COUNCIL ON COURT PROCEDURES

April 30, 1988 Meeting
9:30 a.m.

Embarcadero Resort
Fireside Room
1000 SE Bay Boulevard
Newport, Oregon 97365

A G E N D A

1. Public Comment

2. Approval of Minutes of February 20, 1988

3. ORCP 59 C(6) (report of Judge Riggs and Judge Liepe)

4. ORCP 10 A (Procedure and Practice Committee - Janice Stewart letter)

5. ORCP 80 (Laurence Thorp letter)

6. State ex rel Grimm v. Ashmanskas (Lawrence Wobbrock letter)

7. ORCP 67-71 (review of judgments rules - Merrill memorandum)

8. New Business

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of April 30, 1988

Fireside Room, Embarcadero Resort

Newport, Oregon

Present:	John H. Buttler	Jack L. Mattison
	Lafayette G. Harter	Steven H. Pratt
	Lee Johnson	William F. Schroeder
	Henry Kantor	J. Michael Starr
	Winfrid K.F. Liepe	Larry Thorp
	Robert B. McConville	Elizabeth Yeats
	Ronald Marceau	
Absent:	Richard L. Barron	Richard P. Noble
	Raymond J. Conboy	James E. Redman
	Robert E. Jones	R. William Riggs
	John V. Kelly	Martha Rodman
	Paul J. Lipscomb	

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Management Assistant)

The meeting was called to order by Vice Chairer Ron Marceau at 9:30 a.m.

It was announced that Ray Conboy, Chair of the Council on Court Procedures, had recently been hospitalized for surgery. The Council directed Henry Kantor to express to Mr. Conboy the best wishes of the Council members for his speedy recovery.

The chairer asked members of the public in attendance to present any statements they wished to make. None was received.

The minutes of the February 20, 1988 meeting were unanimously approved.

The Council discussed and took the following actions regarding the attached agenda:

ORCP 59 C(6) (report of Judge Riggs and Judge Liepe). Judge Liepe stated that the proposed amendment to ORCP 59 C would read as follows:

> "The court in its discretion may allow the jury to separate [for the evening] during its deliberation <u>for any noon recess or for the evening</u> when the court is of the opinion

that the deliberation process will not be adversely affected. In such cases the court will give the jury appropriate cautionary instructions."

The council discussed the suggestion. They considered whether the trial judge should be given authority to allow the jury to separate for any reason, or for recesses other than noon or evening.

A motion was made by William Schroeder, seconded by Judge Mattison, to adopt the change proposed by Judge Liepe, with a slight change of wording, which would read as follows:

"The court in its discretion may allow the jury to separate [for the evening] during its deliberation for any noon or evening recess ..."

The motion carried with seven in favor and five opposed. Henry Kantor asked that the minutes reflect that he opposed the change. The Executive Director was asked to prepare a commentary to present to the Council at its next meeting.

ORCP 10 A (Procedure & Practice Committee - Janice Stewart letter). The Procedure & Practice Committee had submitted a proposed change in the last sentence of ORCP 10 A so that the last sentence would read:

"As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.010, and also means any day on which the courthouse or other place prescribed for the completion of an act, event, or default is closed during any part of its normal business hours as established by the State Court Administrator."

The Executive Director called ORS 174.125 to the attention of the Council members. That statute reads as follows:

"Notwithstanding ORCP 10 and ORS 174.120, if a time period is prescribed or allowed for personal service of a document or notice on a public officer or the filing of a document or notice with a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which the document or notice is to be filed. If the last day is so excluded, the time period runs until the close of office hours on the next day the office is open for business. (emphasis on language discussed)

William Schroeder pointed out that, although the statute seems directed primarily at service of documents on public

officers, it also covers filing of any document or notice in a public office, which appears to cover filing in court cases.

The Executive Director was asked to write a letter to Ms. Stewart asking the Procedure and Practice Committee to reconsider the necessity of their proposed amendment to rule 10 A in light of ORS 174.125, and, if any change is recommended, whether the language in the rule should conform to the language in the statute.

ORCP 80. Larry Thorp had brought to the Council's attention a problem with notice requirements in ORCP 80 regarding the appointment of a receiver.

The Executive Director suggested that there were actually two problems presented. The first question was whether the provisions in ORCP 80 F(3) relating to service of notices was necessary in light of the provisions in Rule 9 B relating to manner of service. The second question relates to time computation for periods less than seven days, when services is by mail. ORCP 10 provides that when a time period is less than seven days, intermediate Saturdays, Sundays, and legal holidays are not counted. ORCP 10 C provides that when service is by mail, three days are added to any prescribed period. The question presented is: when a four, five, or six day notice is required, and that notice is served by mail, does ORCP 10 A have reference to the time specified in the statute or rule or does it refer to that time plus the three days provided by ORCP 10 C.

The Council discussed these problems. It was also suggested that the Council consider adopting a rule allowing filing by mail. The Executive Director was asked to consult with Larry Thorp and prepare drafts of changes to ORCP 80 F(3) and ORCP 10 which addressed the problems identified in the Thorp letter. A motion was made by Judge McConville, seconded by Steve Pratt, that the Council take no action on filing by mail until it receives some communication that there is a problem. The motion passed unanimously.

State ex rel Grimm v. Ashmanskas (Lawrence Wobbrock letter). The Council discussed the question of waiver of physician-patient privilege by filing an action and decided that the question presented was one of evidence which was outside its rulemaking power. The Executive Director was asked to communicate this to Mr. Wobbrock.

The Council then reviewed several possible problems in the ORCP rules relating to judgments which have been suggested by the appellate cases interpreting rules 67-71 and which were submitted in a memorandum prepared by the Executive Director. The Council considered the following areas:

ORCP 68 C(2). The Council considered a series of appellate opinions strictly interpreting the requirement that a party seeking attorney fees plead the facts, statute or rule providing a basis for such fees in a very strict fashion. The Council discussed whether it was desirable that a party who has asserted a right to attorney fees based upon a statute, but neglected to cite the statute in the pleading should be denied fees, particularly where the opposing party was actually aware of the basis for the claimed fees. Judge Buttler suggested that one solution might be to provide that failure to object to the specificity in pleading the basis for attorney fees be waived, if not asserted prior to trial. The Executive Director was asked to draft a possible rule that would do this and submit it at the next meeting.

ORCP 69 B(2). The Council discussed the notice requirement for seeking default judgment that presently appears in 69 B(2). The Council discussed whether such notice must be given only after entry of the order of default. Possible elimination of any notice was also discussed, as was possible expansion of notice to include intent to take default. Mike Starr informed the Council that the Oregon State Bar Procedure and Practice Committee was considering the provision and planned to submit a recommendation to the Council. No action was taken at the present time.

ORCP 70. The Council considered the appellate court cases which establish that a final judgment can consist of a series of separate orders disposing of different claims or parties in a case, with all of the documents together being part of the judgment and the date of the final judgment being the date of entry of the final document. The Council decided that no action was necessary.

During the course of the discussion, it was suggested that some procedure for entry of a supplemental judgment, particularly to cover attorney fees accruing in unanticipated collection problems, could be developed. The Executive Director was asked to consult with Larry Thorp and determine if any procedure of this nature existed in other jurisdictions.

ORCP 71 B(1)(c). The Executive Director explained that when the Council originally drafted ORCP 71 B(1)(c) relating to relief from a judgment obtained by fraud, it intentionally did not change the Oregon rule allowing vacation of a judgment only for extrinsic fraud. In Johnson v. Johnson, 301 Or 382, 384-395, 730 P2d 1221 (1986), the Oregon Supreme Court recognized this and refused to vacate a judgment secured by perjured testimony, which is intrinsic fraud. The Executive Director pointed out that the federal rule does distinguish between extrinsic and intrinsic fraud and the Restatement (Second) of Judgments has also abandoned the distinction.

A motion was made by Lee Johnson, seconded by Judge Buttler, to leave ORCP 71 B(1)(c) as it is. The motion passed unanimously.

ORCP 71 A and B(1). The Council discussed the requirement in ORCP 71 A and B(1) that leave of appellate court be granted before a party is allowed to file a Rule 71 A motion to correct a judgment or a Rule 71 B motion to vacate a judgment. The Executive Director stated that the original intent in this requirement was to provide an opportunity to avoid a useless appeal by informing the appellate court that the judgment under appeal might be subject to vacation anyway. This assumes that the appellate court might avoid the useless appeal by directing the trial court to decide the motion, of if the trial court has no jurisdiction to do that by deciding the motion to vacate itself. State ex rel Juv. Dept. v. Shaver, 74 Or App 143, 145, n.2, 700 P2d 1066 (1985), however, suggests that this is not possible and disposition of the Rule 71 motion must await disposition of the appeal and that leave of the appellate court is a useless act. After discussion, the Council felt that it had no authority to change the power of the appellate and trial courts in this area. The Executive Director was asked to draft a suggested statute for submission to the legislature which would allow the appellate court, in an appropriate case, to direct that the trial court pass on the Rule 71 motion before it disposed of the appeal. He was also asked to check on the Rules of Appellate Procedure to see if any changes were necessary in those rules to allow the trial court to do this.

NEW BUSINESS

Henry Kantor mentioned that Federal Rule 23 (class actions) is about to be significantly changed and reduced to two paragraphs and may be of concern to the Council in the next biennium.

Judge Liepe brought to the attention of the Council an April 20, 1988 letter from Judge Eric Valentine suggesting a 45-day time limitation during which a defending party (as a third party plaintiff) can serve a complaint in ORCP 22 C(1). Copies of Judge Valentine's letter will be circulated to the Council for consideration at its next meeting.

Judge Liepe reminded the Executive Director that he had agreed to investigate possible procedures for compelling satisfaction of judgment. The Executive Director stated that he would look into the matter and report at the next meeting.

The Executive Director announced that he would submit a memorandum on court interpretation of Rules 1 through 10 before the next meeting.

The next meeting of the Council will be held on Saturday, May 21, 1988, at 9:30 a.m., in Room 354 of the State Capitol in Salem.

The meeting adjourned at 12:05 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

April 19, 1988

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES:**

Richard L. Barron
John H. Buttler
Raymond J. Conboy
Lafayette G. Harter
Lee Johnson
Robert E. Jones
Henry Kantor
John V. Kelly
Winfrid K.F. Liepe
Paul J. Lipscomb
Ronald Marceau
Jack L. Mattison
Robert B. McConville
Judith Miller
Richard P. Noble
Steven H. Pratt
James E. Redman
R. William Riggs
Martha Rodman
William F. Schroeder
J. Michael Starr
Larry Thorp
Elizabeth Yeats

FROM: Fredric R. Merrill, Executive Director

RE: **REVIEW OF JUDGMENT RULES**

Attached are summaries of all the significant cases decided in the past six years relating to ORCP 67-71 covering judgments.

Some issues have arisen that deserve attention by the Council. The following is a list of those that struck me in preparing the summary and Council members may wish to raise others. We will put this on the agenda for the April 30, 1988 meeting. Raising an issue does not mean that I suggest that all, or even any, of the rules involved should be changed. The best approach is probably to make as few changes as possible. For every problem you cure, you create three more. The strength of the Council on Court Procedures system, however, is the ability to review the rules periodically for problems created by drafting errors and changing conditions.

ORCP 68

Specificity in Alleging Basis for Attorney Fees. The Court of Appeals has interpreted the requirement in ORCP 67 C(2), that a party must plead the facts, statute, or rule entitling them to attorney fees, in a very restrictive fashion. In a series of cases, over a strong dissent, they have concluded that a party not only must claim reasonable attorney fees, but must cite the

exact statute relied upon or no fees can be awarded. This is true even though the opposing party admits they are aware which statute is involved, admits they were aware of the defective nature of the claim and said nothing until after trial, and in fact have asserted a claim for fees under the same statute. Given the purpose of the rule, to allow a party evaluating a case to be aware that in addition to the principal claim at trial, attorney fees claims will be made after trial, the cases seem to be a bit harsh. See the Fulop and Strasser cases in the materials. This is softened somewhat by the possibility that the party incorrectly pleading attorney fees correctly could get a post-trial amendment, but the amendment would be at the discretion of the trial judge.

ORCP 69

Notice of Intent to Take Default Judgment. One aspect of default judgment notice that was not addressed by the Council during the last biennium is the holding in Goldmark III v. Anderson, 84 Or App 287, 734 P2d 3 (1987). Despite the fact that Rule 67 has no language to this effect, the Court of Appeals decided that when notice of intent to take a judgment is required, it can only be given after the order of default is taken. Therefore, if, for ethical or practical reasons, a notice of intent to secure an order of default is given, two separate notices are required, at least when a hearing is necessary before judgment.

