

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
 Saturday, January 10, 2026, 9:30 a.m.
 Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
 Nadia Dahab
 Hon. Andrew Erwin
 Barry J. Goehler
 Hon. Jonathan R. Hill
 Ryan Jennings
 YoungWoo Joh
 Lara Johnson
 Derek Larwick
 Hon. Thomas A. McHill
 Hon. Michelle McIver
 Hon. Melvin Oden-Orr
 Hon. Robert Raschio
 Michael Shin
 Hon. Scott Shorr
 Hon. Todd Van Rysselberghe
 Bryce Whitman Passadore
 Alicia Wilson

Members Absent:

Hon. Christopher L. Garrett
 Melissa Hopkins
 Eric Kekel
 Julian Marrs
 Tom Spooner

Guests:

John Adams, Oregon Tax Court
 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
<ul style="list-style-type: none"> • ORCP 7 • ORCP 9 • ORCP 10 • ORCP 22 • ORCP 24 • ORCP 38 • ORCP 43 • ORCP 45 • ORCP 47 	<ul style="list-style-type: none"> • ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Clarity • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery • Ex Parte 	<ul style="list-style-type: none"> • Federalization • Guardians Ad Litem • "How To" Guides • Offers of Judgment • Pleadings • Receiverships • Remote Appearance • Security Bonds • Self-Represented Litigants • Subpoenas • Summary Judgment 	<ul style="list-style-type: none"> • 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 December 13, 2025, Minutes

Mr. Goehler called the Council's attention to the draft minutes from the December 13, 2025, meeting (Appendix A) and asked whether there were any suggestions for corrections. Judge Shorr stated that he would like to correct a sentence in the first full paragraph on page 11. He noted that the sentence currently reads, "He pointed out that the rule says that an expert is required to create the fact issue," but that it would more correctly read, "He pointed out that the rule says, 'if' an expert is required to create the fact issue, the party must present an ORCP 47 E affidavit."

Mr. Goehler asked for a motion to approve the minutes with Judge Shorr's correction. Judge Bloom made such a motion, Judge Shorr seconded, and the motion was approved by voice vote.

III. Administrative Matters

A. Staff Comments

This topic was carried over to the February agenda.

IV. Old Business

A. Committee Reports

1. Declaration of Expert Opinion/Rule 47 E

Mr. Joh reported that the committee had not yet met, but that he would schedule a committee meeting before the next Council meeting in February. Ms. Dahab, Judge Erwin, and Judge Oden-Orr joined the committee.

Mr. Goehler suggested that it might be a good idea for the committee to discuss when the expert materials are to be produced. He noted that he and Mr. Spooner have some experience on how it works at trial. Many times it is by agreement of the parties and, sometimes, it is handled by a motion in limine. Mr. Goehler stated that he has always thought of it as a trial management issue, or perhaps a rule of evidence issue as far as what is allowed for cross-examination, but not so much as a discovery issue. He wondered how other Council members see this issue and what they feel is the authority for disclosure of the expert's file before the expert testifies. Is it rooted in civil procedure, evidence, or trial practice?

Mr. Joh stated that he recalled this discussion from a previous meeting. His thought is that this situation is a bit of a malpractice trap for newer attorneys and for lawyers that come from outside of the state. In his experience, the practice has been inconsistent. It depends on the judge and the county, and the practice is not enumerated anywhere. There is no rule and no case law, at least with any level of clarity, to guide the practice. Mr. Joh stated that the e-mail chain with Judge Dahlin (Appendix B) has a subject line of "ORCP 47 E"; however, the issue goes beyond that portion of Rule 47. He does believe that some of the discussion that the committee will have about Rule 47 E is likely to overlap or be affected by any thoughts about the expert file. In his experience, with respect to the mechanism for producing an expert file, he has understood it to be a function of the rules of evidence, where there is a rule that provides for showing what the expert relied on. His understanding of the rule of evidence is that the last point at which the expert file can be protected is basically right after the expert goes on the stand and direct examination occurs. After that, the lawyer must turn over whatever the expert relied on for the other side to be able to do a cross-examination. Mr. Joh stated that he does not understand there to be any rules of discovery that require that. Personally, he would be interested in exploring a rule along those lines. He understands that this would come up against what he understands is the historical reticence by Oregon practitioners, as well as the Council itself, to make changes to the lack of expert discovery in Oregon.

