

Ghostbusters Meets Guardians of the Galaxy: Giving Life to the Council on Court Procedures

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“If There’s Something Strange... in Your Neighborhood...”

A long time ago, in a legal system far, far away, Oregon had a canon of laws so antiquated that it was aptly named “the Deady Code.” This ghost of the past—compiled and annotated by Judge Matthew Deady 160 years ago—haunted civil procedure in Oregon from 1862 to 1977.



**HONORABLE
SUSIE L. NORBY**

As early as the mid-1920s, Oregon’s bench and bar resolved to exorcise that ghost and create a better civil procedure blueprint. But finding a ghostbuster squad to liquify the Deady Code was not easy. Legislators sidestepped the daunting rule renovation venture. A 1939 OSB Committee considered empowering the Supreme Court to enact new trial court rules, but bar members voted against it, wanting litigators and trial judges to influence rule reform. A 1962 proposal for a new state constitution again tried to shift rulemaking to the Supreme Court but failed.² The Deady Code remained undead.

“Who You Gonna McCall?”

Finally, in 1975, Governor McCall’s visionary Commission on Judicial Reform, the Oregon State Bar, and the state’s judiciary cooperatively deduced that an ideal ghostbuster squad must extend beyond the legislature and the Supreme Court to include trial judges and lawyers with broad perspectives. They jointly created the Council on Court Procedures with 23 volunteers: one Supreme Court Justice, one Court of Appeals Judge, eight trial court

judges, six plaintiff litigation attorneys, six defense litigation attorneys, and one public member.³ In 1977 these ghostbusters liquified the Deady Code with rule-reforming plasma guns and modernized Oregon’s civil procedure. By 1979, the Council had created Rules 1-64 to guide civil procedure through trial completion. After publication, public comment and acceptance by the legislature, those rules were enacted, and buried the laws of yesteryear. By 1981, Rules 65 through 85 completed Oregon’s new Code of Civil Procedure. The Deady *coda* came to life.

Interface—The Final Frontier

After the original ghostbuster Council vanquished the Deady Code and created a more evolved civil procedure process, it resolved that the new rules must not only live but thrive. So, the Ghostbuster Council members mutated into “Guardians of the Galaxy (of Civil Procedure Rules).” Their new mission: to continually study Oregon civil procedure laws, reexamine existing rules and seek out new ideas and viewpoints.

As egalitarian as the Council members are, even broader inclusion of trial lawyer ideas is key to its mission. Each biennium, the Council distributes surveys inviting Oregon attorneys to suggest ideas for rule improvement. Responses land on the desk of the Council’s own Miss Money Penny—an Executive Assistant with epic skills. Dozens of ideas are sent by lawyers, judges, and organizations that interact with civil courts. They are compiled into a chart for Council members to review and decide which to focus on in that biennium. Once choices are made, committees are formed, sleeves are rolled up, and debates and re-writing begin.

We Ain’t Afraid of No Consensus!

Oregon’s Council on Court Procedures is anomalously democratic compared to other courts’ civil procedure rulemaking overlords. Most federal and state rulemaking power is held exclusively by the highest-ranking judges. Even states with rulemaking committees typically invite only judges to join. Oregon is different. By statute, there are more attorneys on the Council than judges. A quorum requires approval by plaintiff litigators, defense litigators, and judges.

Since today’s civil procedure code is comparatively young, each new proposal for change is cautiously considered. The Council’s Saturday morning monthly meetings last several hours, with some members zealously defending existing rule language while others champion the proposed change. Sometimes a single rule change debate spans many meetings, yet never reaches a point of consensus that advances it for publication to the bar and submission to the legislature. No Council member is immune to the consequences of rule changes, because Council members are not only volunteer Guardians of the Galaxy (of Civil Procedure Rules) but also inhabitants of the worlds affected by rule changes, who must live with Council decisions in their own professional lives.

Time-Space Continuum

Just as a superhero film takes years to produce, so does a rule change take two years to complete. The Council’s own Steven Spielberg, Executive Director Mark Peterson, has harnessed enthusiasm and harmonized discord of ardent Council members for 17 years.

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The first step in the rule change process is action-packed. Its arc begins in August of odd-numbered years when committees are formed to configure and consider new projects. To approve a rule change proposal, a majority vote during a full Council meeting attended by a quorum of members must deem it worthy. Once a proposal is approved, which takes several months, Moneypenny converts it into final form for publication to all Oregon bar members to critique. The Council reviews every comment, then votes on whether to deliver final amendment proposals to the state legislature.

