MEMORANDUM

June 9, 1986

TO: Members, COUNCIL ON COURT PROCEDURES:

Joe D. Bailey
Richard L. Barron
John H. Buttler
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
Steven H. Pratt
James E. Redman
R. William Riggs
William F. Schroeder
J. Michael Starr
Wendell H. Tompkins
John J. Tyner
Robert D. Woods
George F. Cole

FROM: Douglas A. Haldane, Executive Director

RE: AGENDA FOR COUNCIL MEETING

Date and time: Saturday, June 14, 1986, 9:30 a.m.

Place: Red Lion\Jantzen Beach
909 North Hayden Island Drive
Portland, Oregon

The agenda for this meeting will be:

1) Approval of minutes of April 12, 1986

2) Announcements

3) Items for consideration:

   a) Request for production
   b) ORCP 71 B.
   c) ORCP 69
   d) Perpetuation depositions
   e) ORCP 22 C.
   f) ORCP 78 C.
   g) ORCP 47

4) NEW BUSINESS

cc: Public

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held June 14, 1986

Red Lion/Jantzen Beach

909 North Hayden Island Drive

Portland, Oregon

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

(Also present was Douglas A. Haldane, Executive Director, and Dennis Elliott of the Oregon State Bar Practice & Procedure Committee.)

Mr. Bailey called the meeting to order at 9:40 a.m. Mr. Bailey then asked if there were any changes or corrections to the minutes of the April 12, 1986 meeting. There being no changes or corrections, the minutes stood approved as submitted.

Mr. Bailey then asked Mr. Elliott of the Bar's Practice & Procedure Committee to present that Committee's proposal for changes to Rule 39 which would provide a procedure for the perpetuation of deposition testimony in cases where a witness was unavailable "in a practical sense." Mr. Haldane explained that he had been unable to provide the Council with copies of the Bar's proposal because the copy center had not been able to reproduce them in time for the meeting. After some discussion of the proposal, Judge Barron moved with Judge Buttler's second to continue to consider the Bar Committee's proposal and ask Mr. Haldane to bring the proposal back to the Council at a future meeting. Mr. Haldane was also asked to determine whether an amendment to the hearsay rule would be necessary in order that such a statutory change could be recommended to the legislature.

At prior meetings, the Council had discussed whether a

letter request for production from one attorney to another under Rule 43 would be sufficient to compel production under Rule 46. Coincidentally, Mr. Haldane had received a communication from the Chief Justice indicating that some trial courts were concerned that the trial court files were being cluttered with requests for production when these were matters with which the court did not really need to be involved unless someone moved for a protective order or to compel production. Mr. Haldane distributed to the Council proposed changes to Rule 43 and Rule 46 which would make it possible for a letter request to be made of an opposing party without filing the request in court. Filing of the request would only be necessary if a protective order were sought by the one of whom the request was being made or if the one making the request moved to compel discovery. It was suggested that the proposed language, "provided it is shown that the request was properly made", appearing on Page 6 of Rule 46 was redundant. Judge Barron moved, with Mr. Foote's second, that the rule changes to Rules 43 and 46 be adopted with the redundancy on Page 6 of Rule 46 being stricken. The motion was adopted unanimously.

Mr. Haldane then submitted a proposed amendment to Rule 69 which would affect the purpose of a previously submitted proposal of the Bar's Practice & Procedure Committee. If adopted, the proposal would require that notice be given to any party who had appeared in an action or to any party who was represented by an attorney when that representation was known before one could take an order of default. The Council by consensus indicated that knowledge that a party was represented should be sufficient to invoke the requirement of notice, that the parenthetical language currently in Rule 69 referring to representation by an attorney should be retained, and that the Council needed to look at situations where letter responses by pro se defendants are received as responsive pleadings. Mr. Haldane was asked to rework the Rule 69 proposal once again and submit it for Council consideration at its next meeting.

Mr. Haldane then distributed a proposal for a rule change to Rule 22 C. involving third party practice. This proposal had also been suggested by the Bar's Practice & Procedure Committee and would provide that, in addition to the 90 days for filing a third party action, a third party plaintiff should have 60 days in which to serve the third party defendant. Mr. Conboy suggested that since a defendant could still file an independent action for indemnity or contribution, there was no purpose in further slowing the process in third party cases by adding the 60-day time period for service. Judge Barron moved that the Council reject the proposed amendment to ORCP 22 C. Mr. Marceau seconded Judge Barron's motion, and the motion was adopted. Mr. Redman suggested that the Bar's Practice & Procedure Committee be notified of the Council's action and invited to send a representative to the Council's next meeting if they desired a

reconsideration.

