

A G E N D A

Meeting

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, October 18, 1980

Circuit Courtroom "B", Justice Building

Bend, Oregon

1. Approval of minutes of meetings held 6/28/80, 7/26/80, 9/6/80, and 9/27/80

2. Public testimony relating to proposed Oregon Rules of Civil Procedure and Amendments - Tentative Draft dated September 6, 1980

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held October 18, 1980

Circuit Courtroom "B", Justice Building

Bend, Oregon

Present:	Darst B. Atherly	Charles P.A. Paulson
	Carl Burnham, Jr.	Frank H. Pozzi
	John M. Copenhaver	Val D. Sloper
	Wendell E. Gronso	James C. Tait
	Garr M. King	Wendell H. Tompkins
	William L. Jackson	David R. Vandenberg, Jr.
	Berkeley Lent	
Absent:	John Buttler	Harriet R. Krauss
	Anthony L. Casciato	Donald W. McEwen
	Austin W. Crowe, Jr.	Robert W. Redding
	William M. Dale, Jr.	Lyle C. Velure
	Laird C. Kirkpatrick	William W. Wells

The meeting was called to order at 9:35 a.m. At the request of the chairman, Carl Burnham presided. The minutes of the meetings held June 28, 1980, July 26, 1980, September 6, 1980, and September 27, 1980, were unanimously approved.

Mr. Pozzi suggested that the Council should consider an additional amendment to Rule 7. He suggested that Rule 7 D.(3)(b)(ii), providing for alternative methods of service upon corporations, should allow service by mailing to the registered agent, as well as to corporate officers. Charles Paulson moved that ORCP 7 D.(3)(b)(ii) be so amended. The motion was seconded by Judge Sloper and passed unanimously.

The Council discussed the resolution which had been passed at the Bar Convention asking that Rule 58 C. be amended to allow the court to separate the jurors after the submission of the case. No motion was made.

The Council discussed the proposed budget and statement of 1981-83 activities. Upon motion by Judge Jackson, seconded by Charles Paulson, the Council unanimously voted to approve the proposed budget and statement for submission to the legislature. After discussion, Judge Jackson, seconded by Frank Pozzi, moved to amend the proposed budget to be submitted by addition of \$650.00 for audit expenses.

Mr. Raymond A. Babb, Attorney, Bend, addressed the Council. He asked whether the Council was changing the rule that required submission of an answer with a motion to vacate default. The Council

asked the Executive Director to check the source of that rule and the effect of the new proposed rules. Mr. Babb also suggested that stipulated judgments should not be eliminated.

Wendell Gronso moved that the question of the present form of third party practice be removed from the subcommittee and set on the agenda for discussion at the public meeting in Portland on November 22, 1980. The motion was seconded by Charles Paulson and passed unanimously. The Executive Director was asked to publicize this as much as possible.

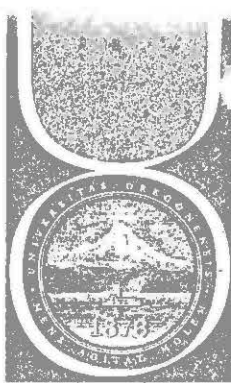
The next public meeting of the Council is scheduled for Saturday, November 1, 1980, at 9:30 a.m., in Harris Hall (Main Meeting Room), 125 East 8th Street, Eugene, Oregon.

The meeting adjourned at 10:15 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

September 29, 1980

Mr. Denny Z. Zikes
FELLOWS, McCARTHY, ZIKES & KAYSER
Attorneys at Law
808 American Bank Building
621 S.W. Morrison
Portland, Oregon 97205

Dear Mr. Zikes:

Austin Crowe gave me a copy of your letter dated September 25, 1980, and asked me to furnish you with a copy of the tentative amendment to ORCP 7 D.(4) which should solve your problem. It is on pages 93 and 94 of the rules. As you can see, the amendment will reinstitute the requirement of delivery of a copy of the summons to the Department of Motor Vehicles.

