A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting on Saturday, September 13, 1986, 9:30 a.m.

Portland Marriott

1401 S.W. Front Street

Portland, Oregon

1) Approval of minutes of meeting of July 26, 1986

2) Summary of Council considerations and proposals for the biennium

3) ORCP 39

4) ORCP 47

5) ORCP 69

6) New business and announcements

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held September 13, 1986

Portland Marriott

1401 Southwest Front Street

Portland, Oregon

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

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

The meeting convened at 9:30 a.m. No objection being raised, the minutes of the July 26, 1986 meeting were approved as read.

Judge Jones brought to the Council's attention a suggestion from the Chief Justice regarding the filing of discovery documents in court. The Council had previously discussed the fact that there was no real need to file requests for production with the court, and it tentatively approved an amendment to ORCP 43 which would avoid the necessity of filing a request with the court. Judge Jones suggested that the same procedure be extended to depositions, requests for admission, and any other discovery documents. Mr. Haldane was requested to draft a proposal to that effect and present it to the Council at its next meeting.

The Council once again addressed a proposal of the Bar's Practice and Procedure Committee to amend ORCP 39 to provide for perpetuation depositions. A copy of the Bar's original proposal is attached to these minutes as Exhibit A. Mr. Haldane had submitted for Council consideration some changes to paragraphs 4 and 5 of the Committee proposal which had been suggested at the Council's July 26, 1986 meeting. That proposal is attached as

Exhibit B. Judge Buttler suggested that the language in paragraph 5 of Mr. Haldane's proposal should be changed to strike the words "which may be immediately" and insert in their place the words "at any time" which would provide that a discovery deposition of the witness could be taken at any time prior to the perpetuation deposition.

Mr. Schroeder suggested that paragraph 3 of the Bar Committee's proposal should be stricken entirely. There was some suggestion that if paragraph 3 were stricken, paragraph 6 would then cause difficulties. It was then suggested that paragraphs 1 and 2 alone would suffice to establish a procedure for perpetuating testimony in the instances where perpetuation was agreed upon by the parties or where it was anticipated that a witness might be unavailable by the time of the trial. After further discussion of the implications of the proposed rule change, Judge Jones moved, with Judge Buttler's second, to adopt the proposal to amend ORCP 39 as submitted by the Bar's Practice and Procedure Committee with the following changes: that paragraphs 4 and 5 as submitted by Mr. Haldane be substituted for the original paragraphs 4 and 5 of the proposal and that paragraph 3 be amended to strike the language "will not, in a practical sense, be available" and insert in its place the language "that the witness may be unavailable as defined in ORS 40.465(1)." It was then suggested that paragraph 5 adds little to the proposal and should be left out entirely. It was also suggested that the last sentence of paragraph 3 should be deleted and that paragraph 6 should be deleted.

Judges Jones and Buttler accepted an amendment which would strike the words "which may be immediately" from paragraph 5, and a vote was requested on the original motion. The proposal was adopted with nine voting in favor and five opposed.

Mr. Haldane was directed to prepare a commentary to the changed ORCP 39 that would provide a clear indication that the Council was not seeking in any way to change the Evidence Code regarding admissibility of testimony given by perpetuation deposition.

The Council then addressed a proposed change to ORCP 47. Mr. Haldane had distributed copies of the proposed rule change, and a copy of what had been distributed by Mr. Haldane is attached to these minutes as Exhibit C.

Since Mr. Conboy had originally brought the matter to the Council's attention, he addressed the proposal. He explained that the intent of the proposal was to eliminate motions for summary judgment in tort cases.

The discussion indicated that this proposal has been a matter of discussion both before the Council and other concerned

groups for some time and is based upon the perception that, while summary judgment is a very effective tool in commercial cases, summary judgment is seldom granted in tort cases and motions for summary judgment in tort cases take considerable court and attorney time to no particularly good purpose. Mr. Schroeder raised some objection to the provision of the proposal which would tax a losing party on a motion for summary judgment with costs. It was his view that if motions for summary judgment were eliminated in tort cases, the cost provision was unnecessary. Mr. Conboy agreed. Mr. Pratt suggested that there were perhaps some areas within the broad category of "tort" where motions for summary judgment would be appropriate and that the mechanism should be retained for those situations. It was further suggested that perhaps the Council did not have sufficient information and perhaps certain individuals, specifically Judge Crookham and Fred Roehr, could be invited to address the issue for the Council's benefit.