Mr. Haldane then distributed a proposal amending Rule 78 C. to strike the words "suit money" and "alimony" since these words have no definite legal meaning in Oregon. Judge Riggs suggested that, while the term "suit money" may not have any legal meaning in the state of Oregon, it had a meaning which was understood by judges and domestic relations practictioners as costs which could be awarded under the authorization of ORS Chapter 107. He indicated that these extended beyond the costs and disbursements of Rule 68. It was the consensus of the Council that the proposal should be redrafted simply to make reference to awards under Chapter 107. Mr. Haldane was directed to redraft the proposal and to submit it to the Council at its next meeting.

Mr. Haldane then submitted a proposed rule change to Rule 47 on summary judgments. The proposed rule change had been raised in the context of a situation where a counsel in a motion for summary judgment had supported the motion with representations made to the court on a prior motion. It was the consensus of the Council that previous matters of record could be used to support a motion for summary judgment either as admissions on file or in the form of affidavits and thus an amendment to Rule 47 was unnecessary. Judge Riggs moved with Mr. Starr's second that the proposal to amend Rule 47 be rejected. That motion passed.

Judge Barron then reported to the Council that the Uniform Trial Court Rules Committee had adopted a rule requiring that counsel confer on all motions except summary judgment motions. He also reported that that Committee was going to require that local rules only be adopted once a year. The rules would have to be submitted to the Chief Justice by September 1st of each year and there would then be a 60-day period of time during which the Chief Justice could reject the proposed local rule.

The proposals considered by the Council at the June 14, 1986 meeting are attached to the original of these minutes.

The meeting was adjourned at 11:45 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

Amendment to ORCP 22 C.(1) Concerning Third Party Practice
Proposed by OSB Committee on Procedure and Practice

ORCP 22 C.(1):

"After commencement of the action, a defending party, as a third party plaintiff, may [cause a summons and complaint to be served upon] file a complaint against a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party[.], provided, that the third party plaintiff also causes summons and third party complaint to be served on the third party defendant not later than 60 days after the filing of the third party complaint. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court[.] in order to file or maintain a third party complaint. * * *"

FOR YOUR INFORMATION

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES RULE 43

A. **Scope.** Any party may [serve on any other party a request] <u>request that any other party</u>: (1) [to] produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, and translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody, or control of the party upon whom the request is [served] <u>made</u>; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is [served] <u>made</u> for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. **Procedure.** The request may be [served upon] <u>made of</u> the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by

individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been [served] made shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. **Writing called for need not be offered.** Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D. **Persons not parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

FAILURE TO MAKE
DISCOVERY; SANCTIONS
RULE 46

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

A.(2) **Motion.** If a party fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. when taking a deposition on oral examination, the proponent of the question may complete or

adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A.(3) **Evasive or incomplete answer.** For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) **Award of expenses of motion.** If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or

that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the deposition is being taken, the failure may be considered a contempt of court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with

the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B.(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A. requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B.(3) **Payment of expenses.** In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney

advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or c., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. **Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is

to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, [after proper service of the request] **provided it is shown that the request was properly made**, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act r the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

SUMMARY JUDGMENT
RULE 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, [and] admissions on file, <u>and matters of record</u>, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. **Form of affidavits; defense required.** Except as provided by section E. of this rule, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. **Affidavit of attorney when expert opinion required.** Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to

obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who s available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

H. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

6/14/86 Draft

DEFAULT ORDERS AND JUDGMENTS
ORCP 69

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 knowledge 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 shall be (served with/given) 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 order of default.

6/14/86 Draft

B. Entry of default judgment.

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

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 7 D.(3)(a)(i), 7 D.(3)(b)(i), 7 D.(3)(e) or 7 D.(3)(f).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs and 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 order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B. and C.

[C.] D. **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled t 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 67 B.

[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.

ORDER OR JUDGMENT
FOR SPECIFIC ACTS
RULE 78

A. **Judgment requiring performance considered equivalent thereto.** A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.

B. **Enforcement; contempt.** The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt as provided in ORS 33.010 through 33.150.

C. **Application.** Section B. of this rule does not apply to a judgment for the payment of money, except orders and judgments for the payment of [suit money, alimony] <u>costs and disbursements, spousal support</u>, and money for support, maintenance, nurture, education, or attorney fees, in:

C.(1) Actions for dissolution or annulment of marriage or separation from bed and board.

