COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 14, 1985

Law Offices of Stoel, Rives ET AL

900 Southwest Fifth Avenue

Portland, Oregon

Present:	Joseph D. Bailey Richard L. Barron John H. Buttler Raymond J. Conboy John M. Copenhaver Karen Creason Jeffrey P. Foote Lafayette G. Harter	William L. Jackson Sam Kyle Ronald Marceau Richard P. Noble James E. Redman J. Michael Starr John J. Tyner, Jr. Robert D. Woods
Absent:	George F. Cole Harl H. Haas Robert E. Jones Steven H. Pratt	R. William Riggs William F. Schroeder Wendell H. Tompkins

(Also present was Douglas A. Haldane, Executive Director of the Council.)

The following are minutes of the meeting of the Council on Court Procedures held on December 14, 1985 in the law offices of Stoel Rives, et al, in Portland.

The meeting of the Council convened at 9:30 a.m. As its first order of business, the Council opened the nominations for the position of Chairman. Judge Copenhaver nominated Joseph D. Bailey. That nomination was seconded by Judge Buttler. Nominations were thereupon closed. Judge Copenhaver moved that a unanimous ballot be cast for Joseph Bailey as Chairman. Judge Jackson seconded that motion, which was adopted.

Nominations were then opened for the position of Vice Chairman. Jeffrey Foote was nominated by Michael Starr. Richard Noble seconded the nomination. There being no further nominations, Mr. Starr moved that the Council cast a unanimous ballot for Jeffrey Foote as Vice Chairman, and the motion was adopted.

The Council then opened nominations for the position of Treasurer. Mr. Starr nominated Sam Kyle. The nomination was seconded by Mr. Noble, and a unanimous ballot was cast for Mr. Kyle as Treasurer.

Mr. Bailey opened the discussion regarding a meeting schedule for the 1985-87 biennium. It was suggested that the Council meet once every two months and have, as its normal meeting date, the second Saturday of each month. A consensus of the Council was reached that the second Saturday of the month would be appropriate where possible. Due to a three-day weekend, the third Saturday, February 22, was chosen as the next meeting of the Council, and Mr. Haldane was directed to provide a meeting schedule for the remainder of the biennium.

Mr. Haldane briefly explained the Council's budget and staffing and indicated that the Council budget had been well received by the 1985 Legislature.

The Council then proceeded to discuss items involving the ORCP which had been brought to the attention of Mr. Haldane.

William E. Love had brought to the Council's attention the problem faced by financial institutions when required to produce records in actions where the financial institution itself was not a party. The question was discussed in the broader context of whether Mr. Love's suggestions were procedural or substantive and whether other institutions, such as hospitals, might face the same problems. It was determined that the specific problem mentioned by Mr. Love may well be substantive but that the broader problem might warrant Council attention. A subcommittee was appointed comprised of Judge Buttler (Chair), Mr. Noble, and Ms. Creason to look into the matter and report back to the Council.

Judge Bearden, Presiding Judge of the Multnomah County District Court, had brought to the attention of the Council the fact that the time limits placed upon motions for summary judgment could cause difficulties in district courts. After discussion, the Council was of the view that the time periods in ORCP 47 had not been in effect for a sufficient period of time to determine their effect on the trial courts. The Council asked that Judge Bearden's concern be placed on the agenda for a later meeting of the Council.

The Council then discussed Mr. Gronso's complaint regarding abuses of requests for production. After discussion, it was determined that the Council should perhaps look into the general question of discovery. It was noted that a Bar committee on costs of litigation had been formed and that the Bar committee may be looking into the question of discovery. Mr. Haldane was

directed to report back to the Council the direction of that committee's work.

George Fulton of Astoria had suggested that the Council should promulgate a rule allowing a motion for reconsideration. Mr. Haldane reported that he had spoken with Mr. Fulton and Judge Hunnicutt, both of whom had expressed their views on this subject. Mr. Haldane was directed to discuss the matter further with Judge Hunnicutt and Mr. Fulton, and if deemed necessary, prepare a proposal for the consideration of the Council.

J.R. Perkins, III, had raised complaints regarding the procedure used in accepting personal checks in satisfaction of civil judgments. While the Council believed that the problems discussed in Mr. Perkins' letter were administrative and thus were within the jurisdiction of the Chief Justice rather than the Council, Mr. Haldane was directed to write to the Chief Justice regarding the current procedure and express the Council's concern.

Bob Oleson had submitted a proposal relating to attorney-client privileges in the form of Senate Bill 390, which had been tabled by the legislative committee. Since the proposal relates to evidentiary matters, it was determined that it is outside the Council's jurisdiction.

Chief Justice Peterson had suggested that the ORCP be amended throughout to delete the periods following capital letters denoting sections. Mr. Haldane reported that information from the Legislative Counsel's office indicated that such a change, while perhaps desirable, would require changing references to the ORCP throughout the entire Oregon Revised Statutes and would, therefore, be prohibitively expensive. The Council determined that it would not pursue the Chief Justice's suggestion at this time.

