NEWS RELEASE

COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

October 22, 1980

The Council on Court Procedures is interested in deciding if changes are needed in ORCP 22 relating to third party practice. This has been set for discussion at the public meeting of the Council to be held at 9:30 a.m. on November 22, 1980, in the County Commissioners' Meeting Room (Rm. 602), Multnomah County Courthouse, Portland, Oregon.

# # #

A G E N D A

Meeting

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, November 22, 1980

County Commissioners' Meeting Room (Room 602)

Multnomah County Courthouse

Portland, Oregon

---

1. Approval of minutes of meeting held November 1, 1980

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

3. Third party practice

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held November 22, 1980

County Commissioners' Meeting Room (Room 602)

Multnomah County Courthouse

Portland, Oregon

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

The meeting was called to order by Chairman Donald W. McEwen at 9:35 a.m. The minutes of the meeting held November 1, 1980, were unanimously approved. Since this was the last scheduled public hearing, testimony relating to the tentative rules was received.

John H. Donnelly, President, Oregon Association for Court Administration, suggested that proposed Rule 70 B.(1), together with ORCP 63 E., be amended to provide for the clerk to mail notice of entry of judgment to the attorneys of record or parties and that mailing copies of judgments be eliminated. He stated this would delete the expensive elements of copying labor and supplies and eliminate the logistical problem of addresses of parties.

Roy Dwyer, speaking on behalf of the Oregon Trial Lawyers Association, told the Council that despite liberal discovery rules embodied in the ORCP, a number of trial judges are imposing restrictions on discovery not contemplated by the rules. He suggested the Council should think of some way of controlling this, such as more detailed comments or supporting interlocutory appeal on discovery orders.

Paul Daigle, Chairman-Elect of the Admiralty Section of the Oregon State Bar, addressed the Council regarding addition of paragraph (g) to ORCP 7 D.(3) providing for service upon the agent of steamship owners or operators. He stated they approved of having the section and liked the concept generally. His suggestion was to speak with the chairman of the Maritime Law Association Committee about rewording the paragraph which could then be submitted to the Admiralty Section of the OSB and to the Portland Steamship Operators Association. He said that this would be accomplished by December 1 and submitted to the Council.

Capt. Jerry Johnston, Chief Civil Deputy for Clackamas County, addressed the Council and recommended that the time in which to answer a garnishment be made uniform and suggested that 5 days apply to all cases rather than giving 10 days to answer if a case is filed in another county.

A motion was made by Wendell Gronso, seconded by Charles Paulson, that third party practice be abolished. A lengthy discussion followed. The motion carried by a vote of 18 to 6. The following members voted against the motion: Darst Atherly, Austin Crowe, Laird Kirkpatrick, Harriet Krauss, Garr King, and Donald McEwen. After the vote, Garr King was permitted to change his vote from nay to aye.

The Council then discussed and acted upon some of the suggestions and comments to the tentative draft which had been previously submitted to the Council and which were presented in the staff memo of November 20, 1980.

1. The Council discussed the amendment to ORCP 7 C.(4)(a) which would again require service on the State Department of Motor Vehicles. Since there was some question whether the Council has authority to require the DMV to keep records of summonses served upon it, the Council decided to submit the change in the form of a recommendation that the legislature enact the change.

2. The Council briefly discussed the proposed change to ORCP 7 D.(3)(g) relating to steamship operators and decided to wait until Paul Daigle submitted his report.

3. It was noted that the change previously approved to ORCP 10 C. had inadvertently been omitted from the tentative draft and would be included in the final draft.

4. Upon motion by Charles Paulson, seconded by Carl Burnham, the Council voted unanimously to add the following sentence at the end of ORCP 55 D.(1):

> "A subpoena for taking of a deposition, served upon an organization as provided in subsection (6) of section C. of Rule 39, shall be served in the same manner as provided for service of summons in subparagraph (i) of paragraph (b) of subsection (3) of section D., and paragraph (e) of subsection (3) of section D., of Rule 7."

The Council also discussed the possibility of adding a provision relating to place of deposition for an organization deposition and no change in the rule was proposed.

5. The Council discussed whether any action to change Rule 25 C. was required due to the possibility that the trial judge could act upon motions previously denied. It was suggested that although a trial judge could act,

there was no current rule that required renewal of motions at trial and that there was no problem. No change was proposed in the draft.

6. The Council discussed whether any change in the rules was required relating to identity of the examining physician's doctor. It was suggested that a party to be examined could object to the identity of the opponent's examining doctor by motion under ORCP 36 C. No change was proposed in the rules.

7. Judge Redding, seconded by Judge Sloper, moved that ORCP 58 C. be amended to remove the words, "at any time before submission of the cause to them." The motion failed with Judges Redding and Sloper and Laird Kirkpatrick voting for the motion.

8. The Council discussed whether the relationship between proposed Rule 67 C.(1) and (2) needed clarification. It was decided the language of the proposed rule was clear and no change was suggested.

9. The Council decided to defer consideration of clarification of 67 F.(2) until action was taken relating to proposed Rule 70 A.

10. The Council discussed the problem of award of attorney fees on default judgment. It was decided that the best approach would be to retain a provision that allowed a party to ask for "reasonable" attorney fees rather than specify a sum, and to allow entry of a default judgment for attorney fees without further service on a defendant if the entry of such judgment was either approved according to a schedule of fees set up by the court or by a judge for each case. Wendell Gronso moved, seconded by Judge Sloper, that the following language be added to proposed Rule 68 C.(4)(a):

> "For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry."

The motion passed unanimously.

11. The Council discussed how proposed Rule 68 could affect subject matter jurisdiction in courts in which jurisdiction is controlled by the amount in controversy. It was suggested that subject matter jurisdiction was beyond the rulemaking authority of the Council. No change was suggested in the proposed rule.

12. The Executive Director pointed out that he had inadvertently failed to include ORS 20.040 in the list of ORS sections superseded and it would be so included in the final draft.

The Council discussed the relationship between ORS 20.180 and ORCP 54 E. Judge Sloper moved that Rule 54 E. be amended to require a tender of the settlement amount rather than an offer to settle. Charles Paulson seconded the motion. The motion failed with Judge Sloper, Lyle Velure, Frank Pozzi, and David Vandenberg voting in favor of the motion.