By the way, the constitutional validity question to which you refer was not created by the Council. The legislature had amended ORS 15.190 prior to 1979 to get rid of the due diligence requirement for default. The Council entirely eliminated special Motor Vehicle mail service, but the legislature inserted it into Rule 7, including the questionable affidavit.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

Enclosure

cc: Mr. Austin W. Crowe, Jr.

MULTNOMAH BAR ASSOCIATION

**LEGAL
AID
SERVICE**

900 BOARD OF TRADE BUILDING
310 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204

(503) 224-4086

J.R. Forester, Director
Gary Roberts, Deputy Director
Michael H. Marcus, Director of Litigation

September 29, 1980

Fredric R. Merrill
Executive Director, Council
on Court Procedures
School of Law
Univ. Of Oregon
Eugene, OR 97403

Re: ORCP 81 B. and ORS 29.178

Dear Mr. Merrill:

I note from the September 6, 1980 draft of Proposed ORCP 81 B. that the rule supersedes ORS 29.178. Please be aware that in Salahub v. Montgomery Ward & Co., 41 Or. App. 775, 782, 783 (1979), it was held that ORS 29.178 governs both prejudgment writs of attachment and post-judgment writs of execution. Since the Council is not revising post-judgment procedures at this time, you may wish to reconsider whether proposed ORCP 81 B. should entirely supersede ORS 29.178.

Sincerely yours,



MICHAEL TAYLOR
Attorney at Law

MT:bw

MINOR, YECK & BEESON, P. C.

J. CHRISTOPHER MINOR
RED A. YECK
RICHARD D. BEESON
EVAN P. BOONE

ATTORNEYS AT LAW
236 W. OLIVE ST.
P. O. BOX 310
NEWPORT, OREGON 97365

TELEPHONE:
(503) 265-8888

October 7, 1980

Donald W. McEwen
Chairman, Council on Court Procedures
c/o University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed New and Amended Oregon Rules of Civil Procedure

Dear Mr. McEwen and Members of the Council:

I recently received notification of the hearings which the Council will be holding in connection with the proposed amendments to the Civil Procedure Rules, together with a synopsis of the changes. I regret that I cannot attend the hearings which the Council is kind enough to conduct throughout various areas of Oregon, but thought I might express some of my concerns by letter.

I note that Rule 67, regarding judgments, will provide that judgments will not be limited to the relief demanded in pleadings, except where a stated amount of money damages is demanded or where judgment is by default. Since I do not have before me the text of the proposed rule, I am not certain what the intent may be. Obviously, equity practice has long recognized the ability of the court to go beyond the specific relief sought. On the other hand, I am concerned that this rule may extend that practice to permit the pleading of indefinite damages in law-type actions, with the possibility of an open-ended judgment. I think, in cases where money damages are the object, that the defendant should have a right to expect the plaintiff to set a maximum value on the claim for damages, and to be limited thereby. Everyone has the right to know the extent of his exposure.

I also note that Rule 67 would eliminate the present procedures for a judgment based upon confession without action. I recognize that such procedures may have been abused in other jurisdictions through the artifice of obtaining a confession of judgment prior

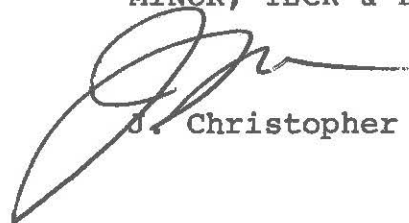
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October 7, 1980

to accrual of a cause of action, and so forth. However, the procedure may have some utility in circumstances where the obligor is willing to confess judgment to minimize plaintiff's attorneys' fees.

My thanks to you and the other members of the committee for the many hours of time which you are donating to this important endeavor.

Sincerely,

MINOR, YECK & BEESON, P.C.

A handwritten signature in black ink, appearing to read "J. Christopher Minor". The signature is stylized with a large, sweeping initial "J" and a long horizontal stroke extending to the right.