The Council then discussed the problems suggested in ORCP 69 in the case of Denkers v. Durham Leasing. It was determined that the Denkers case raised serious problems for practitioners, and Mr. Haldane was directed to draft proposals for Council consideration that would ensure adequate notice prior to the taking of a default order or a judgment of default.

Hugh Collins had suggested that the present methods for effecting service of process are not as clear as they might be. After discussion, the Council determined that a subcommittee should be appointed to look at Rule 7 in its entirety. A subcommittee was appointed comprised of Mr. Conboy (Chair), Mr. Woods, and Mr. Marceau.

The next meeting of the Council will be held on Saturday, February 22, 1986, at the State Capitol (Room 354) in Salem.

The meeting was thereupon adjourned at 11:35 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

OREGON COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, OR 97403
Telephone: 686-3990

January 20, 1986

TO: Members, COUNCIL ON COURT PROCEDURES:

Joe D. Bailey	Sam Kyle
Richard L. Barron	Ronald Marceau
John H. Buttler	Richard Noble
George F. Cole	Steve H. Pratt
Raymond Conboy	James E. Redman
John M. Copenhaver	R. William Riggs
Karen Creason	William F. Schroeder
Jeffrey P. Foote	J. Michael Starr
Harl H. Haas	Wendell H. Tompkins
Lafayette G. Harter	John J. Tyner
William L. Jackson	Robert D. Woods
Robert E. Jones	

FROM: Douglas A. Haldane, Executive Director

RE: MEETING SCHEDULE FOR 1985-87 BIENNIUM

Attached please find a meeting schedule for the Council on Court Procedures. The schedule will fulfill our obligation to meet in each of the congressional districts of the state. I have spaced them at two-month intervals as suggested, with the exception of the July meeting. This will allow us to go back to the two-month schedule and still have an opportunity for a final meeting immediately prior to the legislative session.

In each of the intances where the Council will be meeting at a hotel or motel, I will reserve a block of rooms for Council meetings. However, you will need to make your own reservations (mentioning that you are a Council member).

PNS:gh
Enclosure

COUNCIL ON COURT PROCEDURES

Meeting Schedule

1985-87 Biennium

February 22, 1986 9:30 a.m.	State Capitol (Room 354) Salem, Oregon
April 12, 1986 9:30 a.m.	The Eugene Holiday Inn-Holidome 225 Coburg Road Eugene, Oregon
June 14, 1986 9:30 a.m.	Red Lion/Jantzen Beach 909 North Hayden Island Drive Portland, Oregon
July 26, 1986 9:30 a.m.	The Inn of the Seventh Mountain (on Century Drive on the road to Mt. Bachelor) Bend, Oregon
September 13, 1986 9:30 a.m.	The Village Green Cottage Grove, Oregon
November 8, 1986 9:30 a.m.	Oregon State Bar Offices (Rooms 2 and 3) 1776 Southwest Madison Portland, Oregon
December 13, 1986	(TIME AND PLACE TO BE ANNOUNCED)

COUNCIL ON COURT PROCEDURES

Revised Meeting Schedule

1985-87 Biennium

February 22, 1986 9:30 a.m.	State Capitol (Room 354) Salem, Oregon
April 12, 1986 9:30 a.m.	The Eugene Holiday Inn-Holidome 225 Coburg Road Eugene, Oregon
June 14, 1986 9:30 a.m.	Red Lion/Jantzen Beach 909 North Hayden Island Drive Portland, Oregon
July 26, 1986 9:30 a.m.	The Inn of the Seventh Mountain (on Century Drive on the road to Mt. Bachelor) Bend, Oregon
September 13, 1986 9:30 a.m.	Portland Marriott 1401 SW Front Avenue Portland, OR 97201
November 8, 1986 9:30 a.m.	Oregon State Bar Offices (Rooms 2 and 3) 1776 Southwest Madison Portland, Oregon
December 13, 1986	(TIME AND PLACE TO BE ANNOUNCED)

UNIVERSITY OF OREGON

MEMORANDUM

TO: **COUNCIL ON COURT PROCEDURES**

Joe D. Bailey
John H. Buttler
J. R. Campbell
John M. Copenhaver
Jeffrey P. Foote
Robert H. Grant
John J. Higgins
John F. Hunnicutt
William L. Jackson
Roy Kilpatrick
Sam Kyle
Edward C. Perkins
James E. Redman
R. William Riggs
E. B. Sahlstrom
William Schroeder
J. Michael Starr
Wendell H. Tompkins
John J. Tyner
James W. Walton
William W. Wells
Bill L. Williamson

FROM: **Douglas A. Haldane, Executive Director**

DATE: January 24, 1985

RE: **Financial Institution's Compliance with Subpoenas**

Enclosed is a copy of a letter I received from Bill Love outlining a problem experienced by financial institutions when served with subpoenas for records.

Mr. Love first brought this to my attention in a telephone conversation in which I expressed some question as to whether the type of thing he seeks is within the jurisdiction of the Council. I would appreciate it if I could get an early indication from some of you as to whether imposing these kinds of costs on litigants when seeking records from a financial institution would be considered procedural or substantive.

