

MEMORANDUM

July 17, 1986

TO: Members, COUNCIL ON COURT PROCEDURES:

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

FROM: Douglas A. Haldane, Executive Director

RE: MEETING OF COUNCIL ON COURT PROCEDURES

Saturday, July 26, 1986, 9:30 a.m.

THE INN OF THE SEVENTH MOUNTAIN
Bend, Oregon 97709

A G E N D A

- 1) Approval of minutes of June 14, 1986
- 2) ORCP 39
- 3) ORCP 55
- 4) ORCP 69
- 5) ORCP 78
- 6) NEW BUSINESS

cc: Public

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held July 26, 1986

Inn of the Seventh Mountain

Bend, Oregon

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

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

The meeting was called to order at 9:40 a.m. Mr. Haldane reported to the Council the death of Dr. Robert D. Henthorne, husband of Gilma Henthorne, the Council's Management Assistant. The Council unanimously adopted a resolution expressing its sympathy to Ms. Henthorne for her loss and its appreciation for her continued dedication and service to the work of the Council during the extended period of Dr. Henthorne's illness. Mr. Haldane was directed to draft an appropriate expression of the Council's sympathies and see that it was attached permanently to the original minutes of the meeting.

Mr. Foote moved the approval of the minutes of the meeting of June 14, 1986. Mr. Kyle seconded the motion. The motion was adopted unanimously.

Mr. Haldane presented to the Council the proposal of the Bar's Practice & Procedure Committee regarding a proposed amendment to ORCP 39 which would establish procedures perpetuating testimony after the commencement of an action by way of depositions. The proposal is attached hereto as Exhibit A. Mr. Haldane reported that, while an amendment to ORS Chapter 45 might well be sufficient to avoid problems with the law of evidence, the more direct route would be to amend the Evidence Code to allow the perpetuation of testimony by deposition. Assuming sufficient legislative changes to authorize the use of such depositions, Council members addressed their comments to the specific proposal amending ORCP 39, which would establish procedures in the taking of such depositions.

Concerns were expressed regarding the timing of the deposition, the timing of a discovery deposition taken prior to the perpetuation deposition, and difficulties in dealing with the phrase "unavailable in a practical sense." Specifically, the feeling was expressed that the requirement that the perpetuation deposition notice be filed not less than 21 days before the trial was not sufficient; that the deposition should be taken much earlier. Also, subsection (5) of the proposal, which would allow the taking of a discovery deposition of the witness "immediately" prior to the perpetuation deposition, while perhaps meant to be permissive could be construed to be restrictive in allowing the discovery deposition only "immediately prior" to the perpetuation deposition. It was suggested that the words "which may be" should be inserted after "witness", so that the phrase would read:

". . . a discovery deposition of the witness which may be immediately prior to the perpetuation deposition."

It was also suggested that subsection (4) of the proposal should read:

"(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing, or not less than fourteen days' notice, unless good cause is shown."

This would avoid having depositions the day before trial.

Mr. Haldane was asked to redraft the proposal and present his redraft to the Council at its next meeting. To the extent that any proposal adopted by the Council did not completely clarify the use of the word "immediately" regarding the discovery deposition, Mr. Haldane was directed to be sure that the commentary reflected the Council's concerns.

The Council then addressed the topic raised by Senator Frye regarding ORCP 55 H., which had been the subject of previous Council discussions. It was suggested that a recent Court of Appeals case dealt with the problem identified by Senator Frye, and Mr. Haldane was directed to see if the problem had been cured and report to the next Council meeting.

The Council then addressed the subject of notice of intent to apply for an order of default as a proposed amendment to ORCP 69. A copy is attached as Exhibit B. This proposal has been the subject of a great deal of Council discussion and was brought to the attention of the Council by the Bar's Committee on Practice & Procedure as a result of a recent Supreme Court opinion regarding the notice requirements.

Many of the questions and concerns discussed at prior

Council meetings were addressed once again. A new concern was raised regarding and amendment and ORCP 69 as it is currently written. The rule provides disparate treatment for a litigant represented by counsel as opposed to one appearing pro se. The suggestion was made that if notice is required when an attorney is representing a party, notice should also be required to the party appearing pro se. Since the most typical situation in which an application for a default would be made would be the failure to appear on the part of the defendant, it was pointed out that the original summons provides sufficient notice of when the defendant must appear and providing notice and an additional ten-days was unnecessary. It appeared that the provision of additional notice when a party was represented by counsel was an attempt to require by rule the extension of professional courtesy from one attorney to another. It was suggested that this might be inappropriate in a body of rules that have the force and effect of law and apply to all litigants.