Judge Peterson agreed with Mr. Joh that practitioners from other states may not be aware that Oregon is unique with regard to expert discovery. He stated that he believes that some part of this issue is procedural, and that it might be helpful to include in the rule a requirement for a motion or some sort of procedure to lay out what the practice is going to be for the timing of the production of the expert file.

Mr. Goehler stated that it is a good point to keep in mind that Rule 47 E does not exist on its own but, rather, within the context of Oregon's limitations on expert discovery. He agreed that it would be good for the committee to talk about expert discovery as well as the expert affidavit rule.

2. Joinder/Rule 24

Mr. Goehler reminded the Council that the committee had provided a draft amendment to Rule 24 for the Council's review (Appendix C). The Council was to decide whether any changes were needed or whether the draft could be placed on the agenda for the September publication meeting.

Judge Peterson noted that he has unintentionally developed some expertise in forcible entry and detainer (FED) practice, although this was not his intention when he went to law school. The suggestion for changes to the joinder rule

came from a former Council member, Judge Susie Norby. She opined that the rule does not read very well. Judge Peterson observed that the rule has not been amended since it was promulgated. Section B of the rule has a carve-out for FED practice, but the terminology is not very precise. House Bill 2001 (2023) made a change to the FED statutes that made very clear what constitutes “non payment” in the landlord/tenant context to include rent, late charges, fees, and charges described in the lease or the Oregon Residential Landlord and Tenant Act. However, Rule 24 only mentions “rental due.” If a plaintiff chooses to ask for additional relief other than simply for possession of the premises, that would make the case a regular civil action. The plaintiff would therefore not be entitled to use the summary procedures that are provided in an FED action: the short summons, with its command that the defendant appear at a first appearance within 8 days, and go to trial within 15 days.

Judge Peterson reminded the Council that he did send the draft amendment to about 15 firms or practitioners that he knows have expertise in this area, both on the plaintiffs’ side and the defense side. He only received two responses. One said that the draft amendment looked fine. The other asked whether it might cause any preclusion problem. Since he did not receive any comments back from the remaining practitioners, he assumes that they did not perceive any problems with the draft. Mr. Goehler pointed out that the rule is about permissive joinder, so he did not believe that issue preclusion would be a problem.

Judge Hill made a motion to place the draft amendment to Rule 24 on the September publication agenda. Judge Oden-Orr seconded the motion, which was passed by voice vote. Judge Peterson asked that all Council members take an extra look at the draft between now and September. If anyone notices something wrong with the draft between now and September, they are absolutely entitled to bring it up again.

3. Judgments/Rule 67

Judge Peterson reported that the committee had not met since the last Council meeting.

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

Ms. Wilson reported that the committee, consisting of herself and Judge McHill, had met in December. She stated that, looking at ORCP 38 C, it is clear that Oregon has adopted a rule that is intended to encompass the Uniform Depositions and Discovery Act (UDDA), which most other states have adopted, as a more streamlined foreign deposition process. From her and Judge McHill’s experience, the UDDA process does not occur that often. It is a process where one uses a subpoena in the form of the foreign jurisdiction, then also completes a subpoena that would comply with Oregon law. Ms. Wilson noted that the

UTCR (Rule 5.130) contains two processes for foreign depositions. One is the more streamlined process that tracks ORCP 38 C, and the second is for jurisdictions that have not adopted the UDDA, where a commission or letters rogatory from the other jurisdiction may be required.

Ms. Wilson stated that the committee's conclusion is that, if there is an issue, it is a UTCR issue. However, she stated that it seems to make sense that there is a more streamlined process if the other state has adopted the UDDA, as that is the purpose of the agreement of the different jurisdictions. The committee did not see a reason to make a change to the ORCP.

Judge Peterson wondered exactly how many states have adopted the UDDA. Ms. Wilson stated that she thought that it may be 48 states but that she could not find the exact number. Judge Peterson noted that it might be helpful for Council history to have the exact number and to know which states are outliers. Before making any decisions, he suggested deferring the matter to the next Council meeting, as Mr. Kekel was not present today and it was his partner who brought the matter to the Council's attention. He wanted to ensure that all relevant input had been presented to the Council. Judge Peterson also agreed that it is not unreasonable to have consequences for the jurisdictions that do not adopt the UDDA, if that is what the intent of the Act is.

Ms. Wilson stated that the committee could check in with the UTCR Committee on those two different procedures, but she noted that there is case law recognizing that the process in ORCP 38 C is based on the UDDA. Mr. Goehler asked Ms. Wilson to prepare a memo summarizing the committee's actions and enumerating the jurisdictions where the UDDA has not been adopted. Ms. Wilson agreed to do so.