Austin Crowe asked that the Council consider an amendment to Rule 54 E. that would allow attorney fees, as well as costs and disbursements, to be awarded to a party who made an offer under the rule. It was also suggested that the rule should limit the ability to make the offer to up to three days before trial. The Executive Director stated he would submit a draft at the next meeting.

13. The Council decided unanimously to change the reference to "prevailing party fee" in Rule 68 B. to "prevailing party costs."

14. The Council discussed whether proposed Rule 68 C.(1)(b) could be read to exclude attorney fees from operation of the rule when the right to such fees was based upon a contractual provision. It was pointed out that such fees still were an incident of the action and not damages and therefore would not be excluded by 68 C.(1)(b). To avoid any question, Laird Kirkpatrick moved, seconded by Val Sloper that the words "from events" be removed from proposed Rule 68 C.(1)(b). The motion passed unanimously.

15. The Council discussed the sentence in proposed Rule 68 C.(2) stating, "Attorney fees may be sought before the substantive right to recover such fees accrues." It was suggested that the sentence was necessary because although most attorney fees are incurred after the initial pleading, the right to recover may accrue later. For example, ORS 743.114 conditions granting of attorney fees to the passage of six months from proof of loss, which may be after the complaint is filed.

16. Austin Crowe moved, seconded by Judge Tompkins, that proposed Rule 68 C.(4)(a) be amended to require that costs, as well as disbursements and attorney fees, be included in a statement served upon other parties. The motion passed unanimously. It was pointed out that with this change the time limit for objections in 68 C.(4)(b) would fit all cases.

17. The Council discussed whether any change should be made in proposed Rule 64 B. relating to the authority of clerks to enter default judgments. No change was made in the draft.

18. Don McEwen, seconded by Dave Vandenberg, moved that proposed Rule 69 B.(3) be changed to read as follows:

> "Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the 'Soldiers' and Sailors' Civil Relief Act of 1940,' as amended, except upon order of the court in accordance with the Act."

The motion passed unanimously.

19. Frank Pozzi, seconded by Judge Casciato, moved that Rule 70 A. be changed to read as follows:

> "70 A. Form. Every judgment shall be in writing plainly labelled as a judgment and set forth in a separate document[, except judgments need not be set forth in a separate document if the local rules of a court so provide]. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. No particular form of words is required, but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. The judgment shall be signed by the court or judge rendering such judgment, or in the case of judgment entered pursuant to ORCP 69 B.(1) by the clerk."

The motion passed unanimously.

20. The Council discussed the requirement of mailing copies of judgments to parties. In the light of comments by Messrs. Donnelly and McGavic, the Executive Director was asked to submit a redraft of Rule 70 B.(1) that required only mailing notice of entry of judgment to attorneys of record, or a party if there were no attorneys of record.

21. The Council considered whether proposed Rule 71 B.(1) affected the existing requirement that, upon motion to vacate a default, a pleading be submitting showing a meretorious claim or defense. It was suggested that the rule probably did not change the existing rules in this area. It was also suggested that the requirement could explicitly be included in the rule. The Executive Director was asked to submit a draft of proposed Rule 71 B.(1), with such a provision, for consideration by the Council.

22. Judge Sloper, seconded by Austin Crowe, moved that proposed Rule 72 C. be amended to read as follows:

> "72 C. Stay of injunction in favor of public body. The federal government, any of its public corporations or commissions, a county, a municipal corporation, or other similar public body shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment."

The motion passed unanimously.

23. A proposed change to add a new Rule 73 covering CONFESSIONS OF JUDGMENT WITHOUT ACTION was submitted to the Council. Action was deferred until the next meeting to allow closer study of the proposed rule by members of the Council.

24. The Council discussed the suggestion to incorporate a form of notice and list of exemptions in proposed Rule 81 B.(1). It was suggested that the form was not completely accurate and the existing general language was better. No change was made.

25. Don McEwen, seconded by Dave Vandenberg, moved that the words, "an ex parte" be added between "upon" and "showing" in proposed Rule 82 A.(6). The motion passed unanimously.

26. The Council discussed whether any changes should be made in ORS 23.210, but no action was taken.

27. The Council discussed whether ORS 29.178 could be superseded since it governed writs of execution and garnishment as well as writs of attachment. Austin Crowe, seconded by Charles Paulson, moved that ORS 29.178 not be superseded but be amended as follows:

> (1) Following execution by the sheriff of [any writ pursuant to ORS 29.170 or 29.175] a writ of execution or execution of a writ of garnishment by any person, other than a wage or salary garnishment, the sheriff or such person shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:
>
> . . . .
>
> (b) A copy of the certificate delivered to the county clerk [pursuant to subsection (1) of ORS 29.170] to attach real property, if any;
>
> (c) A copy of a notice of garnishemnt or the notice delivered pursuant to [subsection (3) of ORS 29.170 or] subsection (1) of ORS 29.175, if any; and
>
> . . . .
>
> [(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]
>
> [(4)] (3) The sheriff or such person may meet the requirements of subsection (1) of this section by mailing the documents to the last-known address of the judgment debtor as provided by the judgment creditor. The

sheriff or such person may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

28. The Council discussed the 180-day notice for tort actions against public bodies under ORS 30.275. It was suggested that the provision was probably a substantive limit on the remedy and could not be changed by the Council under its rulemaking power. Lyle Velure, seconded by Charles Paulson, moved that the Council recommend to the legislature that it eliminate the 180-day notice requirement in ORS 30.275. With the concurrence of the seconding member, Mr. Velure then amended his motion to read, "recommend to the legislature that the notice provisions in the Oregon Tort Claims Act be made similar to the notice requirements in the Federal Tort Claims Act." The motion passed with Garr King, Judge Tompkins, Austin Crowe, Carl Burnham, and Wendell Gronso voting against the motion.

29. Austin Crowe, seconded by Charles Paulson, moved that Rule 39 F. be amended to eliminate the mandatory requirement that the transcription of a deposition be submitted to the witness for signing and changing. The motion passed unanimously. The Executive Director was asked to submit a draft of an amendment to ORCP 39 F. that would accomplish this.