ORCP 70

Single Final Judgment. The Supreme Court in State ex rel Zidell v. Jones, 301 Or 104, 110-116, 720 P2d 365 (1986), decided that where multiple claims or the rights of multiple parties are adjudicated in a series of separate orders, the documents taken together constitute the judgment, and the date of entry of the last order is the date of final judgment. Justice Lent dissented, arguing there should be one document that summarizes the final disposition of the case before there is entry of a final judgment. I am not sure the Council ever thought of this question when they adopted Rule 70.

Separate Judgment Requirement. The Supreme Court has interpreted the requirement in Rule 70 that a judgment be in a separate document contrary to the same requirement in the federal rule. They held in Gibson v. Benj. Franklin Fed. Savings and Loan, 294 Or 702, 704-711, 662 P2d 703 (1983), that the effectiveness of an Oregon judgment is not expressly made conditional upon the separate document requirement as it is in the federal rule. I am not sure that is what the Council intended when it adopted Rule 70. The memoranda written at that time suggested that ORCP 70 was intended to incorporate the federal rule to avoid ambiguity about when there was actually a

judgment. The Oregon Supreme Court approach may in fact be the better one as it avoids a potentially serious procedural defect based upon a relatively innocuous mistake. The Oregon rules have, and the Court has retained, the labelling requirement as a condition of an effective judgment. A document reciting the judge's opinion of a case and then giving judgment or combining a judgment with findings of fact and conclusions of law, still must have the word "judgment" in the label and this should alert the parties to the existence of a judgment.

ORCP 71

Extrinsic and Intrinsic Fraud. When the Council originally drafted ORCP 71 B(1)(c), relating to relief from a judgment obtained by fraud, it intentionally did not change the Oregon rule allowing vacation of a judgment only for extrinsic fraud. In Johnson v. Johnson, 302 Or 382, 384-395, 730 P2d 1221 (1986), the Oregon Supreme Court recognized this and refused to vacate a judgment secured by perjured testimony which is intrinsic fraud. The opinion notes that Restatement (Second) of Judgments § 70 has abandoned the distinction and the ALI action was not considered by the Council (the ALI rule was not actually promulgated until after the Council prepared ORCP 71). The Court does recognize that the merits of the Oregon rule, as opposed to the Federal rule which does abandon the distinction, were very thoroughly debated by the Council. A copy of the applicable portions of the Restatement (Second) of Judgments and the Johnson opinion, which accurately summarized the legislative history of ORCP 71, are attached.

Leave of Appellate Court to Move to Vacate. ORCP 71 B(2) requires leave of the appellate court to file a motion to vacate for the grounds set out in ORCP 71 B(1), when a case is on appeal at the time of the filing of the motion. The reason for allowing filing during appeal is to allow compliance with the one-year time limitation applicable to ORCP 71 B(1)(a),(b) and (c). As the comments to the original rule suggest, the reason for requiring leave of the appellate court, rather than simply authorizing filing of the motion during the appeal, was to allow the appellate court to decide if the motion might make the appeal moot, and if so, to dispose of the motion itself. The Court of Appeals, in State ex rel Juv. Dept. v. Shaver, 74 Or App 143, 145 n.2, 700 P2d 1066 (1985), suggests that the leave of the appellate court procedure is useless because the appellate court cannot permit its action to be affected by matters raised under a Rule 71 motion (copy of the court's footnote is attached). If the court is correct, it might be advisable to amend ORCP 71 B(2) to eliminate the first clause of the first sentence and the second sentence. The same reasoning would apply to the leave of court procedure specified in ORCP 71 A. The opinion is probably correct. Although the Nessley case which it cites deals with a procedure before adoption of the language now in ORCP 71 B, the

difficulty is that the Council has no authority to change appellate procedure. It does seem wasteful to have an appellate court consider an appeal from a judgment that may be vacated or changed under Rule 71, but a statute is probably required to correct this. The Council could recommend that the legislature enact a statute.

ORCP IN THE COURTS--RULE 67

Generally

The phrase "judgment order" is a contradiction in terms and should not be used. Under ORCP 67 A, a "judgment" is the final determination of the rights of the parties in an action and an "order" is any other determination which is intermediate in nature. Goeddert v. Parchen 299 Or 277, 279 fn. 1, 701 P2d 781 (1985); May v. Josephine Memorial Hospital 297 Or 525, 528 fn. 4, 686 P2d 1015 (1984); Gibson v Benj. Franklin Fed Savings and Loan 294 Or 702, 711 fn. 3, 662 P2d 703 (1983); Street v Gibson 295 Or 112, 115 fn. 1, 663 P2d 769 (1983); Ensley v. Fitzwater 293 Or 158, 162 fn. 2, 645 P2d 1062 (1982); Soldo v Follis 83 Or App. 470, 472 fn. 1, 732 P2d 72 (1986).

Failure to enter a final judgment disposing of all parties and claims in a case under ORCP 67 A or failure to comply with the requirements of ORCP 67 B may now be avoided in some cases under ORS 19.033(4). That statute, enacted in 1985, allows a trial court, with leave of the appellate court, to enter an appealable judgment after a notice of appeal has been filed, if the order appealed was intended by the trial court to be an appealable judgment. See Parnicky v. Williams 302 Or 150, 151-152, 727 P2d 121 (1986).

Despite the fact that a purported "judgment" does not dispose of all of the issues and parties in a case and does not comply with ORCP 67 B, enforcement of such judgement cannot be collaterally attacked. Ketcham v. Selles 304 Or 529, 534-537, P.2d (1977). In Ketcham an execution was mistakenly issued based upon an interim order which did not dispose of all of the issues in a case and property was sold to defendants at a sheriff's sale. An actual final judgment, which did dispose of all issues in the case, was then entered. Plaintiffs brought a replevin action to recover the property sold at the sheriff's sale claiming that the execution and sale were void. The Supreme Court held that the execution was voidable, not void, and the validity of the execution could only be attacked in the original proceeding, not in a separate proceeding.

ORCP 67 A

Both appellate courts in Oregon have repeatedly dismissed appeals where there is a purported final judgment which does not dispose of all of the plaintiff's claims, or defendant's counterclaims or cross claims, or third party claims. The courts have also faced several less obvious problems of interpretation of ORCP 67 A. In a probate proceeding, a "judgment-order on hearing on objections to final account", without a decree of final distribution, was held not an appealable final judgment in Goeddertz v. Parchen 299 Or 277, 280-281, 701 P2d 781 (1985).

See also Mitchell v Estate of Mitchell 84 Or App 58, 61, 733 P2d 456 (1987). However, in an action seeking strict foreclosure of a vendees interest under a land sale contract, a judgment finding the vendee in default and giving him 40 days to pay the balance due on the property or be strictly foreclosed was a final judgment and appealable. Even though the judgment was called interlocutory, it was in effect final because it determined the only triable issue in the case. Vista Management v. Cooper 81 Or App 660, 662, 726 P2d 974 (1986). See also Randall v. Sanford 75 Or App 68, 70 fn. 1, 705 P2d 756 (1985).

ORCP 67 B

The leading case interpreting ORCP 67 B is May v. Josephine Memorial Hospital 297 Or 525, 529-532, 686 P2d 1014 (1984). The Supreme Court stated that ORCP 67 B was adopted in response to Oregon's liberalized joinder of claims and parties. The purpose of the rule is to make appeal available as to a distinctly separate claim or as to fewer than all the parties, when it is necessary to avoid injustice to the parties or advance the interests of sound judicial administration. All that is required under ORCP 67 B to obtain an appealable judgement, rather than an intermediate order, is for the trial court to (1) make an express determination that there is no just reason for delay and (2) make an express direction for entry of judgement. The trial court may only do this when there are in fact either multiple claims and/or multiple parties and one or more, but fewer than all, claims have been decided or the rights and liabilities of at least one party have been completely adjudicated.

The May opinion states that the trial court decision that there are multiple claims or parties and partial final adjudication will be reviewed upon appeal, but the trial court decision that there is no just reason for delay will not be reviewed upon appeal. In the May case, the Supreme Court expressly overruled a line of Court of Appeal cases which had required that, unless the reasons were apparent from the record, the trial court state its reasons why there were no just reasons for delay. See cases cited in the Court of Appeals opinion, 64 Or App 672, 669 P2d 824 (1983)

An example of a trial court error in determining whether an order actually adjudicates a claim is found in Chelson v. Oregonian Publishing Company 71 Or App 645, 647-648, 694 P2d 981 (1984). The Plaintiff's complaint contained 12 separate legal theories, labelled "claims", and a single prayer for relief. A trial court order of partial summary judgment, disposing of 11 of the 12 theories, could not be appealed, even though the trial court had otherwise complied with the requirements of ORCP 67 B, because the complaint contained only one claim and it had not been fully adjudicated. On the other

hand, in Briles Wing and Helicopters v. Marsh & McLennan 76 Or App 411, 414 fn. 1, 709 P2d 746 (1985), the Court of Appeals held that where plaintiff claimed a fund held by an insurance company, and a defendant counterclaimed seeking the same fund, a judgment disposing of plaintiff's claim, but not defendant's counterclaim, could be certified under ORCP 69 B.

Although the May opinion give the trial court wide discretion to decide that there was no just reason for delay, the Supreme Court said such a determination should only be made after careful consideration of several factors and never made routinely or as a courtesy to counsel. The factors to be considered are: any prejudice, hardship or injustice to a party caused by postponing the appeal; any prejudice to a party by postponing trial on the rest of the case (this actually seems like an insignificant factor in light of the Gattman case discussed below); the likelihood that an early appeal would avoid the need for further litigation or simplify the trial; the relationship between the adjudicated and unadjudicated claims; the possibility that the need for review will be mooted by further proceedings in the trial court; the possibility that the reviewing court might be obliged to consider the same issue a second time; and the presence or absence or a claim or counterclaim which could result in a setoff against the judgment.

The May opinion does not eliminate the requirement that the trial court actually make the finding of no just reason for delay and explicitly direct entry of the partial judgment. In Hale v. County of Multnomah 298 Or 141, 144-145, 689 P2d 1290 (1984), the Supreme Court held that absence of an "express direction for entry of a judgment" in a document entitled "final judgment", even though it contained an express determination that there was no just reason for delay, meant the judgment did not comply with ORCP 67 B and was not appealable. In Kimbler v. Stillwell 69 Or App 644, 645, 686 P2d 1071 (1984), the Court of Appeals held that a judgment which recited no just reason for delay and stated "IT IS HEREBY ORDERED AND ADJUDGED that (a portion of plaintiffs complaint) be and hereby is dismissed..." did not comply with ORCP 67 B because it continued no express direction for entry of judgment. However, in Nelson v. Lane County 75 Or App 753, 755-756. 720 P2d 1291 (1986), the Court of Appeals said that a judgment which recited no just reason for delay and "ordered" that judgment be entered complied with ORCP 67 B. The Court said there was no need for the judgment to contain the exact words used in 67 B and that the Supreme Court in Hale could not have intended for jurisdiction to turn on choices between synonymous words or senses. It is not clear from the rule or these cases whether the necessary finding and direction must be in the judgment itself. The language used in the Hale case suggests that it should be, but the question is not actually presented.

A judgment conforming to 67 B would appear to be not only

appealable and immediately enforceable, but also final in the sense of having res judicata effect, at least in a later case. Although the appellate courts have not directly passed upon the question, several opinions clearly assume that an ORCP 67 B judgement would have res judicata effect in another case. A "partial summary judgment" which did not dispose of all the claims in a case was held not a final judgment under ORCP 67 B and therefore the Court of Appeals said that it could not be given res judicata effect in another case. Dohr v. Marquardt 71 Or App 765, 767-768, 694 P2d 576 (1985). In Klimek v Continental Ins. Co. 76 Or 643, 649, 711 P2d 155 (1985) The Court of Appeals refused to find that an issue in one case was foreclosed by the collateral estoppel effect of an apparently valid partial judgment in a companion case, because that issue had not in fact been decided. Decision on the issue was necessary only for the portion of the first case that had not been reduced to judgment.