C.(2) Proceedings upon support orders entered under ORS chapter 108, 109, 110 or 419 and ORS 416.400 to 416.470.

independent proceeding contemplated by ORS 33.010 through 33.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

D.(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

C.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

D.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

POZZI WILSON ATCHISON O'LEARY & CONBOY

FRANK POZZI
DONALD R. WILSON
DONALD ATCHISON
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OF COUNSEL
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PHILIP A. LEVIN
(1928 - 1967)

May 9, 1986

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

Re: Council on Court Procedures

Dear Doug:

At the April 12, 1986, Council meeting in Eugene, concern arose over the problem of filing a motion for "new trial" in a case which terminated on summary judgment. Since the disposition of a summary judgment motion is not a "trial," a motion for reconsideration would not stay the operation of a judgment based upon an order granting summary judgment. ORCP 64, 71B; ORS 19.026(2).

I pointed out that the Federal Rule differs from State law. Sam Kyle, as pro-tem presiding officer of the meeting, suggested that I bring to the Council's attention the Federal rule or statute to which I made reference.

Accordingly, I am enclosing copies of FRCP 59 and 60, as well as two pages from 6A Moore's Federal Practice (Second Edition), which interpret the Federal Rules. The majority position is that a motion to vacate a summary judgment is a motion under Rule 59(e), FRCP, to "alter or amend the judgment."

A timely motion filed under Rule 59(e) to alter or amend a judgment stays the time for an appeal, pursuant to the express provisions of Rule 4(a)(4), FRAP. A copy of that Rule is also enclosed with this correspondence.

The appropriate Oregon rules and statute, ORCP 64 and ORS 19.026, contain no provisions similar to Rule 59(e), FRCP, and Rule 4(a)(4), FRAP.

I do not express any view whether an amendment of Oregon law to comport with Federal practice would be desirable. Such a change would in any event be beyond the authority of our Committee.

Very truly yours,

Raymond J. Conboy

RJC:em

Enclosures

¶ 56.26—1. Motions To Set Aside Summary Judgment Under Rules 59 and 60.

Aside from the right to appeal from a final order granting summary judgment,[1] a losing party may seek reconsideration in the trial court. A motion for new trial under Rule 59(a) is, of course, technically improper since no trial has occurred to which the motion can refer.[2] Rule 59(e), however, provides for motions seeking relief of the type which literally and technically do not fit into a motion for new trial, such as a motion for rehearing, reconsideration, or vacation of any order terminating the action prior to trial—including a final summary judgment.[3] Although a motion under 59(e) is to "alter or amend," the courts have taken a flexible approach (and sensibly so) as to the scope of Rule 59(e) and have included motions to vacate or set aside summary judgments.[4] A motion under Rule 59(e) must be served not

[1] ¶56.21[1], *supra*.

[2] Jones v. Nelsen (CA10th, 1973) 484 F2d 1165 (but the court treated the motion for new trial as a motion for rehearing on the motion for summary judgment).

But see Chapman & Dewey Lumber Co. (CA6th, 1966) 359 F2d 495 where plaintiff made a motion for new trial after a final summary judgment was entered for the defendant. The appellate court reversed and remanded for a trial on the basis of plaintiff's affidavits submitted on the motion for new trial. While it was technically incorrect to make a motion for new trial here, we believe that the appellate court's review of the denial of the motion was proper since labels do not control. Moreover, we feel the result was sound. While, as a general rule, an appellant may not overturn a summary judgment by raising in the appellate court an issue of fact that was not plainly disclosed to the trial court before his decision on the motion for summary judgment, if the appellate court becomes convinced that the appellant, although acting in good faith, has somehow or other failed to raise at the trial court level a genuine factual issue that is, nevertheless, present in the case it should make such a disposition of the appeal as will permit him to do so. ¶56.27[1], *infra*.

[3] Burkett v. Shell Oil Co. (CA5th, 1973) 487 F2d 1308; ¶56.21[1], *supra*.

