OREGON COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, OR 97403
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February 13, 1986

TO: Members, COUNCIL ON COURT PROCEDURES:

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

FROM: Douglas A. Haldane, Executive Director

RE: COUNCIL MEETING: Saturday, February 22, 1986

Location: State Capitol
Room 354
Salem, Oregon

AGENDA FOR FEBRUARY 22 MEETING

1) Approval of minutes of 12/14/86 meeting

2) Report of subcommittee on compliance with subpoenas - Judge Buttler

3) Report on discovery - Mr. Haldane

4) Report on proposal for motion for reconsideration - Mr. Haldane

5) Report on status of accepting personal checks in satisfaction of judgments - Mr. Haldane

6) Report on Rule 69 A. - Mr. Haldane

7) New business

Enclosure: Minutes of Council meeting held 12/14/85

cc: Members of the Bar

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held February 22, 1986

Room 354, State Capitol

Salem, Oregon

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

(Also present were Douglas A. Haldane, Executive Director, Mark Comstock of the Oregon State Bar's Practice & Procedure Committee, and Diana Godwin of the Oregon State Bar's Office of Public Affairs)

The meeting was called to order at 9:30 a.m. Judge Buttler moved the approval of the minutes of the meeting of December 14, 1985. Mr. Starr suggested that the minutes of that meeting be corrected to show that he had nominated Jeffrey Foote as Vice-Chairman of the Council and that Richard Noble had seconded that nomination. The minutes were approved as corrected.

Judge Buttler reported on the work of his subcommittee on the costs of compliance with subpoenas. He reported that the subcommittee had been formed under the mistaken impression that the legislature had not provided relief for financial institutions for the costs they incur in complying with subpoenas. He had discovered that the legislature had, in fact, provided that relief for the financial institutions in what has been codified as ORS 192.580.

The Council questioned whether the mandate of the subcommittee had not been broader than simply the problems experienced by financial institutions. Following discussion, it was determined by a consensus that no other organizations or institutions have experienced sufficient difficulty to bring the

matter to anyone's attention, and thus perhaps the Council should let the matter drop.

Mr. Haldane reported that he had inquired of various groups in the state in an attempt to determine if any interested parties were taking a comprehensive look at the discovery rules. He had determined that there are no groups currently involved in a comprehensive study of the question of discovery. He reported contact with the Oregon Trial Lawyers' Association which, in conjunction with the Oregon Association of Defense Counsel, had promulgated voluntary cost containment guidelines for litigation. Mr. Haldane distributed copies of those guidelines and suggested that perhaps some of those guidelines warranted study as possible procedural rules. Reference was made to Uniform Trial Court Rule 5.010, which provides a requirement that counsel confer in good faith regarding discovery matters before filing motions under ORCP 36 - 46. It was suggested that a similar procedure for Rule 21 motions might be constructive. It was pointed out that a similar rule requiring certification by counsel in attempts to confer own motions is in effect in the United States Court for the District of Oregon.

Mr. Haldane questioned whether this is a rule which should be incorporated in the Oregon Rules of Civil Procedure or whether a Uniform Trial Court Rule promulgated by the Chief Justice would suffice. Judge Barron pointed out that the Chief Justice could promulgate such a rule much more quickly than the Council and, based upon that, Mr. Haldane was directed to suggest such a rule to the Chairman of the Uniform Trial Court Rules Committee.

On the question of motions to compel discovery, Mr. Redman asked if a letter request for production would be a sufficient request for one to move to compel discovery when the request was not granted. Ms. Creason pointed out that in multi-party cases a letter request to one party does not necessarily carry with it a requirement of service of a copy of the letter on all of the parties. She commented that perhaps a letter request would be a sufficient basis for a motion to compel if all other parties had received copies of the letter request. Mr. Haldane was asked to review the rules and report back to the Council on this subject at its next meeting.

Mr. Haldane then distributed a draft of a proposal to amend ORCP 71 B. to provide for relief from an order or a judgment. A copy of that proposal is attached as Exhibit A. The current ORCP 71 B. allows relief from a judgment in certain specified situations. The addition of relief from an order in that rule would provide the mechanism for a motion for reconsideration.

Judge Barron objected to the inclusion of "order" in Rule 71 B. both on the grounds that, in his view, it added nothing to

the rule and that it could present difficulties by encouraging the filing of motions to reconsider. In addition, he was concerned that the proposal, as drafted, would allow a reconsideration of an order for up to a year after a judgment had been entered. Ms. Creason suggested that the last sentence of ORCP 71 B. regarding the finality of a judgment should assuage any fears on that point. Mr. Haldane pointed out that in multi-party cases a judgment against one party may not be a final judgment under ORCP 69 and thus shared Judge Barron's concerns.

