COUNCIL ON COURT PROCEDURES

Saturday, May 21, 1988 Meeting
9:30 a.m.

State Capitol, Room 354
Salem, Oregon

A G E N D A

1. Public comment
2. Approval of minutes of meeting of April 30, 1988
3. ORCP 22 C(1) - time limit on filing third party complaints (Judge Valentine's letter)
4. ORCP 70 A(2) - summary of judgment and costs and disbursements and attorney fees (Judge McConville's letter)
5. Pleading non-economic damages - jurisdiction of circuit and district courts (Judge McConville's letter)
6. Staff comment for amendment of 59 C(6) (Merrill memorandum)
7. Amendment of ORCP 10 A (time computation) (Merrill memorandum)
8. Amendment of ORCP 80 F(3) (receivership notices) (Merrill memorandum)
9. Amendment of ORCP 68 C(2) (pleading attorney fee claim) (Merrill memorandum and McConville letter)
10. Amendment of ORCP 71 and statute relating to motions to correct and vacate filed during pendency of appeal (Merrill memorandum)
11. Procedure for supplementary judgment (Larry Thorp)
12. Procèdure for compelling satisfaction of judgment (Judge Liepe)
13. Problems with ORCP 1-10 (Merrill memorandum)
14. New business

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of May 21, 1988

Room 354, State Capitol

Salem, Oregon

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

(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.

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

The minutes of the April 30, 1988 meeting were unanimously approved.

The Council discussed the bylaws and the necessity of having an absolute majority of Council members vote for proposals considered at each meeting. It was suggested that the Council takes no final action on rule changes until it actually makes a formal promulgation of rules to be submitted to the legislature which has usually been done at the last meeting before the commencement of the legislative session. All other actions relating to acceptance or rejection of rules and amendments are tentative and subject to revision and would not require vote by an absolute majority of the Council. The Council also discussed the requirement in the bylaws that public notice be given of intent to change the rules with an opportunity for comment. It was suggested that tentative agreement on rule changes for this biennium would be required by October of this year.

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

Agenda Item No. 3: ORCP 22 C(1) - time limit on filing third party complaints (Judge Valentine's letter). Judge Valentine in his April 20, 1988 letter had suggested a 45-day time limitation during which a defending party (as a third party plaintiff) can serve a third party complaint under ORCP 22 C(1). After discussion, the Council took no action to change the present 90-day time limitation to 45 days.

Agenda Item No. 4: ORCP 70 A(2) - summary of judgment and costs and disbursements and attorney fees (Judge McConville's letter). After an extended discussion, the Executive Director was asked to draft an amendment of ORCP 70 A(2) which would exclude costs and attorney fees from the summary of judgment requirement.

Agenda Item No. 5: Unrevealed noneconomic damages - jurisdiction of circuit and district courts (Judge McConville's letter). Judge McConville pointed out in his May 6, 1988 letter that an area of concern had been raised by the adoption of the Tort Reform Act by the 1987 Legislature. He stated that one of the provisions of the Act prohibits the pleading of noneconomic damages and that one of the related problems arising from that prohibition is determining whether an action is within the jurisdiction of the district court or the circuit court. It was suggested that ORCP 18 B(1) or (2) could be amended to require that a person requesting an unspecified amount of noneconomic damages assert jurisdiction. It was further suggested that the Supreme Court had taken some action in the Uniform Trial Court Rules to deal with the problem. The Executive Director was asked to check the Uniform Trial Court Rules and perhaps suggest an amendment to ORCP 18.

Agenda Item No. 6: Staff comment for amendment of 59 C(6) (Merrill memorandum and Thorp memorandum attached). The Executive Director stated that Larry Thorp had proposed a change to the last two sentences of the comment so that the entire comment would read as follows:

> "When the ORCP were originally promulgated, trial judges had no authority to allow a jury to separate after they had retired to begin their deliberation. The 1981 Legislature added 59 C(6) which allowed the trial judge to permit the jury to separate for the evening after deliberation had begun. The Council has now added authority for the trial judge to permit separation for the noon recess. The authority to permit separation is still limited to noon and evening recesses only and then only if the trial court can affirmatively find that separation will not adversely affect the deliberation process. The Council was concerned that

the discretion to allow separation for the noon recess be exercised cautiously since separation for the noon recess presents the risk of unavoidable and undesirable contact between jurors and other trial participants."

A question was raised as to the official status of the comments to the rules. The Executive Director stated that the Council had originally decided not to officially adopt comments, only rules, and that the comments were only staff explanations of the background and nature of rules and amendments for the convenience of the legislature. The Council discussed whether the status of the comments should be changed but no action was taken. The Executive Director announced that he would circulate all comments prepared to be sure that statements of Council intent were consistent with Council members' interpretation. He stated that Larry Thorp's suggested language for the comment seemed clearer than the original language submitted and would be used.

Judge Liepe suggested that a change be made in the last sentence of the comment so that the last sentence would read as follows:

"The Council was concerned that the discretion to allow separation for the noon recess be exercised cautiously since separation for the noon recess [presents] **may present** the risk of unavoidable and undesirable contact between jurors and other trial participants."