Mr. Woods pointed out that it was appropriate to require notice of some sort prior to the taking of judgment, as opposed to the taking of an order of default, in cases where a hearing would be necessary on the question of damages. His suggestion was that no other notice should be required. It was suggested, alternatively, that the ten-day requirement should perhaps apply both to the taking of an order of default and to the taking of a judgment.

Based on the discussion, it was apparent that the Council was not prepared to make a decision regarding amendments to ORCP 69, and Mr. Haldane was directed to present to the Council at its next meeting several proposals for consideration. The first would require notice prior to the taking of an order of default without notice prior to taking judgment. The second would require notice prior to the taking of an order of default and prior to the taking of judgment. The third would remove from ORCP 69 any notice beyond that required in the original summons.

During the discussion of proposed amendments to ORCP 69, the Council recessed briefly to offer fitting congratulations to Mr. Pratt on his fortieth birthday.

The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

PROPOSED AMENDMENT TO ORCP 39

(1985-86 OSB Committee on Procedure and Practice)

I. PERPETUATION OF TESTIMONY AFTER COMMENCEMENT OF ACTION

(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by filing a perpetuation deposition notice.

(2) The notice is subject to subsections C(1)-(7) of this Rule and shall additionally state:

(a) a brief description of the subject areas of the witness' testimony; and

(b) the manner of recording the deposition.

(3) Prior to the time set for the deposition, any other party may object to the perpetuation notice herein. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that the witness will not, in a practical sense, be available for the trial or hearing, or that other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the case, subject to the Oregon Rules of Evidence.

(4) Any perpetuation deposition notice shall be filed not less than twenty-one days before the trial or hearing, unless good cause is shown.

(5) To the extent that a discovery deposition is allowed elsewhere in these rules or under case law, any party other than the one giving notice may conduct a discovery deposition of the witness immediately prior to the perpetuation deposition.

(6) The perpetuation examination shall proceed as set forth in subsection D herein. All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the transcription or recording. The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived.

PROPOSED COMMENTS RE AMENDMENT TO ORCP 39

Section 39 I. allows perpetuation of testimony after commencement of an action. It supplements the allowable deposition uses outlined in ORS 45.250. This Section is new and not drawn from any existing federal or state rule.

The use of a deposition which has not been noticed for perpetuation purposes under this Section remains governed by ORS 45.250.

Under this Section, the party seeking perpetuation is not required to show unavailability as defined in ORS 45.250(2)(i)-(e). Unavailability in a "practical sense," primarily relates to inconvenience of the witness due to vacation, conflicting business schedules and the like. The expense of bringing a witness to trial versus perpetuating his testimony may also be a factor in practical unavailability.

Under §§ I(3), the testimony which is admissible at any subsequent trial or hearing is subject to the evidentiary objections discussed in §§ I(7). Once a perpetuation deposition is taken, the party offering the deposition does not need to show the witness is unavailable at the time of trial. If the trial is rescheduled to a different date other than the one set at the time the deposition is taken, the party offering the testimony need not show unavailability of the witness for the new date.

No expansion of the scope of discovery deposition is intended by allowing a discovery deposition under §§ I(5). For example, this subsection does not govern whether a discovery deposition is available for expert testimony. A discovery deposition of an expert under §§ I(5) is allowed only in those circumstances where these rules or case law so provide. The expense of any perpetuation deposition is governed by other rules within ORCP, see ORCP 46 and 68.

MODES OF TAKING TESTIMONY

45.010 Testimony taken in three modes. The testimony of a witness is taken by three modes:

- (1) Affidavit.
- (2) Deposition.
- (3) Oral examination.

45.020 Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party.

45.030 [Repealed by 1979 c.284 §199]

45.040 Oral examination defined. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact, or act upon it, the testimony being heard by the jury or tribunal from the mouth of the witness.

45.050 [Amended by 1961 c.461 §1; 1979 c.284 §82; repealed by 1981 c.898 §53]

AFFIDAVITS AND DEPOSITIONS GENERALLY

45.110 [Repealed by 1979 c.284 §199]

45.120 [Repealed by 1979 c.284 §199]

45.125 [Formerly 45.180; repealed by 1977 c.404 §2 (194.500 to 194.580 enacted in lieu of 45.125)]

45.130 Production of affiant for cross-examination. Whenever a provisional remedy has been allowed upon affidavit, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant to be produced for cross-examination before a named officer authorized to administer oaths. Thereupon the party to whom the remedy was allowed shall lose the benefit of the affidavit and all proceedings founded thereon, unless within eight days, or such other time as the court or judge may direct, upon a previous notice to the adversary of at least three days, the party produces the affiant for examination before the officer mentioned in the notice, or some other of like authority, provided for in the order of the court or judge. Upon production, the affiant may be examined by either party; but a party is not obliged to make this production of a witness except within the county where the provisional remedy was allowed.