After a lengthy discussion, the Council determined that the problem had first been raised in the context of an order granting a motion for summary judgment in which an attorney had moved for a new trial and in which the court had said, since there was no trial, it would not entertain that motion. Since the problem might well be confined to motions for summary judgment, Mr. Haldane was asked to prepare a proposal for submission at the next meeting which would speak to that specific problem rather than the broader question of motions to reconsider in general.

Mr. Haldane then reported that he had no report on the status of accepting personal checks in satisfaction of judgments. He had spoken with the Chief Justice, who referred him to the State Court Administrator, and the State Court Administrator had not yet gotten back to him on the question.

Mr. Haldane then distributed a proposed amendment to Rule 69 which had been prepared by the Practice & Procedure Committee of the Oregon State Bar. A copy of that proposal is attached as Exhibit B. He explained the problem that had been brought to light in Denkers v. Durham Leasing, 299 Or 544 (1985). Under that opinion, it would appear that notice of intent to take an order of default is not required; however, notice is required prior to an application for judgment. Mr. Mark Comstock of the Bar's Practice & Procedure Committee explained that proposal, pointing out that the proposal would require that notice be served personally or by mail and that mailing would require certified mail with a return receipt. Council members questioned the language: ". . .the party seeking a default has received notice that the party against whom a default is sought is represented by an attorney." What is "notice" under this language? It was suggested that "knowledge that the party against whom a default is sought is represented by an attorney" would be sufficient. Mr. Woods then questioned whether the language, ". . .the party against whom a default is sought (or, if appearing by representative, such party's representative) shall be served personally or by mail," is ambiguous. It was suggested that the proposal should be changed to make it clear that when a party is represented by an attorney, notice to the attorney is sufficient.

After more discussion, it was suggested that the proposal should be reworked. Mr. Comstock agreed to bring the concerns of the Council to the attention of the Bar Committee. Mr. Haldane agreed to attend the next meeting of the Practice & Procedure Committee to discuss this proposal further with that body.

New Business

Mr. Haldane announced that the Bar's Practice & Procedure Committee would be considering a proposal to provide for perpetuation depositions after filing. Since this would require an exception to the hearsay rule, it would be evidentiary and thus outside the Council's jurisdiction. Mr. Haldane suggested, however, that it may be necessary for the Council to provide whatever procedural mechanisms are necessary to put such an evidentiary rule into effect. He would continue to monitor the action of the Bar committee on that subject.

On the question of the Council's meeting schedule, Mr. Marceau pointed out that the September 13, 1986 meeting scheduled for Cottage Grove, Oregon, conflicts with the business meeting of the Oregon State Bar in Portland on that same date. It was suggested that the September 13th date be retained but that the location of the meeting be changed to the site of the Oregon State Bar Convention. Mr. Haldane agreed to make the appropriate arrangements.

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

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

RELIEF FROM JUDGMENT
OR ORDER
RULE 71

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B.(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from an order or a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense.

The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the order or judgment. A copy of a motion filed within one year after the entry of the order or judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

COMMENT

ORCP 71 A. currently allows for correction of clerical errors in orders as well as judgments. ORCP 71 B., however, speaks only to judgments and does not provide relief from an order. Relief from such an order is generally discussed in terms of a motion to reconsider. The device of simply including orders under ORCP 71 B. would seem to cure the problem of their being no provision which allows a court to reconsider an order. The rule, as amended, would continue to allow specific grounds for a reconsideration, but those grounds would seem to be broad enough to suffice, particularly since the current commentary to ORCP 71 makes it clear that the mistake, inadvertence or excusable neglect which is referred to in the rule is not necessarily that of the moving party but can be that of the trial court as well.

RULE 69 - DEFAULT AND JUDGMENT BY DEFAULT

A. Entry of Default.

When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7, or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, [and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.] the party seeking affirmative relief may apply for an order of default. If the party against whom a default is sought has appeared in the action, or if the party seeking a default has received notice that the party against whom a default is sought is represented by an attorney in the pending proceeding, the party against whom a default is sought (or, if appearing by representative, such party's representative) shall be served personally or by mail with written notice of the application for default at least 10 days, unless shortened by the court, prior to the entry of the order of default of that party. These facts, along with the fact that the party against whom the default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise and upon such a showing, the clerk of the court shall enter the default of that party in default.

B. Entry of Default Judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

Exhibit B to Minutes of Meeting Held February 22, 1986

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7D.(3)(a)(i), 7D.(3)(b)(i), 7D.(3)(e) or 7D.(3)(f).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. [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.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required.