Agenda Item No. 7: Amendment of ORCP 10 A (time computation) (Merrill memorandum). The Executive Director suggested that a change be made to ORCP 10 A as follows:

"When the period of time prescribed or allowed **(without regard to section C of this rule)** is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded."

After discussion, a motion was made by Larry Thorp, seconded by Judge Liepe, that the proposed change be adopted. The motion passed unanimously.

Agenda Item No. 8: Amendment of ORCP 80 F(3) (receivership notices) (Merrill memorandum and Thorp memorandum). The Executive Director stated that Larry Thorp in his memorandum (attached) had made several suggestions for the revision of ORCP 80 F(3). Judge Johnson moved, seconded by Larry Thorp, that the revision of ORCP 80 F(3) suggested, as modified by the Thorp suggestions, be adopted. The motion passed unanimously. It was suggested that some technical clarifications were necessary in the cross-reference language in the rule. The Executive Director

was asked to present a draft of the modified rule with technical corrections at the next meeting.

Agenda Item No. 9: Amendment of ORCP 68 C(2) (pleading attorney fee claim) (Merrill memorandum, McConville letter and Thorp memorandum). The Council had asked for a draft of ORCP 68 C(2) that included a waiver rule for lack of specificity in pleading the basis for attorney fees. The draft was prepared and submitted. In addition, the Council had two other alternatives for amendment of ORCP 68 C(2) which were presented by Council members McConville and Thorp. The Council considered all three suggestions together.

The Executive Director suggested that the following be inserted as the fifth sentence of ORCP 68 C(2):

> "The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain as provided in Rule 21, but any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial."

The existing first sentence of 68 C(2) states:

> "A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which proves a basis for the award of such fees in a pleading filed by that party."

Judge McConville by letter had suggested that the first sentence be rewritten as follows:

> "A party seeking attorney fees shall assert the right to recover such fees by alleging in a pleading filed by that party the facts and any applicable statute or rule which provides the substantive basis for the award of such fees."

Larry Thorp in his memorandum suggested that the first sentence be rewritten as follows:

> **"A party seeking attorney fees shall assert the right to recover such fees in a pleading filed by that party."**

A motion was made by Judge Barron, seconded by Henry Kantor, to adopt the change to ORCP 68 C(2) proposed by Larry Thorp and to leave out the waiver language. The motion failed (three in favor and ten opposed).

Larry Thorp moved, seconded by Judge Johnson, that the Executive Director's suggestion of adding a new fifth sentence to ORCP 68 C(2), covering waiver and leaving the first sentence of

the subsection as it is, be adopted by the Council. Henry Kantor suggested that the language proposed by the Executive Director be modified by separating it into two sentences, with a period after "Rule 21" and the word "but" eliminated. This suggestion was accepted by the maker and seconder of the motion. The motion passed unanimously.

It was suggested that the Executive Director modify the staff comment to make it clear that the only waiver involved was as to the form of allegation, and no objection to the substantive validity of the claim to recover fees was waived by failure to raise the objection before the cost bill was filed. The Executive Director indicated that he would do so. Henry Kantor also suggested that the word "substantially" was grammatically incorrect in the fourth sentence of the subsection. The Executive Director indicated that he would submit a draft of the subsection eliminating it.

Agenda Item No. 10: Amendment of ORCP 71 and statute relating to motions to correct and vacate filed during pendency of appeal (Merrill memorandum and Thorp memorandum). The Executive Director stated that he had been asked to draft a statute relating to possible authority of the trial court to pass on a Rule 71 motion during an appeal and that this also involved changes to ORCP 71 A and B. These proposals were incorporated in his memorandum. Larry Thorp had suggested some changes to these proposals in his memorandum. Larry Thorp asked that the matter be tabled until the next meeting of the Council to allow him more time to consider the amendments. The Executive Director also stated that he wished to obtain a reaction from the State Court Administrator's Office.

Agenda item No. 11: Procedure for supplementary judgment (Larry Thorp). Larry Thorp reported that he was still working with the Executive director to develop a suggested procedure and would report on the matter at the next meeting.

Agenda Item No. 12: Procedure for compelling satisfaction of judgment (Judge Liepe). Judge Liepe reported that he had met with the Executive Director and it appeared that a definite problem existed with the procedure for compelling satisfaction of judgment. He stated that they were still working on the matter and would report further at the next meeting.

Agenda Item No. 13: Problems with ORCP 1-10 (Merrill memorandum). The Executive Director pointed out that ORCP 4 E is one of the most complex parts of Rule 4, but it still does not cover all contractual situations that could provide a basis for jurisdiction. After discussion, the Executive Director was asked to draft additional language which would clarify the rule. Regarding ORCP 4 K(1), the Executive Director was asked to clarify the comment for that rule.