The res judicata effect of an ORCP 67 B judgment in the same case is less clear. In Office Services Corp. v. CAS Systems, Inc. 63 Or App 842, 844-845, 666 P2d 297 (1983), a plaintiff sued to recover for money had and received, breach of contract, and unlawful trade practices. Judgment was entered in compliance with ORCP 67 B on the claim for money had and received and the plaintiff executed on the judgment. Defendant then argued that res judicata would preclude enforcement of the other two claims. The Court of appeals held that it did not. At one point in the Office Services opinion the Court of Appeals suggested that by definition res judicata only applied in a different subsequent action. See also Godat v Waldrop 78 Or App 374, 380, 717 P2d 180 (1986). At another point in the Office Services opinion, the Court of Appeals suggested that an ORCP 67 B judgment was only possible in a situation where the plaintiff had three separate claims and so a judgment in the plaintiff's favor on one claim could not preclude another separate claim. The first line of reasoning would avoid claim preclusion if there was one claim but multiple parties and a partial judgment completely adjudicated the rights of one party, and also would avoid collateral estoppel effect from an ORCP 67 B judgment in the same case. The second theory would not. There is, however, some question whether it would be possible to have multiple judgments in a case involving only one claim. In Jefferson State Bank v. Welch 70 Or App 635, 640-641, 620 P2d 1107 (1984), a plaintiff sued the individual members of a partnership on a joint claim. One of the partners did not appear and a judgment by default, complying with the requirements of ORCP 67 B, was entered against the defaulting partner and executed upon. The court then entered judgment for the rest of the partners on the theory that plaintiff's claim merged into the first judgment. The Court of Appeals never got to the res judicata question because it concluded that neither ORCP 67 E(2) nor 67 B authorized entry of a separate partial judgment against one party in a case involving one joint claim. On review, the Supreme Court never passed on either the

possibility of a separate judgment or res judicata, because it concluded that the judgment actually entered in the case did not comply with the requirements of ORCP 67 B. The Supreme Court said that, although ORCP 67 E(2) authorizes individual judgments in the same action against persons jointly indebted, any individual judgment granted must comply with ORCP 67 B in order to have an actual judgment as opposed to an intermediate order. Jefferson State Bank v. Welch 299 Or 335, 339-340, 702 P2d 414 (1985)

ORCP 67 B does not apply when the court has ruled upon all of the issues in a case. If the court has disposed of all claims relating to all parties in a series of separate orders, when considered together these orders constitute a final judgment and none of them need meet the requirements of ORCP 67 B for the final judgment to be appealable or enforceable. State ex rel Zidell v. Jones 301 Or 79, 94-96, 720 P2d 350 (1986). For more extended discussion see cases under Rule 70 A.

ORCP 67 B would only apply where there are multiple claims or parties in the same action. Where two actions have been consolidated for trial, a judgment disposing of the claim or claims in one of the actions, but not the other, is a final judgment and need not meet the requirement of 67 B. Litvin v. Engesether 67 Or App 240, 244-245, 678 P2d 1232 (1984)

If a judgment is entered under ORCP 67 B and appealed, the trial court does not lose jurisdiction of the re
st of the case under ORS 19.033(1) and may proceed to try the remainder of the case and enter a final judgment that disposes of the remaining issues in the case. State ex rel Gattman v. Abraham 302 Or 301, 303-312, 729 P2d 560 (1986); Nelson v. Lane County 79 Or App 753, 756, 720 P2d 1291 (1986), affd. 304 Or 97, P.2d (1987).

ORCP 67 C

ORCP 67 C only limits the amount that a court can award to a prevailing party in an action. In Kalman v. Curry 88 Or App 398, 407-408, P2d (1987), a $100,000 demand for attorney fees in a complaint filed by plaintiffs against a defendant did not prevent the recovery by plaintiff's attorneys of fees for the action exceeding $100,000, in a proceedings by the attorneys against the plaintiffs. In any case, ORCP 67 C should not limit recovery of attorney fees by a plaintiff against a defendant to an amount requested in the complaint. ORCP 68 C(1)(b) specifically distinguishes attorney fees incident to an action from damages, and under ORCP 68 C(2) a party is not required to allege a specific amount requested for attorney fees. See 88 Or App at 408, fn. 4.

ORCP 67 C(1) does not authorize a court to grant affirmative

relief to a defendant who has not counterclaimed. The rule allows the court to grant equitable relief different from that prayed for in a claim, but a defendant who has not made a claim has made no demand for relief at all and can be granted none. Dry Canyon Farms v. U. S. National Bank of Oregon 84 Or App 686, 691-693, P2d (1987). See also City of Portland v. Hespe 69 Or App 663, 665, 687 P2d 804 (1984). The court in the Dry Canyon Farms case also said that, for purposes of application of ORCP 67 C(1), a declaratory judgment proceeding may be either legal or equitable depending upon its underlying nature, including the relief requested. 84 Or App at 692.

ORCP IN THE COURTS-ORCP 68

Generally

Prior to 1983, the Court of Appeals held in several cases that, although a separate judgment for costs and disbursements or attorney fees could be entered pursuant to ORCP 68 after the judgment covering the principal amount claimed in a case, this was not possible after a notice of appeal from the principal judgment was filed, because while a case was on appeal the trial court lacked jurisdiction to enter a judgment. E. g. Truax and Truax 62 Or App 130, 135-138, 659 P2d 983 (1983). The 1983 Legislative Assembly amended ORS 19.033(2) to specifically provide that a trial court has jurisdiction to enter a costs and disbursements or attorney fee judgment, during the pendency of an appeal. Palmateer v. Homestead Development Corp. 67 Or App 678. 685-686. 680 P2d 695 (1984). In Jansen v Atiyeh 302 Or 314, 317-320, 728 P2d 1382 (1986), the Supreme Court noted that ORS 19.033(2) allows the appellate courts to promulgate rules governing the method of appeal from a judgment governing costs and disbursements or attorney fees, entered after appeal of the principal judgment, and the appellate courts have done so by Oregon Rule of Appellate Procedure 2.07 which requires filing of a notice of appeal within 14 days of the entry of the costs and disbursements or attorney fees judgment. The court expressed some doubt about the validity of the 14 day limitation, in view of the 30 appeal period provided for all appeals by ORS 19.026 (1), but did not find it necessary to rule on the question in the case.

ORCP 68 A

The Oregon Court of Appeals has stated that the Council on Court Procedures did not intend to change, and perhaps could not have changed, the amount of allowable costs and disbursements when it promulgated the ORCP. It therefore relied upon a case prior to the ORCP to conclude that expert witness fees are not recoverable as necessary disbursements under ORCP 68 A(2), at least in actions to recover legal remedies. Hancock v Suzanne Properties, Inc. 63 Or App 809, 813-815, 666 P2d 857 (1983). The Court, however, suggested that expert witness fees might be available in actions seeking equitable remedies. See American Timber v. Niedermeyer 276 Or 1135, 558 P2d 1211 (1979). There also are some special statutory provisions authorizing recovery of expert witness fees, e.g. ORS 35.335(2) relating to condemnation proceedings. Dept. of Transportation v. Gonzales 74 Or App 514, 516-517, 703 P2d 271 (1985).

The Hancock opinion also held that, consistent with the prior rule, discovery depositions were not "necessary expenses incurred in the prosecution or defense of an action" and not recoverable as costs and disbursements under ORCP 68 A(2), as

opposed to perpetuation depositions which were recoverable. 63 Or App at 812-813. That conclusions has been overridden by the 1984 Council on Court Procedures amendment of ORCP 68 A(2), explicitly providing that no deposition expenses are recoverable as costs and disbursements. This action by the Council, incidently, suggests that, while the Council may not have intended to change amounts recoverable as costs and disbursements when it originally promulgated ORCP 68, it has the power to make such a change if it wishes.

In Randall v. Sanford 75 Or App 68, 77, 705 P2d 756 (1985), the Court of Appeals held that the cost of a foreclosure title report was not a necessary cost or disbursement, as defined by ORCP 68 A(2), in an action for strict foreclosure of a real estate contract. The opinion relies upon a pre-ORCP case to that effect involving a quiet title proceeding.

In State ex Re Roberts v. Durco-Lam, Inc. 74 Or App 253, 255, 702 P2d 78 (1985), the Court of Appeals noted that ORS 20.055, which was repealed by the legislature after the ORCP were promulgated, was the statutory predicate for allowing the cost of an appeal bond as an allowable cost on appeal. The Court then held, that since the Council on Court Procedures had no power to make rules of appellate procedure, ORCP 68 A(2) did not authorize recovery of the cost of an appeal bond as a cost or disbursement in an appellate court.

ORCP 68 B

In Rogerson v Baker 56 Or App 748, 750, 642 P2d 1216 (1982), the Court of Appeals held that ORCP 68 B adopted the former rule for equity which gave the court discretion whether to allow costs and disbursements and attorney fees to the prevailing party, and rejected the former rule for actions at law that required costs and disbursements and attorney fees as a matter of course to the prevailing party. A court therefore has the authority to deny costs and disbursements or attorney fees to either party. In Parsons v. Henry 65 Or App 627, 633-634, 672 P2d 717 (1983), however, the Court noted that, although the under ORCP 68 B the trial court has discretion to direct that costs or disbursements not be given to the prevailing party, if the court does not exercise that discretion, costs and disbursements are awarded to the prevailing party.

It is still, therefore, necessary in some cases to determine who is the prevailing party in a case. Where the jury returned a verdict for the plaintiff in an action for trespass to land, but did not award any damages, plaintiff was still the prevailing party and entitled to costs and disbursements. Hoaglin v. Decker 77 Or App 472, 474-476, 713 P2d 674 (1986). In a case where a plaintiff's complaint contained two counts based upon Residential Landlord and Tenant Act (RLTA) and two counts based upon common

law, a defendant who asserted a right to recover attorneys fees under RLTA and who successfully defended all claims, was entitled to attorneys fees under RLTA. The existence of other claims did not affect the right to attorneys fees under the act. Kunce v Van Schoonhoven 83 Or App 458, 460-462, 732 P2d 70 (1987). A plaintiff who secured a declaratory judgment that it did not have a duty to perform claimed by the defendant under a contract between the parties was the prevailing party and entitled to recover based upon a contractual provision for attorneys fees and ORS 20.096(1). Flight Dynamics, Inc. v. Questech Capital Corp. 76 Or App 166, 170-172, 708 P2d 1173 (1985).

On the other hand, when a plaintiff in a quiet title action gains nothing that he did not already have, the defendant is the prevailing party and is entitled to attorneys fees under ORCP 68 B. Parnicky v. Williams 85 Or App 117, 120, P2d (1987). Defendants who were found liable to plaintiff for quantum meruit damages, but who recovered larger damages on cross claims against other defendants, were not prevailing parties as against plaintiff and were not entitled to recover attorney fees from plaintiff. Gourley v. Towery 82 Or App 32, 34-35, 727 P2d 144 (1986).

A number of the prevailing party cases have involved construction lien foreclosure proceedings. In an action brought by a subcontractor to foreclose a construction lien, a defendant landowner who deposited money pursuant to ORS 87.076, which caused the property to be released from the lien claim, and who was given a summary judgment after filing an affidavit asserting no interest in the money deposited, was not the prevailing party for purposes of recovery of costs, disbursements, or attorney fees. Beaver State Scaffolding-Equip. Co. v. Taylor 70 Or App 113, 116-117, 688 P2d 417 (1984). The Court said it interpreted "prevailing party" in the case to mean the party who prevailed on the issues of validity and foreclosure of the lien. But see Parsons v. Henry 65 Or App 627, 633-634, 672 P2d 717 (1983), where a plaintiff who failed to foreclose a construction lien on defendant's land, but who was awarded quantum meruit damages against defendant, was the prevailing party in an action and was entitled to costs and disbursements and the defendant was not entitled to recover attorney fees. In Precision Roof Trusses, Inc. v. Devitt 59 Or App 4, 6-8, 650 P2d 152 (1982), however, the Court held that where a subcontractor was unable to foreclose a construction lien against a landowner because of a limitations statute, but recovered on contract claims against other defendants joined in the case, the defendant landowner was the prevailing party as against the plaintiff.

ORCP 68 C

ORCP 68 C, by creating a post trial procedure for

determining a right to attorney fees, made possible recovery of contractually provided attorney fees in a commercial Forcible Entry and Detainer proceeding. Anderson v. Garrison-Reed Enterprises 66 Or App 872, 875-876, 676 P2d 350 (1984). The Court of Appeals had previously held that the procedure before the ORCP, which required a party prove a right to such fees at trial, was inconsistent with the summary nature of an FED proceeding and attorney fees provided by contract could not be recovered in such proceeding.

Although ORCP 68 C(1) makes rule 68 inapplicable to dissolution proceedings under ORS 107.103(1), Rule 68 is applicable to proceedings to modify a dissolution decree under ORS 107.135(3). Truax and Truax 62 Or App 130, 137, 659 P2d 983 (1983). Failure to plead a right to attorney fees under ORS. 107.103(1), as required by ORCP 68 C(2), will prevent recovery of such fees. Moreau and Moreau 87 Or App 202,203-204, P2d (1987).