Thank you in advance for your comments.

DAH:gh

Enclosure

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ATTORNEYS AT LAW
SUITES 1600-1800, PACWEST CENTER
1211 S. W. FIFTH AVENUE
PORTLAND, OREGON 97204-1082
TELEPHONE (503) 222-9981

WILLIAM E. LOVE
(503) 796-2981

CABLE ADDRESS "ROBCAL"
TELEX-151563
TELECOPIER (503) 796-2900

January 18, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
Post Office Box 11544
Eugene, Oregon 97440

Dear Doug:

Following up on our telephone conversation, I set forth a basic problem faced by financial institutions today. With more frequency than one would like to think, financial institutions are faced with requests, or subpoenas, from lawyers and the private sector for the production of massive documents in cases or proceedings in which the financial institutions are not parties. For example, someone seeks copies of all checks written for the past two years costs a substantial amount of money to make these items available. If the subpoena fee is tendered, the financial institution does not currently have the right to demand further reimbursement.

Where a public agency seeks such information, the law provides that the financial institution shall be reimbursed for its reasonable costs incurred. This is covered by ORS 192.550ff for Oregon public agencies, and by 12 CFR 219 for federal agencies generally. The federal rule sets forth specific amounts for specific services; the state law currently does not.

The financial institutions have under consideration legislation which would amend the Oregon law with regard to public agencies to spell out specific amounts as being reasonable, and at the same time applying the comparable requirements to attorneys and other private concerns seeking such information. No final decision has been reached as to whether the expense reimbursement requirement should apply where the financial institution is a named litigant (probably not).

WASHINGTON, D.C. 20007 • THE FLOUR MILL SUITE 302 • 1000 POTOMAC ST. N.W • (202) 965-6300
SEATTLE, WASHINGTON 98171 • PEOPLES NATIONAL BANK BUILDING • SUITE 900 • 1415 FIFTH AVENUE • (206) 621-9168 • (503) 242-1532

The question has been posed as to whether the matter of such reasonable charges properly belongs within the council's jurisdiction or is outside of its area of concern and should be dealt with at the legislative level. I recognize that the Council's report and recommendation changes for action by this 1985 legislative session has already been finalized and submitted so that any Council involvement could not be effective before 1987.

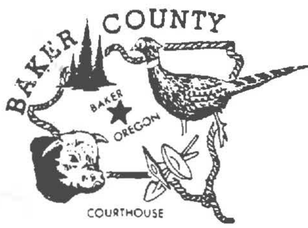
I represent the Oregon League of Financial Institutions (formerly the Oregon Savings League) in this regard which is working in conjunction with the Oregon Bankers Association. It would be helpful if we could be apprised as to whether this is within the responsibility area of the Council and would be considered by it on the merits.

Should you need any additional information, please let me know. I appreciate your input in connection with this matter.

Very truly yours,

WILLIAM E. LOVE

WEL:lb



CIRCUIT COURT OF OREGON
EIGHTH JUDICIAL DISTRICT
BAKER, OREGON 97814
503/523-6303

1995 Third Street
97814-3313

WILLIAM L. JACKSON
Judge

January 29, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
School of Law
Eugene, Oregon 97403

Dear Doug:

This will acknowledge receipt of your letter of January 24, 1985, regarding financial institution's compliance with subpoenas.

It would appear to me that the matter referred to in Mr. Love's letter would not be something that this committee would consider, being substantive rather than procedural.

Yours very truly,

William L. Jackson

WLJ:sm

Judges
JOHN F. HUNNICUTT
JAMES A. MASON

Circuit Court of Oregon

NINETEENTH JUDICIAL DISTRICT
FOR COLUMBIA COUNTY

COLUMBIA COUNTY COURTHOUSE
ST. HELENS, OREGON 97051
TELEPHONE: 503 397-0157

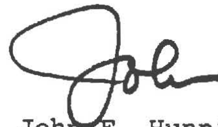
January 30, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Doug:

I have reviewed Bill Love's letter of January 18, 1985. It seems to me that the costs of discovery are procedural even when the financial institution is not a party litigant. If the financial institution is asked for records for any purpose not related to litigation, then the matter should be treated as substantive. I think imposition of a charge (cost) for copying is fair and would support such a rule.

Very truly yours,



John F. Hunnicutt
Circuit Judge

nb

LAW OFFICES OF
GRANT, FERGUSON, CARTER, P.C.

ROBERT H. GRANT
WILLIAM H. FERGUSON
WILLIAM G. CARTER
SANDRA SAWYER

SUITE 5B
201 WEST MAIN STREET
MEDFORD, OREGON 97501-2775
TELEPHONE (503) 773-8471

January 25, 1985

Mr. Doug Haldane
Executive Director
Oregon Council on Civil Procedure
School of Law, University of Oregon
Eugene, OR 97403-1221

Dear Doug:

I have reviewed your letter of January 24, 1985, and Bill Love's letter of January 18, 1985.