NEW BUSINESS

Judge Liepe pointed out that when the legislature added the requirement in ORCP 7 D (4)(a), that a copy of a summons and complaint in a motor vehicle case be sent to the defendant's insurance carrier, they did not make clear whether the summons and complaint could be sent by ordinary mail or should be sent in compliance with ORCP 4 D(2)(d), which requires registered or certified mail and a return receipt. The Executive Director was asked to draft a cross-reference for insertion in ORCP 7 D (4)(a) which would make it clear that the insurance company should be served in compliance with ORCP 7 D(2)(d).

The Executive Director distributed another letter from Janice Stewart of the OSB Procedure & Practice Committee regarding ORCP 10 A. The Committee suggested that ORCP 10A be amended by adding "Subject to ORS 174.125" at the beginning of the second sentence of ORCP 10 A. The Executive Director was asked to draft two versions of ORCP 10 A, one of which would include the language of ORS 174.125 and the other version would cross-reference the statute only.

The Executive Director distributed a letter from Harrison Latto of Schwab, Hilton & Howard raising a question with regard to 24 A. It was suggested that the present Oregon rule is ambiguous as it is not clear if it applies only to the original complaint or whether it also applies to crossclaims, counterclaims, and impleaders which join new parties. The Council asked that the matter be placed upon the agenda for the next meeting.

The next meeting of the Council will be held on Saturday, June 25, at the Woodstone Inn in Bend, Oregon, commencing at 9:30 a.m.

The meeting adjourned at 12:03 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

May 11, 1988

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

FROM: Fred Merrill, Executive Director

RE: Miscellaneous matters from meeting of April 30, 1988

1. The Council directed me to prepare a suggested Staff Comment for the amendment to ORCP 59 C(6). I suggest the following:

1988 STAFF COMMENT

When the ORCP were originally promulgated, trial judges had no authority to allow a jury to separate after they had retired to begin their deliberation. The 1981 Legislature added 59 C(6) which allowed the trial judge to permit the jury to separate for the evening after deliberation had begun. The Council has now added authority for the trial judge to permit separation for the noon recess. The authority to permit separation is still limited to noon and evening recesses only, and then only if the trial court can find affirmatively that separation will not adversely affect the deliberation process. The Council was concerned that this discretion to allow separation for the noon recess be exercised carefully. Under some circumstances, the noon recess presents some serious problems of unavoidable and undesirable contact between jurors and other trial participants, unless the jury is kept together and segregated.

2. The Council asked that a possible change to ORCP 10 and 80 F be presented. The following is suggested.

NEXT TO LAST SENTENCE OF 10 A:

"When the period of time prescribed or allowed **(without regard to section C of this rule)** is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded.

ORCP 80 F(3)

Form and service of notices. Any notice required by this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which

will involve expense or loss) shall be [addressed to] **served upon** the person to be notified, or such person's attorney, [at their post office address, and deposited in the United States Post Office, with postage thereon prepaid] **as provided in Rule 9 B,** at least five days (10 days for notices under section G of this rule) before the hearing on any of the matters described above described[; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section G of this rule) before such hearing]**, unless a different period is fixed by order of the court**. Proof of such service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.

The notices covered are presumably primarily those described in sections 80 E, F, and G. In many cases the persons served are non-parties, whereas 9 B makes reference to service on parties only. Nonetheless, the service in 9 B is more flexible than that described in existing 80 F(3), and it seems desirable to have all post-summons services under the rules tie into Rule 9. Notice that we have also added authority for the court to vary the five-day time period which is not explicit in the present rule. This leads to a question of the need for the parenthetical clause in the first sentence of 80 F(3) referring to sales of perishable property. Does this mean no notice is required for this type of sale at all? If so, we should say that. Or, does it mean the court may vary the time limit in an emergency situation. If so, that would be picked up under the general court authority to vary the time limit.

3. The Council asked for a draft of ORCP 68 C(2) that included a waiver rule for lack of specificity in pleading the basis for attorney fees. I suggest the following:

C(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. **The opposing party may make a motion to strike the allegation or to make the allegation more definite and**

certain as provided in Rule 21, but any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fees is asserted as provided in this subsection.

STAFF COMMENT - 1988

The Council feels that in several cases the requirement in ORCP 68 C(2) that a party plead the statutory basis for attorney fees claimed has been too strictly interpreted by the appellate courts. They felt that it was unfair that an opposing party, who was actually aware of the basis for the claimed fees, or who was aware of the failure to plead such basis specifically, could still wait until the cost bill was filed to assert that such fees could not be recovered. The first clause clarifies the original intent of the Council that all claims for attorney fees be subject to pretrial test for legal sufficiency by motion. This would surely be true under the prior rule for a pleading, but there might be some question whether a motion to strike or make more definite and certain could be used against an allegation of right to attorney fees contained in a motion. Note that the availability of these motions is subject to the waiver and preclusion rules in Rule 21 F and G. The last part of the amendment is totally new and would change the result in cases such as Dept. of Human Resources v. Strasser, 83 Or App 363, 732 P2d 38, and AFSD v Fulop, 72 Or App 424, 695 P2d 979, rev'd on other grounds, 300 Or 39, 706 P2d 921 (1985).

Judge McConville has submitted a different proposal which is attached, together with his explanatory letter. The Council can choose how it wishes to proceed at the next meeting.