ORCP 68 C(2) requires a party seeking attorney fees to plead the facts, statute, or rule entitling them to such fees. In Parkhurst v Faessler 62 Or App 539, 541-544, 661 P2d 571, 1983) the Court held that a party must assert either facts, such as a contractual provision, or the exact statute or rule relied upon as a basis for claiming attorneys fees, but not both. In Flight Dynamics, Inc. v. Questech Capital Corporation 76 Or App 166, 172, 708 P2d 1173 (1985) the court reached a consistent result and concluded a plaintiff, who relied upon a contractual provision authorizing attorney fees only to the other party to a contract coupled with ORS 20.096(1) which provides that in such case either party to the contract can recover fees if it prevails, need plead only that it was entitled to attorneys fees based upon contract and need not cite the statute.

In most other situations the Court of Appeals has been relatively strict in its interpretation of the pleading requirement for attorney fees. In the Parkhust case the Court also held that a defendant who had asked for reasonable fees, but asserted no basis, could not rely upon the fact that the plaintiff's complaint asserted a contractual right to attorney fees based upon a provision in the mortgage involved in the case, and that judicial notice of ORS 20.096(1) that provided attorney fees to both parties to the contract if there was a contractual provision for attorney fees to one party, could not cure the defect. In Dept. of Human Resources v. Strasser 83 Or App 363, 364, 732 P2d 38 (1987), the Court held that a defendant in a filiation proceeding who asked for reasonable attorney fees in his answer could not recover any attorney fees because he had not alleged the facts, statute, or rule entitling him to such fees as required by ORCP 68 C(2.). The Court held such pleading was required even though the plaintiff had asked for attorneys fees in its complaint asserting the same statute that the defendant

relied upon as a basis for his fees. The Court of Appeals reached the same conclusion on identical facts in State ex rel; AFSD v. Fulop 72 Or App 424, 425, 695 P2d 979, **rev'd on other grounds** 300 Or 39, 706 P2d 921 (1985), despite the fact that the plaintiff admitted it realized that defendant had failed to make the necessary allegation of statutory basis and said nothing and was well aware which statute defendant was relying upon as a basis for attorney fees. 72 Or App at 425-428. **See also** Northwest Admin. v. Albina Fuel Co. 85 Or App 497, 499, P2d (1987) and Diamond Claims & Inves., Inc. v. Grensky 68 Or App 446, 447, 681 P2d 802 (1984).

In the Strasser case the Court said that the defendant could not seek amendment of his pleading to conform to the evidence and assert the basis for attorney fees pursuant to ORCP 23 C, because no evidence had been submitted relating to such fees. In Benj. Franklin Fed. Savings and Loan v. Phillips 88 Or 354, 355, P2d (1987), however, the Court held that the trial court had authority under ORCP 23 A to allow an amendment of a pleading to assert a right to attorney fees, where none had been originally asserted. Apparently, a trial court also would have the discretion to allow an amendment under 23 A to cure a defective request for fees. Such amendment, however, is only possible before entry of the final judgment. Cf. U.S. Nat'l Bank v. Smith 49 Or App 289, 295, 619 P2d 921, **modified on other grounds**, 292 Or 125, 637 P2d 139 (1981).

In Horn v. Lieuallen Land and Livestock Corp. 69 Or App 285, 287-288, 684 P2d 1246 (1984), the Court of Appeals held that a defendant who filed a motion to dismiss plaintiff's complaint for failure to state a claim and did not allege a right to attorney fees, could assert the right to such fees in a motion for entry of judgment after the trial court dismissed the plaintiff's complaint without leave to amend. The Court said that, even though a motion may not have been necessary, because the trial judge was obligated to enter judgment in any event, ORCP 88 C(2) specifically allows a claim for attorney fees to be raised in a motion seeking judgment.

When a plaintiff claims attorney fees in an Oregon court pursuant to 28 USCA 1988, which provides for attorney fees on federal civil rights claims brought in state court, the pleading requirements of ORCP 68 C do not apply. Kay v. David Douglas Sch. Dist. No. 40 79 Or App 384, 395-396, 719 P2d 875 (1986). The Court of Appeals said a plaintiff who had alleged they were entitled to attorney fees, could recover fees under section 1988, even though they pled no specific statutory basis for such fees.

In Richard v. PGE 83 Or App 59, 64, 730 P2d 578 (1986), the Court of Appeals held that attaching an affidavit to a summary judgment motion, explaining why plaintiff's claim had been brought in bad faith, was a sufficient assertion a factual basis

for a claim of attorneys fees under ORS 20.105. The Court also stated that, although they would treat a request for a "hearing to dispute the amount of attorney fees claimed by defendant's counsel" as an objection to a cost bill under ORCP 68 C(4)(b), it was only an objection to the amount of fees, not to defendant's entitlement to fees.

The time limit in ORCP 68 C(4)(a)(i) for presenting cost bills differs from most other time limits in the ORCP, in that cost bills must be served within 10 days of judgment, not just be filed. This causes the validity of service of a cost bill to be an issue in some cases. Although ORCP 68 C(4)(a)(i) requires that cost bills shall be served in the manner provided in ORCP 9 B, service by a manner not specified in rule 9 is effective, if the opposing party in fact receives the cost bill and is not otherwise prejudiced. Murray v. Meyer 81 Or App 432, 434-435, 725 P2d 947 (1986). In State ex rel AFSD v. Rikard 84 Or App 546, 548, 734 P2d 410 (1987), a defendant's cost bill, filed 11 months after plaintiff secured an order of dismissal, was timely because ORCP 68 C(4)(a)(i) requires service of the cost bill within 10 days of entry of judgment, and an order of dismissal is not a judgment.

Under the ORCP 68 C(4)(a)(i) requirement of a detailed statement of the amount of attorneys fees claimed, the filing of an affidavit which gave only total hours expended, without itemization or particularization of services was not sufficient. Parker v. Scharbach 75 Or App 530, 534-535, 707 P2d 85 (1985). The Court noted that evidence presented at the evidentiary hearing following objections to a statement claiming attorneys fees could supplement the statement and satisfy the requirements of ORCP 68 C(4)(a)(i), but that the party had not done so in the case. In Johnson v. Jeppe 77 Or App 685, 688-689, 713 P2d 1090 (1986), The Court said that time expended is not the only criterion of the reasonableness of attorneys fees and that, among other factors, a contingent fee agreement could be considered. The Court, however, ended up relying upon the time expended by the attorney as a basis for setting a reasonable fee. In Johnson the Court also stated that, if clearly shown, attorney fees could be recovered for services not yet performed but anticipated relating to the judgment and collection costs. For another case discussing factors to be considered in determining the reasonableness of attorney fees under ORCP 68, see Dept. of Transportation v Gonzales 74 Or App 514, 518-520, 703 P2d 271 (1985). In Gonzales the Court also stated that attorney's affidavit containing a detailed recital of time expended was sufficient to support an inference of the reasonableness of fees claimed.

While allowance of attorney fees in dissolution proceedings is specifically exempted from coverage under rule 68 by ORCP 68 C(1) (a), cost and disbursements in dissolution proceedings are

subject to the requirements of rule 68. Whitlow and Witlow 79 Or App 555, 558-559, 719 P2d 1308 (1986). The Court said ORCP 68 C(4)(c) requires that, if an objection is filed to a cost bill, the court must hold an evidentiary hearing before entering judgment allowing costs and disbursements, and vacated a judgment allowing expert fees without such hearing. In Medford Irrigation Dist. v. Western Bank 66 Or App 589, 597-598, 674 P2d1192 (1984), however, the Court held that a hearing is only required when the objections raise issues of fact and objections raising only issues of law could be decided by the court without a hearing. In the Medford Irrigation case the attorney fees involved were actually attorney fees incurred in a separate case against another party, which plaintiff sought to recover from defendant. As such, they appear to not be covered by ORCP 68 because of ORCP 68 C(1)(b). The Court of Appeals, however, applied Rule 68.

After a court ordered one party to pay attorney fees to be determined by the court pursuant to ORCP 68, the mere filing of a petition for attorneys fees is not enough, they must be entered as part of the judgment, as required by ORCP 68 C(4)(d). 89 Or App 12, 16, P2d (1987).

The Court of Appeals has stated that under ORCP 68 C(6)(a), although a plaintiff may have separate claims against different defendants, if damages are entered jointly and severally against the defendants, the court may award costs and disbursements in the same fashion and thus avoid multiple taxation of the same costs and disbursements. Hancock v. Suzanne Properties, Inc. 63 Or App 809, 812, 666 P2d 857 (1983). The case, however, actually involved one single judgment against multiple defendants and ORCP 68 C(6)(a) was not applicable at all. It only applies where there are separate judgments (presumably under ORCP 67 B) against multiple defendants in the same case.

Current to 1-26-88

ORCP IN THE COURTS--RULE 69

Generally

ORCP 69 has been the subject of extensive judicial interpretation. Much of this centered upon notice requirements in the rule and the difference between a default and a judgemnt by default. The 1987 Council on Court Procedures amendments to the rule should clarify these areas.

In Morrow Co. Sch. Dist. v. Oregon Land and Water Co. 78 Or App 296, , 716 P2d 766 (1985), the Supreme Court stated that two kind of "appearances" were contemplated under Rule 69: An appearance to avoid a default under Section 69 A requires that a party "plead or otherwise defend" but under ORCP 69 B(2) a party who has "appeared" is entitled to notice of an intent to take a judgment.

ORCP 69 A

Entry of a default order under ORCP 69 A is a ministerial recognition of the state of the record and it may be done either by the clerk or the court. A judgment by default follows an order of default and, except for certain contact actions under ORCP 69 B(1), it may only be done by a court. Before a default order is entered, a party who is in default may cure the default without permission and thereafter no default order may be entered. The default may be cured even though an application has been made for a default order, as long as the default order has not been entered. Morrow Co. Sch. Dist. v. Oregon Land and Water Co. 78 Or App 296, 298-301, 716 P2d 766 (1985).

In the Morrow case the Court of Appeals also held that a party who had filed a motion to dismiss under Rule 21 A had acted to "otherwise defend under Rule 69 A" and was not in default, but a motion to quash an order to show cause why a preliminary injunction should not be granted was not an appearance that would avoid a default because it was not directed to the substance of the complaint or the merits of the plaintiff's claim. The Court also said that a defendant who filed a motion to make more definite and certain or to strike under Rule 21 was otherwise defending and was not subject to default under ORCP 69 A. 78 Or App at 301-302.

ORCP 69 B

In Morrow Co. Sch. Dist. v. Oregon Land and Water Co 78 Or App 296, 300 fn. 4, 716 P2d 766 (1985) the court said that, consistant with federal practice, almost anything that indicates a party is interested in the case constitutes an appearance under 69 B(2). The Court of Appeals has also held that the general appearance authorized in dissolution cases is an "appearance"

that requires notice of intent to take judgement under ORCP 69 B(2). McCumber and McCumber 72 Or App 529, 532, 695 P2d 992 (1985).

Under ORCP 69 B(2) no notice of any kind is required prior to the entry of an order of default, the only notice required is of intent to apply for judgement after default. Denkers v. Dunham Leasing 299 Or 544, 548, 704 P2d 114, 116-117 (1985). The Denkers case also stated that the notice involved must be formal notice, served and filed in accordance with ORCP 9. The exact language interpeted in the Denkers case was amended by the Council on Court Procedures in 1987, but the limitation of the noticed requirement to intent to seek judgment was not changed. Prior to 1987 notice was required whenever any party had appeared or was known to be represented by counsel. After the 1987 amendment notice is only required when the party against whom judgment has sought has appeared in the action and then only when it is necessary to receive evidence prior to entering judgment.

The courts have also held that the notice requirements relating to default orders and judgments by default are exclusive and overide any local court rules requiring notice of default, Morrow Co. Sch. Dist. v. Oreg. Land and Water Co. 79 Or app. 296, 302, 716 P2d, 766 (1985) and that, when 10 days notice of intent to seek judgment by default is required, it must be given after entry of the order of default, not before, Goldmark III v. Anderson 84 Or App 287, 734 P2d 3 (1987).

In Rajneesh Foundation v. McGreer 303 Or 139, 142, P2d (1987), the Supreme Court held that a party whose pleadings had been stricken and against whom a default had been entered because of failure to comply with a discovery order, was not in default for failure to appear and was entitled to notice under ORCP 69 B(2). The court also reversed the Court of Appeals and held that, even though a party is in default, they may still attack the legal sufficiency of the claim because the defaulting party only admits the truth of the factual allegations in the oppponents pleading, not the legal sufficiency of the claim. 303 Or at 142-144. The Supreme Court disagreed with the Court of Appeals decision that, even if a defaulting party can attack the legal sufficiency of the opponents claim after default, they may only do so by motion under ORCP 71. The Supreme Court held that ORCP 71 only applies after a judgment is entered, and does not apply after a default order but before judgment. The proper procedure to raise legal sufficiency of the claim following default but before judgment is a Rule 21 A motion to dismiss. 303 Or at 144-146. Note, subsequent to this case, the Council on Court Procedures added Section C to ORCP 69 to clarify the distinction between vacation of an order of default and vacation of a judgment by default.