[4] Sonnenblick-Goldman Corp. v. Norwalk (CA3d, 1970) 420 F2d 858 (motion to vacate summary judgment and to grant rehearing and reconsideration treated as motion under Rule 59(e)); Gainey v. Brotherhood of Railway & Steamship Clerks Etc. (CA3d, 1962) 303 F2d 716 (motion to reargue under local court rule, filed after grant of summary judgment dismissing the action); Spatz v. Nascone (WD Pa 1973) 368 F Supp 352; Tucker v. Reading Co. (ED Pa 1971) 335 F Supp 1269; Butterman v. Walston & Co. (ED Wis 1970) 50 FRD 189; see Boro Hall Corp. v. General Motors Corp. (ED NY 1947 6 FRD 539.

later than 10 days after the entry of summary judgment,[5] and the motion suspends the finality of the judgment for purposes of appeal.[6]

A motion to vacate or set aside a final summary judgment under Rule 60(b) can be made within the time periods stated therein,[7] but the motion does not affect the finality of a judgment or suspend its operation.[8] The court may, of course, stay enforcement of the judgment under Rule 62(h).[9] The filing of a supersedas bond under Rule 62(d) will provide an automatic stay of enforcement.[10]

Partial summary judgments on the other hand are interlocutory in character,[11] and they do not terminate the action. Rather, they remain subject to being revised, modified or vacated by the trial court.[12]

But *cf.* Blair v. Delta Air Lines, Inc. (SD Fla 1972) 344 F Supp 367 (Rule 59 does not apply as a basis for reconsideration of an order granting summary judgment when the movant does not seek to alter or amend the judgment but reasserts his original memorandum of law as a basis for a redetermination of the issues; the proper procedure is appeal), aff'd per curiam (CA5th, 1973) 477 F2d 564.

[5] ¶56.01[5], [6], *supra;* ¶59.12[1], *infra.*

[6] ¶56.12[1], *supra;* ¶204.12[2], *infra.*

[7] See Cinerama, Inc. v. Sweet Music, Inc. (CA2d, 1973) 482 F2d 66; ¶¶59.12[1], 60.28, *infra.*

[8] ¶56.12[1], *supra;* ¶60.29, *infra.*

[9] Curtis Publ. Co. v. Church, Rickards & Co. (ED Pa 1973) 58 FRD 594 (citing **Treatise**); ¶62.10, *infra.*

[10] Cinerama, Inc. v. Sweet Music, S.A., *supra,* n 7; ¶62.06, *infra.*

[11] ¶56.20[3.—1], *supra.*

[12] United States v. Desert Gold Mining Co. (CA9th, 1970) 433 F2d 713; Wheeler v. Brotherhood of Locomotive Firemen & Enginemen (D SC 1971) 324 F Supp 818; ¶56.21[1], *supra.*

518–19 (2d Cir.1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See id.; and compare *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir.1961); *United States v. Higginson*, 238 F.2d 439 (1st Cir.1956); *Danzig v. Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir.1960); *Sears v. Austin*, 282 F.2d 340 (9th Cir.1960), with *Matteson v. United States*, supra; *Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir.1958); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir.1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v. Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir.1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U. S. District Courts for the Eastern and Southern Districts of New York: *Ram v. Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule represents an amalgamation of the petition for rehearing of former Equity Rule 69 (Petition for Rehearing) and the motion for new trial of 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc., Deering, 1937, §§ 656–663a, 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, former § 840 (Executions; stay on conditions) is modified in so far as it contains time provisions inconsistent with **Subdivision (b)**. For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States*, 1926, 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518; *Aspen Mining and Smelting Co. v. Billings*, 1893, 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.

For partial new trials which are permissible under **Subdivision (a)**, see *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 1931, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188; *Schuerholz v. Roach*, C.C.A.4, 1932, 58 F.2d 32; *Simmons v. Fish*, 1912, 97 N.E. 102, 210 Mass. 563, Ann.Cas. 1912D, 588 (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen states and contra from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann., Struckmeyer, 1928, § 3852; Calif.Code Civ.Proc., Deering, 1937, §§ 657, 662; Smith-Hurd Ill.Stats., 1937, c. 110, § 216 (Par. (f)); Md. Ann.Code, Bagby, 1924, Art. 5, §§ 25, 26; Mich.Court

Rules Ann., Searl, 1933, Rule 47, § 2; Miss.Sup.Ct.Rule 12, 161 Miss. 903, 905, 1931; N.J.Sup.Ct.Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246–1251, 1255, 1924; 2 N.D.Comp.Laws Ann., 1913, § 7844, as amended by N.D.Laws 1927, ch. 214.