4. You asked for suggestions relating to a possible procedure for supplementary judgment. This will be covered in a separate memorandum.

5. You asked for a draft of a statute relating to possible authority of the trial court to act on a Rule 71 motion during the pendency appeal. On reflection this makes a lot of sense, rather than giving authority to the appellate court to pass on the Rule 71 motion. The trial court would be far more familiar with the entire case and have a better sense of the validity of the grounds for the motion. In any case, having the trial court rule on the matter initially, subject to review by the appellate court, is more consistent with the role of the two courts.

We could amend ORS 19.033 (copy attached) by adding the

following new sections:

> (6) If the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, and a motion to vacate judgment is filed in the trial court under ORCP 71 B (1), the Supreme Court or the Court of Appeals may stay the appeal and enter an order directing the trial court to rule upon the motion to vacate and the trial court shall have jurisdiction to rule upon the motion to vacate the judgment. The trial court file shall be transmitted to the trial court with the order directing the trial court to rule. The trial court shall notify the appellate court of its ruling on the motion. If the trial court vacates the judgment, the appeal shall be dismissed. If the trial court refuses to vacate a judgment, the trial court shall transmit the trial court file back to the appellate court, and the appellate court shall terminate the stay and proceed with the appeal from the judgment. The order of the trial court refusing to vacate the judgment may be appealed to the appellate court which has jurisdiction over the appeal from that judgment and which directed the trial court to rule on the motion to vacate.
>
> (7) If the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, and a motion to correct judgment is filed in the trial court under ORCP 71 A, the Supreme Court or the Court of Appeals may stay the appeal and enter an order directing the trial court to rule upon the motion to correct and the trial court shall have jurisdiction to rule upon the motion to correct the judgment. The trial court file shall be transmitted to the trial court with the order directing the trial court to rule. The trial court shall notify the appellate court of its ruling upon the motion. After the trial court rules on the motion to correct judgment, the trial court shall transmit the trial court file back to the appellate court, and the appellate court shall terminate the stay and proceed with the appeal from the judgment. If the trial court corrects the judgment, the appeal shall proceed as from the corrected judgment, unless the order correcting judgment is reversed or modified on appeal. The trial court ruling on the motion to correct judgment may be appealed to the appellate court which has jurisdiction over the appeal from that judgment and which directed the trial court to rule on the motion to correct.

The necessary statute turns out to be a bit complicated but it should allow the appellate court discretion to either proceed with the appeal, irrespective of the filing of the motion, or to

direct the trial court to rule. Presumably this would turn on the relationship between the subject of the appeal and the motion, and the appellate court assessment of the most time saving way to dispose of the matter. It also would avoid the necessity of further appellate consideration of a judgment that has been vacated and presumably would allow the appellate court to dismiss an appeal when the correction of the judgment obviates the need for appeal. The appeal on the trial court ruling on the motion to correct or vacate, back to the appellate court where the matter originated, would allow the appellate court to consider both the vacation and original appeal together and proceed from there according to what it decides is appropriate.

For this scheme to work, leave of appellate court is not needed, but notice of the filing of the motion to correct or vacate should be given to the appellate court. I suggest we amend Rule 71 A and B(1) as follows:

> A. **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared. [During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.] **A motion for correction of judgment may be filed during the pendency of an appeal therefrom, but no relief may be granted by the trial court during the pendency of the appeal, unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion for correction of judgment, filed during the pendency of an appeal, shall be filed in the appellate court having jurisdiction over the appeal.**
>
> B.(2) **When appeal pending.** [With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a] A motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court during the pendency of an appeal[.], **unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion to vacate under this section, filed during the pendency of an appeal, shall be filed with the appellate court having jurisdiction over the appeal.** [Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.]

If the statute did not pass, the rule as amended still makes

sense. It lets the appellate court know what is happening and makes it clear that the trial court has no jurisdiction to act during the pendency of the appeal. Without the statute, however, there probably would be no authority for the appellate court to direct the trial court to rule before the appeal is over. I took a quick look at the Appellate Rules of Procedure and saw nothing that would have to be changed. I will look more carefully before the meeting. If the Council does decide that it wants to proceed with this, we should send a copy to the State Court administrator, the Court of Appeals and the Supreme Court for comment.

6. I am consulting with Judge Liepe regarding compelling satisfaction of judgment.

7. A separate memorandum relating to court interpretation of Rules 1-10, and problems suggested with those rules, is attached.

Enc.

19.033 Jurisdictional effect of filing notice; jurisdictional requirements; relief from nonjurisdictional errors; trial court jurisdiction to enter appealable judgment; end of appellate court jurisdiction. (1) When the notice of appeal has been served and filed as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, pursuant to rules of the court, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law and shall retain jurisdiction for the purpose of allowance and taxation of attorney fees, costs and disbursements or expenses pursuant to rule or statute. If the trial court allows and taxes attorney fees, costs and disbursements or expenses after the notice of appeal has been served and filed, any necessary modification of the appeal shall be pursuant to rules of the appellate court.