It would appear that this matter is already covered by Rule 55B which gives the court in cases of subpoena duces tecum the authority to upon Motion to Quash "condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing books, papers, documents, or tangible things". I would think that the financial institution could simply advise the attorney issuing the subpoena that the institution will move to quash unless a reasonable fee is advanced or agreed to. If the aevance or agreement is not forthcoming then the financial institution would move to quash. The subpoena is oppressive unless the conditions are imposed by the court.

I think it is within the jurisdiction of the Council on Court Procedures and is already covered in Rule 55.

Sincerely,

ROBERT H. GRANT

RHG:eld

LAW OFFICES OF
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1200 S. W. MAIN
PORTLAND, OREGON 97205

JOHN J. HAUGH
JEFFREY P. FOOTE
STUART I. TEICHER
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DAVID E. DEAN
BEN C. FETHERSTON, JR.
MICAH D. STOLOWITZ

AREA CODE 503
TELEPHONE 227-6722
STATEWIDE TOLL FREE NUMBER
1-800-228-8228
LEGAL ASSISTANTS
RAYMOND B. DUVAL III
GALE CULMSEE

January 28, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Doug:

I received your correspondence regarding the question of whether posing costs on litigants seeking records from a financial institution would be considered procedural or substantive. It is my feeling that this is substantive, and beyond the jurisdiction of the Council. The provisions in ORCP which provide for the awarding of costs and attorney fees are generally based upon some other provision of substantive law. The exception would be costs and attorney fees for failure to comply with discovery orders (ORCP 46B(3)). For example, ORCP 32N, dealing with attorney fees in class actions provides the procedure for the awarding of attorney fees, but only if another provision of law provides for the fees. Likewise, ORCP 68 sets the mechanism for the awarding of costs and attorney fees.

It would seem to me that for us to create a right of financial institutions to the costs of complying with subpoenas would be creating a substantive right, rather than setting forth the procedure to collect those costs. Accordingly, it is my feeling that Mr. Love's request is outside of the jurisdiction of the Council on Court Procedures and is more properly directed to the Legislature.

Sincerely yours,

Jeffrey P. Foote

JPF:rh

cc: Roy Kilpatrick, Esq.

LANDIS, BAILEY & MERCER, P. C.
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1516 STANDARD INSURANCE CENTER
900 SOUTHWEST FIFTH AVENUE
PORTLAND, OREGON 97204-1276

TELEPHONE (503) 224-6532

DAVID C. LANDIS
JOE D. BAILEY
JOHN C. MERCER
VICKI HOPMAN YATES
KATHRYN M. MILLER

February 5, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221

RE: Your January 24 Memorandum concerning Financial Institution's Compliance with Subpoenas

Dear Mr. Haldane:

My opinion is that the provision Bill Love discusses in his January 18 letter is a matter for the legislature.

Very truly yours,

Joe D. Bailey

JDB/jmh

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 11
(503) 248-3803

FRANK L. BEARDEN
PRESIDING JUDGE

March 7, 1985

Douglas A. Haldane
Attorney at Law
P.O. Box 11544
Eugene, Oregon 97440

Dear Mr. Haldane:

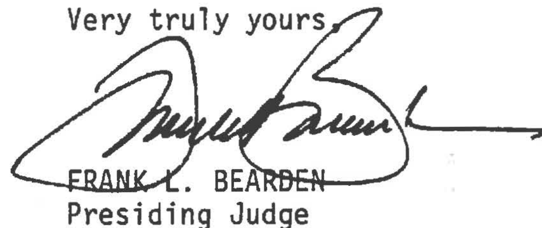
Thank you for responding to my letter regarding changes in ORCP 47.

The summary judgment practice in Multnomah County District Court is probably a little under 200 motions per year. This is only 2% of the 10,000 civil cases filed in our court each year so it is not a big part of our motion practice. However, the bill to raise the jurisdictional limit of the District Court to $10,000 has passed the House and is in the Senate where it could be amended upward to $15,000. Either way, our motion practice will increase significantly.

If ORCP 47 as proposed becomes law I anticipate we would enact a local court rule allowing motions for summary judgment to be filed up to 7 days from the trial date. Unfortunately a lot of attorneys might ask for trial resets for the sole purpose of getting the 45 days in order to file the motion. Too few attorneys read the local court rules.

I would like to see the time shortened to 30 days since I hate to see anything become a rule or law which could actually encourage docket delay.

Very truly yours,



FRANK L. BEARDEN
Presiding Judge

FLB:cc

WENDELL GRONSO
Attorney At Law
709 Ponderosa Village
Burns, Oregon 97720
(503) 573-2550

Legal Assistant
Donna J. Stampke

March 26, 1985

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
P. O. Box 11544
Eugene, OR 97440

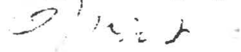
Dear Doug:

I believe it would be well to consider sanctions against attorneys who constantly request production of things not allowed by the rules. It merely increases the cost of litigation and court appearances.