J. Christopher Minor

JCM/cw

CIRCUIT COURT OF OREGON
Sixth Judicial District
Pendleton
Oregon
97801

WILLIAM W. WELLS
Judge

P. O. Box 547

October 10, 1980

Mr. Fredric Merrill, Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Dear Fred:

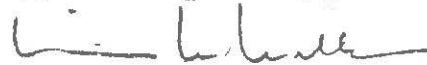
I doubt that I will be able to be at the meeting in Bend on October 18, but you requested that we submit any suggestions which we might have with respect to the explanatory material to the Legislature.

One of the matters which you have not mentioned is the fact that Senate Bill 121, known as the Juvenile Services Act directed that body to draft proposed rules of procedure in the Juvenile Court and submit the same to the Council on Court Procedures for their review.

As a member of the Juvenile Services Commission I can advise you that we have been so preoccupied with other tasks which were mandated to us that we have not had an opportunity to devote any time to the rules of procedure in the Juvenile Courts and, for that reason nothing will be submitted to the Council on Court Procedures this biennium. However, it will be on our agenda commencing in 1981.

It might be appropriate that you include in the explanatory material the fact that this is another area which will have to be reviewed and compiled by the Council on Court Procedures when the recommendations from the Juvenile Services Commission have been received by the Council.

Yours very truly,



William W. Wells
Circuit Judge

WWW m

SPEARS, LUBERSKY, CAMPBELL & BLEDSOE

(DEY, HAMPSON & NELSON)

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OUR FILE NO.

October 10, 1980

Fredric R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

The head of our appellate department, Jim Clarke, raised an issue with respect to proposed ORCP 25 which I am passing on to you and to the Council. The rule does not clearly deal with the necessity of challenging the rulings of presiding judges.

ORCP 25 suggests, though it does not mandate, a rule of appellate procedure. It suggests that it is only necessary to raise a pleading issue once. The Court in State Highway Comm. v. Superbilt Mfg. Co., Inc., 204 Or 393, 403, 281 P.2d 707 (1955) noted that in multi-judge circuits, the trial judge is the ultimate arbiter.

"In Multnomah county, where there are several trial judges, the presiding judge customarily hears and decides all preliminary motions and demurrers, while the trial is held before another circuit judge. This often presents a rather delicate situation to the trial judge, where his opinion as to the applicable law may differ from that of the presiding judge. However, responsibility for the conduct of the trial according to the applicable law and rules of evidence is solely that of the trial judge, and though a prior ruling upon the law by the presiding judge may be and most often is persuasive, nevertheless, it is in so sense binding upon the trial court. It must be kept

Fredric R. Merrill

10/10/80

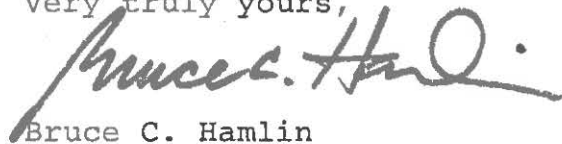
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in mind that if error is committed upon the trial,
that error is chargeable to the trial judge, and
not to the presiding judge." 204 Or at 403

Neither Superbilt nor subsequent cases have stated whether it is necessary to ask the trial judge to reconsider all pretrial rulings at the start of trial. Superbilt suggests that it may be necessary to do so.

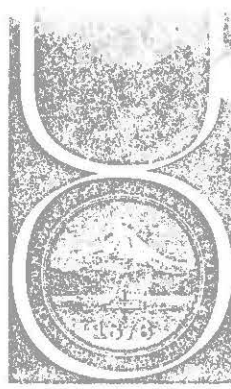
ORCP 25 similarly does not state whether it is necessary for either the prevailing party or the opponent to ask for reconsideration. ORCP 25 hints that it is not necessary to do so. It would seem that the Council should consider this issue and resolve it one way or the other.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Bruce C. Hamlin". The signature is written in a cursive style with a large, sweeping flourish at the end.

Bruce C. Hamlin

cc: J. Clarke



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

October 16, 1980

Mr. J. Christopher Minor
MINOR, YECK & BEESON, P.C.
Attorneys at Law
236 W. Olive Street
P.O. Box 510
Newport, Oregon 97365

Dear Mr. Minor:

Thank you for your letter of October 7, 1980, relating to the proposed rules. I am enclosing a copy of those rules.