Current to 12-1-87

ORCP IN THE COURTS-ORCP 70

ORCP 70 A

ORCP 70 A does not require that a final judgment be set forth in one single document. When a trial court disposes of all of the multiple claims or adjudicates the rights of multiple parties in one case, in a series of separate orders or judgments, the documents taken together constitute the "final judgment". The date of the entry of the last of such separate documents is the effective date of the judgment. State ex rel Zidell v. Jones 301 Or 79, 87-88, 720 P2d 350 (1986); State ex rel Orbanco Real Estate Serv. v. Allen 301 Or 104, 110-116, 720 P2d 365 (1986); Jerstad v. Warren 73 Or App 387, 390, 698 P2d 1033 (1985); Barker v. Parker 63 Or App 21, 23 fn. 1, 662 P2d 779 (1983).

The Oregon Supreme Court has held that, despite the separate document requirement for final judgments contained in ORCP 70 A, a judgment document that included "Findings of Fact" and " Conclusions of Law" was an appealable judgment. Gibson v. Benj. Franklin Fed. Savings and Loan 294 Or 702, 704-711, 662 P2d 703 (1983). The Court concluded that, although the Oregon rule was similar to Federal Rule of Civil Procedure 58, ORCP 70 A was worded differently and effectiveness of an Oregon judgment is not expressly made conditional upon the separate document requirement as it is in the federal rule. The Court therefore concluded that, while the separate document requirement should generally be followed, it was not jurisdictional in the sense of compliance being necessary for the existence of an appealable judgment.

A judgment need not recite every matter on the record in a case, but under ORCP 70 A must only specify clearly the parties affected and the relief granted. A failure of a final judgment to reflect a defendant's objections to the judge hearing a summary judgment motion and the date of the hearing on the motion did not affect its validity. Meyer v. Caldwell 296 Or 100, 103, 672 P2d 342 (1983). However, a judgment stating that it was in favor of plaintiff and against "defendants", which did not clearly indicate whether it referred to only the 14 remaining defendants in the case who were named in the caption of the document or included two other defendants whose rights had been disposed of earlier by summary judgment, did not clearly specify the party or parties against whom it was given as required by ORCP 70 A. Zidell v. Jones 301 Or 79, 86-87, 720 P2d 350 (1986).

A judgment, including one granting injunctive relief, is only effective when reduced to writing and signed by a judge. In Kay v. David Douglas Sch. Dist. No. 40 303 Or 574, 578-579, P2d (1987) the Supreme Court held that judgment did not take place when the trial judge announced a decision from the bench, but occurred more than a month later when the judge signed and

entered a written judgment.

The character of a document is determined by its content not its title. A document labeled " Final Judgment", which did not in fact finally determine the rights of the parties in an action, was not a final judgment. Goeddertz v. Parchen 299 Or 277, 279-280, 701 P2d 781 (1985). ORCP 70 A, however, specifically requires that a final judgment be labelled as such, and a document which disposed of all of the rights of the parties to a case but was labelled "Order" was not a final judgment. City of Portland v. Carriage Inn 296 Or 191, 193-194, 673 P2d 531 (1983). See also Rothstein v Oregon Physician's Service 74 Or App 362, 363, 702 P2d 84 (1985).

Oral withdrawal or dismissal of claims by a party at trial, followed by entry of a written judgment disposing of the balance of the claims in a case, does not result in a final appealable judgment. Under ORCP 54 A(2) any dismissal of a claim by the claimant or stipulated by the parties requires a separate written judgment complying with ORCP 70 A. Maduff Mortgage Corp v. Deloitte Haskins & Sells 83 Or App 15, 17-21, 730 P2d 558 (1987). In Maduff Court of Appeals followed its earlier opinion on this question in Osborne v. International Harvester Co. 60 Or App 563, 565-566, 654 P2d 1148 (1982) and rejected a statement to the contrary in Flight Dynamics, Inc. v. Questech Capital Corp. 76 Or App 166, 172, 708 P2d 1173 (1985). The conclusion in the Flight Dynamics case that no written judgment is required relating to pleadings superseded by amendment was not questioned, and that remains a correct statement of the requirements for a final judgment. However, pretrial orders of dismissal of a plaintiff's claim, pursuant to stipulation, also are not judgments and require a separate written "judgment" before there is a final judgment in a case. State ex rel AFSD v. Rikard 84 Or App 546, 548, 734 P2d 410 (1987); Pearson v. Ogden Marine, Inc. 74 Or App 670, 672, 704 P2d 521 (1985); Oregonians Against Trapping v. Martin 72 Or App 210, 213-214, 695 P2d 932 (1985).

An order directing summary judgment cannot take the place of a judgment. Landon v Lane County 66 Or App 756, 757, 675 P2d 516 (1984). An "Order Directing Verdict" may lay the foundation for entry of a final judgment but is not a judgment. Aebischer v. White 71 Or App 308, 309, 692 P2d 128 (1984).

An order allowing a judgment on the pleadings is not the same as a judgment. A "judgment order", however, following a motion for judgment on the pleadings, which "adjudged" the rights of the parties and dismissed the complaint was held to be a final judgment in Soldo v Follis 83 Or App 470, 472, fn. 1, 732 P2d 72 (1986).

ORCP 70 B

The "entry" of judgment referred to in ORCP 70 B is entry in a journal kept by the clerk pursuant to ORS 7.030, and is not docketing of the judgment under ORS 7.040 or any other notation of the judgment made by the clerk. Henson and Henson 61 Or App 210, 212-216, 656 P2d 345 (1982).

The failure of a clerk to mail a notice of entry of a final judgment to the attorneys of record in a case, as required by ORCP 70 B(1), does not affect the validity of judgment for purposes of appeal or extend the time in which to file notice of appeal. Amvesco, Inc. v. Key Title Co. 69 Or App 740, 743, 687 P2d 1121 (1984); Union Oil Co. v. Clackamas County 67 Or App 27, 30, 676 P2d 948 (1984). In Junction City Water Control v. Elliot 65 Or App 548, 550-551, 672 P2d 59 (1983), the Court of Appeals said that the Council on Court Procedures apparently did not intend to change the prior Supreme Court ruling to this effect in Farwest Landscaping, Inc. v. Modern Merchandising 287 Or 653, 601 P2d 1237 (1979) when it enacted Rule 70. In any case, the Council does not have rulemaking authority to change rules of appellate procedure. The failure of the clerk to send the notice required under ORCP 70 B(1), however, may avoid the collateral estoppel effect of the judgment. Universal Ideas Corp. v. Esty 68 Or App 276, 280-282, 681 P2d 1176 (1984).

Under ORCP 70 B(1) filing of objections to the award of costs or attorneys fees in a case does not delay entry of judgment. Amvesco, Inc. v. Key Title Co. 69 Or App 740, 743, 687 P2d 1121 (1984).

ORCP 70 C

As provided in ORCP 70 C a trial court does have inherent power to vacate a judgment which was entered because of a procedural mistake or while matters relating to the case are still pending. Stevenson v. U.S. National Bank 296 Or 495, 498, 677 P2d 696 (1984); Amvesco, Inc. v. Key Title Co. 69 Or App 740, 744-745, 687 P2d 1121 (1984). This does not change the prior rule that a judgment cannot be vacated for the sole purpose of extending the time for appeal. Far West Landscaping v. Modern Merchandising 287 Or 653, 659, 601 P2d 1237 (1979).

Current to 1-21-88

ORCP IN THE COURTS--RULE 71

Generally

ORCP 71 governs only relief from judgments and does not apply to relief from orders. Although an order of default has been entered, ORCP 71 does not apply until a judgment is actually entered. Rajneesh Foundation v. McGreer 303 Or 139, 145, 734 P2d 871 (1987).

The Oregon Supreme Court has held that a denial of an ORCP 71 motion to vacate a judgement, which raises ground that could have been raised upon appeal of that judgment, is not appealable under ORS 19.010(2)(c) which allows appeal from "A final order affecting a substantial right, and made in a proceeding after judgment or decree." A denial of an ORCP 71 motion to vacate judgment based upon grounds that could not have been raised on appeal of the original judgment, or based upon the ground that the judgment is void, is appealable under ORS 19.0120(2)(c). Waybrant v. Bernstein 294 Or 650, 652-659, 661 P2d 931 (1983). The Court said that a motion to vacate a decree closing an estate and discharging the personal representative, where the moving party contented he did not receive notice of the motion to close the estate, may have been an appealable order either because it claimed judgment by mistake or a void judgment.

The Court of Appeals has also held that an order refusing to set aside a judgment on the basis of clerical error under ORCP 71 A is appealable. Johnson v. Overbay 85 Or App 576, 581-582, 737 P2d 1251 (1987). The Court has, however, held that an order denying a motion seeking vacation of a contempt order for failure to comply with a judgment was not appealable because the grounds for the motion could have been raised on appeal. State ex rel Washington Co. v. Betschart 72 Or App 692, 696-700, 697 P2d 206 (1985).

An order setting aside a judgment under ORCP 71 is not appealable, unless the court lacked jurisdiction over the parties or the subject matter. Donahoo v. Zacharias 85 Or App 551, 552, 737 P2d 1250 (1987).

ORCP 70 A

In Stevenson v. U. S. National Bank 296 Or 495, 497-498, 677 P2d 696 (1984) the court held that ORCP 71 A and C authorized vacation of a judgment which had been entered by mistake, while the court still had the case under advisement. The Court distinguished a pre-ORCP case, Far West Landscaping v. Modern Merchandising 287 Or 653, 601 P2d 1237 (1979) and a case under ORCP 71, Junction City Water Control v. Elliot 65 Or App 548, 550-552, 672 P2d 59 (1983), which both held that a trial judge does not have authority to vacate one judgment and enter another

solely to extend the time for appeal. The Court in Stevenson said that the judgment in that case had not been vacated solely to extend the time for appeal, but the judgment had been vacated because the judge never intended that it be entered. Since the vacation of the judgment obviously affected the appeal time, the key word seems to be solely. See also Amvesco, Inc. v. Key title Co. 69 Or App 740, 743-745, 687 P2d 1121 (1984).

ORCP 71 B

A defendant who fails to act diligently and fails to tender a meritorious defense is not entitled to relief from a default judgment on any of the grounds specified in ORCP 71 B. Bank of California v. Bryant 81 Or App 666, 667, 726 P2d 978 (1986).

In dicta, the Oregon Supreme Court has pointed out that ORCP 71 A(1)(a) does not require that the mistake providing the basis for vacation of judgment be made by a party, as did former ORS 18.160, and that paragraph might provide a basis to vacate a judgment inadvertently entered by a court which intended to further consider disposition of the case. Stevenson v. U. S. National Bank 296 Or 495, 498 fn. 4, 677 P2d 696 (1984)

The Court of Appeals has said on several occasions that a ruling on a motion to vacate under ORCP 71 B(1) for mistake, inadvertence, surprise, or excusable neglect is within the discretion of the trial court. It held that a trial court did not abuse its discretion in denying relief to a plaintiff, who sought vacation of a judgment based upon a dismissal for failure to respond to a court order and failure to prosecute, which resulted from lack of communication among plaintiff's counsel, because to plaintiff did not show why this was excusable neglect. Bruner v. Cascade Western Corp 88 Or App 501, 504-505, 746 P2d 231 (1947).

For other examples of appellate courts upholding trial court discretion in ruling upon an ORCP 71 B motion see Tugman v. Lieuallen 86 Or App 566, 548-569, 740 P2d 200 (1987), (defendant claimed he did not understand that suit was against his corporation, as well as against him personally); Pacific Protective Wear v. Banks 80 Or App 101, 104, 720 P2d 1320 (1986), (defendant failed to submit affidavit showing any facts showing excusable neglect).

The Court of Appeals, however, has questioned whether the standard for review of a trial court ruling on a motion under ORCP 71 B(1) is only for abuse of discretion. The Court has pointed out that, prior to the ORCP, the Supreme Court said that trial court discretion in motions to vacate judgments "is controlled by fixed legal principles" and a body of case law exists that may require, under certain circumstances, that

default judgments be set aside as a matter of law rather than of discretion. Hackett v. Alco Standard Corp. 71 Or App 24, 33 fn. 7, 691 P2d 142 (1984). The Court reversed a trial court refusal to vacate default judgment, where the president of a defendant corporation was served with summons, but neglected to notify the corporation's insurer because he incorrectly assumed that the corporations interests would be protected by a co-defendant. 71 Or app at 32-33. Also, in Fisher v. Fenter 75 Or App 408, 410-411, 706 P2d 593 (1985), the Court reversed a trial court refusal to vacate a judgment under ORCP 71 B(1)(a), where the defendant filed the motion to vacate 11 months after learning of entry of the judgment, because the defendant was suffering from psychiatric difficulties which prevented him from defending the case or moving diligently to vacate the judgement. Cf McKenna and McKenna 57 Or App 185, 188-189, 643 P2d 1369 (1982).

