

RULE 68

ALLOWANCE AND TAXATION OF
ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Attorney fees. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) Costs. "Costs" are fixed sums provided by statute, intended to indemnify a party.

A.(3) 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 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.

B.(1) Generally. 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 court otherwise directs.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items;

C.(1)(b) Such items are claimed as damages arising from events prior to the action; or

C.(1)(c) Such items are not granted as an incident to a judgment.

C.(2) Asserting claim for attorney fees, costs, and disbursements.

C.(2)(a) Attorney fees. A party seeking attorney fees shall assert the right to such fees by asserting a demand for attorney fees in the initial pleading filed by that party. A party shall not be required to demand a specific amount of attorney fees or allege facts which entitle that party to attorney fees. A demand for "reasonable attorney fees" is sufficient. Such demand shall be taken as automatically denied unless the party against whom such demand is made fails to object to the entry of an award of attorney fees under paragraph C.(4)(b) of this rule, admits liability for attorney fees under

Rule 45, or affirmatively admits such liability. Attorney fees may be demanded before the substantive right to recover such fees accrues.

Notwithstanding the provisions of Rule 67 C., no attorney fees shall be awarded unless such demand is made. Pleadings may be amended or supplemented to assert such demand before trial, during trial, or prior to entry of a statement allowing attorney fees under paragraph C.(4)(d) of this rule, as provided in Rule 23. Failure to object to an award of attorney fees under paragraph C.(4)(b) on the ground that no demand for attorney fees was asserted in a pleading is a waiver of such objection.

C.(2)(b) Costs and disbursements. No pleading or demand or prayer for costs and disbursements shall be required.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection C.(4) of this rule, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and

the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the entry of attorney fees, costs, and disbursements as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the entry of the judgment. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall review the action of the clerk and shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary, and the same shall be conclusive as to all questions of fact.

C.(4)(e) Further allowances. There shall be no recovery of attorney fees or disbursements incurred in the course of the review by the court.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, the court may stay enforcement of that portion of the judgment until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 68

This rule (a) provides a uniform method for assessment of attorney fees; (b) adopts the equitable approach of allowance of costs and disbursements to the prevailing party subject to court discretion, and (c) retains the existing method of taxation of costs with some language clarification and minor modification. It is assumed that the amount of costs and fees and the right to attorney fees are not properly subject to Council rulemaking power and will remain as statutes.

A. This section retains the traditional Oregon distinction between costs and disbursements. Since attorney fees will be uniformly taxed as part of the bill of disbursements, a definition of such fees is included. The costs were originally an indemnification for attorney fees. ORS 20.010. Because of passage of time and inflation, costs are so small that they no longer have any reasonable relation to attorney fees. There also is a potential for confusion when there is a right to attorney fees. Therefore, costs are simply identified as a separate statutory indemnity. The "disbursements" definition combines ORS 20.055 and 20.020 and includes a slightly more specific description of disbursements. The definition also recognizes that other statutes or rules may grant a right to additional specific disbursements, e.g., expert witness compensation under ORS 20.098. Note, in a number of other rules, usually taken from the federal rules, the word "costs" is used in a mere inclusive sense as incorporating general expenses. The definition is, therefore, limited to this rule relating to judgments.

B. This section governs allowance of costs and disbursements but

not attorney fees. The right to recover attorney fees is substantive and is covered by a number of separate statutes. This section adopts the equity approach to allowance of costs and disbursements which allows costs to the prevailing party subject to court discretion, i.e., ORS 20.030, rather than the law approach, which made costs mandatory based upon the type of case, e.g., ORS 20.040 and 20.060. The prior equity statute, ORS 20.030, referred to the party in whose favor the decree was entered rather than the prevailing party. The term "prevailing party" is a more common term used in Federal Rule 54(d) and most state rules. The exact language used was taken from Michigan General Court Rule 526.1. The Michigan rule requires that the court direction that costs not be given to the prevailing party be in writing with the reasons stated. This rule does not so require because no such requirement is contained in ORS 20.020 and would be inconsistent with ORS 20.220(2)(now ORCP 68 C.(4)(d)).

Note, the particular limits on costs in de novo appeal to the circuit court in ORS 20.060 are eliminated.

The ORS sections tied disbursements absolutely to costs. A party with a right to costs had a right to disbursements. Under this rule the court may direct that both or either not be allowed.