5. Post-Judgment Subpoenas/Rule 55

Mr. Passadore reported that the committee had not met since the last Council meeting but stated that he would schedule a committee meeting before the February Council meeting.

6. Service/Rules 7, 9, & 10

Judge Peterson reported that the committee had not met since the last Council meeting. He noted that the committee intends to continue to discuss the 3-day extension in Rule 10 B. The committee's preliminary thought is that it is a good idea to keep the 3-day extension in the rule. The committee will also continue to discuss whether clarity might need to be added regarding email service, because some attorneys have varying understandings as to whether such service is effective and, if so, when it is effective. Judge Peterson explained that the committee intends to discuss the Rule 7 summons form and whether it can be

made more readable for the laypeople who are most often the recipients of summons forms. Finally, Judge Peterson remarked that, at the last Council meeting, he had suggested requiring Rule 43 and Rule 45 requests to be filed. There is currently a carve-out in Rule 9 exempting them from filing; however, now that everything is electronic, the requests could be filed with the court to perhaps help avoid contentions of practitioners that they did not receive a request for production of documents or a request for admissions. He stated that he believes that is the final issue on the committee's agenda.

Mr. Goehler stated that he thought that the trending view among committee members was toward leaving the service rules alone, but he agreed that it will be helpful for the committee to discuss the issues further to ensure that the Council is confident that the rules are keeping up with the times and how practices like e-service are currently happening.

7. Third Party Practice/Rule 22

Ms. Dahab reported that the committee is still considering changes to Rule 22 regarding the consent requirement of all parties for the addition of third-party defendants after the 90-day period runs. She stated that the committee is still working to determine the original intent of the rule, the legislative history as changes were considered and rejected over the course of history, what happens in other jurisdictions, and, specifically, the evolution of other laws affecting third-party practice, like comparative fault, that have changed the development of the law since Rule 22 was initially adopted. Ms. Dahab stated that the committee's goal is to have a memo and a summary of potential options for either modifications or no modifications to Rule 22. She stated that she does not expect the committee to reach any consensus on the question. However, members will talk through potential options and put them in writing for the Council's consideration.

Mr. Goehler summarized that the options would be to leave the rule alone, to not require consent of all parties, or to tinker with the timing of the rule. Ms. Dahab stated that the committee has discussed all three of these options, as well as a potential fourth option, which is to add some sort of newer, "should-have-known" discovery-type wording into the rule. She reemphasized that the committee has been researching other jurisdictions and comparing them to existing Oregon law to the extent that it provides any clarity on the question, and that this will be included in the memo to the Council as well.

V. New Business

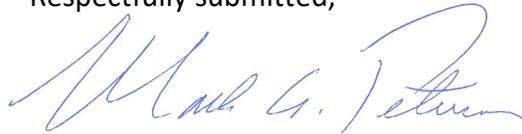
No new business was raised.

VI. Adjournment

Judge Peterson reminded the Council that there are just five Council meetings left before the September promulgation meeting. While that seems like a lot of time, it does go fast. He noted that making no change to a rule is absolutely an appropriate result, if the Council can document why it made no change. Research into the origins of the rule, comparison to federal practice, and comparisons to other jurisdictions are all helpful for a committee's consideration. He opined that Oregon's procedures are better than those of most jurisdictions, and stated that the Council's legislative history is helpful to litigants. To the extent that committees can provide, in the next few months, either a draft amendment or a report explaining why no change will be made, that will be very helpful. Ms. Nilsson reminded the Council that the February meeting will be held on the first, rather than the second, Saturday: February 7, 2026.

Mr. Goehler adjourned the meeting at 10:03 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
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 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

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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 (UTCRC). 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.

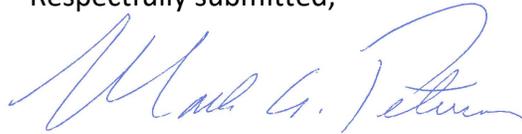
Judge Shorr stated that he was not sure as to which appellate cases Judge Dahlin is referring. He pointed out that the rule says that an expert is required to create the fact issue. He also noted that there will be issues for which an expert may obviously be required, like the standard of care in a medical 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



Shari Nilsson <nilsson@lclark.edu>

RE: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations - follow up about scope of expert file that has to be disclosed

1 message

Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
To: "Eric L. Dahlin" <Eric.L.Dahlin@ojd.state.or.us>, Mark Peterson <mpeterso@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

Wed, Jan 7, 2026 at 9:57 PM

Eric,

Thanks for the clarification. Your suggestion should make for a lively discussion at the January Council meeting. We will see what the collective experiences of the judge members and attorney members is and if the Council should focus in on what appears to be a matter of procedure.