Mr. Haldane was directed to contact Judge Crookham and Mr. Roehr and see if further information could be developed.

Regarding ORCP 69, the Council directed its discussion to the five proposals which had been submitted by Mr. Haldane. Copies of those proposals are attached to these minutes as Exhibit D. Judge Buttler moved, with Mr. Woods' second, to adopt Proposal No. 5 as submitted by Mr. Haldane. Proposal No. 5 does not require notice prior to taking an order of default but does require notice prior to taking judgment in the event that an evidentiary hearing is necessary. This would change the present rule which requires that notice be given prior to taking judgment in any case in which a party has appeared or the party taking judgment is aware that the defaulting party is represented by an attorney. Knowledge that the defaulting party was represented by an attorney would no longer trigger a notice requirement. It was suggested that the second paragraph of ORCP 69 B.(1)(g) be moved and renumbered as ORCP 69 B.(3) and that the current ORCP 69 B.(3) be renumbered as ORCP 69 B.(4). Judge Buttler and Mr. Woods accepted those suggestions, and the motion was adopted with eight voting in favor and five against.

Judge Jones expressed some concern with the use of the word "render" in ORCP 69 when referring to a judgment and moved that the word "entry" be used in its place. His motion was seconded by Mr. Woods and was passed by voice vote.

The meeting was adjourned at 12:00 noon.

Respectfully submitted,

Douglas A. Haldane

DAH:gh

MEMORANDUM

September 5, 1986

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane, Executive Director

RE: Meeting of September 13, 1986

Attached to this memorandum are several proposals for Council consideration.

The first is a redrafted version of the proposal of the Bar's Practice & Procedure Committee regarding ORCP 39, Perpetuation Depositions. The draft attempts to deal with concerns expressed by Council members at the last meeting regarding the Committee's original proposal. This proposal assumes there will be some legislative change which will provide a substantive basis for the procedures sought to be established through ORCP 39. Unless the law of evidence allows the use of such depositions, there is no point in having a procedure for taking them. The Bar Committee has suggested that an amendment to ORCP 45 will be sufficient to provide that substantive law basis. In my opinion, the Bar Committee is mistaken. If allowed, these depositions would have the effect of forcing a party to forego live cross-examination of witnesses in certain instances. ORS Chapter 45 deals with the admissibility of deposition testimony at trial when that testimony is "admissible

under the rules of evidence." The use of perpetuation depositions absent a stipulation and in the manner suggested will require an amendment to the hearsay rule. The proposal to amend ORCP 39 assumes a legislative of approval of a substantive basis for the rule and would only go into effect if the substantive law was amended.

The second is a proposed amendment to ORCP 47 similar to that distributed by Mr. Conboy. I have taken the liberty of playing with Mr. Conboy's language on an award of costs. The problem of summary judgments has been addressed by the Council on many occasions. The breadth of opinion seems to run from leaving the rule as it is to abolishing it entirely. For some time now opinions have been expressed that summary judgment works well in commercial cases but is not particulary effective, perhaps indeed counter-productive, in injury cases. The litigation section of the Bar sponsored a symposium on litigation delay during the spring of 1984 at which a suggestion similar to Mr. Conboy's was raised and well received. Wendell Gronso has suggested that summary judgment be abolished in tort cases to the legislative task force on liability insurance. It appears that is an idea that may have broad support.

Nonetheless, some concerns have been expressed about the proposal. The primary concern is the use of the word "tort". It is thought by some that the category is too broad. Consider

the case in which a plaintiff brings a personal injury action after having executed a complete release. It has been suggested that this would be an appropriate subject for summary judgment. Additionally, a case that is being defended on the basis of the running of the statute of limitations might be appropriate for summary judgment. Some concerns have been expressed about indemnity cases which in many instances are based on contract but can also be based in tort. While the use of the word "tort" may be too broad, attempting to refine the category further could present even more difficulties. Perhaps the simple answer is to accept the fact that summary judgment would not be available in cases involving the examples listed above and that that price is worth paying to avoid the waste of time which many see in summary judgment practice as it currently exists.