The next meeting of the Council will be held at 9:30 a.m., Saturday, December 13, 1980, in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 12:15 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

LAW OFFICES

SHANNON AND JOHNSON

DAVID S. SHANNON
REES C. JOHNSON
RONALD ALLEN JOHNSTON
ANN W. LEHMAN

DATA SYSTEMS PLAZA
975 S. E. SANDY BLVD.
PORTLAND, OREGON 97214

(503) 232-3171

November 4, 1980

Counsel and Court Procedures
University of Oregon School of Law
Eugene, Oregon 97401

Re: Amendments to the Oregon Rules of Civil Procedure

Ladies and Gentlemen:

I request that you consider amending ORCP 7D(2)(c) relating to office service. The current rule requires that service shall be perfected by a subsequent mailing of the summons and complaint to the defendant at his dwelling house or usual place of abode. This poses practical service problems in that a person's place of business is often well known but his place of abode is not. This applies particularly to commercial defendants who have unlisted telephone numbers and generally undisclosed residences. I request that this rule be amended to require a subsequent mailing to either defendant's place of abode, his place of business, or such other place under circumstances that is most recently calculated to apprise the defendant of the existence and pendency of the action.

Sincerely,

Ronald Allen Johnston

Ronald Allen Johnston

RAJ/ml

LANE COUNTY LEGAL AID SERVICE, INC.

RICHARD H. HART
EXECUTIVE DIRECTOR

1309 WILLAMETTE STREET
EUGENE, OREGON 97401

AREA CODE 503
342-6056

November 13, 1980

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

Dear Fred:

I write to comment on the September 6, 1980 tentative draft of Proposed Oregon Rules of Civil Procedure 65-85. My comments are as follows:

1. Rule 68A(1) defines costs and attorney fees separately. I think this is a good and important idea, but I fear confusion when this section is reviewed in conjunction with statutes such as ORS 20.080, which treat attorney fees as a part of costs. Which definition then applies? Rather than amend each of those statutes, I recommend that you add to the definition of attorney fees language which states that this definition controls even where attorney fees are treated as a part of costs by ORS.

2. Rule 68C(4)(b) allows a party 15 days after service of a "statement" of the amount of attorney fees and disbursements to file an objection. I presume that the "statement" referred to in 68C(4)(b) is the statement of attorney fees and disbursements required in 68C(4)(a)(i), so that the 15 day period won't begin running when the court clerk automatically enters the costs, presumably sometime before the statement of attorney fees and disbursements is filed. However, what happens if the prevailing party does not file for or even seek attorney fees or disbursements? The costs will have already been entered; how does the opposing party object to the costs, and when?

3. Rule 69 allows a party to take a default judgment, which may include attorney fees. However, Rule 68 provides that a request for "reasonable attorney fees" is a sufficient allegation in a pleading. Generally, I think that is the best approach. Unfortunately, though, a defendant who decides to allow a default has no way of knowing then how much attorney fees will be sought against him/her. In fact, Rule 68C(4)(a)(i) does not even require service of the cost bill on a defaulted party. Some defendants in parties allow defaults to be taken against them for strategic reasons (they have no money to pay an attorney to contest the case or they don't want to drive up the attorney fees on a losing defense), but they still may want to, and should be entitled to, contest the amount of attorney fees sought.

4. I disagree with the deletion, in Rule 81B(1), of the requirement presently found in ORS 29.178 that the notice to individuals contain a list of exemptions, an explanation of the exemption procedure, and a reference to the availability of forms. Your reasoning is that this requirement is incomprehensible and constitutes a procedural trap. The Oregon State Sheriff's Association has come up with a form (a copy is enclosed) which does the job very well. If you are concerned that plaintiff's won't know of the existence of this form, then I suggest that you incorporate the form, in full, in the rule, as is now done with ORS 23.665. In my practice with Legal Aid I have encountered many people who would not have understood their post-judgment exemption rights without this notice, which has been used by the Lane County Sheriff since 1977. My conversations with the Lane County Sheriff's Office indicate that they have had very few problems with it and that they, too, feel that the notice is a significant and valuable tool in informing people of their rights and in prompting them to act.

5. There is another problem related to Rule 81B. In your Comment to Rule 84, you state that ORS 29.178 would be eliminated as unnecessary because of 81B. You are ignoring the fact that ORS 29.178 applies to both pre-judgment attachments and post-judgment executions. ORS 23.410(4); Saluhub v. Montgomery Ward, 41 Or App. 775 (1979). Deleting ORS 29.178 is going to leave a big hole for post-judgment executions. Saluhub, by the way, presents another argument for not deleting the exemptions from the notice, since doing so may be a denial of equal protection for debtors whose bank accounts are attached, yet receive less notice than do debtors garnished under ORS 23.665.

6. With regard to bonds and undertakings (Rule 82), I think it would be helpful if you incorporated the provisions of ORS 22.020, which allows a deposit of money, rather than security, directly into the rule rather than just referring to it in the Comment, and if you elaborated on this alternative.

7. Please note that in the Comment to Rule 84, on page 87, the 5th line down, 29.170 and 29.185 should be 23.170 and 23.185.

I hope my comments are of some help. If I can do more, or explain myself better, please let me know.

Sincerely,

John Van Landingham
Attorney at Law

JVL:vj
encls

NOTICE TO JUDGMENT DEBTOR
(Under O.R.S. 29.178)

YOU ARE HEREBY NOTIFIED, that pursuant to an execution and/or other process initiated by creditors, copies of which are enclosed herewith, certain of your property has been or may have been taken (levied upon) by the sheriff or other officer. The following described property has been so taken or levied upon:

The law declares certain types of property and funds exempt from execution (that is, you may be able to get your property or funds back).

EXEMPTION LIST

WAGES; $106 per week or 75% of weekly net (take home) wages, whichever is greater
SOCIAL SECURITY (including SSI)
PUBLIC ASSISTANCE (welfare)
CHILD SUPPORT
UNEMPLOYMENT BENEFITS
DISABILITY BENEFITS
WORKMEN'S COMPENSATION BENEFITS
PUBLIC OR PRIVATE PENSIONS
VETERANS BENEFITS and loans
HEALTH INSURANCE PROCEEDS
ALL SEAMEN'S WAGES and clothing
LIFE INSURANCE POLICIES not payable to your estate
FEDERAL ANNUITIES
OTHER ANNUITIES to $250 per month, excess over $250 per month subject to same exemption as wages
VOCATIONAL REHABILITATION benefits
BENEFITS TO THE AGED
BENEFITS TO THE BLIND
CREDIT UNION SHARES to $600
FRATERNAL SOCIETY BENEFITS
CIVIL DEFENSE BENEFITS
BENEFITS TO INJURED INMATES of penitentiary or correctional institution
BENEFITS TO INJURED MENTALLY RETARDED MINORS in special education training program
SERVICEMEN'S LAND during declared war

