

**Public Safety Subcommittee of the Joint Ways and Means Committee  
Testimony in Support of Council on Court Procedures, HB 5016, Section 6  
Wednesday, March 20, 2013**

**Background: The Council and its Mission**

In 1977, the Legislative Assembly recognized the need for a comprehensive set of rules of civil procedure proposed by a body that could conduct a deliberative, careful review of the rules governing litigants and the public in civil actions in Oregon's court system. As a result, the Legislature formed the Council on Court Procedures. In 1980, the Council proposed and the Legislature adopted the Oregon Rules of Civil Procedure (ORCP). The Legislature authorized the Council to make biennial revisions to the ORCP as necessary to respond to an increasingly complex environment of statutes, case law, rules and regulations, and technology. As the Legislature has already recognized, a coherent set of procedural rules, and a consensus regarding any changes to them, is critical to the efficient functioning of the courts.

Review of the ORCP is time-consuming, and highly technical. Council members perform their duties on a volunteer basis contributing hundreds of hours of their time to the process. The task can be challenging for non-lawyers who have no personal experience with the way the rules work in a courtroom setting. For these reasons, the Legislature determined that it would be better for this process to be undertaken by those who are experts in the field. The Legislature retains the authority to amend or repeal Council proposals and to amend the ORCP by statute as it deems appropriate.

The Council is a balanced group representative of the geography of the state as well as practice areas of the bar. Its membership consists of:

- one Supreme Court justice;
- one Court of Appeals judge;
- eight circuit court judges from across the state;
- 12 Oregon lawyers appointed by the Oregon State Bar (chosen equally from the defense and plaintiffs' bar); and
- a public member chosen by the Oregon Supreme Court.

The Council's work is primarily performed when the Legislature is not in session, so that any proposed rule changes can be presented to the Legislature when the session begins. During the legislative session, the Council is available to assist legislators with questions about proposed changes to the rules, and with changes which may be proposed in the legislative process that did not go through the Council.

**The Council's Performance**

Hundreds of thousands of Oregonians use and rely upon the ORCP each year. According to Oregon Judicial Department statistics, 159, 586 civil cases were filed in 2011 (the most recent year for which statistics are available), each of which would involve at least two parties and, not infrequently, multiple parties. During the 2011-2013 biennium, the Council promulgated the following rule changes:

- **ORCP 17** Added language to clarify that electronic signatures on pleadings and court documents may be allowed, consistent with other ORCP and other rules of court, as the court

system transitions to electronic filing.

- **ORCP 19** Replaced the historic affirmative defense of res judicata with the more modern and specific concepts of claim preclusion and issue preclusion.
- **ORCP 39** When a deposition subpoena seeks testimony of a person (usually unknown to the party issuing the subpoena) to testify on behalf of an organization or a company, the party providing the witness will be required to disclose the witness' identity in advance of the deposition to promote efficiency.
- **ORCP 55** The promulgated amendment requires that the plaintiff identify any medical records which are not being produced in discovery, and the applicable privilege, to improve the discovery process and reduce the frequency that the courts must rule on motions to compel.
- **ORCP 57** Under the current rule, alternate jurors are discharged at the time when the jury begins to deliberate. The promulgated rule provides that alternate jurors will not be discharged until the verdict is given so that, if a juror becomes unable to continue, the alternate juror(s) will be available, at the judge's discretion, to deliberate with the remaining jurors and to reach a verdict. The amendment also allows more flexibility in selecting, seating, and using alternate jurors.
- **ORCP 59** The promulgated amendment authorizes the trial court to specify the appropriate time at which a party can make a concern with a jury instruction known to the trial court, is not unduly technical, and preserves the issue for appeal if the court does not give or modify the proposed instruction.
- **ORCP 68** The promulgated amendment provides better procedures for informing the court of the disputed issues in the parties' filings, so that the need for a hearing in some cases is obviated, clarifies when a right to attorney fees must be plead in cases, such as domestic relations actions, when litigation arises from a motion or a response rather than from a complaint and an answer, and makes clear that Rule 68 is the exclusive procedure for seeking, opposing, and obtaining an award of attorney fees unless (as in probate practice) the Legislature refers to Rule 68 but provides different procedures.

In addition, the Council has continued to expand its website offerings ([www.counciloncourtprocedures.org](http://www.counciloncourtprocedures.org)) and to increase the volume of archived materials available to attorneys who do not have easy access to the seven law libraries which hold Council materials, all of which are located in the Willamette Valley.

The Council receives high marks for the quality of its work. Of the 448 judges and attorneys who responded to the Council's 2009 survey who were familiar with the Council's work:

- **79% rated its quality of work as excellent or good;**
- **65% rated its responsiveness to the needs of litigants, lawyers, and judges as excellent or good; and**
- **71% rated the Council's website as excellent or good.**

Oregon has one of the most efficient court systems in the nation. Efficient civil court rules are important to a well-functioning economy. The rules must be updated regularly to reflect changes in technology, practice, and federal and state statutes, as well as new appellate court decisions which indicate that amendments to existing rules may be desirable.

## **Council Funding**

The Council thanks the Legislature for its longstanding support. In the past biennium, the Legislature provided funding for the Council in the amount of \$52,000, which was included in the judicial department budget bill.

The Council does this vital work at a remarkably low cost to the State. It is able to do so much with so little for the following reasons:

- **the volunteer contribution of approximately 1,500 hours per biennium in Council meetings and travel, and another 1,500 hours in committee work, research, and meeting preparation;**
- **the Oregon State Bar's generous contribution of meeting space and conference calling services at no charge, as well as \$8,000 per biennium to reimburse Council members' travel expenses; and**
- **the in-kind contribution of the following from the Lewis and Clark Law School:**
  - **office space and archive storage space;**
  - **office furniture and equipment, including computer hardware and software, maintenance and repairs;**
  - **a telecommunication system, T1 internet connection, and storage space on Lewis and Clark's server for website materials and e-mail;**
  - **information technology services;**
  - **library and electronic research services;**
  - **faculty travel and research budget for the Executive Director;**
  - **business services and human resources including payroll and benefits administration for the part-time administrative assistant and the Executive Director's stipend; and**
  - **some insurance coverage.**

In addition to these generous donations, the Council does require the services of a part-time director and administrative assistant, as well as office supplies, postage, and specialized software in order to perform its legislatively mandated functions. Continued state general fund support, as proposed in HB 5016, in the modest amount of \$52,000 is critical to the successful functioning of the Council.

It is doubtful that the Council can continue its work of keeping the ORCP modern and effective, much less maintain its website and the archiving of its records, without continued support from the State. Failure to have a functioning Council would mean that the job of keeping the ORCP current would revert to the Legislature, adding to the workload of both legislators and staff, and politicizing the process of amending the rules of procedure. Although the Legislature always retains ultimate control over the rules, a functioning Council comprised of experts in civil litigation will continue to allow Oregon to avoid the friction between the legislative and judicial branches as is seen in other states.

Respectfully submitted,

Brooks Cooper  
Attorney at Law, Portland  
Chair, Council on Court Procedures