When the next long legislative session begins, neither the Senate nor the House vote on the Council's proposals. The law requires that they be published with the Oregon Revised Statutes the following January. The legislature retains the option to enact other rules, modify a change, or reject a recommendation, and remains the entity that rulemaking power would revert to if the Council is disbanded. But for 45 years, the legislature has welcomed nearly all Council creations. The Guardians of the (Civil Procedure Rules) Galaxy continue to find favor with lawmakers the Council was created to help.

Rulemaking Kryptonite

Though the Council's superpowers may seem limitless, there are two forms of kryptonite that unfailingly repel a rule amendment proposal. The first arises from ORS 1.735(1), which authorizes the Council to make rules "governing pleading, practice and procedure ... in all courts of the state **which shall not abridge, enlarge, or modify the substantive rights of any litigant.**" When a rule change proposal may affect a litigant's substantive rights, the Council is powerless to approve it. Many biennial survey comments lament the Council's inaction on substantive issues, urging it to be bolder. Alas, only the legislature has the superpower to alter substantive law.

The second form of kryptonite arises from ORCP 1B, which requires: "These rules shall be construed **to secure the just, speedy, and inexpensive determination of every action.**" Other biennial survey comments question whether the Council purposely alters rules to make litigants' lives more difficult. It does not. On the contrary, whenever a proposal threatens the just, speedy, and inexpensive determination of any action, it is in jeopardy. The Council members retreat unless there is no other way to craft a necessary rule improvement.

Edge of Tomorrow

The Council on Court Procedures busted the ghosts of the past, guards civil procedure in the present, and shapes Oregon's court processes for the future, a mission of galactic proportions. There were only four Ghostbusters, and only five Guardians of the Galaxy. Even if Agent 007 and Superman vote, too, the Council would not reach a quorum. A dozen more volunteers comprise our 23-member Civil Justice League. Council member identities shift continuously; each is appointed for four years and must pass their cape to a new crusader after eight years. Leadership power is balanced by rotating plaintiffs' attorneys and defense attorneys as Chairperson in each new biennium.

Every Council on Court Procedures volunteer knows that Oregon's Rules of Civil Procedure are imperfect. It is a perpetual challenge to protect, revise, and harmonize rules while modernizing parts that no longer function well, and balancing interests of all who work for civil justice. Serving on the Council is a privilege and a unifying pursuit, akin to jury service. Unlikely collaborators unite—people from divergent legal standpoints and dissimilar communities. These protectors, critics, and visionaries clash and collaborate over the rules in a cacophony of voices, rising and falling for hours as members passionately debate whether rule changes

would bring clarity or calamity. Then, at meeting's end, dissonance resolves into conviviality, as combatants retreat into friendships forged in the verbal fire.

Oregon civil procedure has come a long way since the exorcism of the Deady Code 45 years ago. Council on Court Procedure volunteers are not cinematic action heroes unifying to protect people from mythic threats. But they are steadfast allies bound by a shared mission to protect Oregon's procedural code from the threat of obsolescence. No one need buy a ticket to see the Council or pay money to read stories of the Council's adventures. Council meetings are open to the public and meeting minutes are posted on its website.⁴ You don't need a superpower to be a potential future Council member either—just litigation experience, a collaborative nature, and a love of law. For Council on Court Procedure members, a sense of duty is mandatory, but capes and intergalactic ancestry are, surprisingly, optional.

Endnotes

- 1 NOTE ABOUT THE AUTHOR: Hon. Susie L. Norby has served as a trial judge in Clackamas County since 2006 and on the Council on Court Procedures since 2017. She spearheaded the Council's recent overhaul of ORCP 55, in response to a survey comment that simply read: "ORCP 55 is a mess. Can you do something about that?" Other biennial survey notes sometimes criticize the Council based on misconceptions about why the Council exists, how it works, and who is on it. This article is an explanatory response, unanimously approved by all Council members. The Council thanks OADC for its support of the Council and enthusiastic willingness to publish this to its members.
- 2 For a more in-depth account of the history leading up to the creation of the Council on Court Procedures, see Frederic R. Merrill, *The Oregon Rules of Civil Procedure – History and Background, Basic Application, and The "Merger" of Law and Equity*, 65 Or L Rev 527 (1986).
- 3 ORS 1.730
- 4 <https://counciloncourtprocedures.org>.