A HOMESTEAD (home-mobil, home-houseboat) * if you live in it, to the value of $10,000 ($12,000 if land is included) or proceeds from its sale for (1) year
HOUSEHOLD BOOKS, furniture, radios, a television and utensils to $800
*AUTOMOBILE, TRUCK, TRAILER or other vehicle to $800
*TOOLS, apparatus, team, harness, or library necessary to carryo on your occupation to $1600, LESS value of any vehicle claimed exempt. Food for such team for 60 days
*BOOKS, PICTURES & MUSICAL INSTRUMENTS to $150
*WEARING APPAREL, JEWELRY and other personal items to $500
DOMESTIC ANIMALS AND POULTRY for family use to $600 and their food for 60 days
PROVISIONS (food) and FUEL for your family for 60 days
1 RIFLE or SHOTGUN and 1 PISTOL
BURIAL LOTS or SPACE
STATE EMPLOYEES WAR SAVINGS ACCOUNT
BUILDING MATERIALS, furnished for constructing improvements on land

*NOTE: if two or more of the people in your household owe this judgment debt, each of you may claim the exemptions marked by (*).

You may use the form on the other side of this notice to claim your exemption. Additional copies of this form are available at the courthouse, at no cost. Mail or deliver the claim of exemption to the clerk (or justice) of the court from which the enclosed process was issued.

The above list describes certain exemptions. It is not exhaustive. If you have questions regarding these exemptions or any others that might exist, or the process by which you claim an exemption, you should consult an attorney.

YOU MUST FILE THIS FORM IMMEDIATELY IN ORDER TO CLAIM AN EXEMPTION

CCP-SF 78

IN THE _____ COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

_____

_____
Plaintiff,

vs.

Name _____

Address _____

_____

Telephone _____
Defendant,

CLAIM OF EXEMPTION

CASE NO. _____

STATE OF OREGON)
: ss.:
County of _____)

I, the above-named defendant, being first duly sworn, depose and say that:

I CLAIM the following described property or funds exempt from execution:

_____

_____

(Complete this section if applicable.)

The present fair market value of the said property is . . . . . $_____

I owe to _____
on said property, the sum of . . . . . $_____

My net equity in the said property is . . . . . $_____

I HAVE MAILED OR DELIVERED THE ORIGINAL of this claim to the clerk or justice of the above court and have mailed or delivered copies of the Claim of Exemption to:

____ The plaintiff or his attorney

____ The Sheriff or:

_____
Defendant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19____

_____
NOTARY PUBLIC FOR OREGON

My Commission expires: _____

The aforesaid Claim of Exemption based upon the evidence is hereby _____ allowed _____ denied.

IT IS SO ORDERED

Dated _____

_____
Judge

COMMENTS AND SUGGESTIONS

Sept. 6, 1980 Draft

ORCP and Amendments

11-20-80

CONTENTS

Proposed Amendment to ORCP 7 C.(4)(a) Service on DMV

PROBLEM

Judge Liepe questioned the advisability of reinstituting service on the DMV. He also suggested if the reason for the move was to allow insurance carriers to determine whether suit was filed, why not require notice?

RESPONSE

The problem with notice is the burden on the DMV and the fact they would not know the identity of the carrier.

Judge Liepe's question does raise one point: Does the Council have the authority to require the DMV to do anything? The prior requirements were created and removed by the legislature. We may have to ask them to amend the rule by statute.

Proposed Amendment to ORCP 7 (addition of paragraph D.(3)(g))

Service upon agent of steamship owners or operators

PROBLEM

Lloyd Weisensee questions the lack of prior notice and constitutionality of this change adopted by the Council which permits service on a foreign steamship company or steamship charterer by serving an agent.

RESPONSE

I am somewhat unsure about the constitutional effect. Since this is in Rule 7 it merely provides a method of serving process not a basis for jurisdiction. The rule does not provide that an Oregon court has jurisdiction over a company that only does business in Washington through agents located there; it says if there is jurisdiction, then service can be made upon Washington or Oregon passenger or cargo agents. The real constitutional question is adequacy of notice. Is notice given to agents of this type likely to apprise the defendant of the existence and nature of the action? Is it the most reasonable notice? How else could you serve a foreign steamship line?

I also see several other problems:

(1) "Foreign" is not defined. I assume we mean a person not a citizen of the United States and a corporation Not created by United States laws.

(2) Why the geographical limit? If a) there is a basis for jurisdiction and b) serving such agent is calculated to provide notice, why not allow service anywhere you can find the agent?

10 C. Additional time after service by mail

PROBLEM

In the minutes of May 10, 1980, the Council voted to add the words "Except for service of summons" to Rule 10 C. to make clear that the automatic 3-day extension for mail service in that section did not apply to summons service. This was not included in the tentative draft.

RESPONSE

The inadvertent omission should be cleaned up in the final draft. Since the change is primarily housekeeping, no one should object.

39 C.(6) Deposition of organization

54 D.(1) Service (of subpoena)

PROBLEM

A Eugene attorney called and pointed out that our existing rules do not specify who shall be served if a subpoena is used for an organizational deposition. 39 C.(6) authorizes use of an organizational subpoena.

RESPONSE

He is correct and perhaps we should clarify 55 D.(1). We could simply add:

> "A subpoena for taking of a deposition, served upon an organization as provided in subsection (6) of section C. of Rule 39, shall be served in the same manner as provided for service of summons in subparagraph (i) of paragraph (b) of subsection (3) of section D., and paragraph (e) of subsection (3) of section D., of Rule 7."

This would limit service to personal service upon the registered agent or an officer, director, or partner, or to leaving it in the office of the registered agent.

Note, Rule 39 F.(2) relating to place of deposition also does not cover subpoenas on organizations. We could add:

> "A person deposed under a subpoena to an organization under subsection (6) of section C. of Rule 39 may only be required to attend in the county in which the principal place of business of the organization is located, or at such other convenient place as is authorized by an order of the court."

25 Effect of Proceeding After Motion or Amendment

C. Denial of motion; non-waiver by filing responsive pleading.

PROBLEM

James Clark and Bruce Hamlin of Portland have suggested that Rule 25(c) may need to be clarified in light of State Highway Comm. v. Superbuilt, 204 Or. 393, 403 (1955). The Superbuilt case authorizes a trial judge to reconsider pretrial motions and reverse a prior decision by another judge. They ask if proposed Rule 25 C. makes it clear that all denied pretrial motions need not be reasserted at trial.