The direction of the court might conceivably include assessment of costs against the prevailing party. This is rarely done in the federal system absent a specific statute, e.g., 28 U.S.C.A. §§ 1331 and 1332, but is possible. Note, 54 (roughly the equivalent to Federal Rule 68) identified one situation where costs go to the losing party. This is covered by the first clause of the exception referring to the express provision in these rules or other rule or statute. There may be others. ORS 20.180

was another but is superseded. ORS 20.180 seems to be swallowed by 54 E. ORS 20.180 requires an offer of compromise before action and a tender. It is restricted to a suit for money damages. The same result can be secured by the offer of judgment under ORCP 54 E.

C. This section makes the procedure for assessment of all attorney fees the same as that for costs and disbursements. Rather than refer to assessing attorney fees as part of costs and disbursements, they are treated as a separate item.

There are approximately 150 statutes governing the substantive right to attorney fees. The language of most of them is different, and they have been differently interpreted by the courts as requiring allegation of a right to attorney fees in the complaint and proof of such fees at trial, or as allowing taxation of attorney fees as part of the costs and disbursements. This has created a Grade A procedural trap for a party with a right to attorney fees who makes a mistake as to the proper procedure. It has caused the supreme court and Senate judiciary committee to ask that the Council develop a uniform procedure. Rather than attempt to change the language in all the statutes, this rule simply overrides any other procedural provisions for pleading and assessing attorney fees; hence, the strong language at the beginning of subsection C.(1).

The exceptions specified are necessary because the problem arises with the situation where attorney fee awards are for the fees incurred in prosecution of the action in which they are awarded. In divorce proceedings under Chapter 107 the attorney fees are more properly part of the property settlement. Turner v. Turner, 237 Or. 39, 40, 390 P.2d 360 (1964); Termin v. Termin, 30 Or. App. 1163, 1166, 569 P.2d 673 (1977). The cost bill procedure does not seem appropriate to the sharing of costs involved.

Paragraph C.(1)(b) makes clear that the cost bill procedure would not apply when attorney fees are damages--not costs incurred in the action. Where the attorney fees sought are damages for losses incurred prior to the action based upon a tortious liability or contract obligation, such as breach of warranty, malicious prosecution, professional negligence, etc., the fees should be alleged in the complaint and proved at trial in the same manner as other items of damages.

Paragraph C.(1)(c) recognizes that in some cases a right to costs or attorney fees might arise during the pendency of an action and the court might wish to order payment pendente lite (enforceable by contempt) rather than have such items included in the judgment. For example, the ORCP include provisions for assertion of costs and attorney fees in connection with discovery procedures, for failure to admit, for bad faith affidavits in summary judgment proceedings, etc.

The one troublesome aspect of establishment of a uniform cost bill approach to attorney fees is the question of right to jury trial. The award of attorney fees would be better handled by the trial judge and not a jury. To the extent prior statutes were interpreted as requiring pleading and proof of attorney fees at trial in law cases, the jury assessed attorney fees. If this is purely a matter of procedural rule, the Council could leave this to the trial judge as is done in this rule. If the right is constitutional, however, it is beyond Council rulemaking power.

While the matter is not absolutely free from doubt, there does not seem to be a constitutional right to have a jury award attorney fees. This would only arise if, prior to 1859, such claims were commonly heard

by a jury. In 1859 there appears to have been no attorney fee statutes. They are of later origin and in a number of them the legislature specifically mandated the cost bill procedure which has not been challenged. The Oregon cases referring to right to have a jury trial are interpreting specific statutes. First National Bank v. Mack, 35 Or. 122, 57 P. 329 (1899). There is one case in Oregon that refers to a constitutional right but this may be properly characterized as dicta because the court ruled that a statute required jury trial. Cox v. Alexander, 30 Or. 438, 46 P. 794 (1896). In the recent case of Nicolletti v. Damerow Ford Co., 40 Or. App. 87 (1978), the court's finding of a right to jury trial is based upon a determination that if the statute requires pleading and proof of attorney fees at trial, the matter must be submitted to the trier of fact. If the trier of the fact is the jury, then the issue is submitted to them. There is no suggestion in the Nicolletti case that the submission to the jury is a matter of constitutional right.