A good example of the type of things that are being asked for are contained in John Hart's Request for Production, a copy of which is enclosed.

I do not believe that Rule 26 is broad enough to cover this type of situation.

Very truly yours,



Wendell Gronso

WG:md
Enc.

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON

2 FOR THE COUNTY OF MULTNOMAH

3 KATHLEEN HOCH NISHIMOTO,	)	
	)	
4 Plaintiff,	)	No. A8501-00129
	)	
5 v.	)	
	)	DEFENDANT'S REQUEST
6 DIEBOLD, INC.,	)	FOR PRODUCTION
	)	
7 Defendant.	)	

8 Defendant requests plaintiff to produce the documents and
9 information described below for inspection and copying in accordance
10 with ORCP 43. Defendant's request extends beyond all documents and
11 information within plaintiff's possession to include all documents
12 and information within plaintiff's custody or control and may,
13 therefore, require plaintiff or plaintiff's attorneys to seek and
14 obtain the specifically-requested documents and information. This
15 request will be satisfied by making the original documents and
16 information available within thirty (30) days at the offices of
17 defendant's attorney. Finally, defendant's request is intended to
18 be perpetual throughout the pendency of this action so that any
19 new documents or information falling within the classifications
20 below should be forwarded to defendant's attorney within thirty (30)
21 days after any such document or information comes within plaintiff's
22 possession, custody or control.

23 1. Documents disclosing the identity and location of
24 any and all persons known to plaintiff or plaintiff's attorneys
25 who have knowledge of any discoverable matter which may lead to
26 the discovery of admissible evidence for trial herein including,

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Attorneys at Law
Suites 1600-1800, Pacwest Center
1211 S. W. Fifth Avenue
Portland, Oregon 97204-1082

1 but not limited to, the names of all individuals who plaintiff
2 claims to have witnessed the incident of September 2, 1983, as well
3 as any individuals who have observed plaintiff's claimed injuries.
4 2. Any and all photographs depicting plaintiff's
5 condition after the incident of September 2, 1983, or the condition
6 of the scene of the incident which is the subject of the within action.
7 3. All documents and information reflecting plaintiff's
8 earnings for the years 1980, 1981, 1982, 1983 and 1984, including
9 any and all tax returns filed by plaintiff for these years.
10 4. The names and addresses of all of plaintiff's employers
11 for the period 1980 through the current time.
12 5. The names and addresses of all employers or potential
13 employers (with whom plaintiff has sought employment) since September
14 2, 1983, as well as the inclusive dates of employment, if any.
15 6. All documents and information pertaining to medical
16 treatment which plaintiff has undergone for any reason since
17 September 2, 1983, the date of the subject incident herein.
18 7. All documents and information pertaining to medical
19 treatment which plaintiff has had prior to September 2, 1983, with
20 respect to plaintiff's physical and emotional condition.
21 8. The names and addresses of all doctors, physical
22 therapists, chiropractors or others involved in medical-related
23 arts with whom plaintiff has made appointments, whether kept or not,
24 since September 2, 1983.
25 9. The names and addresses of all hospitals or similar
26 facilities in which plaintiff has been a patient, either in-patient

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Attorneys at Law
Suites 1600-1800, Pacwest Center
1211 S. W. Fifth Avenue
Portland, Oregon 97204-1982

1 or out-patient, since September 2, 1983.

2 10. The names and addresses of any hospitals or similar
3 facilities in which plaintiff was a patient for any reason prior
4 to September 2, 1983. The information provided should include the
5 dates of hospitalization and a brief description of the reasons
6 therefor.

7 11. All documents and information reflecting plaintiff's
8 medical treatments, expenses and billings subsequent to September
9 2, 1983, which plaintiff claims to have been the result of the
10 incident of this date, together with a current total of claimed
11 medical expenses.

12 12. In accordance with ORCP 44(C) and 44(D), written
13 reports from any and all examining physicians relating to the
14 injuries for which recovery is sought. These written reports
15 should set out the history provided, the physician's findings,
16 including the results of all tests made, the physician's diagnoses
17 and conclusions, together with similar reports of all earlier
18 examinations for the same condition(s), if any.

19 13. Plaintiff's social security number.

20 14. If plaintiff has filed a workers' compensation
21 claim, provide the name of the carrier or paying agency, together
22 with the plaintiff's appropriate claim number.

23 DATED this ____ day of March, 1985.

24 SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS

25

26 By ______________________
John E. Hart, OSB #74127
Of Attorneys for Defendant
Trial Attorney: John E. Hart

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
Attorneys at Law
Suites 1600-1800, Pacwest Center
1211 S. W. Fifth Avenue

Ringo, Walton, Eves and Stuber, P.C.

Attorneys at Law

Robert G. Ringo
James W. Walton
S. David Eves
Larry W. Stuber
Loren W. Collins

April 2, 1985

Mr. Douglas A. Haldane
Attorney at Law
P.O. Box 11544
Eugene, OR 97440

RE: ORCP 55

Dear Mr. Haldane:

ORCP 55 provides that copies of hospital records can be subpoenaed for trial. Among the trial lawyers and medical records librarians, there is confusion as to whether or not they can supply copies of the patient's x-rays or the original must be submitted.

