge Peterson observed that the 3-day extension in Rule 10 B seems to be a bone of contention raised with the Council each biennium. He stated that he likes it and noted that, if the Council were to modify Rule 10 B to mirror the FRCP, it would actually take away the 3-day rule for postal mail as well. He pointed out that, even when a pleading or document is e-filed, it is not necessarily accepted. Sometimes, filings get rejected. In addition, sometimes attorneys will email things on Friday evening after 5:00 p.m., and that was one of the reasons for the 3-day extension being added for email like it was for facsimile service years ago. He wondered if service by email is perhaps an attorney education issue. He stated that it has been a while since he practiced in federal court but, as he understands it, service is effective when it is sent but, if it is not received, then it is not effective. He noted that this is not much clearer than the ORCP, where email service is effective when sent if the receiving party agrees to that kind of service or when they acknowledge receipt.

Judge Peterson also noted that there was a suggestion that, in terms of notice issues, the summons form could be made more user-friendly, because most people who receive a summons are not lawyers. He suggested that, if the

committee is going to meet again, that issue should be on the agenda.

Judge Peterson also proposed a somewhat radical idea. He noted that some issues that had been raised related to service involve discovery documents. Rule 9 specifically has a carve-out that discovery documents do not need to be filed, because of their volume. However, most discovery today is electronic and no longer in paper format. He wondered whether making a change to Rule 9 to require that discovery requests (Rule 43 and Rule 45 requests) must be filed, just like any other document, would be helpful. Judge Raschio asked that Judge Peterson be present at the next committee meeting to discuss these issues with the committee, as his insight would be appreciated.

Mr. Goehler stated that it is important to make sure that the rules keep up with the times and technology as practice evolves but, if the current rules are working, it is fine to acknowledge this and not make changes for the sake of making changes. He noted that Oregon should be proud of having uniform rules. One of the challenges in other jurisdictions, like Washington, is that e-service rules may differ by county. Some counties in Washington do not even have e-filing, and email service does not exist. In King County, service is basically federalized. One can encounter the whole spectrum in one state, whereas Oregon has one rule that allows for email service as well as e-service and is pretty up-to-date on rules, technology, and practice.

7. Third Party Practice/Rule 22

The committee provided a memo to the Council (Appendix D). Ms. Dahab was not able to attend today's meeting, but Ms. Johnson reported in her absence. She stated that the committee does not have any language to share with the Council yet. Her understanding is that the committee has two action points. The first is to survey how other jurisdictions handle the issue of late additions of parties in third-party practice cases. The second is to look into the legislative history of the Council on Rule 22. Ms. Johnson stated that she has already reached out to Ms. Nilsson, who has shared legislative history information, but a committee member was going to circle back and do a little bit of a deeper dive into what the Council has previously attempted to do or considered. Once that is done, the committee will meet again and put together some proposed language. Ms. Johnson indicated that there probably is a philosophical difference among committee members as to whether late third-party practice should be more readily allowed and the extent to which a change might create additional litigation and a burden on the courts.

Mr. Goehler asked whether the issue is taking away the "required consent of all parties" piece or just the timing. Ms. Johnson explained that there are two requirements for late third-party practice, both consent of all of the parties and approval by the court. She stated that she believes that one of the proposals will

be to remove the consent of all of the parties. It is possible that an alternative would be to extend the time for late addition of parties to more than 90 days.

V. New Business

A. Rule 47 E

Judge Peterson reported that Judge Eric Dahlin of Multnomah County had made a suggestion for improvement to Rule 47 E (Appendix E). Judge Dahlin has two concerns. One has to do with assessing when an expert's declaration or an expert's opinion will defeat a motion for summary judgment. Judge Dahlin feels that the appellate decisions regarding this do not follow Rule 47 E. The rule uses the word "required," both in the lead line and in the language of the rule, and the appellate opinions seem to state that the expert's opinion "may or must" be helpful to put the issue in dispute.

The other part of Judge Dahlin's proposal is the concern that some attorneys may claim in the Rule 47 E certification that they have an expert who will put an issue in fact, but that they perhaps do not, and how to police that. The rule contains a mechanism for the party that was not being honest about having an expert to be sanctioned, and that would be fine if the case goes to trial, because the expert could be questioned about when they were first contacted by the attorney. However, for cases that are resolved before trial, there is not a way to get that information. Judge Dahlin's simple suggestion is to require at least some kind of documentation about the expert to be filed, perhaps under seal, to support a Rule 47 E statement that there is a retained expert whose testimony will defeat summary judgment.