The third set of proposals you are receiving involve amendments to ORCP 69. I am submitting for Council consideration five sets of proposals on ORCP 69. The consensus of Council membership seems to be that the changes which clarify the distinction between an order of default and a judgment of default and the use of "rendering" rather than "entry" when speaking of a judgment are desirable. The problem, of course, is the provision of notice to the opposing party prior to taking an order of default, a judgment without hearing, or a judgment with hearing.

Proposal No. 1 represents the current language of ORCP 69 with no changes being made in the notice requirement. Under Denkers v. Durham Leasing, no notice would be required prior to taking an order of default, but notice would be required prior to making application for a judgment when the opposing party had either appeared or was represented by counsel.

Proposal No. 2 provides for notice of intent to take an order of default but not notice of intent to take a judgment of default. This proposal simply reverses the current rule and is closest to the original proposal of the Bar's Committee on Practice & Procedure.

Proposal No. 3 provides the notice in both instances, prior to taking an order of default and prior to taking judgment. However, notice prior to taking judgment would only be in the instance that an evidentiary hearing was necessary to establish damages.

Proposal No. 4 would do away with the notice requirement entirely.

Proposal No. 5 does not require notice prior to taking an order of default but does require notice prior to taking judgment in the event that an evidentiary hearing is necessary.

I am not yet sure that this covers all the bases, but it should at least give us enough options to work from. The fifth proposal would seem to be that which summarizes most of the thoughts of Council members at the last meeting. No notice would be required beyond that contained in the summons prior to taking an order of default. Notice would be required prior to taking judgment in the event that an evidentiary hearing was necessary, regardless of whether a party was represented by counsel. This would cure the problem of treating defendants appearing pro se differently from those who have counsel.

DAH:gh

Enclosures: Proposals

cc: Public (w/encs.)

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 CHANGES TO OSB COMMITTEE'S
PROPOSED AMENDMENT TO ORCP 39

* * * *

SUBSTITUTE THE FOLLOWING FOR THE COMMIITTEE'S PROPOSAL:

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

(5) To the extent that a discovery deposition is allowed by law, any party other than the one giving notice may conduct a discovery deposition of the witness which may be immediately prior to the perpetuation deposition.

* * * *

PROPOSED AMENDMENTS TO ORCP 47

A. **For claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim, other than a claim, counterclaim or cross-claim for damages for injury based upon tort, 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, other than a claim, counterclaim or cross-claim for damages for injury based upon tort, 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.

* * * *

I. Costs of motion. If a motion for summary judgment is denied, or the granting of such a motion is reversed upon appeal, the party resisting the motion shall be entitled to recover from the party asserting the motion all costs incurred as a result of resisting the motion, including reasonable attorney fees.

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.

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(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 CHANGES TO OSB COMMITTEE'S
PROPOSED AMENDMENT TO ORCP 39

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* * * *

EXHIBIT B TO 9/13/86 MINUTES

PROPOSED AMENDMENTS TO ORCP 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, other than a claim, counterclaim or cross-claim for damages for injury based upon tort, 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, other than a claim, counterclaim or cross-claim for damages for injury based upon tort, 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.

* * * *

I. Costs of motion. If a motion for summary judgment is denied, or the granting of such a motion is reversed upon appeal, the party resisting the motion shall be entitled to recover from the party asserting the motion all costs incurred as a result of resisting the motion, including reasonable attorney fees.

PROPOSAL NO. 1

CURRENT ORCP 69. CHANGES REFLECTED HERE ARE NOT SUBSTANTIVE BUT MERELY ATTEMPT TO CLARIFY DISTINCTIONS BETWEEN ORDERS OF DEFAULT AND JUDGMENTS OF DEFAULT, AS WELL AS USING "RENDERING" OF JUDGMENT RATHER THAN "ENTRY" OF JUDGMENT.

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] order the default of that party.

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;

EXHIBIT D TO 9/13/86 MINUTES

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. **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. **"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.

PROPOSAL NO. 2

THIS PROPOSAL PROVIDES FOR NOTICE OF INTENT TO TAKE AN ORDER OF DEFAULT BUT NOT NOTICE OF INTENT TO TAKE A JUDGMENT OF DEFAULT.