Mark

From: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>
Sent: Wednesday, January 7, 2026 11:22 AM
To: Mark Peterson <mpeterso@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>; Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: RE: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations - follow up about scope of expert file that has to be disclosed

Mark – my concern is more about what is included in the file, not the timing of the disclosures. I think everything the expert has touched should be included in the file and disclosed. The reason I think the rule should be clarified is that some attorneys either don't disclose the entire file or are surprised when they are told they need to disclose the entire file. If the rule is clear about what needs to be disclosed, then there will not be surprises and there won't be inconsistent rulings about what has to be disclosed.

With that being said, it wouldn't hurt to have the rule state when the disclosures should occur, though allowing the parties or the judge to modify those timelines. I suspect many judges order the disclosure by 5 pm the day before the expert testifies. That is what I used to do, but I changed that to

3 pm at the request of a party said that the 5 pm (or later) disclosure meant that their staff had to stay late to process the file, so I moved the time up to accommodate staff.

Eric L. Dahlin
Circuit Court Judge
Multnomah County Circuit Court

From: Mark Peterson <mpeterso@lclark.edu>
Sent: Wednesday, January 7, 2026 10:34 AM
To: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>
Cc: Shari Nilsson <nilsson@lclark.edu>; Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: Re: Suggestion that the Council on Court Procedures re-examine ORCP 47E regarding expert declarations - follow up about scope of expert file that has to be disclosed

WARNING: This email is from outside of the Oregon Judicial Department. If links or files in this email are unexpected, even if from an email address you trust, please call the sender on the phone and verify them before you click.

Eric,

How and when to disclose expert files? A reasonable ask. In fact, the issue was raised when your suggestion for a change to Rule 47 E was discussed at the December meeting. The general consensus is that all judges allow disclosure and that each judge has his or her procedure for said disclosure. Some Council members pointed out that it presents an additional concern getting ready for trial to be guessing what procedure a particular judge prefers. This is especially true in this county where one may not know which judge will be assigned. The general suggestion was to confer with the other party and then seek guidance from the judge shortly before trial, That is an imperfect resolution, certainly in this county. Do you have a proposal that will not infringe too heavily on a judge's preferences? Possibly inserting a motion requirement to get everyone on board with the expert disclosure procedures that will be in play would solve the problem in many districts but I do not see it as a solution in this county. Your thoughts?

Mark

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Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
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Council on Court Proceduers
January 10, 2026, Meeting
Appendix B-2

mpeterso@lclark.edu

(503) 768-6505

On Mon, Jan 5, 2026 at 4:39 PM Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us> wrote:

Mark – when looking at ORCP 47E, it may also make sense for the Council to expressly state what the expectations are for turning over an expert’s file, and in particular whether any part of the file is protected from disclosure under the work product doctrine. Even though ORCP 47E does not address disclosure of the expert’s file, every judge I am aware of requires that the expert’s file be turned over before cross examination (often the day before testimony) but I don’t know that there is consistency about whether the entire file, or only portions of the file, have to be turned over.

I have consistently ruled that the *entire* file of a testifying expert has to be provided and that any work product protections do not apply at that point, though some attorneys think that they can withhold large portions of the file on the grounds of work product. I had two jury trials in 2025 where the attorneys had not only sent a list of potential questions to the expert but also had sent a list of *answers* they were expecting the expert to give – essentially a full script of the direct exam. Although a lawyer could certainly argue that they are just providing the expert a summary of what the lawyer thought the expert would say based on what their conversations had been, it could also be seen as the lawyer suggesting to the expert what the expert should say. I think a script of direct exam is highly relevant for cross examination, and I can say that the jurors we're uniformly unimpressed by the lawyers doing this.

If sending such a “script” to an expert is protected work product that would never have to be disclosed, then lawyers in every case could simply write out in detail what they want the expert to say, and if the expert is truly a hired gun without scruples and is willing to say whatever they are asked to say, the jury would never have any idea that it is the lawyer who is driving the expert’s testimony, not the expert. Based on my experience with juries, that would be very important information to a jury in evaluating the credibility of an expert. It seems that keeping such information from the jury in the name of work product is not consistent with a search for the truth. I realize this could still be done orally and the jury would not have a way of learning out what the discussions were, but it is more difficult to sculpt and remember expected testimony when all the preparation is oral and nothing is committed to writing.