RESPONSE

As I read Superbuilt, it authorizes the party to ask a trial judge to reconsider a pretrial decision but does not require such a reconsideration. The case involved a denial of a motion to strike new matter in an answer which was denied prior to trial by a judge who did not try the case. The question is whether the trial judge could strike the defenses to shorten trial if the trial judge felt there was no legal merit to the defenses. The question was then one on law of the case and not on waiver. Holding that the prior judge's decision does not bind the trial judge does not mean that a party must ask for such reversal by the trial judge. If there is any question, however, we could add the following at the end of 25 C.: , including trial of the case without renewal of the motion to the trial judge.

ORCP 44 Physical and Mental Examination of Persons, etc.

PROBLEM

Bob Ringo asked the Council to consider a rule that would allow a party who has been ordered to, or agreed to, submit to a medical examination some control over the identity of the examining physician

RESPONSE

ORCP 36 C. does give the court discretion to enter a variety of protective orders. Although the identity of the opposing party's examining physician is not specifically mentioned, the federal rule from which this was taken has been invariably interpreted to allow the court authority to enter any order necessary for the protection of a party, including specifying a doctor for a physical examination.

ORCP 58 C. Separation of jury

PROBLEM

The Bar passed a resolution that the legislature amend Rule 58 C. to allow the jury to separate after submission of the case. Bob Ringo has written a letter asking the Council to do this.

RESPONSE

It does seem awkward having the Bar bypassing the Council on Court Procedures which it prevailed upon the legislature to create. The change would involve removing the words, "at any time before submission of the cause to them," from 58 C.

Proposed Rule 67 C.(1) and (2)

PROBLEM

Judge Liepe has suggested that there is an inconsistency between ORCP 67 C.(1) and (2) in that it is not clear whether the limit to amount demanded of C.(2) applied to defaults under C.(2). Specifically, would a equitable default judgment for money damages be limited to the prayer. He also suggested it was not clear what should be included in the notice under C.(1).

RESPONSE

I am not sure the problem actually exists. Proposed Rule 67 C.(1) applies to judgments by default. Proposed Rule 67 C.(2) applies to judgments not by default. We could perhaps make this clearer by adding "In any judgment not by default" at the beginning of C.(1).

If there is a question about notice in 67 C.(1), we could add "of the nature and kind of the remedies actually sought" in line 5 after the words "reasonable notice."

67 F.(2) Filing stipulation of judgment

PROBLEM

Stamm Johnson suggests the following language is clearer than the draft:

> "F.(2) Filing; assent in open court. The stipulation for judgment may be in a writing signed by the parties, their attorneys or authorized representatives, which writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court."

RESPONSE

Johnson's language does seem clearer. This, of course, does not work unless the Council amends Rule 70 A. as suggested (see below).

Proposed Rules 68 and 69

Costs, disbursements, and attorney fees in default judgments

PROBLEM

Both John Van Landingham and J.P. Graff questioned whether the provision for pleading and proving attorney fees in Rule 68 and default award of such fees in Rule 69 are consistent. Two problems are presented:

1. Since we only require a statement of "reasonable" fees demanded, rather than a dollar amount, the complaint served does not give notice of the amount of fees claimed. Rule 68 C.(4)(a)(1) requires only that attorney fees and disbursement statements be served on "parties who are not in default." The statement is not served on the defaulting party, and if excessive or improper fees are demanded, there is no notice or opportunity to object.

2. It is possible that the rules could be read as not allowing attorney fees on default. Rule 69 B.(1) makes reference to "costs, disbursements, and attorney fees entered pursuant to Rule 68." Rule 68 C.(4)(a) seems to require some service of a disbursement and attorney fee statement on someone (i.e., a proof of service is required) but not service on parties in default. If only parties in default are subject to such judgment, a question can be raised: how do you serve?

RESPONSE

There is certainly a problem here. It seems we have choices, all of which have some problems.

1. Retain the present system, making clear that if all parties against whom judgment is to be entered are in default, then notice need not be served but only filed. This seems to be the present system on default and may be acceptable for costs and disbursements which are fixed by statute or limited in a default situation, but for attorney fees there is substantial potential for abuse. It could be argued that:

(a) The Court will protect the defaulting party by refusing improper fees, but the court is never involved unless objections are filed. If the defendant is not aware of the improper attorney fee award, why file objections.

(b) A party who has defaulted is aware that there will be attorney fees and consents to whatever he gets. This seems a little harsh for a defendant who would calculate the amount demanded against the cost of defense and not realize the attorney fee award would ultimately be whatever the plaintiff puts in the cost bill.

2. Require that there be a demand for a dollar amount of attorney fees in the complaint. This brings back the problem of estimating fees not yet incurred. The normal reaction will be to demand a large amount to be safe (in default you would have to limit the award to the amount demanded). This would discourage default as a choice.

3. Require the statement to be served under Rule 7. This would give maximum notice to the defaulting defendant. It seems unfair to require a plaintiff who has only been able to serve a defendant with difficulty to repeat the process to recover attorney fees.

4. Require the statement to be served under Rule 9. This seems like the best compromise. There is a reasonable attempt to provide notice of the amount claimed without the difficulty of full summons service. The defendant who chooses to default is aware of the fees and the prior service gives a guide to where to send or leave the statement. The defendant who never had notice may not get the statement but is no worse off than when the amount of attorney fees were included in the complaint; at least, the plaintiff does not have to obtain a special court order or make a showing of due diligence.

Proposed Rule 68 Jurisdictional Effects

PROBLEM

Stamm Johnson suggests that the following provision be added to Rule 68 to clarify the effect of the cost bill practice on jurisdiction:

> "Except for items referred to in subsection C.(1)(b) of this rule, attorney fees or the right thereto alleged or demanded in any pleading shall not be taken into account or considered in determining the amount in controversy for jurisdictional purposes."

Several other attorneys have asked what effect the rule would have on circuit court jurisdiction.

RESPONSE

The present rule seems to be that attorney fees are not included in the amount in controversy if they are part of the allegations in the complaint. Draper v. Mullennex, 225 Or. 267 (1961). We run the danger of some confusion being generated as we require a request in the complaint, but the fees are assessed with costs. The problem is that subject matter jurisdiction is not within the rulemaking authority of the Council. If the Council wishes to proceed with Mr. Johnson's suggestion, it would have to recommend a statute for addition to ORS Chapters 46 and 51.