If you will look at proposed Rule 67 C.(2) on Page 10, I think this answers the first point in your letter. The rule does not deal with the necessity of a demand for specific damages but only the effect of such a demand upon the amount of judgment. ORCP 18 B. already requires that a demand for relief or money or damages must state the specific amount.

Finally, I am enclosing a copy of the minutes of the last meeting. You will note that the question of elimination of confession of judgment without action has already been raised by another attorney and is being reviewed by the subcommittee which drafted Rule 67.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

Encl.

RULE 67
JUDGMENTS

A. Definitions. "Judgment" as used in these rules is the final determination of the rights of the parties in an action; judgment includes a decree and a final judgment entered pursuant to section B. of this rule. "Order" as used in these rules is any other determination by a court or judge which is intermediate in nature.

B. Judgment for less than all claims or parties in action; judgment on portion of claim exceeding counterclaim. 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 direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The court may also direct entry of a final judgment as to that portion of any claim which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, only upon an express determination that the party or parties against whom such judgment is entered have admitted the claim and asserted a counterclaim amounting to less than the claim and there is no just reason for delay. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all

the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

C. Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except:

C.(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

C.(2) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

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, or the value of the property, in case a delivery cannot be had, and 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 same.

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

E.(1) Partnership and unincorporated association. Judgment in an action against a partnership or unincorporated association which is sued in any name which it has assumed or by which it is known may be entered against such partnership or association and shall bind the joint property of all of the partners or associates. If service of process is made upon any member of the partnership or other unincorporated association as an individual, whether or not such partner or associate is also served as a person upon whom service is made on behalf of the partnership or association, a judgment against such partner or associate based upon personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

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 such parties and a default, dismissal, or judgment in favor of or against less than all of such 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 of 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 pursuant to Rule 68.

F.(2) Filing; assent in open court. The stipulation for judgment shall be in writing and filed according to Rule 9 or, if not, shall be assented to in open court. The stipulation shall be signed by the parties or by a person authorized to bind the parties.

COMMENT

The definition of judgment in 67 A. is taken from ORS 18.010. Under ORCP 1 and 2 the reference to decree is probably unnecessary but is included here for clarity. The separate reference to special proceedings of ORS 18.010 is eliminated, as statutory proceedings are "actions" under ORCP 1. The definition of "order" comes from ORS 18.010(2). See ORCP 14 A. for a definition of "motion."

Section 67 B. is a combination of ORS 18.125(1) and ORS 18.080(2). ORS 18.080(2), which covered the possibility of judgment for admitted amounts exceeding a counterclaim, was previously included with default judgment provisions. The judgment involved is a form of special final judgment, not a default judgment, and should fit the definition of judgment in Rule 67 A.

The procedural merger of law and equity creates the problem of whether the unified procedure follows the former equity

or legal rule relating to limitation of relief by the prayer of the complaint. Section 67 C. preserves the essential elements of the prior Oregon practice without reference to law or equity. The general rule is that of equity, where the relief accorded is not limited by the prayer. Recovery on default is limited to the prayer (ORS 18.080(a) and (b)), except for cases seeking equitable remedies (Kerschner v. Smith, 121 Or. 469, 236 P. 272, 256 P. 195 (1927)) if reasonable notice and opportunity to be heard are given (Leonard v. Bennett, 165 Or. 157, 103 P.2d 732, 106 P.2d 542 (1940)). Note, the limit of relief to the prayer applies for every default, not just defaults for failure to appear. In a case where money damages are claimed, the damages recoverable are limited to the prayer. Note that ORCP 18 B. requires a statement in the prayer of the amount of damages claimed.

Section 67 D. is ORS 18.110. See ORCP 61 D.