The most powerful argument against a constitutional right is the fact that if there was any pattern of awarding attorney fees in 1859, they were actually "costs". The costs were an indemnity for attorney fees under the 1852 Territorial Code and the 1862 Deady Code, and the cost award did not involve the jury. See ORS 20.020. The few cases that do exist in other jurisdictions also find no constitutional right to have the jury assess attorney fees.

Paragraph C.(2) states the basic requirement of notice that attorney fees, costs, and disbursements are requested. Since costs and disbursements are available of course, no specific prayer seems necessary, particularly in view of 67 C. Attorney fees, however, are only available

in limited cases, and some notice that the opponent will seek attorney fees seems desirable. It could strongly affect the opposing party's evaluation and tactics in a case. Since the fees are a court determination in the cost bill context, formality of pleading seems unnecessary and undesirable. The rule requires only a simple demand and no responsive pleading. To secure fees, a party is required to (a) make a demand and (b) put such fees in the cost bill. The denial of the demand would come in the form of an objection to the cost bill.

Note, in those cases where attorney fees formerly were allowed as part of the cost bill, this rule may add a new requirement of assertion prior to the cost bill. However, failure to make the demand is not irrevocable. Under the specific reference to Rule 23, the party's pleading could be amended as of course or by leave of court prior to the entry of the court's determination of attorney fees. Under the liberal amendment standards of that rule, leave to amend should be granted unless the opponent can show prejudice in some form. Failure to object or objection to the cost bill without raising the question of failure to demand would result in waiver of that objection.

Subsection C.(3) covers proof of objection and makes clear the matter is not handled at trial by the trier of fact but is subject to court determination in the context of assessing costs, disbursements, and attorney fees. The assessment procedure in subsection C.(4) is basically the same as ORS 20.210 and 20.220. Costs, disbursements, and fees may be entered by the clerk and are subject to court review upon objection. Where only costs are sought, no notice is required. The costs are fixed amounts clearly specified by statute and generally are a very limited amount. For disbursements or attorney fees, which would be most subject to controversy,

notice and proof of service is required before the clerk enters these as part of the judgment. The time for objection and filing the cost bill are limited to "not later than" fixed days after "entry" of the judgment of which they are a part, rather than "within" fixed days of entry.

The reasoning is the same as similar changes in Rules 63 and 64 relating to time for post trial motions. Paragraphs C.(4)(c) adds a specific requirement of opportunity to present evidence on factual issues heard by the judge.

Subsection C.(5) is based on ORS 20.030. Entry as part of the judgment makes the attorney fees, costs, and disbursements award enforceable. Since the procedure is entry followed by objection, the rule adds a provision allowing a stay if objections are raised. The stay is not automatic but must be granted by the court.

Subsection C.(6) is entirely new and is required by the new procedure that allows more than one judgment in a case, which is 67 B. It avoids multiple court assessments for the same items and makes clear that, even though an appealable and enforceable judgment is entered under 67 B., the court may delay an award of costs, disbursements, and attorney fees until all judgments are entered. This may be either on its initiative or upon objection to a cost bill in the first judgment.

MISCELLANEOUS ORS SECTIONS

Note, ORS 20.050 provided that costs were not available in separate actions against several parties. This has no equivalent in this rule. The problem was limited to costs and seems inconsequential. In any case, it is inconsistent with the other rules.

ORS 20.120 would be eliminated. With the merger of law and equity and elimination of 20.060, it has no function.

Subpart (3) of ORS 20.220 relates to appeal of attorney fees and remains as a statute in Chapter 19 as follows:

An appeal may be taken from the decision and judgment on the allowance and taxation of attorney fees, costs and disbursements on questions of law only, as in other cases. On such appeal the statement of attorney fees and disbursements, the objections thereto, the statement of attorney fees, costs, and disbursements as filed by the court or judge, the judgment or decree rendered thereon, and the exceptions, if any, shall constitute the trial court file, as defined in ORS 19.005.

This statute could use some attention:

- (1) It would not include the pleading requiring attorney fees in the trial court file.
- (2) What about evidence submitted at the hearing?
- (3) What exceptions?

The statute is beyond our rulemaking power.

Rule 67 E.