The patient's x-rays are an important diagnostic and treating record for the patient which are easily lost or mishandled.

Would it not be possible to clarify the rule by inserting copies of x-rays along with the records? It should also be the responsibility of the party subpoenaing the documents and x-rays to pay for the expense of copying them.

Very truly yours,

Robert G. Ringo

jma

605 S.W. Jefferson Avenue • P.O. Box 1067 • Corvallis, Oregon 97339-1067 • (503) 757-1213

Judges
JOHN F. HUNNICUTT
JAMES A. MASON

Circuit Court of Oregon

NINETEENTH JUDICIAL DISTRICT
FOR COLUMBIA COUNTY

COLUMBIA COUNTY COURTHOUSE
ST. HELENS, OREGON 97051
TELEPHONE: 503 397-0157

April 5, 1985

328

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Doug:

Recently, while sitting in Astoria, I had occasion to have George Fulton appear in my court. He appeared there in the capacity of attorney representing a party against whom I had granted a summary judgment. He filed a motion asking for a new trial because he could not file a motion for reconsideration. See- Schmibling v. Dove, 65 OrApp 1 (1983). My question to Mr. Fulton was: How can I consider your motion for a new trial when there was no trial in the first place?

Enclosed is Mr. Fulton's letter for your consideration and the consideration of the Council.

Very truly yours,

John F. Hunnicutt
Circuit Judge

nb

ANDERSON, FULTON & VAN THIEL
ATTORNEYS AT LAW
968 COMMERCIAL STREET
ASTORIA, OREGON 97103

ROBERT C. ANDERSON
GEORGE C. FULTON
DAN VAN THIEL

TELEPHONE
325-5911

April 3, 1985

The Honorable John F. Hunnicutt
Judge of the Circuit Court
Columbia County Courthouse
St. Helens, Oregon 97051

Re: COUNCIL ON COURT PROCEDURES

Dear Judge Hunnicutt:

It is my understanding that you are a member of the Council on Court Procedures, and I am therefore writing to you concerning a problem which I believe exists under our rules of civil procedures.

In that under our present rules of civil procedure there is no provision for a motion to reconsider, and the only procedure that I am aware of to have a matter reviewed by a Court is by a motion for a new trial. This leaves a litigant without a means of challenging an order of dismissal, or in the event a litigant is the unsuccessful litigant on the summary judgment, his only avenue of attacking that procedure is by an appeal. This is not only expensive, but time consuming.

To cite a perfect example, I represented an unsuccessful litigant in which a motion for summary judgment was granted against my client. I firmly believe that the matter should be reviewed by the Court, and in view of the fact that there is no such a thing as a motion to reconsider in Oregon, my only alternative was to file for a motion for a new trial. When I appeared in court for argument, I was advised by the Court that I had no standing in that there was no trial, therefore, there was no justification for granting a new trial. Frankly, I have no logical argument against the decision of the Court, however, I do firmly believe that there should be a remedy in a case such as this for a review and it would appear that the proper remedy would be by a motion to reconsider. I believe that the most appropriate avenue to challenge a decision of the Court would be better served by reinstating the old tried and true remedy of the motion to reconsider rather than a motion for a new trial.

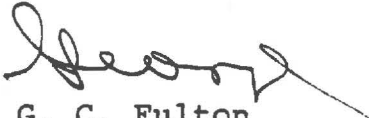
This not only gives the Court the opportunity to rectify any

error in the decision or, if the Court deems it necessary, to grant the new trial under that motion.

I would appreciate you bringing this to the attention of the Council upon which you serve, and if I may have any additional information you believe would be of any value to you, please do not hesitate to contact me.

Very truly yours,

ANDERSON, FULTON & VAN THIEL



G. C. Fulton

GCF:ja

J.R. PERKINS III
LAWYER
109 EAST FIFTH
THE DALLES, OREGON 97058
TELEPHONE (503) 296-1127

June 5, 1985

Roy Kilpatrick
P.O. Box A
Mount Vernon, OR 97865

Dear Roy:

If you don't remember me, let me refresh your recollection. You and I met in the office of Ed Storz in Hermiston. You were up there on a medical malpractice matter involving an ectopic pregnancy resulting in the death of the patient. The name of the plaintiff escapes me at this time.

In any event, I have a matter I want to bring to your attention in your capacity as chairman of the Council on Court Procedures. The enclosed letter pretty well details the circumstances. It's hard enough to obtain a judgment, so it's really frustrating when the system reduces the value of the judgment. I really think the State Court Administrator's office is way off base in permitting clerks to hold personal checks that they accept in satisfaction of civil judgments. Mr. Scalia of the State Court Administrator's office seems to be the main proponent, if not the instigator, of the policy. My discussions with him were most unsatisfactory. He seemed to think that this problem was a problem of the judgment creditor and that the judgment creditor had some control over it.