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 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 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.

[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.

PROPOSAL NO. 3

THIS PROPOSAL PROVIDES FOR THE GIVING OF NOTICE PRIOR TO TAKING AN ORDER OF DEFAULT AND PRIOR TO TAKING A JUDGMENT OF DEFAULT. THE NOTICE REQUIRED PRIOR TO TAKING A JUDGMENT OF DEFAULT IS REQUIRED ONLY IN THE EVENT SOME FORM OF EVIDENTIARY HEARING IS NECESSARY PRIOR TO RENDERING JUDGMENT.

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 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 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. In the event that it is necessary to receive evidence prior to rendering judgment and 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 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 ten days, unless shortened by the court, prior to the hearing on such application.

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.

PROPOSAL NO. 4

THIS PROPOSAL DELETES THE NOTICE REQUIREMENT BOTH PRIOR TO TAKING AN ORDER OF DEFAULT AND PRIOR TO THE RENDERING OF JUDGMENT.

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] order the default of that party.

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] <u>rendered</u> [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] <u>rendered</u> 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.

PROPOSAL NO. 5

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] order the default of that party.

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, 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. In the event that it is necessary to receive evidence prior to rendering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the applicatin for judgment at least ten days, unless shortened by the court, prior to the hearing on such application.

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.

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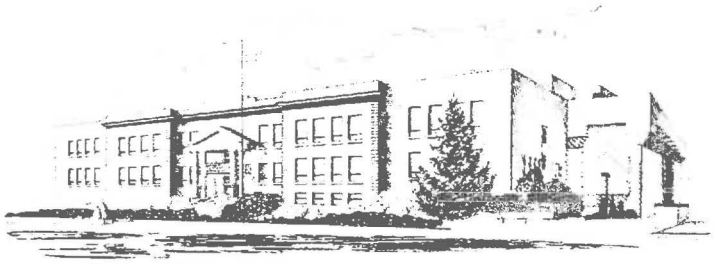

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September 9, 1986

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

Re: Meeting of September 13, 1986

Dear Mr. Haldane:

I am in receipt of your September 5, 1986 transmittal of various proposals for amendments to ORCP 39, 47, and 69. I take this opportunity to briefly offer my thoughts on the proposed amendments to ORCP 47 and 69.

ORCP 47. I suggest that the committee not adopt the proposed amendments to this rule. The first amendment (to ORCP 47-A and 47-B) excludes "damages for injury based upon tort" from the purview of the rule. In addition to the problems you point out in your transmittal memorandum regarding the scope of the term "tort" in this context (which problem is not insubstantial), the advisability of the proposed amendment is not apparent. While there may perhaps be reasons in the committee's prior deliberations, I noted no reasons in the transmittal letter nor in the minutes of the last meeting of the Council on July 26th. The basic purpose of a summary judgment rule, of course, is to cut through claims (by either party) that are factually insupportable. As such, summary judgment is a tool with immense potential for saving time, costs, and energy. I am aware of no reason why this salutary purpose of the summary judgment rule could not be applicable to "damages for injury based upon tort." If there is a material issue of fact, the non-moving party may easily defeat the motion with the appropriate affidavit.

While there is something favorable to say for the proposed ORCP 47-I, I also suggest the committee not adopt this amendment to the rule. It would have the benefit of discouraging poorly grounded ORCP 47 motions---and come closer to the English rule of the losing party paying for the prevailing parties attorney's fees (which I basically support). My concern, however, is that

in the limited context of a motion for summary judgment, the proposed ORCP 47-I would go too far. As the Council should be aware, there is a considerable disparity of approach from one judge to the next regarding willingness to grant motions for summary judgment. Since denial of a motion for a summary judgment is not appealable, there is a powerful (and, I believe, excessive) tendency to deny many such motions even though they are meritorious. Other judges, more mindful (in my opinion) of the purpose of the rule and (properly) less concerned about "playing it safe" regarding possible reversal, are more willing to grant such motions in meritorious cases---and achieve the remedial purpose of the rule. Thus there is considerably less predictability regarding a given court's ruling on a motion for summary judgment than there would be in other contexts. Therefore implementation of the proposed ORCP 47-I would have a "chilling effect" on filing of such motions--- discourage use of this powerful tool for cutting through insupportable claims expeditiously and at an early stage.