Proposed Rule 68 Allowance and Taxation of Attorney Fees, Costs, and Disbursements

ORS 20.040 - When costs allowed of course to plaintiff in action

ORS 20.180 - Attorney fees in actions for damages for personal or property injury

PROBLEM

Bruce Hamlin has suggested that Rule 54 E. and proposed Rule 68 should result in ORS 20.040 and ORS 20.180 being deleted which is not shown in the present list of statutory deletions. He also asked whether under 54 E. this means that the losing party who offered more than the judgment can recover attorney fees and the winning party cannot recover them. He finally suggests that reference to judgments in confession should be excluded from ORCP 54 E. and a number of ORS sections.

RESPONSE

ORS 20.040 should be superseded. It was left off the list by mistake.

ORS 20.180 probably also is superfluous but supersession must be directed by the Council. ORS 20.180 is the Deady Code statute provision allowing a losing defendant to avoid or collect costs by "tendering" a settlement. The tender has to be alleged in the answer and then the sum must be deposited in court. This would seem to be completely swallowed by ORCP 54 E. (formerly ORS 17.055). Who would follow the ORS 20.180 procedure when all they need to do is offer to settle to reach the same result?

The literal wording of 54 E. bars only costs and disbursements. The definitions under 68 do not include attorney fees as costs and therefore 54 E. would not prevent a plaintiff who recovers less than the offer from recovering attorney fees if a right to such fees existed. On one hand, this is exactly what was provided by statute prior to the rules. On the other hand, changing Rule 54 to also allow a change in fee recovery might put more teeth in 54 E. This also has the question of whether it is substantive. I do not think it is because the rules provide fees for various procedural reasons such as abuse of discovery.

Whether the reference to confession of judgment should be changed depends upon Council decision on the issue. Other statutes that may have to be changed are: ORS 19.020, 51.080(4), 53.010, 68.210(3)(d), 69.350(1)(c), 73.1120(1)(d), 83.670(1), 91.745(1)(b), and 697.733(4).

Proposed Rule 68 A. Definitions (costs and attorney fees)

PROBLEM

John Van Landingham suggests that the definitions in Rule 68 A.(1) may not be sufficient because of the existence of a number of ORS sections which define attorney fees as costs. This approach was used with some frequency to allow collection of such fees through the cost bill.

RESPONSE

I think the problem is taken care of by 68 C.(1). Although ORS may contain some references to attorney fees (as defined in A.(1) which are called "costs," the procedure for handling such fees is that provided by Rule 68. The difference is clearly set out in the rule; costs are a fixed sum provided by statute and attorney fees are a variable amount related to legal services provided in relation to the action, whether provided by rule, state, or some other basis.

68 Allowance and Taxation of Attorney Fees, Costs, and Disbursements

B. Allowance of costs and disbursements

PROBLEM

Stamm Johnson suggests that the reference to "prevailing party fee" in proposed Rule 68 B. should be "prevailing party costs."

RESPONSE

There is little danger of mistake because the section contains an explicit reference to 20.070. Technically, however, he is correct. These are "costs."

Proposed Rule 68 C. Application of procedure to award attorney fees based on contractual provision

PROBLEM

Judge Liepe asked if the procedure in Rule 68 was applicable to attorney fees provided in a contract and suggested that 68 C.(1)(b) could be read to exclude such fees.

RESPONSE

The rule is clearly intended to encompass such fees. In fact, a draft which would have excluded them was rejected. I don't think there is any ambiguity. Subsection C.(1) clearly says that the procedure applies regardless of the source of the right. Paragraph C.(1)(b) only applies to attorney fees claimed as damages arising from events prior to an action, i.e., "A" promises to pay "B's" attorney fees and a suit is brought for breach of contract. In a situation where "A" and "B" enter into a contract which provides for award of fees in case action is brought on the contract, the fees are an incident of the action, not damages based upon breach of contract.

68 C.(2) Asserting claim for attorney fees

PROBLEM

The next to the last sentence of proposed Rule 68 C.(2) states that "Attorney fees may be sought before the substantive right to recover such fees accrues."

It has been suggested by a Eugene attorney that the sentence is superfluous as the claim might be made in the initial pleading and presumably no right to recover fees would accrue until the case was completed.

RESPONSE

I think the following excerpt from testimony submitted in support of an identical provision contained in a bill submitted during the last legislative session explains why the sentence is included:

> "[This provision] makes it clear that a party need not file a supplemental complaint when a right to attorney fees accrues after the complaint is filed. For example, ORS 743.114 conditions the granting of attorney fees on the passage of six months since proof of loss was given to the insurer. A cause of action exists immediately after proof of loss. But the right to attorney fees doesn't ripen for another six months. See Murray v. Firemen's Ins. Co., 121 Or. 165, 169-70, 254 P. 817 (1927); Johnson v. The Prudential Life Ins. Co., 120 Or. 353, 252 P. 556 (1927). See also Dean Vincent, Inc. v. Kirshell Laboratories, Inc., 271 Or. 356, 359-60, 532 P.2d 237 (1975). This could be important when a statute of limitations is looming, in light of the holding in Walker v. Fireman's Fund Ins. Co., 114 Or. 545, 234 P. 542 (1925), that the effect of amending to add an allegation of attorney fees is sometimes to '. . .introduce . . . a new cause of action on the covenants of the policy. . . ." (114 Or. at 574).

In other words, the reference is to accrual of the right as opposed to actually incurring all of the fees.

Proposed Rule 68 C.(4)

PROBLEM

John Van Landingham points out that by tying the time for objection to attorney fees, disbursements, and costs to service of a statement does not take care of the situation where no statement of disbursements or attorney fees is filed but the clerk does enter a judgment for costs.

RESPONSE

He is correct. The situation would rarely come up, but it is possible. Under proposed Rule 68 C.(4)(a), the only statement referred to is the 64 A. statement for disbursements or attorney fees. If only costs are involved, there is no statement.

The present time limit in ORS 20.210 is 5 days following expiration of the time to file such statements (which is 15 days after entry of the judgment). Since a party could file the statement on the 10th day and mail it the same day the costs and fees judgment is entered, even with the 3-day mailing extension of Rule 10 C., the opponent would not have time to object. Probably the best method is to simply increase the time for objections to 30 days from entry of the judgment.

Proposed Rule 69 B. Entry of default by the clerk

PROBLEM

Judge Liepe questioned whether we ought to allow clerks to enter any defaults and at least suggested clear authorization for a local court to insist that all default judgments be submitted to the court. Apparently, this is presently the rule in Lane County District Court.