Mr. Goehler suggested that the Council should discuss the formation of a committee. He stated that he thought that there may be some different applications of the rule in terms of when an issue of fact can be created by an expert. There are some times when it is obvious but sometimes, for example when there is a question of contract interpretation and a party tries to trump it with a declaration, it may not be appropriate. Mr. Goehler stated that there may be an opportunity to clarify the rule as to when an expert declaration does or does not apply. He also noted that there is a requirement that the declaration be submitted in good faith, and the suggested change would incorporate requirements that basically say, "there is an obligation of good faith, but we do not trust you and we want you to file something under seal." He did not know that it was worth the policing effort for the 1 in 10,000 attorneys who may not follow the rule.

Judge Hill stated that he thought that it was worth the effort to form a committee to discuss the issue. He believes that there will be strong opinions on different aspects of the issue, including whether the expert should be anonymous. Practitioners on the Council will have experiences that will be informative. Mr. Joh stated that he is also in favor of forming a committee. He wondered whether the attempt to police things will do more harm than good, given that there will always be bad actors who will do things

in bad faith, but stated that it is an issue worth discussing. He also expressed interest in discussing whether there could be a requirement added to identify the issue that would be made a disputed factual issue by the expert.

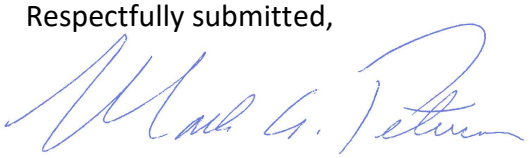
Judge Shorr stated that he was not sure as to which appellate cases Judge Dahlin is referring. He pointed out that the rule says, "if" an expert is required to create the fact issue, the party must present an ORCP 47E affidavit. He also noted that there will be issues for which an expert may obviously be required, like the standard of care in a medical malpractice case, but there will be many issues for which an expert is not required, and that alone seems like a substantive law issue rather than a procedural issue. Whether the committee feels like it is important to get into the policing issue may be procedural, but the rest seems substantive in his opinion.

Mr. Goehler stated that he thinks that there is enough interest to form a committee. He asked for volunteers. Judge Hill, Mr. Joh, Ms. Johnson, Mr. Marrs, and Mr. Shin joined the committee, with Mr. Joh chairing.

VI. Adjournment

Mr. Goehler adjourned the meeting at 10:35 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 8, 2025, 9:30 a.m.
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Members Present:

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

Members Absent:

Nadia Dahab
YoungWoo Joh
Derek Larwick
Michael Shin

Guests:

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

Council Staff:

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I. Call to Order

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

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

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

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

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

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

III. Administrative Matters

A. Staff Comments

This topic was carried over to the December agenda.

B. June Council Meeting

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

IV. Old Business

A. Committee Reports

1. Attorney Fees/Rule 68

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

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

2. Judgments/Rule 67

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

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

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

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

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

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

an amended pleading.

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

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

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

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

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

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

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

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

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

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

3. Service/Rules 7, 9, & 10

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

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

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

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

4. Third Party Practice/Rule 22

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

5. Joinder/Rule 24

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

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

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

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

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

B. Suggestions for Amendments to the ORCP

1. ORCP 38 C

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

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

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

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

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

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

2. Post-Judgment Subpoenas

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

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

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

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

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

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

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

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

V. New Business

A. Motions within Responses

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

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

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

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

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

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

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

B. E-Mail Service

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

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

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

C. Offers of Compromise

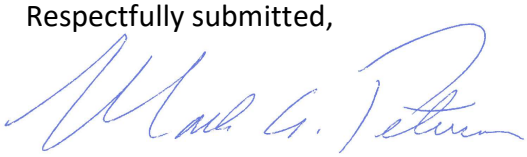
Judge Peterson again raised an issue that was not exactly new business, but related back to the Council's prior decision not to form a committee related to offers of compromise under Rule 54 E. He wanted to clarify for Council legislative history that the person making the suggestion did not just want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

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

VI. Adjournment

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

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

JOINDER OF CLAIMS

RULE 24

A Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

B Forcible entry and detainer [*and rental due.*] actions. If a claim of forcible entry and detainer and a claim for [*rental due*] **any other legal or equitable relief** are joined, the defendant shall have the same time to appear as is provided by rule or statute in **civil** actions [*for the recovery of rental due.*] **and the action is not governed by the provisions of ORS 105.100 to 105.168.**

C Separate statement. The claims joined must be separately stated and must not require different places of trial.

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JUDGMENTS

RULE 67

A Definitions. "Judgment" as used in these rules has the meaning given that term in ORS 18.005. "Order" as used in these rules means any other determination by a court or judge that is intermediate in nature.