(2) The following requirements of ORS 19.023, 19.026 and 19.029 are jurisdictional and may not be waived or extended:

(a) Service of the notice of appeal on all parties identified in the notice of appeal as adverse parties or, if the notice of appeal does not identify adverse parties, on all parties who have appeared in the action, suit or proceeding, as provided in ORS 19.023 (2)(a), within the time limits prescribed by ORS 19.026.

(b) Filing of the original of the notice of appeal with the Court of Appeals as provided in ORS 19.023 (3), within the time limits prescribed by ORS 19.026.

(3) After the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, the omission of a party to perform any of the acts required in connection with an appeal, or to perform such acts within the time required, shall be cause for dismissal of the appeal. In the event of such omission, the court, on motion of a party or on its own motion may dismiss the appeal. An appeal dismissed on a party's motion or on the court's own motion may be reinstated upon showing of good cause.

(4) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction, with leave of the appellate court, to enter an appealable judgment if the appellate court determines that:

(a) At the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment; and

(b) The judgment from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under subsection (1) of this section, or the trial court had not yet entered an appealable judgment.

(5) Jurisdiction of the appellate court over a cause ends when a copy of the appellate judgment is mailed by the State Court Administrator to the court from which the appeal was taken pursuant to ORS 19.190, except that the appellate court may recall the appellate judgment as justice may require. After jurisdiction of the appellate court ends, all orders which may be necessary to carry the appellate judgment into effect shall be made by the court from which the appeal was taken.

M E M O R A N D U M

May 12, 1988

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

FROM: Fred Merrill, Executive Director

RE: **REVIEW OF ORCP 1 THROUGH 10**

Attached is a summary of cases relating to ORCP 1-10. Most of the problems in these rules appear in ORCP 4. There are several problems that appear to merit some consideration by the Council:

ORCP 4 E - Application to purchasing goods shipped from the state and to guarantors. ORCP 4 E is one of most complex parts of Rule 4, but it still does not cover all contractual situations that could provide a basis for jurisdiction. The language of the rule does not cover situations where: (a) the defendant seller actually sends goods from the state, or (b) defendant buyer actually receives goods in the state. On the other hand, it includes two situations of doubtful constitutionality: (a) where a defendant's only contact with the state is to receive goods shipped from the state; and (2) where the defendant's only contact with the state is to guarantee performance of a contract by a person who is subject to jurisdiction. This is explained in more detail in Sec. 1.11 of Merrill, Jurisdiction and Summons in Oregon, a copy of which is attached. The problem is partially the result of an apparent drafting error in the Wisconsin statute which was copied into the Oregon Rule. See discussion in FN 233 of Merrill, Jurisdiction and Summons in Oregon, a copy of which is attached. The Council should consider whether it wants ORCP 4 E redrafted in light of this.

ORCP 4 K(1) - Dissolution of marriage where plaintiff domiciled in Oregon. The existing ORCP 4 K(1) seems to allow a suit to dissolve a marriage by a person who has just established domicile in Oregon. ORS 107.075 requires six months' domicile for most dissolution proceedings. The statute limits the subject matter of the courts. It seems misleading to have the rule providing personal jurisdiction over a defendant in cases where the Oregon Courts have no subject matter jurisdiction. Should the rule conform to the statute?

Enclosures

ORCP IN THE COURTS--RULE 1

ORCP 1 A does not precisely state the extent of application of rules in courts other than the circuit and district courts. It also fails to clearly define what is a "civil action or special proceeding". There has been relatively extensive consideration of these questions by the appellate courts.

ORCP 1 A states that the ORCP apply to civil proceedings in circuit and district courts and also apply to civil proceedings in other state courts, if there is some other rule or statute making them applicable. The ORCP are not applicable in original jurisdiction cases before the Supreme Court. State ex. rel. KOINTV v. O. 300 Or. 392, 711 P.2d 966 (1985). The rules do not, by virtue of ORCP 1A, apply to cases before the tax court. Multistate Tax Com'n v. Dow Chemical Co. 295 or 831, 671 P.2d 108 (1983). The Tax Court, however, has itself adopted many of the ORCP provisions as its own rules, and seeks wherever possible to conform such rules to changes in the ORCP. See Brenner v. Dept. of Rev. 9 OTR 200, 202-203, (1982).

Even in circuit and district courts, the ORCP do not apply to civil cases where some other statute or rule makes another procedure applicable. In State ex. rel. Adult and Family Services Div. V. Fulop 300 Or. 39, 706 P.2d 921 (1985) the Supreme Court held that, while filiation proceedings in circuit court are civil proceedings within the meaning of ORCP 1 A, the ORCP did not apply to such proceedings before 1983 because of the language of ORS 109.135(1). The legislature, however, the amended ORS 109.135 in 1983 to make the ORCP applicable in filiation proceedings.

The ORCP are also not applicable in small claims proceedings in district courts, and ORCP 7 does not govern service of summons in such proceedings. Michel v. Uetz 87 Or. App. 452, ,742 P.2d 698, (1987).