Alternative II on page 3 of the draft, which allows a partnership to be sued as an entity, should be used. The Executive Director suggested that this would also involve amending ORCP 26 to add a new subsection B. as shown on page 20 of the comment to Rule 67 and a possible new section for service on partnerships in Rule 7. He was asked to submit a draft of a suggested rule covering service on partnerships.

Rule 67 F.

The complicated categories of who may stipulate to judgment in 67 F.(2) should be eliminated and replaced by a requirement that the stipulation be signed by the defendant or a person with authority to bind the defendant.

Rule 68 A.(3)

The comment to this subsection should reflect that the language relating to deposition expense was taken from ORS 20.020 and there was no intent to change existing law.

Rule 68 C.(2)

This subsection should be changed to require allegation of facts, statute, or rule providing a basis for such fees in the body of the pleading. The section should also cover the situation where a party seeking fees files no pleading but moves to dismiss or for summary judgment and also to allow assertion of a right to attorney fees at a point later than an initial pleading if the right to such fees later appears.

Rule 68 C.(4)(b)

The time for objection to cost bill should be increased from 15 days after the entry of judgment to "15 days after the filing of the cost bill or 30 days after the entry of judgment, whichever occurs first." Since there are 10 days in which to file the cost bill, 15 days to object is too short.

Rule 68 C.(4)(d)

The words "and the same shall be conclusive as to all questions of fact" should be removed from the last sentence.

Rule 68 C.(4)(e)

This section should be eliminated. Any additional costs incurred in the objection to the cost bill should be recoverable.

Rule 68 C.(5)

This section should be changed to provide an automatic stay of the costs and attorney fees portion of the judgment upon filing of objections.

Rule 69 A.

The words "or court" should be added between "clerk" and "shall" in last line.

Rule 69 B.(1)

A further qualification upon the power of the clerk to enter judgment should be added as section B.(1)(g) as follows:

"Summons was personally served within the State of Oregon upon the party against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i)."

Rule 69 B.(2)

The necessity for appearance by a general guardian should be eliminated. The reference to three days in line 9 should be changed to "10 days, unless shortened by the court," and specific reference to authority of the court to use affidavits should be added. The requirement for mandatory jury trial in unliquidated damage cases should be omitted.

Rule 69 C.

The Executive Director was asked to redraft this section to avoid differing standards for vacating default judgments and other judgments.

Rule 69 E.

This section relating to publication default should be eliminated.

Rule 70 A.

Add the words "plainly labelled as a judgment" between the words "writing" and "and" in the first line. The words "or approved" should be eliminated from line 6.

Rule 70 B.

Eliminate words "in the journal" in lines 1 and 2 of this section.

Rule 70 C.

This section should be redrafted to provide for service a fixed number of days prior to submission.

The Council next considered revised Rules 67 - 73. Fred Merrill stated that copies of those rules, and also Rules 75 - 87, had been furnished to various State Bar committees and other groups. The only written response has been from Legal Aid. The State Procedure and Practice Committee has been given copies of the revised rules. It was suggested that any further action be deferred until they have an opportunity to respond. The Executive Director suggested that the revised rules include several matters where the Council had requested further information or drafting as follows:

68 C.(2) Asserting claim for attorney fees, costs, and disbursements. The language was designed to include all matters suggested by the Council at the last meeting. The Council discussed whether consideration of attorney fees arising from a contractual right would violate the constitutional right to jury trial. Austin Crowe moved, seconded by Garr King, that Rule 68 C.(2) be redrafted in order to protect the right to jury trial when the claim for fees is based upon a contractual right. The motion passed, with Lyle Velure opposing it.

71 B. The Executive Director pointed out that in the second draft of Rule 71, the word "fraud" had been eliminated from section B. Examination of Oregon cases has revealed that there is some question if fraud could provide a ground for motion to vacate judgment. The Executive Director suggested that, even if there was no desire to expand fraud beyond extrinsic fraud, extrinsic fraud should be raisable by motion as well as by independent equity suit. After discussion, a motion was made by Austin Crowe, seconded by Charles Paulson, to include "fraud" as a subsection under 71 B. The motion passed, with Wendell Gronso and Carl Burnham opposing it.

The Council discussed proposed Rule 42 (account). Wendell Gronso moved, seconded by Carl Burnham, to change Rule 42 so that 30 days would be allowed within which to furnish a copy of an account unless motion for extension of time was filed within 30 days and that if the account were not furnished, no evidence of the account could be submitted at trial. The motion failed, with Judge Wells and Wendell Gronso voting in favor of the motion.