If the attorney is going to argue that they are not directing the expert what to say, and they are just summarizing what the expert has told them, then I don't see how the attorney work product doctrine would apply in the first place because this is not showing the mental impressions of the attorney, it is showing the mental impressions of the expert. And I would not consider an expert witness as a "representative of the party" as that term is used in ORCP 44B(3)(a) any more than any other non-party witness in a case.

If an expert's entire file is not required to be produced because there are parts that are work product because they show the mental impressions of the attorney or the expert, then presumably almost nothing in the expert's file would have to be disclosed because everything the expert – who is a stranger to the case – has in the file is related to mental impressions and preparation for that particular litigation.

Because there is evidently enough confusion over this important issue, I think the rules should directly address the issue of whether there are any work product protections that can be asserted once the expert has testified, and I think the rule should directly state what the expectations are for turning over the expert file before cross examination. This is a policy issue that seems to be better addressed by the Council in the first instance, as opposed to the courts developing law on this on an ad hoc, and potentially inconsistent, basis.

I would think this would be of interest to both the plaintiff bar and the defense bar, as this would apply in equal measure to each side.

Thanks for considering this.

Eric L. Dahlin
Circuit Court Judge
Multnomah County Circuit Court

From: Mark Peterson <mpeterso@lclark.edu>
Sent: Sunday, December 21, 2025 8:36 PM
To: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>

Cc: Shari Nilsson <nilsson@lclark.edu>

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

WARNING: This email is from outside of the Oregon Judicial Department. If links or files in this email are unexpected, even if from an email address you trust, please call the sender on the phone and verify them before you click.

Thanks Eric. I will share your response with the committee. Rue 47 is impactful, and often a near-black hole for a good deal of attorney time and effort with no reward in the end. A good look by a committee that will be balanced, representing both the plaintiff and defense sides is appropriate.

Mark

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Mark A. Peterson

Executive Director

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Clinical Professor of Law

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On Sun, Dec 21, 2025 at 2:31 PM Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us> wrote:

Mark – I am pretty sure the “may or must” language first appeared in *Moore v. Kaiser Permanente*, 91 Or App 262 (1988). There was no discussion in that case about the language from ORCP 47E “If a party, in opposing a motion for summary judgment, *is required* to provide the opinion of an expert to establish a genuine issue of material fact ...” (emphasis added), other than quoting the rule in a footnote, so the court was not engaging in any kind of statutory interpretation in coming up with that language. This language was also dicta because it was not needed for the resolution of the issues in the case, and in my opinion it was the worst kind of dicta because it was stray language without any supporting authority, yet that stray language has been picked up by subsequent courts who have cited it as a holding.

Many subsequent decisions have used the “may or must” language, and quote *Moore* as the authority for that (or cite cases that had cited *Moore* for that proposition), and even emphasize the quotation, but there still has been no attempt to address the actual language of the rule and to explain how the “may or must” language is consistent with the “required” language of the rule.

It may be the case that if the appellate courts, or the Council, conducted a statutory interpretation analysis that they would determine that in context that “required” means “may or must,” but the main concern that I have is that such statutory interpretation analysis has not been done. It seems to create unnecessary confusion when the appellate courts impute language to the rule that does not exist in the rule. And if it is determined that “required” really means “may or must” then it seems that the rule should be changed to say just that.

It also appears to me that when the appellate courts have subsequently discussed and expanded the ORCP 47E case law in other contexts, this seems to happen without much, if any, reference to the language of the rule itself or the legislative history. Again, because ORCP 47E is a creature of statute, any interpretation of or expansion of the rule should be tethered to the language of the rule itself. It seems to me that it has been treated more as an issue of common law as opposed to statutory interpretation. If the Council determines that the discussion of the rule in various cases is exactly what it would have done had it thought at the outset to have a more robust explanation of the rule, it seems to make sense to go ahead and put all of that explanation and context directly into the rule.

Thanks for considering this.

Eric L. Dahlin
Circuit Court Judge
Multnomah County Circuit Court

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, December 17, 2025 3:52 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

Eric,

The Council on Court Procedures decided to form a committee to explore your suggestions for amendments to ORCP 47. Forming a committee may or may not result in an amendment to a rule; the committee may recommend no change after considering any proposed amendments and how a change may impact practice. There was some question as to which appellate decisions that you were referring to that have approved “decision creep.” The committee will undoubtedly look at what it considers to be relevant decisions but, if you are to supply the decisions that most clearly point out your analysis, the committee will be certain to appreciate your concern. You can follow the progress of your proposal on the Council’s website—counciloncourprocedures.org.