Without citing ORCP 1 A the Oregon Court of Appeals has held that Habeas corpus proceedings are civil proceedings and the ORCP apply. Pitt v Sunderland 56 Or. App. 751, 752, 642 P.2d 703, (1981).

The Oregon Court of Appeals has cited ORCP 1 B in two cases. In Harris v Erickson 48 Or. App. 655, 617 P.2d 685 (1980), the Court relied upon the stated purpose of the rules, to secure a just determination of litigation, as a basis for an implicit requirement of a reasonable opportunity to secure and present material in opposition to a motion for summary judgment in ORCP 47. In Parkhust v. Faessler 62 Or. App. 539, 661 P.2d 571 (1983), the Court stated that the general language of ORCP 1 B could not be used to override explicit provisions in 68 C(2) relating to the procedure for claiming attorney fees.

In North Pacific S. S. Co. v Guarisco 293 Or. 341, 647 P.2d 920 (1982) the Court said that, under ORCP 1 C, the new rules did not apply to a case which was on appeal when they went into effect. In Safeco Insurance Co. of America v Tualatin Development Co. 50 Or. App. 521, 524-528, 633 P.2d 1112, 1113-16 (1981) the Court of Appeals held that a procedural waiver of a defense, which took place before the ORCP went into effect, could not be avoided because of a change in the waiver rule contained in ORCP 21 G(2). The Court said the rules: "...do not apply to matters previously ruled upon or the legal consequences of pleading under the prior rules." 50 Or. App. at 521, 632 P.2d at 1115. See also State ex. rel. Adult and Family Services Div. v. Fulop 300 Or. 39, 445-46, 706 P.2d 921 (1985) where the Supreme Court held the ORCP 68 procedure for asserting a right to attorney fees in an answer did not apply to an answer filed in a filiation proceeding before the rules became applicable to such proceedings.

Without specific citation to ORCP 1 C, the Court of Appeals has held that the relation back rule for an amended complaint, specified by ORCP 23 C, did not apply to an amended complaint which had been filed before the effective date of the ORCP. Wood Panel Structures v. Grangaard 55 Or. App. 294, 198 637 P.2d 1320, 1322 (1981).

For more detailed discussion, See Merrill, The Oregon Rules of Civil Procedure--History and Background, Basic Application, and the "Merger" of Law and Equity 65 OLR 527, 553-572 (1986).

ORCP IN THE COURTS--RULE 2

ORCP 2 makes the same procedures applicable to all cases whether such cases were historically cognizable on law or equity side of the Oregon court. Therefore, the procedure and time limits for a motion for new trial in ORCP 64 apply to all cases and there is no longer a separate "motion to reconsider" in cases seeking an equitable remedy. Schmidling v. Dove 65 Or. App. 1, 670 P.2d 166 (1983). Separate procedures for assessing costs and disbursements in law and equity cases also have been eliminated and ORCP 68 controls in all cases Rogerson v. Baker 56 Or. App. 748, 642 P.2d 1216 (1982) and Albright v Medoff 54 Or. App. 143, 634 P.2d 479 (1981)

The merger accomplished by ORCP is procedural only. The substantive rules of law and equity are not changed. Thus, although a uniform procedure is followed for assessing costs and disbursements in all cases, the right to recover costs and disbursements is substantive and remains subject to prior distinctions based upon the legal or equitable nature of a case. Hancock v Suzanne Properties, Inc. 63 Or. App. 809, 666 P.2d 857 (1983). ORCP 2 does not make "unclean hands" a defense to a legal claim. McKinley v. Weidner 73 Or. App. 396, 698 P.2d 983 (1985)

ORCP 2 does not and could not change the right to jury trial. Rexnord, Inc. v. Ferris 55 Or. App. 127, 637 P.2d 619 (1981). Legislative amendments to conform statutory language to the usage in ORCP 2 also do not change the right to jury trial. Changing a requirement for proof of facts in ORS 113.044(4) from as in a "suit in equity" to as in "an action tried without a jury" did not create a right to jury trial in will contests. Rantru v. Unger 73 Or. App. 680, 700 P.2d 272 (1985) and Sanders v. U.S. National Bank 71 Or. App. 674, 694 P.2d 548 (1985). ORCP 2 does not eliminate the necessity of asserting a right to jury trial if one is available. Rexnord, Inc. v Ferris 294 Or. 392, 657 P.2d 673 (1983).

ORCP 2 does not and could not change the scope of review in appellate courts. Will contests are still subject to de novo review on appeal. Sanders v. U.S. National Bank 71 Or App. 674, 694 P.2d 548 (1985). A claim for restitution is legal and subject to factual review under a substantive evidence standard. Cobra Bldg. & Development, Inc. v. City of Salem 59 Or. App. 441, 651 P.2d 150 (1982). A claim for recovery of insurance payments also remains legal for purposes of appellate review and the assertion of equitable defenses does not change the nature of the original claim. Ben Rybke Co. v. Royal Globe Ins. Co. 293 Or. 513, 651 P.2d 138 (1982).