David Vandenberg moved, seconded by Carl Burnham, to leave the matter of furnishing an account to notice of production and inspection and other discovery devices and that no request for account procedure be retained. The motion passed unanimously.

The Council received reports of subcommittees as follows:

For the subcommittee considering Rules 75 - 87, the Executive Director reported that they were examining the rules and soliciting comments.

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A.(3) 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.

B.(1) Generally. 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 court otherwise directs.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items;

C.(1)(b) Such items are claimed as damages arising from events prior to the action; or

C.(1)(c) Such items are not granted as an incident to a judgment.

C.(2) Asserting claim for attorney fees, costs, and disbursements.

C.(2)(a) Attorney fees. A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in the initial pleading filed by that party. If a party did not know and reasonably could not have known of the existence of a basis for the award of attorney fees, such allegations may be made in a subsequent or supplemental pleading by that party. A party shall not be required to allege a right

to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegations or demand shall be taken as substantially denied unless the party against whom the award of attorney fees is sought fails to object to the entry of an award of attorney fees under paragraph C.(4)(b) of this rule, admits liability for attorney fees under Rule 45, or affirmatively admits such liability. Attorney fees may be sought before the substantive right to recover such fees accrues. Notwithstanding the provisions of Rule 67 C., no attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

C.(2)(b) Costs and disbursements. No pleading or demand or prayer for costs and disbursements shall be required.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection C.(4) of this rule, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disburse-

ment has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the entry of attorney fees, costs, and disbursements as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 30 days after the entry of the judgment. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall review the action of the clerk and shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court shall make a statement of the attorney fees, costs, and disbursements

allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 68

A.(3). In comparing ORS 20.020 and this subsection I find that we had changed "the necessary expenses of taking depositions" by taking out the word "necessary." I put it back in to conform to Council intent not to change the rule relating to discovery depositions.

C.(2). I think this redraft reflects the suggestion of the subcommittee and the Council. The effect of making the standard form of assertion of right to attorney fees an allegation would be that specificity could be tested by motion to make more definite and certain and existence of a right to recover tested at a pretrial stage by motion to dismiss or partial summary judgment.

Paragraph C.(4)(b) contains the changed time for filing objections. The time was simply changed to 30 days rather than 30 days or 15 days after filing the cost bill. Since the cost bill must be filed within 10 days after entry, 15 days after filing the cost bill would always be less than 30 days after entry.

The subcommittee asked for clarification of the relationship between the procedure for determining costs bills and the rule that the trial court loses jurisdiction and cannot modify a judgment once a notice of appeal is filed.

ORS 19.033(1) states:

(1) When the notice of appeal has been served and filed as provided in ORS 19.023 to 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, subject to a determination under ORS 2.520, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law.

The vesting of jurisdiction in the appellate court takes place upon the filing and serving of the notice of appeal, and the appeal is pending from that time rather than the completion of any other steps in the appeal. This was the result of the 1959 Revision of the appellate statutes. Puhrman v. Klamath Co. Comm., 272 Or. 390, 392-393 (1975). The reference to "as conferred upon it by law" is to steps which the trial court is statutorily required to take in relation to the appeal. Gorden Creek Tree Farms v. Layne, 230 Or. 204, 209 (1962)

Correctly speaking, the trial court does not "lose jurisdiction" completely upon the vesting of jurisdiction in the appellate court; the trial court only is prohibited from acting in any manner "so as to affect the jurisdiction acquired by the appellate court or defeat the right of the appellants to prosecute their appeal with effect." State v. Jackson, 228 Or. 371, 382 (1961). Thus the trial court may vacate a judgment to correct the record but cannot modify its prior judgment. Caveny v. Asheim, 202 Or. 195, 208-212 (1954). This would prohibit a trial court from vacating a judgment for new trial or NOV if a notice of appeal were filed prior to moving for the new trial or NOV. C.f. Tomasek v. Oregon Highway Com'n., 196 Or. 120, 134 (1952). The appellate statutes recognize this by extending the time for appeal when post trial motions are filed. ORS 19.026(2).