ORCP 69. I understand that the committee is leaning toward proposal number 5 (mentioned on page 4 of your transmittal letter). I concur in that approach in that it would represent a significant scaling back of the present rule. Most preferable, in my view, would be proposal number 4 (which would do away with the notice requirement for default orders and judgments entirely. In addition to the problem of applying unequally to parties who are and are not represented by counsel, the notice requirement of ORCP 69 simply extends (indirectly) the 30-day period for first appearance set forth in ORCP 7-C(2). Since the summons already puts the receiving defendant on notice that he or she has 30 days in which to respond, all of the necessary notice would seem to have been given at that point. The effective 10 day extension contained in ORCP 69 simply introduces more delay (and expense) into a system that is already overburdened. Why not have a 30 day limit mean what it says?

Hopefully these thoughts will prove helpful to the Council as it considers further the proposals for changing ORCP 47 and ORCP 69. Enclosed please find extra copies of this letter for members of the Council.

Thank you for continuing to encourage participation by keeping us informed of the Council's deliberations.

Sincerely,

James H. Boldt

James H. Boldt
Legal Counsel

JHB/gg
Enclosures

DEFAULT ORDERS
AND JUDGMENTS
RULE 69

A. Entry of order 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 order the default of that party] **the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of 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 enter the order of default.**

B. Entry of default judgment.

* * *

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] **the minor or incapacitated person** [have] **has** a general guardian or [they are] **is** represented in the action by another representative as provided in Rule 27. 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 a 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. [In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought 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.]

COMMENT

The first sentence of ORCP 69 B(2) was amended by the Council to cure grammatical defects.

(MORE COMMENT)

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May 23, 1986

Mr. Douglas A. Haldane
899 Pearl Street
Eugene, Or 97401

Re: Proposed Amendment to ORCP 39 (Perpetuation of Testimony After Commencement of Action)

Dear Doug:

Enclosed is the result of a project that took the most study and discussion of any other considered by the OSB Committee on Procedure and Practice during this Bar year. The proposed amendment to ORCP 39, associated Comments and the companion amendment to ORS 45.250 were drafted by Portland attorney Dennis Elliott, and were approved unanimously by the Committee at its May 3, 1986 meeting.

In summary, the rule amendment adds a section I. which provides a procedure for a party, after commencement of an action, to notice a deposition for the perpetuation of testimony where the deponent will not, in a practical sense, be available for the trial or hearing. The provisions also set forth a procedure for the making and determination of objections to the perpetuation deposition, allows any other party to take a discovery deposition of the witness immediately before the perpetuation deposition (though not where the deponent is the noticing party's expert), and requires that all objections to perpetuation testimony and evidence must be made at the time and noted upon the transcript so that when the testimony is offered, the court can determine objections in accordance with the Oregon Rules of Evidence.

As you can see from the proposed Comments, unavailability in a "practical sense" would broaden considerably the concept of unavailability presently found in ORS 45.250 (2). It would not have to be re-established after a perpetuation deposition has been validly noticed and taken, even if the witness could be shown to be available at the time of trial (e.g., where the trial has been rescheduled to a new date). In this instance, another party could subpoena the perpetuation witness to the trial or hearing, but at least that party would bear the expense, and not the party who went to the time and trouble of perpetuating the testimony in the first place.

If the Council on Court Procedures decides to adopt the Committee's proposal, it will be necessary to introduce companion legislation amending ORS 45.250 (2) by adding a new subsection (f) along the lines of the enclosed marked-up copy of the statute. I suspect that the Bar would stand ready to assist the Council in this endeavor, to the extent assistance is deemed necessary or advisable.

It is the strong consensus of the Committee that these proposals would fill a bedeviling gap in Oregon's procedural rules. Most litigators have experienced the frustration of unsuccessful attempts to obtain their adversaries' agreement while an action is pending that a particular deposition should be considered for perpetuation, since that status can be conferred only at the time of trial under present ORS 45.250. The proposals also have the salutary potential of decreasing the cost of litigation and making other professionals' involvement as expert witnesses less onerous than at present.