Although the line between surprise and excusable neglect is not bright, surprise in ORCP 71 B(1)(a) refers to a judgment taken in violation of an agreement or understanding. McKenna and McKenna 57 Or App 185, 188-189, 643 P2d 1369 (1982), (actually applying identical language in ORS 18.160 which preceded ORCP 71).

A claim that a doctor who testified as to his opinion of a parties' medical condition at trial would now give a different opinion will not support vacation of a judgment under ORCP 71 B(1)(b) on the ground of newly discovered evidence. State ex rel Juv. Dept. v. Shaver 74 Or App 143, 144-145, 700 P2d 1066 (1985).

ORCP 71 B(1)(c) applies only to extrinsic and not intrinsic fraud. Prior to the ORCP, the Oregon cases only allowed relief from extrinsic fraud. Intrinsic fraud is fraud practiced in the very act of obtaining the judgment, that is committed in course of the proceeding leading to a judgment. Although Federal Rule 60 eliminates the distinction between intrinsic and extrinsic fraud, and this is the course advocated by Restatement (Second) of Judgments §70, the Oregon Council on Council on Court Procedures did not wish to change the rule in Oregon. In Johnson v. Johnson 302 Or 382, 384-395, 730 P2d 1221 (1986), The Court recognized this and refused to vacate a judgement based upon intrinsic fraud. A party to a dissolution proceeding had allegedly transferred property to Washington and Idaho and presented false testimony relating to it. The Court said that the transfer was not fraudulent; the only fraud was the false testimony and that occurred in the course of the proceeding and was intrinsic. The Johnson case actually involved a separate suit in equity to vacate a judgment, and not a motion under ORCP 71, but the court said the test for fraud is the same under either procedure.

A default judgment secured by a plaintiff who failed to serve a summons upon a defendant, which is statutorily required

after transfer of a case from small claims court to district court, was void and subject to vacation under ORCP 71 B(1)(d). Michel v. Uetz 87 Or App 452, 4576-457, 742 P2d 698 (1987). A judgment based upon the granting of a motion for judgment notwithstanding the verdict more than 55 days after entry of the judgment is void and subject to vacation under ORCP 712 B(1)(d). Micek v. LeMaster 71 Or App 361, 364-365, 692 P2d 652 (1984). On the other hand, the fact that a builder failed to register under ORS 701.065 is not jurisdictional and does not make a judgment for work performed void and subject to vacation under ORCP 71 B(1)(d). Beckwith v. Frazey 86 Or 236, 238, 738 P2d 1003 (1987).

The Court of Appeals has decided that the rule which requires that a defendant attack lack of personal jurisdiction at the first opportunity, which is set forth in ORCP 21 G(1) before trial, also applies to post trial motions. A defendant who filed a motion to vacate under ORCP 71 B(1)(a) and (c), but did not assert that the judgment was void due to lack of personal jurisdiction over the defendant, consented to jurisdiction and waived its jurisdictional defense and could not therefore maintain a subsequent motion to vacate under ORCP 71 B(1)(d). Pacific Protective Wear v. Banks 80 Or App 101, 104-105, 720 P2d 1320 (1986). In another case, decided under ORS 18.160, the statutory predecessor of ORCP 71, the Court held that denial of a motion to vacate a judgment on the grounds of lack of personal jurisdiction did not bar a subsequent motion to vacate based upon surprise. Pacific City Sanitary District v. McKee 64 Or App 500, 502, 669 P2d 330 (1983).

An answer in a dissolution proceeding which simply states "Respondent Appears" is a pleading which contains an assertion of a defense under ORCP 71 B(1) because it complies with ORS 107.055 and is sufficient to put the trial court on notice that there are substantial issues to be decided. Wagner and Wagner 89 Or App 102, 106, 747 P2d 400 (1987). A defendant seeking vacation of a judgment under ORCP 71 B(1) need not submit a defense on the merits with the motion, and a motion under rule 21 A challenging the complaint is sufficient. The ORCP 71 B(1) only requires that the motion "be accompanied by a pleading or motion under Rule 21 A". Hawkins v. Conklin 87 Or App 392, 394, 742 P2d 672 (1987). From the facts given in Hawkins it appears that the defendant actually sought relief only from an order of default, not a default judgment. ORCP 71 B(1) was not applicable in any case. See Rajneesh Foundation v. McGreer 303 Or 139, 145, 734 P2d 871 (1987).

The purpose of permitting a party to an appeal, with leave of the appellate court under ORCP 71 B(2), to file a motion in the trial court to vacate a judgment is to avoid hardship that might be caused by the one year time limitation upon motions under ORCP 71 B(1)(a),(b) and (c). The Court of Appeals has, therefore, denied leave to file a motion under ORCP 71 B(1)(e)

during the pendency of an appeal, on the grounds that such leave was unnecessary because the motion could be filed at any time after the case was remanded to the trial court. Weyerhauser Co. v. United Pacific Ins. Co. 82 Or App 211, 218, 728 P2d 543 (1986). The Court has also said, that despite the fact that the Council on Court Procedures official comment to rule 71 B(2) suggests that the appellate court might itself consider the motion to vacate, an appellate court does not have authority to consider such motion, even for a case pending before it on appeal, and that the appellate leave of court requirement accomplishes nothing. State ex rel Juv. Dept. v. Shaver 74 Or App 143, 145 fn. 2, 700 P2d 1066 (1985).

ORCP 71 C

ORCP 71 C reaffirms a trial judges traditional power to modify a judgment within a reasonable time. This does not authorize the court to vacate a judgment unless it is necessary to make technical amendments or unless "extraordinary circumstances" are present. Condliff v. Priest 82 Or App 115, 118, 727 P2d 175 (1986). The Court held that ORCP 71 C did not justify vacation of a judgment to allow a defendant to assert a new defense, which had not been asserted by another party to whom the moving party had entrusted their defense. The court noted that ordinarily the courts inherent power to vacate a judgement was not used to allow the parties to circumvent res judicata or to assert new substantive arguments. The Court has also said that vacation of judgment under ORCP 71 C requires "good and sufficient reasons" and that facts which did not demonstrate excusable neglect under ORCP 71 B would not support a vacation under ORCP 71 C. Pacific Protective Wear Dist. Co v. Banks 80 Or App 101, 105, 720 P2d 1320 (1986).

ORCP 71 C has been held not usable to allow substitution of a new party, who had been subrogated to the rights of the judgment creditor, as judgment creditor in a new judgment. Tecmire v. Hogan 82 Or App 19, 21 fn 2, 727 P2d 138 (1986). ORCP 71 C also cannot be used to avoid the limitations, set forth in ORCP 64, upon the power to a trial court to grant a new trial. United Adjustors, Inc. v. Shaylor 77 Or App 510, 511, 713 P2d 687 (1986). The Court of Appeals has also held that ORCP 71 C does not allow a trial court to vacate a judgment because a subsequent United States Supreme Court opinion had changed the law applied in the case. Vinson and Vinson 57 Or App 355, 359-361,64 P2d 635 (1982).

Modification of property division provisions of dissolution judgments based upon fraud, duress, gross inequity, or breach of fiduciary duty have been allowed under the authority confirmed by ORCP 71 C, but the trial court has no authority to vacate a judgment because one of the parties forgot to include an noncompetition provision limiting the activities of the other

party. Renninger and Renninger 82 Or App 706, 711-712, 730 P2d 37 (1986). See Elzroth and Elzroth 67 Or App 520, 526, 679 P2d 1369 1984.

The Court of Appeals has held that ORCP 71 C allowed a trial court to change provisions in a judgment relating to sale of collateral to satisfy the judgment, because the bankruptcy of one of the defendants prevented sale of the collateral. Palmateer v. Homestead Development Corp. 67 Or App 678684, 680 P2d 695 (1984).

Current to April 1, 1988

6 Moore, Taggart & Wicker, Moore's Federal Practice § 56-11 (2d ed. 1986) sets out the following ground rules:

> "If a motion is directed solely to the pleadings, the movant admits the truth of his adversary's well-pleaded allegations but denies their sufficiency as a matter of law. And in ruling on such a motion the pleadings are to be liberally construed."

We must now determine what test we should use to measure the sufficiency of plaintiff's complaints for a genuine issue of material fact. Should we use the "extrinsic/intrinsic" fraud concept previously used in Oregon caselaw to determine if relief should be granted from a judgment? Or, should we adopt the test set out in Restatement (Second) of Judgments § 70?

Both parties have cited *O.-W.R. & N. Co. v. Reid*, 155 Or 602, 65 P2d 664 (1937), as authority for the type of fraud necessary to set aside a judgment. This court in 155 Or at 609 commented as follows:

> "* * * It is not every species of fraud, however, that vitiates a judgment. It is fraudulent to give perjured testimony and such evidence may result in a judgment but, according to the great weight of authority, equity will not interfere for that reason alone, since the unsuccessful party had his opportunity to refute the false testimony. If the rule were otherwise, there would be no end to litigation: *Friese v. Hummel*, 26 Or. 145 (37 P. 458, 46 Am. St. Rept. 610). However, as stated in 34 C.J. 476:
>
> " ' * * * If the perjury is accompanied by any fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the conclusion that but for such fraud the result would have been different, a new trial may be granted. * * * .'
>
> "It is only when the fraud is extrinsic or collateral to the matter actually tried that equity will enjoin enforcement of the judgment: *United States v. Throckmorton*, 98 U.S. 61 (25 L. Ed. 93). In 15 R. C. L. 762, it is said:
>
> " 'Relief is granted for extrinsic fraud on the theory that by fraud or deception practiced on the unsuccessful party, he has been prevented from fully exhibiting and trying his case, by reason of which there never has been a real contest before the court of the subject matter of the suit.'
>
> " 'Extrinsic, as distinguished from intrinsic fraud, pertains not to the judgment itself, but to the manner in which it

is procured: *Caldwell v. Taylor,* 218 Cal. 471 (23 P.(2d) 758, 88 A.L.R. 1194); *Flood v. Templeton,* 152 Cal. 148 (92 P. 78, 13 L. R. A. (N. S.) 579)."

See also Slate Const. Co. v. Pac. Gen. Con., Inc., supra, 266 Or at 151.

The Restatement of the Law of Judgments, adopted and promulgated in 1942, stated in effect that relief from a judgment could not be obtained because of intrinsic fraud. The relevant part of Section 126 read as follows:

"(1) Equitable relief from a valid judgment will be granted only in accordance with the rules stated in this Chapter.

"(2) Although a judgment is erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that

"* * * * *

"(b) the judgment was obtained by false or perjured testimony, production of false documents, or a conspiracy between the successful party and the witnesses * * *."

On June 12, 1980, the American Law Institute abandoned the "extrinsic/intrinsic" distinction by adopting and promulgating Restatement (Second) of Judgments § 70:

"Judgment Procured by Corruption, Duress, or Fraud

"(1) Subject to the limitations stated in § 74, a judgment in a contested action may be avoided if the judgment:

"(a) Resulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon that party, or

"(b) Was based on a claim that the party obtaining the judgment knew to be fraudulent.

"(2) A party seeking relief under Subsection (1) must:

"(a) Have acted with due diligence in discovering the facts constituting the basis for relief;

"(b) Assert his claim for relief from the judgment with such particularity as to indicate it is well founded and prove the allegations by clear and convincing evidence; and

"(c) When his claim is based on falsity of the evidence on which the judgment was based, show that he had made a

reasonable effort in the original action to ascertain the truth of the matter."[7]

Plaintiff has urged us to overrule the *O.-W.R.& N. Co. v. Reid, supra,* line of cases and to abandon the "extrinsic/intrinsic" fraud distinction in favor of Restatement (Second) of Judgments § 70. In considering such a suggestion, we look not only to our own precedents but also to whether the other branch of government with authority to make this policy change—the legislature—has considered the matter or expressed any views on it. We find that the legislature has had the matter brought to its attention fairly recently.

On December 13, 1980, the Council on Court Procedures promulgated ORCP 71. It became effective January 1, 1982. Or Laws 1981, ch 898.

The relevant portions of ORCP 71 are:

"B.(1) On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: * * * (c) fraud, misrepresentation, or other misconduct of an adverse party * * *. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. * * *

"C. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, * * * or the power of a court to set aside a judgment for fraud upon the court."