The limitation on the trial judge's authority does not then prevent any action relating to a case that is collateral or incidental to the matter appealed which does not directly affect the appeal. 4 Am. Jur. 2d Appeal and Error § 555. The trial court is not prohibited from entering a cost judgment or passing on objections to costs once

the notice of appeal is filed. 4 Am. Jur. 2d Appeal and Error § 618, n.29 at p. 413. In Lemmons v. Huber, 45 Or. 282, 284 (1904), the Oregon court held that entry of a cost judgment after the main judgment did not extend the time for appeal, but the cost judgment could be separately appealed. The court said:

The controversy over the disbursements did not delay the entry of the judgment, nor did the final decision of that question amount to a modification of the judgment, or extend the time in which to appeal. * * * The costs were but a mere incident to the judgment. The proceedings subsequent to its rendition were merely for the purpose of ascertaining the amount of the disbursements to which the defendant was entitled, and they did not alter, modify, or affect the judgment in any way.

See also Lyon v. Mazeris, 170 Or. 222 (1943), and cases cited at p. 232.

The Oregon statutes recognize the cost bill is a separate judgment, and ORS 20.220(3) (which remains as a statute) provides for a separate appeal from the cost and disbursements judgment. It is possible and customary to appeal both the main judgment and entry of costs at the same time. Wade v. Amalgamated Sugar, 71 Or. 75 (1914). The costs judgment, however, can be appealed separately if there is no desire to appeal the main judgment. Presumably if the main judgment were appealed before the costs were entered, a separate appeal would be used.

Increasing the time to object to a cost bill would not then affect the trial court's authority to direct entry of costs in response to the objection. It may increase the number of cases where the notice of appeal is filed before the cost judgment is finalized. This situation requires more care in determining whether the appeal filed is directed to the cost judgment, whether the designation of record is complete, and whether a separate notice of appeal is required. This frequently would

be a consideration anyway since there is no limited time for the judge to rule on objections to the cost bill.

Rule 68 C.(4)(d) was changed to eliminate the language referring to conclusiveness of findings of fact, and 68 C.(4)(e) (which prohibited recovery of further costs in the objection proceeding) was eliminated. Subsection 68 C.(5) was changed to provide the automatic stay.

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

court otherwise directs. If, under an express provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party fee authorized by ORS 20.070.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 C. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising from events prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

C.(2) Asserting claim for attorney fees. A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a

basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45 or may affirmatively admit liability. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection C.(4) of this rule, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph C.(4)(a). Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall

hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

This rule uses the bill of disbursements method for almost all attorney fee claims. The Council adopted the post trial procedure because it is the simplest and separates a collateral controversy from the main trial. It also makes sense to deal with attorney fees after the case is tried.

The rule also develops a uniform provision for entitlement to costs and disbursements. This is necessary because of the procedural merger of law and equity. The rule is the prior rule in equity and for special proceedings. The rule does not deal with right to receive attorney fees. This was felt to be a substantive rather than a procedural matter. For the same reason, the rule does not cover the amount of costs or fees.

Section 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain non-recoverable because the rule refers to "necessary" deposition costs.

Section 68 B. would supersede ORS 20.040, 20.060, and the last sentence of 20.100. The rule is the flexible standard formerly applied to equity cases. The language used was adapted from Michigan District Court Rule 526.1. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Section 68 C.(1) makes almost all claims for attorney fees subject to this rule. There a large number of statutes governing right to attorney fees. Rather than attempt to change the language of all the statutes, the rule simply provides a procedure for assessing such fees no matter what source is relied upon as providing the right to such fees. There are a few specific exceptions where the rule procedure would not be appropriate, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as discovery sanctions which are part of a court order and enforceable by contempt, would not be covered by the rule. 68 C.(1)(c).

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

Subsections 68 C.(4) and (5) preserve the existing costs and disbursements procedure from ORS 20.210 through 20.230. The specific claim for attorney fees is included in the bill of disbursements. The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after service of a bill of disbursements. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence on affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) is new and provides for costs and disbursement assessment in cases where multiple judgments are entered under 67 B.

Proposed Revision

RULE 68

* * *

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items;

C.(1)(b) Such items are claimed as damages arising from events prior to the action;

C.(1)(c) Such items are not granted as an incident to a judgment; or

C.(1)(d) A party claims a right to attorney fees based upon a contract which specifically provides that attorney fees incurred to enforce the contract shall be awarded to one or both parties or based upon ORS 20.096.