45.140 [Repealed by 1979 c.284 §199]

45.150 [Repealed by 1955 c.611 §13]

45.151 [1955 c.611 §1; repealed by 1979 c.284 §199]

45.160 [Repealed by 1955 c.611 §13]

45.161 [1955 c.611 §2; repealed by 1979 c.284 §199]

45.170 [Repealed by 1955 c.611 §13]

45.171 [1955 c.611 §3; repealed by 1979 c.284 §199]

45.180 [Renumbered 45.125]

45.181 [1955 c.611 §5; repealed by 1977 c.358 §12]

45.185 [1959 c.354 §1; 1977 c.358 §6; repealed by 1979 c.284 §199]

45.190 [1955 c.611 §6; 1977 c.358 §7; repealed by 1979 c.284 §199]

45.200 [1955 c.611 §7; repealed by 1979 c.284 §199]

45.210 [Repealed by 1955 c.611 §13]

45.220 [Repealed by 1955 c.611 §13]

45.230 [Repealed by 1979 c.284 §199]

45.240 [Repealed by 1979 c.284 §199]

45.250 Use of deposition. (1) At the trial or upon the hearing of a motion or an interlocutory proceeding; any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions of this subsection:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party, may be used by an adverse party for any purpose.

(2) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party for any purpose, if the party was present or represented at the taking of the deposition or had due notice thereof, and if the court finds that:

(a) The witness is dead; or

(b) The witness's residence or present location is such that the witness is not obliged to attend in obedience to a subpoena as provided in ORCP 55 E.(1), unless it appears that the absence of the witness was procured by the party offering the deposition; or

(c) The witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or

(d) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(e) Upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; [1955 c.611 §§8, 9; 1979 c.284 §83]

45.260 Introduction, or exclusion, of part of deposition. If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce all of it which is relevant to the part introduced and any party may introduce any other parts, so far as admissible under the rules of evidence. When any portion of a deposition is excluded from a case, so much of the adverse examination as relates thereto is excluded also. [1955 c.611 §10]

45.270 Use of deposition in same or other proceedings. Substitution of parties shall not affect the right to use the depositions previously taken; and when an action, suit or proceeding has been dismissed and another action, suit or proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, any deposition lawfully taken and duly filed in the former action, suit or proceeding may be used in the latter as if originally taken therefor, and is then to be deemed the evidence of the party reading it. [1955 c.611 §11]

45.280 [1955 c.611 §12; repealed by 1979 c.284 §199]

45.310 [Repealed by 1955 c.611 §13]

45.320 [Repealed by 1979 c.284 §199]

45.325 [1955 c.611 §4; repealed by 1979 c.284 §199]

45.330 [Repealed by 1979 c.284 §199]
45.340 [Amended by 1959 c.96 §1; repealed by 1979 c.284 §199]

45.350 [Repealed by 1979 c.284 §199]

45.360 [Repealed by 1979 c.284 §199]

45.370 [Repealed by 1979 c.284 §199]

45.380 [Repealed by 1955 c.611 §13]

45.410 [Repealed by 1979 c.284 §199]

45.420 [Repealed by 1979 c.284 §199]

45.430 [Repealed by 1979 c.284 §199]

45.440 [Repealed by 1979 c.284 §199]

45.450 [Repealed by 1979 c.284 §199]

45.460 [Repealed by 1979 c.284 §199]

45.470 [Repealed by 1979 c.284 §199]

45.510 [Repealed by 1981 c.892 §98]

45.520 [Repealed by 1981 c.892 §98]

45.530 [Repealed by 1981 c.892 §98]

45.540 [Repealed by 1981 c.892 §98]

45.550 [Repealed by 1981 c.892 §98]

45.560 [Repealed by 1981 c.892 §98]

45.570 [Repealed by 1981 c.892 §98]

45.580 [Repealed by 1981 c.892 §98]

45.590 [Repealed by 1981 c.892 §98]

45.600 [Repealed by 1981 c.892 §98]

45.610 [Repealed by 1981 c.892 §98]

45.620 [Repealed by 1981 c.892 §98]

45.630 [Repealed by 1981 c.892 §98]

45.910 [1959 c.523 §§1, 2, 3; repealed by 1979 c.284 §199]

* (f) The deposition was taken pursuant to ORCP 39 I.

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 (or that party's attorney) 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 or the court shall render an order of default.

B. [Entry] Rendering of default judgment.

B.(1) By the court or the clerk. The court or the clerk

upon written application of the party seeking judgment shall
[enter] render 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] rendered 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] rendered 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] render 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] rendered 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 rendered, 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 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 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.

7/26/86 DRAFT