Obviously, that is not the case. If the judgment debtor chooses to discharge the judgment by a deposit of the judgment amount in court, there is absolutely nothing the judgment creditor can do about it if the clerk accepts, and notes accepting, the correct amount.

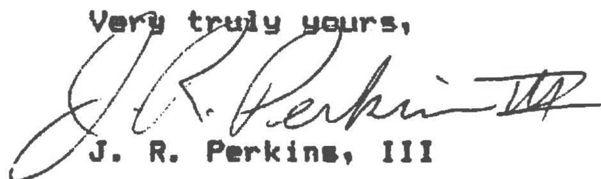
My suggestions for remedying the unpleasant situation the Court Administrator's office has created would be either to not accept personal checks in satisfaction of civil judgments, or, if such checks are accepted, to not make the docket entry until the check had cleared and the funds collected.

My little case, while extremely frustrating to me and of some financial concern, is only the tip of the iceberg. Imagine the feelings of the judgment creditor had this been a substantial judgment. For instance, interest at 9% on $1,000,000 is $246 a day. I can imagine what you would feel if a trial court clerk held $1,000,000 from a defendant insurance company which was tendered in payment of your client's $1,000,000 judgment.

It would be greatly appreciated if you could use your good offices to get the State Court Administrator to take a

critical look at this policy before some real damage is done. If I can be of further assistance in the matter, please feel free to call upon me.

Very truly yours,



J. R. Perkins, III

M E M O R A N D U M

TO: Doug Haldane

FROM: Bob Oleson

DATE: August 9, 1985

I hope your summer is going well.

Attached is a copy of SB 390 relating to attorney client privilege which was sponsored by the Bar's Business Section and killed by a faction of the Trial Lawyers at the end of the legislative session. I would greatly appreciate a note from you suggesting how the possible merits of this issue could be rationally and thoroughly examined during the current interim period either by your Council or the Interim Judiciary Committee. It would also be helpful to know what other evidence code issues are likely to surface.

I look forward to working with you during the months ahead.

Senate Bill 390

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon State Bar, Business and Corporate Law Section)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Extends attorney-client privilege to principal, employe, officer or director of client who provides client's lawyer with information or who, as part of that relationship with client, seeks or receives legal advice from client's lawyer.

1 **A BILL FOR AN ACT**

2 Relating to lawyer-client privilege; creating new provisions; and amending ORS 40.225.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 40.225 is amended to read:

5 40.225. (1) As used in this section, unless the context requires otherwise:

6 (a) "Client" means a person, public officer, corporation, association or other organization or entity, either
7 public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to
8 obtaining professional legal services from the lawyer.

9 (b) "Confidential communication" means a communication not intended to be disclosed to third persons
10 other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or
11 those reasonably necessary for the transmission of the communication.

12 (c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice
13 law in any state or nation.

14 *[(d) "Representative of the client" means a person who has authority to obtain professional legal services and*
15 *to act on advice rendered pursuant thereto, on behalf of the client.]*

16 **(d) "Representative of the client" means a principal, an employe, an officer or a director of the client:**

17 **(A) Who provides the client's lawyer with information which was acquired during the course, or as a result, of**
18 **such person's relationship with the client as principal, employe, officer or director, and by means of which**
19 **information the client may obtain legal advice or legal services; or**

20 **(B) Who, as part of such person's relationship with the client as principal, employe, officer or director, seeks,**
21 **receives or applies legal advice from the client's lawyer.**

22 (e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional
23 legal services, but does not include a physician making a physical or mental examination under ORCP 44.

24 (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential
25 communications made for the purpose of facilitating the rendition of professional legal services to the client:

26 (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

27 (b) Between the client's lawyer and the lawyer's representative;

28 (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

29 (d) Between representatives of the client or between the client and a representative of the client; or

NOTE: Matter in **bold face** in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

1 (e) Between lawyers representing the client.
2 (3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client,
3 the personal representative of a deceased client, or the successor, trustee, or similar representative of a
4 corporation, association, or other organization, whether or not in existence. The person who was the lawyer or
5 the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege
6 but only on behalf of the client.
7 (4) There is no privilege under this section:
8 (a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit
9 what the client knew or reasonably should have known to be a crime or fraud;
10 (b) As to a communication relevant to an issue between parties who claim through the same deceased client,
11 regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
12 (c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to
13 the lawyer;
14 (d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an
15 attesting witness; or
16 (e) As to a communication relevant to a matter of common interest between two or more clients if the
17 communication was made by any of them to a lawyer retained or consulted in common, when offered in an
18 action between any of the clients.
19 **SECTION 2.** The amendments to ORS 40.225 by section 1 of this Act shall apply to actions, cases and
20 proceedings commenced after the effective date of this Act, and shall also apply to further procedure in actions,
21 cases and proceedings then pending except to the extent that application would not be feasible or would work
22 injustice, in which event former principles of lawyer-client privilege shall apply.