COMMENT

This seemed like the simplest way to handle the right to jury trial problem presented by claims based upon contracts providing for attorney fees. By excluding them totally from the rule, they then would be governed by existing law. They would have to be pled and proved at trial as other claims for damages, and submitted to the trier of fact for decision. Gorman v. Boyer, 274 Or. 467 (1976); State High. Com. et al v. Kendrick et al, 227 Or. 608, 610-11 (1961).

RULE 68

ALLOWANCE AND TAXATION OF
ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

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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

court otherwise directs. If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party fee authorized by ORS 20.070.

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C.(2) Asserting claim for attorney fees. A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a

basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45 or may affirmatively admit liability. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

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C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph C.(4)(a). Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

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hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

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C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

This rule uses the bill of disbursements method for almost all attorney fee claims. The Council adopted the post trial procedure because it is the simplest and separates a collateral controversy from the main trial. It also makes sense to deal with attorney fees after the case is tried.

The rule also develops a uniform provision for entitlement to costs and disbursements. This is necessary because of the procedural merger of law and equity. The rule is the prior rule in equity and for special proceedings. The rule does not deal with right to receive attorney fees. This was felt to be a substantive rather than a procedural matter. For the same reason, the rule does not cover the amount of costs or fees.

Section 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain non-recoverable because the rule refers to "necessary" deposition costs.

Section 68 B. would supersede ORS 20.040, 20.060, and the last sentence of 20.100. The rule is the flexible standard formerly applied to equity cases. The language used was adapted from Michigan District Court Rule 526.1. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Section 68 C.(1) makes almost all claims for attorney fees subject to this rule. There are a large number of statutes governing right to attorney fees. Rather than attempt to change the language of all the statutes, the rule simply provides a procedure for assessing such fees no matter what source is relied upon as providing the right to such fees. There are a few specific exceptions where the rule procedure would not be appropriate, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as discovery sanctions which are part of a court order and enforceable by contempt, would not be covered by the rule. 68 C.(1)(c).

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

Subsections 68 C.(4) and (5) preserve the existing costs and disbursements procedure from ORS 20.210 through 20.230. The specific claim for attorney fees is included in the bill of disbursements. The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after service of a bill of disbursements. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence on affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) is new and provides for costs and disbursement assessment in cases where multiple judgments are entered under 67 B.

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, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs.

If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party costs authorized by ORS 20.070.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

C.(2) Asserting claim for attorney fees. A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a

basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Attorney fees, costs, and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees, costs,

and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.

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.

C.(4)(b) Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court

shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph (4)(d) of this section.

C.(6) Avoidance of multiple collection of costs, disbursements, and attorney fees.

C.(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and

disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments.

COMMENT

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

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Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as discovery sanctions which are part of a court order and enforceable by contempt, would not be covered by the rule. 68 C.(1)(c).

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

Subsections 68 C.(4) and (5) are based upon the existing costs and disbursements procedure in ORS 20.210 through 20.230. Paragraph 68 C.(4)(a) changes the procedure and requires service of a statement claiming costs, as well as disbursements and attorney fees, prior to entry of such costs as part of a judgment. The specific claim for attorney fees is included in the bill of disbursements. Note that in cases involving a judgment against parties who are in default for failure to appear, service of the statement of costs, disbursements, and attorney fees is not required. However, a statement must be prepared and filed to provide a basis for assessment of these items. Also, no judgment for attorney fees can be entered in such default cases unless the court approves the amount of the fees. Such approval could be in the form of an approved fee schedule for default cases adopted by the court or approval for individual cases.

The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after service of the statement of costs, disbursements, and attorney fees. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence and affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) replaces ORS 20.050 and also covers the entry of multiple final judgments in one case. Paragraph 68 C.(6)(a) covers the situation where multiple judgments are entered on separate claims pursuant to ORCP 67 B. In such case, the court is required to avoid multiple taxation of the same costs, disbursements, or attorney fees. Paragraph 68 C.(6)(b) allows entry of the same costs, disbursements, and attorney fees when there are multiple judgments against different parties on the same claim (in the same case or in separate cases), but makes clear that satisfaction of the costs, attorney fees, and disbursements portion of one such judgment satisfies all of the judgments.