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

C. Setting aside default. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71B and C.

[C.] D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67B.

[D.] E. "Clerk defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

NOTE: UNDERLINED LANGUAGE IS NEW; BRACKETED LANGUAGE IS TO BE DELETED

EFFECTIVE LITIGATION COST CONTAINMENT GUIDELINES

PURPOSE

The delay between the time of filing a case and final disposition contributes significantly to the cost of litigation. This list is intended to be a set of proposed guidelines promulgated by the joint OTLA/OADC committee for guidance of all lawyers engaged in litigation. It is hoped that these guidelines, when fairly followed by the litigants, will result in cost savings to all parties.

The joint committee suggests that all attorneys begin litigation by tendering this list to the opposing attorneys and asking if they are willing to process the case using these guidelines. Such an approach will expedite the entire dispute resolution process and provide a set of agreed upon ground rules.

1. Avoid unnecessary motion practice. Consider submitting to opposing counsel a proposed responsive pleading with a letter in lieu of a motion setting forth any objections you may have to the adversary's pleadings which you would normally raise by motion. Determine if your objections can be resolved by mutual agreement or reserved until trial.

2. Seek early agreement of counsel for a voluntary exchange of information without the paper chase of motions.

3. Courts and attorneys should be encouraged to use telephone conferences to resolve matters which cannot be handled by mutual agreement.

4. Depositions:

   a. Set depositions by mutual agreement with the aid of legal secretaries or assistants. Avoid the paper chase and time waste of noticing depositions at arbitrarily selected times.

   b. Depositions should be to the point. A little preplanning can save time. Encourage associates taking depositions to set reasonable time constraints on depositions.

7. Try to agree on discovery plans with opposing counsel so that the parties will be able to know at an early stage whether the case is one to be tried or settled. Avoid the last minute flurry of discovery.

8. Seek court sanctions for discovery abuses if personal communication between counsel fails to resolve the problem. Seek protective orders where appropriate to shorten discovery procedures.

9. Avoid setovers whenever possible. If you know you are going to need a setover promptly notify the court and parties. Do not wait until the last minute as the case comes up for trial. Verify the availability of witnesses and counsel immediately upon receipt of a trial date and immediately notify all parties if setovers are anticipated. A friendly, periodic check of adverse counsel's availability for trial is helpful and wise, especially in complex cases.

10. Create an office research bank and index it carefully. The same is true with jury instructions and unusual pleadings.

11. Consider the use of paralegals or law clerks when appropriate; but limit the number of and the time allowed for associates, clerks and paralegals to complete assignments. Unrestricted use of assistants frequently increases the cost of legal services for both sides.

12. Ask expert witnesses to be cost-effective and agree on fees in advance.

13. Consider voluntary, non-binding arbitration, in appropriate cases before experienced trial lawyers to be chosen by the parties; or, as an alternative, in those cases in which arbitration would otherwise be required or available consider utilization (by stipulation) of less crowded dockets in the District Courts where a jury trial would be available.

CONCLUSION

The foregoing guidelines are intended as simply that; guidelines for use by trial lawyers with the dual purpose of cutting the cost of litigation by making the process more pleasant and more expeditious. These are simply ideas which come from experienced trial lawyers for the plaintiff and the defendant. We urge trial attorneys to amplify and add practices to the list as it is by no means exhaustive.

We would hope that a goal might be an end to the acrimonious "trial by ambush" without sacrificing the efficiencies of our Oregon Court system and, as an alternative to the imposition of rules which may in some cases serve to make the process more cumbersome, time consuming and costly.

THE JOINT COMMITTEE OF
OTLA and OADC

Effective January 15, 1985

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December 12, 1985

FOR YOUR INFORMATION
Doug
CASS, SCOTT, WOODS & SMITH

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

RE: OSB Procedure & Practice Committee

Dear Sir:

On November 2 and December 7, 1985, the Oregon State Bar Procedure & Practice Committee concluded a discussion which began earlier this year regarding Rule 69. It was the committee's concern that the present form of Rule 69 requires notice only to those persons against whom a judgment by default is being entered, but does not pertain to taking an order of default, which may be the important procedural step at which point notice is required.

We have labored to create the enclosed proposed revised Rule 69, which we have unanimously approved, to deal with just that problem. The language in brackets is deleted language from the present rule; the underscored language is new, proposed language.

If we can be of any assistance to you in your deliberations on this proposal, please let us know. Janice Stewart of our committee was designated as the liaison person to assist you regarding this matter.

Very truly yours,

A. Duane Pinkerton II
Secretary, OSB Procedure
& Practice Committee

ADP:sl
Enc.
1/62

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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.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required.

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

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[C.] D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67B.

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