RESPONSE

Judge Liepe's final suggestion could easily be accommodated by adding "when not prohibited by local rule" at the beginning of 69 B.(1). The court probably has inherent authority to control the clerk in this respect anyway.

This approach would, however, encourage local variation and require litigants to check local rules to decide where to take the judgment. It also seems the entire idea of having the clerk enter judgment goes against the principal of having the clerks make decisions on legal questions. We have already restricted B.(1) to the point that most defaults do not fit. There are so many restrictions that we are risking an invalid judgment anytime one is entered by the clerk.

The reason for having such a rule must be (a) unavailability of a judge regularly and (b) to save expensive judicial time. The first really is no longer a problem. Is the second reason worth it?

Assuming a clerk does enter defaults, is the clerk subject to liability if he does not do it right? The judge would would have judicial immunity but clerks would not.

Proposed Rule 69 B.(3) Non-military affidavit required

PROBLEM

Stamm Johnson suggests that the language relating to the non-military affidavit is too strict in that it requires that the affiant swear on his "own knowledge: and recite facts. He suggests the following language:

> "69 B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the 'Soldiers' and Sailors' Civil Relief Act of 1940,' as amended, except upon order of the court in accordance with that Act."

RESPONSE

Mr. Johnson is right that the requirement is basically a formality required by a federal statute. His suggested changes seem reasonable.

Proposed Rule 70 A. Form (of judgment)

PROBLEM

Judge Liepe, Lane County District Court, Stamm Johnson, and several other commentators criticized the provision in the first sentence of Rule 70 A. requiring that a judgment be a separate document unless the court rules otherwise provide. The argument is that, particularly in district court, some litigants use reasonably efficient forms that combine affidavits for default, return of service, etc., with the judgment. It was argued that this saves paper and storage space and time. It was also argued that the local option rule should not authorize different practices in different courts.

RESPONSE

The rule probably should be uniform. No one should be required to check a local rule to determine if a combined form of judgment and affidavit for default can be used.

Most of the testimony heard relates to default judgments and possibly stipulated judgments. The reasoning behind the separate document rule is to avoid confusion between judgments and opinions, findings of fact and conclusions of law, orders allowing judgment, etc. The type of material combined with a judgment on default or stipulation does not present a danger of confusion. The following language was adapted from language suggested by Stamm Johnson:

> "70 A. Form. Every judgment shall be in writing plainly labelled as a judgment and set forth in a separate document, except judgments need not be set forth in a separate document if the local rules of a court so provide. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. No particular form of words is required, but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. The judgment shall be signed by the court or judge rendering such judgment, or in the case of judgment entered pursuant to ORCP 69 B.(1) by the clerk."

Proposed Rule 70 B.(1) Mailing notice of entry of judgment

PROBLEM

Derrick McGavic suggested the elimination of the requirement of mailing to all parties of a copy of the notice of entry of judgment. He also asked that, if the requirement is retained, the clerk be required to note the mailing addresses in the docket.

RESPONSE

The mailing of notice of entry is crucial to a reasonable system of having a judgment effective on entry. For purposes of appeal it is important that the party against whom it is entered have notice. Some clerks ask: Why mail to the party who filed the judgment. Since enforceability is tied to entry, the party or parties securing the judgment should have notice. In any case, why ask the clerk to figure out who the judgment is "against."

There apparently is a financial burden, but this is a very important procedure; it is possible that the clerks could demand addressed, stamped envelopes as a condition of filing and etnry.

The suggestion of entry of addresses presumes a form of docket which no longer exists in some counties. In any case, it would be an added burden for the clerk with no apparent general benefit.

71 Relief from Judgment or Order

B.(1) By motion

PROBLEM

Several attorneys in Bend asked if Rule 71 B.(1) changed the existing rule because it did not require that a motion to vacate a default for failure to answer be accompanied by an answer.

RESPONSE

Actually, this does not change the existing rule. ORS 18.160 has no explicit requirement that a motion to vacate a default judgment have a copy of a proposed pleading attached. The requirement that a pleading be attached showing the merits of the claim or defense comes from case law. Lowe v. Installment Investors Trust, 270 Or. 814, 817 (1974). An affidavit asserting existence of a defense could probably be used in some cases. Washington County v. Clark, 276 Or. 33, 37 (1976). The pleading or affidavit is necessary because of the implied requirement that relief from a default judgment for mistake, inadvertence, surprise, or excusable neglect will only be granted where there is a meritorious defense; otherwise, vacation is a useless procedure. See Washington County v. Clark, supra, at 37.

The new rule has basically the same requirements for vacation as ORS 18.160, and the assertion of the existence of a meritorious defense prior to vacation would still be required.

Proposed Rule 72 C. Stay of injunction in favor of state or municipality thereof.

PROBLEM

Stamm Johnson suggests that the intent of the Council relating to eliminating a bond requirement for injunctions for public bodies is not clearly set out in the language of section 72 C.

RESPONSE

He is right. His language is clearer:

"72 C. Stay or injunction in favor of public body. The federal government, any of its public corporations or commissions, the state, any of its public corporations or commissions, a county, a municipal corporation, or other similar public body shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment."

Confessions of Judgment Without Action - Proposed Rule 73

PROBLEM

Stamm Johnson, Derrick McGavic, J. Christopher Minor, and several other persons have suggested that it would be a mistake to completely eliminate confessions of judgment. It was argued that this is a useful device to avoid filing when a defendant is willing to admit money is owed but cannot presently pay. Presumably, the debtor would be willing to wait and not sue with a confession of judgment in hand.

RESPONSE

As suggested at the first public hearing in Portland, I have drafted a rule which would allow limited confession of judgment consistent with the request made. A rather elaborate form of rule was originally submitted to the judgment subcommittee. It would have allowed contractual agreements to confession of judgment, but required notice and hearing before actual entry of judgment. The following seems like a much simpler approach. It has the following basic elements:

Subsection A.(1). This would limit confession of judgments to amounts actually due. The confession of judgment should not be available as a security device in the ordinary contract situation. The limiting of place of entry guarantees defendant a local court for this procedure. The provision is adapted from Ill. Stat. Ann., Ch. 110, § 50(3) (1968).