ORCP 71 is a modified form of Federal Rule of Civil Procedure 60, adapted to Oregon cases and practice. Council

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[7] Restatement (Second) of Judgments § 74 reads as follows:

"Except with regard to judgments referred to in §§ 65-66 and 69, relief from a judgment will be denied if:

"(1) The person seeking relief failed to exercise reasonable diligence in discovering the ground for relief, or after such discovery was unreasonably dilatory in seeking relief; or

"(2) The application for relief is barred by lapse of time; or

"(3) Granting the relief will inequitably disturb an interest of reliance on the judgment. When such an interest can be adequately protected by giving the applicant limited or conditional relief, the relief will be shaped accordingly."

on Court Procedure, Staff Comment *reprinted in* Merrill, Oregon Rules of Civil Procedure: 1986 Handbook 203 (1986).

The relevant portions of FRCP 60(b) are:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * * (3) Fraud (*whether heretofore denominated intrinsic or extrinsic*), misrepresentation, or other misconduct of an adverse party; * * *. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * * This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, * * * or to set aside a judgment for fraud upon the court. * * *" (Emphasis added.)

The staff comment of the Council on Court Procedures observes that ORCP 71B.(1)(c) differs from FRCP 60(b) in that it "does not eliminate the distinction between extrinsic and intrinsic fraud." It also states that ORCP 71C. "simply recognizes the other existing methods of seeking vacation of judgment, *e.g.* separate suit for equitable relief, *Oregon-Washington R. & Navigation Co. v. Reid,* 155 Or 602, 609, 65 P2d 664 (1937) * * *." Merrill, *supra* at 203-204.

On October 15, 1979, the Council on Court Procedures prepared its first draft of ORCP 71. In that draft what later became ORCP 71B.(1)(c) contained the same language as FRCP 60(b)(3): "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." The comment prepared for that draft suggested that subsection B(1)(c) might change the law in this state. It specifically said:

> "* * * [T]he Oregon cases do maintain the distinction between intrinsic and extrinsic fraud. *Slate Const. Co. v. Pac. Gen. Con., Inc.*, 226 Or. 145, 359 P.2d 530 (1961). *Friese v. Hummell* [sic], 26 Or. 145, 37 Pac. Rept 458 (1894). The basic distinction is between fraud going to issues actually involved in the first action and collateral issues; this means no relief is available for perjury. This rule follows Federal Rule 60 and eliminates the distinction."

On January 19, 1980, Circuit Judge William L. Jackson reported to the Council on Court Procedures that his subcommittee recommended that subsection 71B.(1)(c) relating

to fraud be eliminated as it did not appear in former ORS 18.160[8] and that the Oregon caselaw provided adequate grounds for relief.

On February 4, 1980, the Council on Court Procedures prepared its second draft of ORCP 71. In that draft the B.(1)(c) subsection on fraud was completely eliminated. The comment to the second draft in part stated:

> "Whether the language relating to both extrinsic or intrinsic fraud is necessary depends upon whether the Council wishes to make perjury a basis for vacation of judgment. The distinction between extrinsic and intrinsic fraud in Oregon goes back to 1894 and *Friese v. Hummel*, 26 Or. 145 (1894). The distinction is described as follows in *Slate Construction Co. v. Pac. Gen. Con., Inc.*, supra, at pp. 151-152:
>
> " 'In order to set aside a judgment for fraud it must appear the fraud was practiced in the very act of obtaining the judgment, and such fraud must be extrinsic or collateral as distinguished from intrinsic. * * *
>
> " 'Fraud is regarded as intrinsic where the fraudulent acts pertain to an issue involved in the original action.
>
> "Basically, the rule prohibits vacation of judgment for perjury, presentation of false or forged evidence, and false allegations in a pleading. *Larson v. Heintz Construction Company*, [219 Or 25 (1959)], *Lothstein v. Fitzpatrick*, 171 Or. 648, 658 (1943), *O.-W.R. & N. Co. v. Reid*, 155 Or 602, 610 (1937); *Dixon v. Simpson*, 130 Or. 211, 221-222, *Windsor v. Holloway*, 84 Or. 303, 306 (1917); *Wallace v. Portland Ry., L. & P. Co.*, 88 Or. 219, 224 (1916); *Friese v. Hummel*, supra."

On June 16, 1980, Fred Merrill, Executive Director of the Council on Court Procedures, prepared a memorandum on the recommendations of Judge Jackson's subcommittee. It recommended that 71B.(1)(c) be adopted in its present form. The memorandum noted that the subcommittee recommended the reinstatement of a motion to vacate based upon fraud, but did not recommend the elimination of the distinction between extrinsic and intrinsic fraud. The memorandum

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[8] *Former* ORS 18.160 (*repealed by* Or Laws 1981, ch 898, § 53) read as follows:

"The Court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

concluded: "Therefore, in accordance with Oregon cases, the fraud, misconduct, etc., would have to be extrinsic."

For the purposes of this case, the language of the rule that became ORCP 71C. remained the same through the first, second and final drafts.

ORCP 71 in its present form was promulgated by the Council on Court Procedures on December 13, 1980. It was not amended by the 1981 legislature.

Although the American Law Institute adopted and promulgated Restatement (Second) of Judgments § 70 on June 12, 1980, it was not mentioned in the minutes or comments of the Council on Court Procedures during its consideration of ORCP 71. However, the Council thoroughly considered the issue of whether it should be necessary to distinguish between extrinsic and intrinsic fraud to set aside a judgment. The Council's decision not to eliminate the distinction is an approval of the Oregon caselaw and a disapproval of the principle underlying Restatement (Second) of Judgments § 70. The "extrinsic/intrinsic" concept has been widely criticized. *See* Restatement (Second) of Judgments § 70, *comment c* (1980) and Wright and Miller, Federal Practice and Procedure § 2861 (1973). Even so, the legislature has not chosen to change the existing Oregon rule, although the issue was squarely raised by the report of the Council on Court Procedures. We have the separate authority to accomplish what plaintiff seeks, but we think the legislature's failure to act, coupled with our own long-standing precedents, call for us to retain our present rule.

So that there will be no misunderstanding, this case is an independent action under ORCP 71C. and not a motion under ORCP 71B.(1)(c). In Oregon, the test for fraud is the same under either procedure.

We now must determine which type of fraud plaintiff's complaints allege. For this purpose we assume that the allegations of the complaints are true and draw all inferences therefrom in favor of plaintiff. The complaints allege in effect that defendant Johnson, without the consent or knowledge of plaintiff, removed large sums of money to Washington and Idaho where it was concealed beyond the reach of garnishment. It is further alleged that defendant Johnson, at the trial

of the dissolution case and again at the modification proceeding, deliberately and knowingly testified falsely about the money for the purpose of decreasing plaintiff's award and increasing his own award.

Plaintiff concedes that defendant Johnson's false testimony was intrinsic fraud, but argues that removing and concealing the money in Washington and Idaho was extrinsic fraud and that her complaints therefore contained a genuine issue of material fact.

3. We hold that the facts set out in plaintiff's complaint allege only intrinsic fraud. Removing and placing the money in Washington and Idaho did not damage plaintiff and was not fraud of any variety. That conduct was no different than defendant Johnson buying common stock in a New Jersey company, registered on the New York Stock Exchange, and concealing the stock certificates in a safety deposit box in Vancouver, Washington. A trial court in Oregon does not have jurisdiction of property in another state, but it does have personal jurisdiction of the parties in a dissolution case. It could have ordered defendant Johnson to transfer the money or assets to plaintiff and held him in contempt if he failed to obey the court's order. ORS 33.010. Under the allegations of plaintiff's complaints, she was defrauded only by defendant Johnson's false testimony. That was intrinsic fraud.

There being no allegation of extrinsic fraud, plaintiff's complaints failed to raise a genuine issue of material fact and defendants were entitled to a summary judgment as a matter of law.

The Court of Appeals and trial court are affirmed.

(1976); Mamer v. Morrison, 35 Ill. 2d 133, 219 N.E.2d 524 (1966); cf. Lacks v. Lacks, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976), rearg. denied, 41 N.Y.2d 862, 393 N.Y.S.2d 710, 362 N.E.2d 261 (1977); Coons v. Stokes, 514 S.W.2d 33 (Mo.App.1974); see Armstrong v. Armstrong, 15 Cal. 3d 942, 126 Cal.Rptr. 805, 544 P. 2d 941 (1976). But cf. Hughes v. Neely, 332 S.W.2d 1 (Mo.1960); Hartigan v. Hartigan, 272 Ala. 67, 128 So.2d 725 (1961) (jurisdiction procured by joint fraud of the parties). The same result is sometimes reached on the basis of estoppel. See Estate of Lee v. Graber, 170 Colo. 419, 462 P.2d 492 (1969); Cothron v. Scott, 60 Tenn.App. 298, 446 S.W.2d 533 (1969).

§ 70. Judgment Procured by Corruption, Duress, or Fraud

(1) Subject to the limitations stated in § 74, a judgment in a contested action may be avoided if the judgment:

(a) Resulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon that party, or

(b) Was based on a claim that the party obtaining the judgment knew to be fraudulent.

(2) A party seeking relief under Subsection (1) must:

(a) Have acted with due diligence in discovering the facts constituting the basis for relief;

(b) Assert his claim for relief from the judgment with such particularity as to indicate it is well founded and prove the allegations by clear and convincing evidence; and

(c) When his claim is based on falsity of the evidence on which the judgment was based, show that he had made a reasonable effort in the original action to ascertain the truth of the matter.

Comment:

a. Rationale. Judgments are taken as finally determining claims because of confidence that the procedure leading to judgment is reasonably effective to ascertain the merits of the controversy. It is recognized that no system of procedure is infalli-

ble and that mistakes and miscarriages of justice may occur despite such protective devices as the right to be heard, the assistance of counsel, and the availability of appellate review. But it is assumed that modern systems of procedure generally yield results that are as just as may be expected, given the uncertainties of proof in contested cases and elements of individual judgment inherent in application of legal rules and principles to specific instances. Indeed, if this confidence did not exist, the concept of finality itself would be rationally insupportable.

It is for this reason that attacks are not permitted on a judgment simply on the ground that the losing party neglected to take best advantage of his day in court or that additional evidence or argument would produce a different outcome. See §§ 24, 27. Furthermore, inasmuch as losing parties have strong inducement to contrive attractive reasons why a controversy should be reopened, the rules concerning relief from a judgment are properly cast in narrow terms. On the other hand, it is equally inappropriate that all judgments be treated as absolutely inviolable. Particularly is this true when a judgment has been procured by the fraud of the successful party. To immunize such a judment from attack is to compound the injustice of its result on the merits with the injustice of the means by which it was reached. Equally important, if judgments were wholly immune it would give powerful incentive to use of fraudulent tactics in obtaining a judgment. A litigant would know that if he could sustain duress or deception through the moment of finality, the benefit of the judgment would be his forever.

b. Bribery or duress. When a judgment is shown to have been procured by the prevailing party through corruption of the tribunal, or of the attorney for the party against whom the judgment was rendered, no worthwhile interest is served in protecting the judgment. The only serious question concerns the showing that must be made by the applicant for relief to substantiate his claim. To discourage ill-considered assertion of claims of corruption or duress, it is required that such a claim be alleged with particularity and that it be proven by clear and convincing evidence. See also Comment *d*.

c. Fraud: Extrinsic and intrinsic, and similar distinctions. Defining the circumstances under which the conclusiveness of a judgment can be overcome on account of fraud is especially difficult. The question presented by a charge of fraud is

whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Reexamination of those matters typically involves testimonial conflicts, often the same that were presented in the original action. Such conflicts are easy to propound and difficult to resolve with confidence. The definitional task is therefore to state criteria that cannot so easily be met as to create open opportunity for relitigation, but which are not so demanding that plain cases of fraud cannot be remedied.

From an early date some decisions permitted a judgment to be attacked on the ground that it was based on perjured or fabricated evidence. The only qualification was that the application for relief show clearly and persuasively that the evidence had indeed been perjured or fabricated. Since in the early days the procedure of seeking relief was a separate suit in equity, the complaint was permitted and required to go into detail concerning the evidence of the fraud and the reason it had not been discovered at the time of trial. Later decisions, however, attempted to draw distinctions in terms other than the positiveness with which the fraud could be shown, and these have led to much confusion.

The most widely recognized distinction was between "extrinsic" and "intrinsic" fraud. In its core meaning, "extrinsic" fraud meant fraud that induced a party to default or to consent to judgment against him. See § 68. "Intrinsic" fraud meant knowing use of perjured testimony or otherwise fabricated evidence. But this distinction was obliterated by decisions in which it was reasoned that offering fabricated evidence "prevented" the other party from contesting the proposition for which the fabricated evidence was offered as proof. Hence, in many jurisdictions the distinction between "extrinsic" and "intrinsic" fraud was accepted nominally but not in substance. Moreover, it was never satisfactorily explained why a litigant misled into defaulting should be more fully protected than one who suffered judgment by reason of deception committed in open court.