I would be happy to answer any questions or concerns you have regarding these proposals, and either Dennis Elliott or I will make ourselves as available as our schedules permit to discuss them with the Council, if that is desired.

Sincerely yours,

Frank C. Gibson

FCG/lh
Encs.
cc: Duane Pinkerton
Dennis Elliott

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.

Amendment to ORS 42.250 (2) (Companion legislation to amendment to ORCP 39, adding section I.)

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 subpena 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 subpena; ~~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]

or *

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.

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‡ OREGON AND DISTRICT OF COLUMBIA BARS
• WASHINGTON BAR ONLY

August 7, 1986

Mr. Joe D. Bailey
Chairman
Council on Court Procedures
1001 SW Fifth Avenue, Suite 1300
Portland, OR 97204

Re: Possible amendment to ORCP 44 or other rules to permit discovery of doctors' chart notes in personal injury litigation.

Dear Joe:

I am a member of the Circuit Court Liaison Committee of the Multnomah Bar Association. Our committee recently prepared an article for The Multnomah Lawyer summarizing some of Judge Crookham's more frequent rulings in Presiding Court. A copy of the article is enclosed. Item 1 discusses Judge Crookham's practice regarding discovery of doctors' chart notes which are not contained in hospital records otherwise discoverable and accessible under ORCP 44E and 55H.

As you know, many personal injury claimants are never treated in a hospital and the chart and office notes by the treating physician, chiropractor, nurse practitioner or other medical provider is really the only "running record" of the treatment for the injuries involved in the litigation. Under Judge Crookham's interpretation of the Rules of Procedure, there is not any mechanism by which a defending party can require production of such office or chart notes. Rather, the defending party must go to the expense of acquiring a report prepared by the treating practitioners for purposes of the litigation. The content of such report may be controlled to some extent by the claimant's attorney.

It is my experience that office and chart notes are often far more informative regarding the nature and extent of a claimed injury and, because they are an existing record for which the cost of production is only the charge of photo-copying, they are a far less expensive and less time-consuming method to identify and thereafter evaluate the facts regarding injuries.

While I do not favor eliminating the procedure by which a Rule 44 report can be obtained, I believe defending parties should not have to bear the costs of such a report if they can obtain the information they need to defend and evaluate--particularly in the smaller value cases which are subject to mandatory arbitration--by a far less costly and speedy procedure which could be utilized to no one's prejudice. Office and chart notes are, in any event, available at trial and I cannot see any reason why they should not be made available as soon as a defendant requests them.

I propose that the Council on Court Procedures consider amending the Rules of Procedure to provide for discovery along these lines. I am willing to assist in that effort if needed.

Very truly yours,

Anna

Anna J. Brown

AJB/fb
Enclosure
cc: The Honorable Charles S. Crookham

FREQUENT RULINGS OF PRESIDING COURT

Anna J. Brown

The MBA Circuit Court Liaison Committee offers the following summary of Judge Crookham's rulings on some frequently raised issues in Presiding Court. It is hoped that the publication of this summary will help counsel to avoid the need to incur the cost of motion practice to resolve some of the more common disputes. If you have other issues/rulings to include in future summaries, contact Anna Brown at the Bullivant offices.

1. Discovery of doctors' chart notes.

Judge Crookham rules that a doctor's chart notes (which are not contained in a hospital record otherwise discoverable under ORCP 55H) are not "written reports of any examination relating to injuries for which recovery is sought" within the meaning of ORCP 44C. Strictly speaking, chart notes are therefore not subject to a motion to compel. However, Judge Crookham agrees that production of chart notes is well within the spirit of the litigation cost containment guidelines recently adopted by OTLA and OADC and promoted by Chief Justice Petersen. Presiding Court therefore

encourages parties to stipulate to production of chart notes and other "existing" documentation of injuries.

2. Rule 44 medical examinations.

Judge Crookham rules that a person examined pursuant to ORCP 44 may not require that the exam be attended by the person's counsel or other witnesses or that the exam be recorded or memorialized in any fashion other than the report contemplated by ORCP 44B. In State ex rel Vriesman v. Crookham, the Supreme Court declined to issue an alternative writ of mandamus on June 18, 1986, where Judge Crookham had denied plaintiff-relator's motion that the medical examination be attended by a witness and tape-recorded, and that the examining physician agree to follow principles contained in a "Patient's Bill of Rights".