Subsection A.(2). Although the procedure might have some utility in some consumer transactions, this is also the area of highest danger. The legislature has virtually eliminated confessions of judgment in the consumer area. See ORS 83.670(1), 91, 745(1)(b), 697.733(3), and 725.050(2) (no confession of judgment by debt consolidation agencies, by sumer finance entities, for rental agreements, or for instalment sale contracts). This section would merely carry out the policy in the rule; it is taken from Cal. Code of Civil Procedure § 1132.

Section B. This would be new but is basically designed to assure that the confession was based upon an assent by the debtor after the amounts claimed were due and not upon a cognovit agreement before the due date. The cognovit agreement is the one most likely to be abused and where due process would require a hearing. The testimony received indicated confessions of judgment based upon cognovit agreements were not used in Oregon and are arguably unconstitutional, and the need related to debtors who were willing to confess judgment after it was due and they could not pay.

Sections C. and D. were adapted from N.Y. C.P.L.R. § 3218.

(PROPOSED RULE 73 ATTACHED)

RULE 73

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

A.(1) Judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A.(2) No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or extension of credit.

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered, or a person authorized to bind such party, and verified by oath, as follows:

B.(1) It must authorize the entry of judgment for a specified sum; and

B.(2) It must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly and presently due.

B.(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment.

B.(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

Proposed Rule 81 B.(1) Form of notice (of levy)

PROBLEM

John Van Landingham questioned the change in the notice to individuals which eliminates the list of exemptions, the exemption procedure, and reference to the availability of the forms. He submitted a form prepared by the Oregon State Sheriff's Association which he says has value and works well.

RESPONSE

The form of notice was changed because of a concern that requiring a list of "all" exemptions was a procedural trap; that the exemption procedure could arguably never be correctly explained which was another procedural trap; and that the exemption forms were not available.

The solution suggested seems to make sense. By incorporating the notice form into the rule, the notice is automatically sufficient and the exemption claim form is in the notice.

The list of exemptions seems reasonably complete. The detail for "a homestead" should include condominiums, ORS 91.581. The only statutory exemption which I could find missing were insurance company security deposits, ORS 731.644 (which is hardly crucial). The common law exemptions are: (1) claims for or judgment proceeds in personal injuries, damage to reputation, invasion of privacy or dignity interests, or for taking or injuring exempt property; and (2) spendthrift trusts. The common law exemptions seem difficult to explain and would be relatively uncommon

Proposed Rule 82 A.(6) Form of bond

PROBLEM

J.P. Graff asked that Rule 82 A.(6) be clarified to show that the party seeking to use a non-corporate bond could do so by an ex parte application for an order under Rule 82 A.(6).

RESPONSE

This seems reasonable. I believe the suggestion was to add the following in line 5 of the subsection: "upon [a] an ex parte showing of good cause."

ORS 23.310 - Indemnity to sheriff or constable

PROBLEM

Stamm Johnson proposed (see September 22, 1980, letter) the following changes in ORS 23.310:

"_____ Indemnity to sheriff. (1) Whenever a sheriff holding an execution is instructed to levy on personal property, if he is in doubt as to the ownership thereof or as to encumbrances thereon, he may require that the judgment creditor provide him with satisfactory evidence, by affidavit or otherwise, of the ownership of and encumbrances on such property.

(2) The sheriff may require the judment creditor to furnish an indemnity bond if, with respect to such personal property:

a) He is not satisfied as to the ownership thereof, or encumbrances thereon; or

b) He has notice or knowledge of a third party claim thereto; or

c) Damage thereto may result by reason of its perishable character.

(3) The indemnity bond provided for in subsection (2) shall have the same qualifications as a bail bond, and shall run in favor of the sheriff, indemnifying him and his bondsmen against any loss or damage by reason of the illegality of any such levy. It shall be in an amount calculated to cover any reasonably anticipated damages, expenses and costs, but in no event shall it exceed twice the value of such personal property."

RESPONSE

If we are going to make changes in ORS 23.310, I think the best thing to do would be to use the same language which appears in proposed Rule 84 D.(5). I believe this accomplishes everything that Mr. Johnson wants and we would not have two different rules for post-judgment and pre-judgment services.

ORS 29.178 Post-execution procedure, etc.

PROBLEM

Both John Van Landingham and Michael Taylor point out that we would supersede ORS 29.178, but the recent case of Salahub v. Montgomery Ward, 41 Or. App. 775 (1979), had held this was the controlling provision for post judgment writs of execution.

RESPONSE

The Salahub case does hold that the notice provisions of ORS 29.178 apply to garnishments under writs of execution because the execution statute provides that attachment procedure will be followed. See ORS 23.410(4). It also holds that to the extent the writ of garnishment does not require the same notice it is unconstitutional on equal protection grounds. Since we are trying to confine the effect of our changes to provisional remedies, we should recommend that ORS 29.178 remain (probably added to ORS Chapter 23) with the following change in the first sentence:

> (1) Following execution by the sheriff of [any writ pursuant to ORS 29.170 or 29.175] a writ of execution or execution of a writ of garnishment by any person, other than a wage or salary garnishment, the sheriff or such person shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:
>
> . . . .
>
> (b) A copy of the certificate delivered to the county clerk [pursuant to subsection (1) of ORS 29.170] to attach real property, if any;
>
> (c) A copy of a notice of garnishment or the notice delivered pursuant to [subsection (3) of ORS 29.170 or] subsection (1) of ORS 29.175, if any; and
>
> . . . .
>
> [(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as

garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]

[(4)] (3) The sheriff or such person may meet the requirements of subsection (1) of this section by mailing the documents to the last-known address of the judgment debtor as provided by the judgment creditor. The sheriff or such person may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

Note, the deletion of subsection (3) is pursuant to information that (a) banks don't do this; (b) the Multnomah County courts have held the requirement unconstitutional because the bank is not involved in the action but must pay the cost of notice.

ORS 30.275 180-day notice in public body tort claims

PROBLEM

Bob Ringo asked that the Council remove the 180-day notice for tort actions against public bodies, at least for cities. He says this is procedural, not substantive.

RESPONSE

I am not sure whether this is procedural or substantive, but the change is quite significant and deserves some detailed research and discussion. It is too late to do that for this biennium.

ORCP 7 D.(2)(c)

PROBLEM

We received the attached letter from Ronald Allen Johnston which has not been previously submitted to the Council. He requests a change in the adddress for mailing after office service.

RESPONSE

His request seems reasonable and could be accomplished by adding to ORCP D.(2)(c) the language contained in the last sentence of his letter.