Three other distinctions arose, each as an exception to the proposition that "intrinsic" fraud is not a basis for relief. One is that if the fraud was practiced by a party having a fiduciary capacity, then relief was obtainable even though the fraud concerned the proofs at trial. In some of the decisions making this distinction, the fiduciary was representing a non-party benefici-

ary and the fiduciary's fraud consisted of connivance with the opposing party. This situation can be convincingly analogized to that of a fraudulently procured default judgment against the beneficiary, because both situations involve fraudulent deprivation of a day in court for the beneficiary. Compare §§ 67, 42. However, the exception concerning fiduciaries was extended to actions between the fiduciary and the beneficiary.

Another distinction involves the concept of "fraud on the court." It is not entirely clear what this concept entails. Some decisions indicate it means corruption of the judge or other court officials. Other decisions indicate it means fabrication of evidence by the attorney as distinct from fabrication by the party who proferred it, on the theory that the attorney is an officer of the court and that his corruption is equivalent to judicial corruption. This distinction, too, seems unsatisfactory, although it is suggestive of a more coherent analysis. The fact that the fabrication of evidence was procured by or with the aid of the party's attorney may result in it being easier clearly to prove the fabrication, because the potential sources of such proof include both the party and the attorney. Hence, the point would seem to be that the cases where the attorney is involved also involve strong proof of deliberate fabrication of evidence.

Still a third distinction, found in a few cases, is made when the judgment amounts to a fraud against the government or the public welfare. Such a judgment is said to be open to relief even though procured by "intrinsic" fraud. Assuming that a clear case of fraud is made out, however, it is difficult to see why it should make a difference that the victim is a private person.

Aside from not being very persuasive, these various distinctions are not consistently applied. Specifically, when the evidence of fraud is weak, or when it appears that the victim should have anticipated the possibility of fabrication or concealment, the decisions often invoke the proposition that relief may not be granted on the basis of "intrinsic" fraud. It is also clear that there is discord in the underlying judicial attitudes toward relief on the basis of fraud, some courts being more responsive than others. Allowing for all these factors, if the cases are read with close attention to their facts, the critical considerations usually are whether the claim of fraud is well substantiated and not merely asserted at large and whether in the original action the victim had pursued reasonable precautions against deception.

See Appendix for Court Citations and Cross References

d. Elements required for relief from fraud. Four elements must be established to obtain relief. First, it must be shown that the fabrication or concealment was a material basis for the judgment and was not merely cumulative or relevant only to a peripheral issue. Second, the party seeking relief must show that he adequately pursued means for discovering the truth available to him in the original action. Under modern procedure in trial courts of general jurisdiction in cases involving substantial stakes, abundant devices exist for discovering an opposing party's proof and subjecting it to investigation prior to trial and adequate incentive usually exists to use such devices. Hence, in such circumstances, only a well concealed or unforeseeable fraud is likely to survive a reasonably diligent effort to ascertain the truth. On the other hand, in cases involving limited stakes, it may be unreasonably costly to pursue intensive discovery or investigation when there is no indication that the other side may offer fabricated evidence. Furthermore, in some situations a litigant is entitled to be passive and unquestioning with respect to the proofs of another party. Thus, the cases allowing relief from fraud practiced by a trustee often advert to the fact that a beneficiary should not have to anticipate a trustee's deliberate falsification of the accounts he presents to the court.

Third, the applicant must show due diligence after judgment, in that he discovered the fraud as soon as might reasonably have been expected. This is an application of the general principle of due diligence, see § 74.

Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present, and must offer clear and convincing proof to establish that the evidence underlying the judgment was indeed fabricated or concealed. This heavy burden of proof is an important measure of protection against attacks on honestly procured judgments. It also transforms the issue from a retrial of a question previously litigated to a search for something approaching incontestable proof as to truth of the underlying matter in issue.

Illustrations:

1. P brings an action against D for dissolution of a partnership of which they are members. P fails to take D's deposition or otherwise to obtain evidence from him prior to trial

concerning the extent of D's dealings with partnership property, a fact that is relevant in determining the division of the partnership assets. After a judgment is rendered dissolving the partnership and dividing its assets, P discovers that D made withdrawals from the partnership to an extent far greater than that to which he testified at trial. P's failure to use discovery on the issue could be found to be a lack of due diligence, depending on the circumstances, and hence a ground for denying P relief from the judgment.

2. P obtains a judgment against D for professional services rendered, P testifying that he was a duly licensed professional. The names of licensees in P's profession is a matter of public record. A year later, D seeks to set aside the judgment on the ground that P was not licensed and therefore that under applicable law P could not properly have maintained the action for his fees. D's delay in discovering the facts is a ground for denying D relief.

3. P brings an action against D for injuries sustained in a collision with a car allegedly driven by D. At deposition and trial D denies having been the driver at the time of the accident, and judgment is for D. Later C, who knows D but was not present at the accident, tells P that D admits having been the driver. P seeks relief from the judgment, stating in his application that D knowingly testified falsely that he was not driving at the time of the accident. In the absence of greater substantiation, such as an affidavit from C concerning D's admission, the application is insufficient for relief from the judgment.

4. T performs work for C, a corporation, and then dies. A, T's administrator, brings suit against C for the reasonable value of T's services. C's officers testify on deposition and at trial that there was no agreement to pay for T's services. In response to A's pretrial demand for production of documents, C states that there are no relevant documents in its files. Judgment is for C. Shortly after trial A obtains a copy of a document containing C's commitment to pay T for his services. An application for relief from the judgment stating the foregoing facts and attaching a copy of the document is sufficient to entitle A to a hearing for relief.

The evidence which mother seeks to present in the trial court is not in any of the categories in ORCP 71B(1).[2]

Leave denied.[3]

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[1] The Comment to ORCP 71B points out that, under case law before the enactment of ORCP, during the pendency of an appeal a trial court could not vacate a judgment for any of the grounds set forth in ORCP 71B(1) and that, because there may be a one-year limit for filing the motion, it should be possible to file the motion in the trial court during the one-year period to await disposition of the appeal. The Comment then reasons:

> "*Since the motion might affect the appellate court's consideration of the case, the rule requires notice and leave from the appellate court.* After termination of the appeal there is no reason to require permission of the appellate court. See *Nessley v. Ladd*, 30 Or. 564, 566-567, 48 P. 420 (1897)." (Emphasis supplied.)

The emphasized sentence is an anomaly for, as the Supreme Court pointed out in *Nessley*:

> "A motion for rehearing, based upon newly discovered evidence, might very properly have been entertained by the court below, if filed in season; and, acting by authority of its original jurisdiction, it could have set aside its decree and ordered a new trial. *This court, however, in the exercise of its appellate jurisdiction, acts only upon the transcript and the evidence, and it cannot permit its action to be governed or controlled by affidavits touching testimony aliunde.* It cannot set aside a decree except by the record." 30 Or at 568. (Emphasis supplied.)

That excerpt from a case decided in 1897 remains a cornerstone of appellate law; so it is unclear why a party to a case on appeal should need leave from the appellate court or how the appellate court could take cognizance of the evidence in support of the motion. Nevertheless, ORCP 71B as written requires leave from this court to file a motion.

[2] Whether mother could seek relief on one of the grounds alluded to in ORCP 71C is not before this court.

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JACK B. LIVELY
(1923-1979)

February 24, 1988

Professor Fredric R. Merrill
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Fred:

I was reviewing the requirements of ORCP 80 for the appointment of a receiver recently, and I noticed what appears to be a drafting error in subsection F(3).

Subsection C requires that notice be given to the adverse party prior to the appointment of a receiver. Subsection F(3) states that, "any notice required by this rule" may be given either personally or by mail. If the notice is given by mail, it must be mailed at least five days before the hearing. The first question which arises is whether the notice referred to in subsection F(3) is really intended to apply only to notices required under subsection F, as opposed to all notices under the rule, including notice to the adverse party under C. My suspicion is that the drafters of the rule intended subsection F(3) to apply only to notices under subsection F.

The second problem under F(3) is that it requires deposit in the mail "at least five days . . . before the hearing." ORCP 10A states that when any period of notice is less than seven days, you do not count intervening Saturdays, Sundays or holidays. In addition, Rule 10C requires that you add three additional days any time notice is given by mail. The first question which arises is whether 10C even applies. If it does, do you then consider the notice period to be eight days, in which case 10A does not apply and you can include Saturdays, Sundays and holidays. If that is not the case, then you are left with the anomalous situation in which the five day notice requirement under subsection F(3) is really a minimum of 10 days, since the period of time as a result of mailing is eight days, which will necessarily include at least one Saturday and Sunday.

I have no simple solution to any of this, except that I think it would be helpful to amend subsection F(3) to specify that it relates only to notices under subsection F, rather than to all notices under ORCP 80.

You may wish to give some thought to these comments in conjunction with your review of the rules.

Very truly yours,

THORP, DENNETT, PURDY,
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET:edk

cc: Raymond J. Conboy, Chairman
Council on Court Procedures

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

March 24, 1988

R. WILLIAM RIGGS
JUDGE

COURTROOM 512
(503) 248-3250

Council on Court Procedures
Attention Mr. Fred Merrill
Executive Director
University of Oregon Law School
Eugene, Oregon 97403

Re: Council on Court Procedures
Revision of ORCP 59

Dear Fred:

Enclosed is a copy of a letter from Judge Winfrid Liepe regarding his proposed revision of ORCP 59 C.(6). I agree completely with Judge Liepe's observation contained in his letter. The only comment that I would add is that I would normally not feel it necessary to have a bailiff accompany jurors to lunches if they are excused at lunch time. Our experience in Multnomah County is that the jurors generally "scatter" and go to a variety of different places for lunch unsupervised.

In my past ten years' experience as a trial judge and with my prior ten years as a trial attorney, I have never had a case where I believe that modification of this rule would have caused problems. Obviously, the court can exercise its discretion not to release jurors if circumstances in a particular case would indicate that to do so would be inappropriate. I would assume that most judges would exercise such discretion in capital cases, particularly during the penalty phase. However, in a recent aggravated murder case that I tried, I permitted the jurors to leave for lunch each day, unsupervised, during the guilt phase of the trial.

I plan to attend the next council meeting, however if I am absent, please present this letter along with Judge Liepe's letter as our recommendation to the council.

Sincerely,

R. William Riggs

RWR/jm
cc: Judge Liepe
Enclosures

DISTRICT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

RECEIVED

MAR [illegible]

Judge R. William Riggs

WINFRID K. LIEPE
DISTRICT JUDGE
687-4218

March 21, 1988

The Honorable R. William Riggs
Courtroom 512
Multnomah County Courthouse
1021 S. W. 4th
Portland, Oregon 97204

FILE

Re: Council on Court Procedures - Revision of ORCP 59

Dear ~~Bill:~~

Enclosed please find my magnum opus, a draft revision of ORCP 59C(6) to allow separation of jurors for any noon recess as well as for the evening. The revision of subsection 6 will also dovetail with the underlined portion of subsection 5.

Please send this on to Fred Merrill, the new Executive Director, at the U of O Law School, with any further revisions, for which I give you blank check. We will then have completed the difficult task of our subcommittee.

This revision will enable courts to send jurors to lunch at their own expense. In most cases this would not extend the total deliberation time. If jurors are accompanied by a bailiff to some luncheon spot they are usually instructed not to discuss the case in public anyway.

By this stroke of the pen we will be able to strike a blow for being efficient and cheap.

Sincerely yours,

Winfrid K. Liepe
District Judge

WKL:ga

Enclosure

C.(4) **Notes.** Jurors may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.

C.(5) **Custody of and communications with jury.** After hearing the charge and submission of the cause to them, the jury shall retire for deliberation. When they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon their verdict or are allowed by the court to separate or are discharged by the court. Unless by order of the court, the officer must not suffer any communication to be made to them, or make any personally, except to ask them if they are agreed upon a verdict, and the officer must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. Before any officer takes charge of a jury, this subsection shall be read to the officer who shall be then sworn to follow its provisions to the utmost of such officer's ability.

C.(6) **Separation during deliberation.** The court in its discretion may allow the jury to separate ~~for the evening~~ during its deliberation when the court is of the opinion that the deliberation process will not be adversely affected. In such cases the court will give the jury appropriate cautionary instructions.

C.(7) **Juror's use of private knowledge or information.** A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to other jurors, nor shall the juror be governed by the same in giving his or her verdict.

D. Further instructions. After retirement for deliberation, if the jury requests information on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given either orally or in writing in the presence of, or after notice to, the parties or their counsel.

E. Comments on evidence. The judge shall not instruct with respect to matters of fact, nor comment thereon.

F. Discharge of jury without verdict.

F.(1) **When jury may be discharged.** The jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court unless:

F.(1)(a) At the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement; or

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