The procedural merger of law and equity may, however, have some effect on scope of appellate review. Prior to the ORCP, in cases involving lien foreclosures where there were additional

claims of a legal nature, if the lien foreclosure was disallowed a failure to move to transfer from the equity to the law side of the court was a was a waiver of objection to equitable jurisdiction over the legal claims. The Court of Appeals has held that, after the adoption of ORCP 2, a motion to transfer from the equitable to the legal side of the court no longer makes sense and failure to so move waives nothing. Right to jury trial must still be preserved by requesting a jury trial when the lien foreclosure is disallowed, but all legal claims which have joined with the foreclosure claim are heard in law and reviewed as such on appeal. Dale's Sand & Gravel Co, Inc. v. Westwood Const. 62 Or. App. 570, 661 P.2d 1378 (1983).

ORCP 2 and ORS 174.590 abolish all procedural differences between legal and equitable cases, whether or not the procedures are covered by the ORCP. In Nelson v Hughes 46 Or. App. 353, 611 P. 2d 688 (1980), the Court of Appeals said that the merger had eliminated the difference between law and equity cases in the allocation of the burden of proving knowledge of a prior unrecorded deed. On review, however, the Supreme Court said that determination of that question was not necessary to resolve the appeal, and reserved decision on the question. Nelson v. Hughes 290 Or. 653, 625 P.2d 643 (1981). It is therefore unclear whether the allocation of the burden of proof is procedural for purposes of the merger of law and equity, and if it is, whether the prior law or equity procedure is now the correct procedure for all cases.

For more detailed discussion, See Merrill, The Oregon Rules of Civil Proceure--History and Background, Basic Application, and the Merger of Law and Equity 65 OLR 527, 579-588 (1986).

A case is commenced, for purposes of application of the doctrine of liz pendens, when it is filed, not when the defendant is served with summons. Fremont Indemnity Company v. Corbett 66 Or. App. 668, 671-673, 675 P.2d 1097 (1984).

ORCP IN THE COURTS-RULE 4

ORCP 4 has been the subject of extensive interpretation by the appellate courts. This probably reflects a combination of the complexity of the rule and the importance of the question involved. In one case, the ORCP 4 E language relating to jurisdiction over guarantors, discussed below, the rule was erroneously drafted.

There has been some judicial disagreement relating to the general method of interpretation of ORCP 4. In several cases the Court of Appeals suggested that the specific language in ORCP 4 A through K should be ignored and the only question considered be whether the exercise of jurisidiction fell within constitutional limits under ORCP 4 L. e.g. Resorts Marketing, Inc. v Zuckerman 52 Or. App. 589, 591-592, 628 P.2d 771 (1982). The Supreme Court, however, disagreed and said the specific provisions of the rule should be considered first, and only if the situation did not fit under those provisions should the the court look to ORCP 4 L, the catchall provision. State ex rel Hydraulic Servocontrols Corp v. Dale 294 Or. 381, 384-385, 657 P.2d 211, 212-213 (1982). See First intyerstate Bank v. Tex-Ark Farms 71 Or. App. 427, 434, 692 P.2d 678, 683 (1984).

The Oregon courts have refined the meaning of the language "substantial and not isolated activities within this state" in ORCP 4 A(4). In State ex. rel. Michelin v. Wells 294 Or. 296, 299-300, 647 P.2d 920 (1982), the Oregon Supreme Court held that the language did not cover a French tire company, which although it distributed a substantial number of tires Oregon, did so only through independent middlemen and apparently distributed a substantial number of tires in each of the United States. In Bachman v. Medical Engineering Corp. 81 Or. App. 85, 724 P.2d 858 (1986), the Oregon Court of Appeals held that a Vancouver, Washington Hospital, with about 3% of its patents from Oregon and which did some advertising and solicitation in Oregon, and two Washington doctors, who had a few Oregon patients and were listed in the Portland, Oregon yellow pages, were not subject to jurisdiction in Oregon under ORCP 4 A(4) for alleged malpractice that occurred in Washington. The court, however, did find ORCP 4 A(4) jurisdiction in Oregon over a foreign medical engineering company involved in the case because the company had advertised promoted sales of goods in Oregon through its agents and sold a large number of its products in the state. The opinion does not indicate what percentage of the company's products actually were sold in Oregon or the extent of its activities in other states.

ORCP 4 D does not apply when an Oregon resident bring a products liability case based upon personal injuries which occurred outside the state. State ex. re. Michelin v. Wells 294 Or. 296, 657 P.2d 207 (1982). The Court also said that if the product causing the foreign injury also was not sold or delivered in Oregon, exercise of jurisdiction over the seller would not be consitutional and no jurisdiction is available under ORCP 4 L.

If a product, however, was sold in Oregon, jurisdiction could be exercised in the state under ORCP 4 L, even though the injuries occurred outside the state. State ex. rel. Hydraulic Servocontrols Corp v. Dale 294 Or. 381, 657 P.2d 211 (1982).