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

Salem, Oregon 97310
Telephone 378-6026

September 16, 1985

Douglas Haldane
Executive Director
Council on Court Procedures
P.O. Box 11544
Eugene, Oregon 97440

Re: Amending Oregon Rules of Civil Procedure

May I suggest that ORCP 1E. be amended at the next legislature to delete the period following the capital letter. Similar amendments should be made throughout.

Sincerely,

Edwin J. Peterson
Chief Justice

EJP:fw
cc: Justice Jones

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AREA CODE 503
TELEPHONE 226-7321

RALPH H. CAKE
(1891-1973)
NICHOLAS JAUREGUY
(1896-1974)

HERBERT C. HARDY
OF COUNSEL

October 2, 1985

Mr. Roy Kilpatrick
Kilpatricks & Pope
Box A
Mt. Vernon, Oregon 97865

Dear Mr. Kilpatrick:

Re: Council on Court Procedures

Don McEwen thinks that you are Chairman of the Council on Court Procedures. If you are not, please pass this letter on to your successor.

Due to the Supreme Court's decision on August 8 in Denkers v. Durham Leasing, I respectfully request the Council to consider modifying ORCP 69A. As you may be aware, the Supreme Court in that case held that a literal reading of ORCP 69A did not require any written notice to opposing counsel prior to taking a default order. Although that reading may be correct, it ignores the custom and practice of professional courtesy among trial lawyers of giving notice to opposing counsel before taking a default order.

The need for a change in ORCP 69A to correspond to the custom and practice became apparent in the meeting of the State Professional Responsibility Board, of which I was a member, last Saturday. We had to consider the ethical impropriety of an attorney taking a default order without giving advance notice to opposing counsel who had specifically written a letter requesting that no action be taken against his client without prior notice. Because the attorney had not violated a statute, we were forced to consider his action under DR 7-106(C)(5) for failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply. Unfortunately, this disciplinary rule will be before the Oregon State Bar convention on a recommendation to delete.

cc to Doug Haldan[e]
10/8/85

I would ask the Council to codify the existing custom and practice regarding default orders in order to ensure a modicum of professional courtesy in that regard. I do not condone sharp practices by lawyers, but see the Supreme Court's decision in Dunkers as an open invitation to such sharp practices.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lpi

694 P.2d 996

72 Or.App. 180

Charles P. DENKERS, Respondent,
v.
DURHAM LEASING CO., INC., an Oregon corporation, Defendant,
and
Chris Hunt, Appellant.

Nos. 240341; CA A30762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 26, 1984.
Decided Feb. 6, 1985.
Reconsideration Denied Feb. 22, 1985.

John M. Wight, Portland, argued the cause and filed the brief for appellant.

Keith S. Davidson, Portland, argued the cause and filed the brief for respondent.

Before BUTTLER, P.J., and WARREN and ROSSMAN, JJ.

[72 Or.App. 181] PER CURIAM.

Defendant Hunt appeals from a default judgment entered in an action for breach of contract and deceit, contending that plaintiff's notice of application for a default judgment did not conform to the requirements of ORCP 69 B. We agree and reverse and remand.

On November 22, 1983, plaintiff served defendant with a notice of intent to apply for a default order, which indicated that the hearing on the application would be held on November 29, 1983. Plaintiff appeared on November 29, 1983, and the court entered an order of default on that date. On December 1, 1983, the court vacated the order on its own motion to hear defendant's motion to modify an order compelling discovery. The court denied defendant's motion and re-entered the order of default.

ORCP 69 B(2) provides, in pertinent part:

" * * * If the party against whom judgment by default is sought has appeared in the action or if the party seeking judgment has received notice that the party against whom judgment is sought is represented by an attorney in the pending proceeding, the party against whom judgment is sought (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. * * * "

Plaintiff's notice was served on defendant only seven days before the hearing. There is no indication that the ten-day period in ORCP 69B (2) between notice and hearing was shortened by the court.

Reversed and remanded.

HUGH B. COLLINS
JEFFREY W. FOXX

HUGH B. COLLINS
ATTORNEY AT LAW
837 EAST MAIN STREET
P.O. BOX 4490
MEDFORD, OREGON 97501-0176

(503) 770-5900

OCT 14 1985

OUR FILE NO. October 10, 1985

Robert H. Grant
201 W. Main Street
Medford, OR 97501

Re: ORCP 7D. (2) (B)

Dear Bob:

Here's a suggestion for clarifying and approving this rule. Change the last sentence to read:

> "For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be completed when a duplicate original of said statement, with proof of service endorsed thereon, is actually filed with the trial court administrator.

As ORCP 7D. (2) (B) now stands, I'd be hard put to it to say when a defendant who has been given substitute service is first truly in default. Reason tells me that under the present rule he would be in default by the expiration of 30 days after such mailing, but "as soon as reasonably possible" is pretty elastic. This leaves room for a fight on a case by case basis to objectively define "as soon as reasonably possible".

If your not still on the Counsil, please send this letter on to your successor.

Sincerely,

HUGH B. COLLINS/rmf