Section 67 E. addresses the problem of enforceability of judgments against assets held by a partnership or unincorporated association. Present Oregon rules address this problem through the device of a "joint debtor statute" (ORS 18.135). Partnerships and associations cannot be sued as entities, but suit must be brought against individual partners or members. At common law, for partnership or association assets to be subject to a judgment, the judgment had to be against all partners or association members. ORS 18.135 allows an action to recover for a joint debt even though not all joint debtors are served. A judgment enforceable against partnership assets can be secured by naming all partners but serving less than all.

This rule addresses the problem by the much simpler and more modern approach of making a partnership or unincorporated association suable in its own name and subject to entry of a judgment against the entity. To accomplish this, a new rule defining capacity of partnerships or associations to be sued is added to Rule 26 as section B. and a new service of summons category is added to Rule 7. The rule allows individual partners to be named in addition to the partnership and for the entry of a judgment enforceable against the personal assets of any partner actually served with summons.

The entity approach has a number of advantages. The approach:

(a) avoids the necessity of difficult distinctions between joint and several obligations. The joint debtor statute did not apply to some joint partnership obligations because it was limited to actions based on contract. See ORS 68.270.

(b) simplifies naming of defendants and service of process for partnerships and unincorporated associations with large membership. In some cases a defendant would find it difficult, if not impossible, to ascertain the names and locations of thousands of members of a multi-state partnership or association. Although in most cases the members would be subject to service of summons under ORCP 4, the difficulty and expense of serving such large numbers of people could be prohibitive.

Litigation and judgment in the name of the partnership or association is more consistent with other treatment of such groups. If a partnership can own property and have bank accounts in its own name, it is simpler to have judgments entered against that partnership in its name.

The language used in 67 E.(1) and 26 B. was adapted from section 388 of the California Code of Civil Procedure.

ORS 18.135 referred to action against any joint obligors, not just partnerships or associations. This rule covers only the ability to create judgments enforceable against partnerships or associations. ORS 18.135 subjected a person, who was never actually served and perhaps not aware of a suit, to judgment because another joint obligor was served. From a due process standpoint, this is defensible for partnerships and associations because partners and association members can be viewed as agents for the partnership or association. That theory would usually not apply to other joint obligation situations.

Rule 67 E.(2) addresses a problem not specifically covered under ORS 18.135. Under the common law theories of joint obligations, including those of partnerships and associations, there was a requirement that any judgment be against all persons jointly obligated. Therefore, any suit or recovery against less than all joint obligors extinguished the claim against the other joint obligors. See Ryckman v. Manerud, 68 Or. 350, 136 P. 826 (1913); Wheatley v. Halvorson, 213 Or. 228, 323 P.2d 49 (1958). The same reasoning could be extended to say a default or dismissal against less than all partners or joint debtors extinguished the obligation. This is inconsistent with modern concepts of joinder and judgments and could be an unnecessary procedural trap. The rule does not affect the substantive nature of the joint obligation but merely says there is no procedural rule that prohibits separate judgment. Note, 67 E.(2) is not limited to partnerships or joint ventures, but covers any joint obligation.

ORS 18.135 also covered whether joint debtors could be or should be joined. ORCP 28 and 29 governing permissive and compulsory joinder of parties already cover this and should be the applicable rules. The joinder aspects of ORS 18.135 are unnecessary and are eliminated.

Section F. provides the procedure for specific submission to a judgment formerly referred to as confession of judgment after suit. ORS 26.010 through 26.040. The procedure is basically stipulation to an agreed judgment. Note, this is not a confession of judgment based upon prior contractual agreement, which is eliminated, but an actual stipulation to judgment after action. Dismissals by stipulation are covered by Rule 54.

RULE 68

ALLOWANCE AND TAXATION OF
ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Costs and attorney fees. "Costs" are fixed sums provided by statute, intended to indemnify a party. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) Disbursements. "Disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses, the necessary expenses of taking depositions, publication of summonses or notices, the postage where the same are served by mail, the compensation of referees, the copying of any public record, book, or document used as evidence on the trial, a sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation (not exceeding one percent per annum of the amount of the bond or other obligation), and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. .

B. Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, except when express provision therefor is made either in these rules or other rule or statute, or unless the