[***B Judgment for less than all claims or parties in action.*** *When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may render a limited judgment as to one or more but fewer than all of the claims or parties. A judge may render a limited judgment under this section only if the judge determines that there is no just reason for delay*.]

B Judgment for less than all claims or parties in action.

B(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may render a limited judgment as to one or more but fewer than all of the claims or parties. A judge may render a limited judgment under this section only if the judge determines that there is no just reason for delay.

B(2) A party submitting a form of judgment must recite in the first paragraph of the judgment any judgment that was previously entered in the action that has not been vacated and the date of entry of each judgment. A supplemental judgment must recite only the date of entry of the general judgment and any judgment entered thereafter in the action.

C Relief granted. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

D Judgment in action for recovery of personal property. In an action to recover the

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possession of personal property, judgment for the plaintiff may be for the possession of the property, or for the value of the property in case a delivery cannot be had, and for damages for the detention of the property. If the property has been delivered to the plaintiff and the defendant claims a return of the property, judgment for the defendant may be for a return of the property, or the value of the property in case a return cannot be had, and damages for taking and withholding the property.

E Judgment in action against partnership, unincorporated association, or parties jointly indebted.

E(1) **Partnership and unincorporated association.** Judgment in an action against a partnership or unincorporated association that is sued in any name that it has assumed or by which it is known may be entered against that partnership or association and shall bind the joint property of all of the partners or associates.

E(2) **Joint obligations; effect of judgment.** In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all of those parties and a default, dismissal, or judgment in favor of or against less than all of those parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties.

F Judgment by stipulation.

F(1) **Availability of judgment by stipulation.** At any time after commencement of an action, a judgment may be given upon stipulation that a judgment for a specified amount or for a specific relief may be entered. The stipulation shall be by the party or parties against whom judgment is to be entered and the party or parties in whose favor judgment is to be entered. If the stipulation provides for attorney fees, costs, and disbursements, they may be entered as part of the judgment according to the stipulation.

F(2) **Filing; assent in open court.** The stipulation for judgment may be in a writing signed by the parties, their attorneys, or their authorized representatives. That writing shall be filed in

accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G Judgment on portion of claim exceeding counterclaim. The court may direct entry of a limited judgment as to that portion of any claim that exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if the party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

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B(2) The first paragraph of any form of judgment submitted by a party must recite any previous judgment entered in the action that has not been vacated and the date of entry of each such judgment. A supplemental judgment must recite only the date of entry of the general judgment and any judgement entered in the action thereafter.

C Relief granted. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

D Judgment in action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession of the

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property, or for the value of the property in case a delivery cannot be had, and for damages for the detention of the property. If the property has been delivered to the plaintiff and the defendant claims a return of the property, judgment for the defendant may be for a return of the property, or the value of the property in case a return cannot be had, and damages for taking and withholding the property.

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F(2) **Filing; assent in open court.** The stipulation for judgment may be in a writing signed by the parties, their attorneys, or their authorized representatives. That writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a

proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G Judgment on portion of claim exceeding counterclaim. The court may direct entry of a limited judgment as to that portion of any claim that exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if the party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

MEMO

To: Council on Court Procedures

From: Rule 22 Committee

Date: 12/4/25

Re: Committee Update

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

The proposal, generally speaking, would be to eliminate the requirement under ORCP 22C that all parties consent to addition of a third-party defendant after the 90-day period set forth in that rule. Eric expressed concern that the current practice for adding third-party claims after the 90-day period - which, in the absence of consent, often involves filing a separate action and seeking consolidation - potentially creates a Lara Johnson offered, and the committee discussed, the various additional "malpractice traps" that exist for both sides under several procedural rules and statutes, and Lara observed that this rule does not appear to be different in kind. Lara also provided background material about the current rule, including about its original enactment and prior proposals to amend it. The committee further discussed the concern that the proposal may result in prejudice to potential third-party defendants who do not wish to be joined in an action late in the litigation, and the idea that the current rule was developed to preserve some control for plaintiffs in the determining the course of their case. There was on resolution on whether the committee ultimately will propose any amendment.

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

Shari Nilsson <nilsson@lclark.edu>

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

1 message

Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us> Tue, Nov 11, 2025 at 12:21 AM
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, "ccp@lclark.edu" <ccp@lclark.edu>
Cc: Mark Peterson <mpeterso@lclark.edu>

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

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

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

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

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

Eric L. Dahlin
Circuit Court Judge

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

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

Mark

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

Dear Council on Court Procedures members:

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

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

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

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

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

Please let me know if you have any questions.

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Judge Biography

Him/He