3. Discovery of tax returns.

In a wage loss claim, discovery is appropriate of those portions of tax returns showing an earning history, i.e. W-2 forms, but not those parts of returns showing investment data or other non-wage information.

In punitive damage claims, Judge Crookham favors the production of sworn financial statements or balance

sheets which he "invites" parties to prepare in lieu of the court ordering production of complete copies of tax returns for a long period of time.

4. Deposition procedures.

Judge Crookham routinely sustains deposition objections to any consultation between a deponent and counsel in any fashion other than would ordinarily be permitted in the course of a trial. This particularly includes consultation during the pendency of a question or the calling of recesses to permit consulation over a line of questioning. While Judge Crookham is available by phone to rule on objections made while a deposition is underway, he discourages a "piece meal" approach and suggests that counsel continue on other matters and contact him once when the objectionable areas are identified.

5. Pleading issues.

a. Pre-judgment interest. Where there are different conclusions a trier of fact could reach regarding the value of a claim (i.e. in a fire loss or property damage claim), the amount in controversy is not "ascertainable" and pre-judgment interest is not recoverable.

b. Specifications of negligence. Judge Crookham routinely sustains motions to make more definite and certain made against general allegations of negligence, the proof of which would ordinarily require expert or technical testimony. For example, in a medical malpractice case, if plaintiff's theory is that the defendant doctor negligently performed an appendectomy, Judge Crookham will require the plaintiff to plead in what manner the procedure was negligently performed. Judge Crookham suggests that the pleader paraphrase the particulars an expert would identify as falling below the standard of care for that profession.

c. Punitive damages. The case of Chamberlain v. Jim Fisher Motors, 282 Or 229 (1978), held that notwithstanding allegations of "gross negligence" and recklessness", punitive damages were not sustained where the defendant claimed gross negligence in failing to issue title after sale of an auto. However, allegations of gross negligence for intoxication in connection with operation of a motor vehicle is sufficient to sustain a claim of punitive damage in a personal injury claim.

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August 8, 1986

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

Re: Council on Court Procedures
Amendment to Rule 47, ORCP

Dear Doug:

In view of the approaching 1987 Legislative Session, I suggest that we consider the enclosed amendment of Rule 47, ORCP, at the September 1986 session of the Council on Court Procedures. I am furnishing copies of the proposed amendment to all members of the Council to give the members time to think about the proposed change.

Motions for summary judgment in tort cases have been granted a fair trial and proved beyond a reasonable doubt to be a tremendous source of unnecessary expense and waste of time and energy.

A claimant has no chance of obtaining summary judgment in a tort action. Most motions filed by the defense have no chance of success, but generate unnecessary work by everybody. Any motion that is granted will often be set aside on appeal. The granting of a motion may also result in a miscarriage of justice if the party opposing the motion has failed to file adequate counter-affidavits.

Summary judgments in tort cases result in no saving of judicial time. For every hour of trial time saved, I suspect that judges and attorneys have invested 50 hours of wasted effort with meritless motions. Oregon practice should be simplified by eliminating this worse than worthless procedural device.

An additional check on summary judgments of every class should be made by imposing substantial costs upon a litigant who files a motion which does not prove to be successful.

Very truly yours,

Raymond J. Conboy

RJC:em

Enclosure

cc: All members, Council on Court Procedures (w/encl)

RULE 47. SUMMARY JUDGMENT

A. For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, other than a claim, counterclaim or cross-claim for damages for injury based upon tort 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, without 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, other than a claim, counterclaim or cross-claim for for damages for injury based upon tort, 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.

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I. Costs of Motion. If a motion for summary judgment is denied, or if granted is reversed upon appeal, the party asserting the motion shall be liable for all costs incurred by the party or parties opposing the motion, including reasonable attorney's fees.

NOTE: The purpose of the foregoing amendments is to eliminate motions for summary judgment in tort cases, and to impose costs upon parties who unsuccessfully seek summary judgment in other classes of cases.