1946 AMENDMENT

Note to Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*, C.C.A.8, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

1966 AMENDMENT

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid v. McGrath*, 133 F.2d 350 (D.C.Cir.1942); *National Farmers Union Auto. & Cas. Co. v. Wood*, 207 F.2d 659 (10th Cir. 1953); *Bailey v. Slentz*, 189 F.2d 406 (10th Cir. 1951); *Marshall's U. S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg v. Indemnity Ins. Co.*, 36 F.R.D. 253 (E.D.La. 1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 Moore's Federal Practice, par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck v. William A. Jarvis Co.*, 250 F.2d 285 (3d Cir. 1957); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *General Motors Corp. v. Perry*, 303 F.2d 544 (7th Cir. 1962); *cf. Grimm v. California Spray-Chemical Corp.*, 264 F.2d 145 (9th Cir. 1959); *Cooper v. Midwest Feed Products Co.*, 271 F.2d 177 (8th Cir. 1959).

Rule 60. Relief from Judgment or Order

(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 of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) 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; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram

nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). See former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich. Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 464(3); Wyo.Rev. Stat.Ann., (Courtright, 1931) § 89–2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va.Code Ann. (Michie, 1936) §§ 6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) § 473. See also N.Y.C.P.A., 1937, § 108; 2 Minn. Stat., Mason, 1927, § 9283.

For the independent action to relieve against mistake, etc. see Dobie, Federal Procedure, pages 760–765, compare 639; and Simkins, Federal Practice, ch. CXXI, pp. 820–830, and ch. CXXII, pp. 831–834, compare § 214.

1946 AMENDMENT

Note to Subdivision (a). The amendment incorporates the view expressed in *Perlman v. 322 West Seventy-Second Street Co., Inc.*, C.C.A.2, 1942, 127 F.2d 716; 3 Moore's Federal Practice, 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram v. Safety Investment Co.*, Mich.1942, 45 F.Supp. 636; also *Miller v. United States*, C.C.A.7, 1940, 114 F.2d 267.

Note to Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623. See also 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945; *Wallace v. United States*, C.C.A.2, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 659–682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in

every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace v. United States*, C.C.A.2, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573; *Fraser v. Doing*, App.D.C. 1942, 130 F.2d 617; *Jones v. Watts*, C.C.A.5, 1944, 142 F.2d 575; *Preveden v. Hahn*, N.Y.1941, 36 F.Supp. 952; *Cavallo v. Agwilines, Inc.*, N.Y.1942, 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn v. United States*, D.Mass.1942, 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis v. Oliver*, Okl.1945, 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 631–653; 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary Effect of Rule 60b on Other Methods of Relief from Judgments, op. cit. supra. Cf. *Norris v. Camp*, C.C.A.10, 1944, 144 F.2d 1; *Reed v. South Atlantic Steamship Co. of Delaware*, Del.1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin v. Berens*, D.C.1945, 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske v. Buder*, C.C.A.8, 1942, 125 F.2d 841; see also inferentially *Bucy v. Nevada Construction Co.*, C.C.A.9, 1942, 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653–659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C., Appendix, § 501 et seq. [§ 520(4)], a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

1948 AMENDMENT

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1655," in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, U.S.C., Title 28, § 118."

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

NOTES OF ADVISORY COMMITTEE ON RULES

A combination of U.S.C., Title 28, § 2111, former § 391 (New trials; harmless error) and former § 777 (Defects of form; amendments) with modifications. See *McCandless v. United States*, 1936, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205. Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally).

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under section 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of section 25 an aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, section 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cases referred to in section 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein* v. *Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert. den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by section 25 or by FRCP 73(a), which is applicable to such appeals in bankruptcy as are not governed by section 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions of a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶ 73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) without change of substance.

1979 AMENDMENT

Note to Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Note to Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge* v. *Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby* v. *Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau* v. *Diamond Nat'l Corp.*, 345 F.2d 469 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Note to Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., *Kieth* v. *Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. *Stokes* v. *Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Note to Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the

original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in *In re Orbitek*, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. and local rules of the district court. See Note to proposed amended Rule 1, *supra*. And see Rules 6(d), 7(b) of the F.R.C.P.

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Note to Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document. See *United States* v. *Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 48 is not jurisdictional, (see *Bankers Trust Co.* v. *Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Grant of Permission; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived in the main from Third Circuit Rule 11(2), which is similar to the rule governing appeals under 28 U.S.C. § 1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by § 1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare *Milbert* v. *Bison Laboratories*, 260 F.2d 431 (3d Cir., 1958) with *Sperry Rand Corporation* v. *Bell Telephone Laboratories*, 272 F.2d (2d Cir., 1959), *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697 (5th Cir., 1961), and *Houston Fearless Corporation* v. *Teter*, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to