Thanks again for making a suggestion to make the rules of civil procedure work better for litigants, lawyers, and judges.

Mark

Mark

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

Sent: Monday, November 10, 2025 3:22 PM

To: Mark A. Peterson <Mark.A.Peterson@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

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

However, regardless of whether that portion of the rule is changed or adhered to, it does seem that an enforcement (and deterrent) mechanism is needed and would be appropriate. I did not raise that issue in my prior communications with the Council because I had not thought about that before. The reason I am raising this issue now is that this issue came up in a recent case of mine where the defense was very suspicious that any expert could have legitimately offered an opinion that would create a question of fact, and I realized that without having plaintiff's counsel somehow timestamp that opinion that it would be very difficult after trial to analyze whether it was proper to use a ORCP 47E declaration to defeat summary judgment. I did order that plaintiff's counsel time stamp the opinion, which they chafed at because it took so much time to put that together. But the fact that the plaintiff's counsel complained that it took an excessive amount of time to memorialize the opinion (I did not require a report, I just required that the opinion be documented based on what the expert had already provided to the lawyer, which could have been an email from the expert or a memo to file from the lawyer based on oral discussions etc.) further solidified my belief that there needs to be some mechanism in place to be able to prove later that *at the time of the ORCP 47E declaration* that the expert had actually rendered a particular opinion that would create a question of fact. I can't imagine that any attorney worth their salt would not have that opinion documented in some fashion at the time they made the ORCP 47E declaration, so they could simply copy and paste that and file it with almost no extra time. If attorneys are intentionally not documenting the opinions in any form but are nonetheless representing to the court that the expert has actually rendered an opinion that would create a question of fact, then that would make it almost impossible to determine what was known at the time of the ORCP 47E declaration, as opposed to what was developed later on as trial approaches. That seems to be antithetical to the rule.

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

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

Eric L. Dahlin
Circuit Court Judge

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>

Sent: Monday, November 10, 2025 1:41 PM

To: Eric L. Dahlin <Eric.L.Dahlin@ojd.state.or.us>; ccp@lclark.edu

Cc: Mark Peterson <mpeterso@lclark.edu>

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

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

Mark

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

Sent: Monday, November 10, 2025 1:17 PM

To: ccp@lclark.edu

Cc: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>

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

Dear Council on Court Procedures members:

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

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

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

On a separate but related matter, at a minimum it may make sense for the Council to modify the rule to provide a mechanism to evaluate *after trial or other resolution* whether an ORCP 47E declaration was, *at the time it was filed*, made in good faith and supported by an adequate opinion. The appellate courts routinely refer to the ability to obtain sanctions for an ORCP 47E declaration made in bad faith as being sufficient to ensure that the declarations are made in good faith. However, there is no formal mechanism in place by which such an evaluation can be made because a contemporaneous expert report is not required to be submitted when the ORCP 47E declaration is filed, and if the case is resolved short of trial, the expert’s opinion would never otherwise be disclosed. Perhaps the Council could update the rule to require that when an ORCP 47E declaration is filed that the party simultaneously file *under seal* the precise basis on which the ORCP 47E declaration is made. This would be consistent with the rule’s purpose to not allow summary judgment to be used as a discovery device, because the information could only be unsealed later after the case had been tried or otherwise resolved. Such a requirement would require minimal additional effort for the lawyer because the rule already requires that the expert “has actually rendered an opinion or provided facts” that would create a question of fact, so presumably the lawyer could just copy and paste the expert’s opinion into a document and then file that document under seal. This would also avoid the situation where an attorney who did not at the time of submitting the declaration have an expert retained that would create a question of fact could later retain an expert and have that person testify at trial and then argue there need not be any inquiry about what was known by the attorney at the time the declaration was submitted.

Please let me know if you have any questions.

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

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

[Judge Biography](#)

Him/He

1 **JOINDER OF CLAIMS**

2 **RULE 24**

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

6 **B Forcible entry and detainer [*and rental due.*] actions.** If a claim of forcible entry and
7 detainer and a claim for [*rental due*] **any other legal or equitable relief** are joined, the
8 defendant shall have the same time to appear as is provided by rule or statute in **civil** actions
9 [*for the recovery of rental due.*] **and the action is not governed by the provisions of ORS**
10 **105.100 to 105.168.**

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