An injured longshoreman had jurisdiction in an Oregon Federal District Court, under ORCP 4 D or 4 L, to maintain an action against a West German Terminal operator who had allegely improperly packed a containor in Germany which was sent to Oregon and caused the plaintiff's injuries. The defendant knew the containor was being sent to Oregon and had also shipped 94 other containors to Oregon during the preceeding two years. Raffaele v. Comagnie Generale Maritime 707 F.2d 395, 396-399 (9th Cir. 1983). The Ninth Circuit has also held that a foreign manufacturer of a wire-rope splice for an ocean going ship, that gave way in an Oregon port and caused injury, was subject to suit in an oregon federal court under ORCP 4 because the defendant would should be aware that sale of such a product to an ocean carrier would result in use in a foreign port. Hedrick v Daiko Shoji Co., Ltd., Osaka 715 P.2d 1355, 1357-1359 (9th Cir. 1983)

An injury to person or property does not occur " within this state" and ORCP 4 D does not apply, just because economic impact is felt within the state from an injury occurring outside the state. In North Pacific S. S. Co. v. Guarisco 293 Or. 341 ,647 P.2d 920 (1982), the Court said that a defendant's alleged fraudulent transfer of assets outside the state, to avoid collection of a foreign judgement, did not cause "injury within" Oregon, even though the plaintiff corporation was primarily owned by Oregon residents who suffered economic loss in the state. In Bachman v. Medical Engineering Corp. 81 Or. App. 85, 724 P.2d 858 (1986) the Oregon Court of Appeals rejected an argument that a plaintiff in a medical malpractice case, who had been physically injured outside the state and then moved to Oregon and suffered pain within the state, fell within ORCP 4 D. The Court said that due process did not contemplate such a "portable tort".

An Oregon travel agency, which performed services in Oregon, consisting of arranging rental of a condominium in Mexico, at the request of a foreign defendant, could assert jurisdiction over such defendant in Oregon. Resorts Marketing v. Zuckerman 52 Or. App. 589, 592-593, 628 P.2d 770 (1981). The Court of Appeals upheld jurisdiction by reliance upon ORCP 4 L, rather than ORCP 4 E(1), which actually appears to apply. In Regal Manufacturing v. Louisiana Glass, Inc. 83 Or. App. 463, 465-467, 731 P.2d 1066 (1987), however, the Court specifically relied upon ORCP 4 E(1) and (2) to find jurisdiction over a nonresident purchaser of a custom skylight system, who had caused an Oregon manufacturer to perform extensive design services within the state.

A promise to deliver "goods, documents of title, or other things of value" within this state under ORCP 4 E(3), does not include a promise to pay money to someone in the state. State ex. re. Jones v. Crookham 296 Or. 735, 741, 681 P.2d 103, 107

(1984).

Even though ORCP 4 E(4) does not cover executory contracts to send goods from the state, and only refers to cases where the goods are actually sent, jurisdiction over a foreign purchaser who actually receives goods exists under ORCP 4 L, provided the purchaser does something more than simply agree to receive goods to be shipped from the state. Regal Manufacturing v. Louisiana Glass, Inc. 83 Or. App. 463, 467-468, 731 P.2d 1066 (1987). The Court found jurisdiction because the contact involved purchase of custom made goods. This strongly suggests that, if a defendant's only contact with the state is to receive goods actually shipped from the state, the defendant is not subject to jurisdiction in Oregon for an action to recover payment for the goods, despite the explicit language of ORCP 4 D(4) indicating that there would be jurisdiction. **Compare** Neptune Microfloc, Inc. V. First Florida Utilities, 261 Or. 494, 495 P.2d 263 (1972) and State ex. rel. White Lumber Sales, Inc. v Sulmonetti 252 Or 121, 448 P.2d 571 (1972). **See also** Morrow Crane Co. v. Biltmore Construction 68 Or. App 292, 295-296, 680 P.2d 1014, 1015-1016 (1984),

A defendant whose only contact with Oregon is that he sent goods into the state for delivery to an Oregon purchaser is subject to jurisdiction in Oregon under ORCP 4 E(5) in an action to recover damages for misrepresenting the nature of the goods sent. Ron Tonkin Gran Turismo v. Carruth 71 Or. App. 81, 691 P.2d 127 (1984). The local plaintiff had contacted the defendant as a result of national advertising by the defendant.

The Oregon Supreme Court has said that the language in ORCP 4 E, which would make a guarantor subject to jurisdiction in Oregon in every case where the principal obligor would be subject to jurisdiction, exceeds constitutional limits. In State ex. re. Sweere v. Crookham 289 Or. 3, 609 P.2d 361 (1980), the court held that a guarantor who had no contacts with Oregon other than providing a guarantee of performance by a corporation which could have been sued on its debt in the state was not subject to jurisdiction. The case was tried before the effective date of ORCP 4 E, but the court commented on the guarantee language in the new rule. On the other hand, if the guarantee causes economic consequences in Oregon, or the defendant had additional contacts with the state, jurisdiction over the guarantor would be proper. Thus in Nike Inc. V. Spencer 75 Or. App. 362, 373-374, 707 P.2d 589, 596-597 (1985) and White Stage Mfg. Co. v. Wind Surfing Inc. 67 Or. App. 459, 465, 679 P.2d 312 (1984), the Court found jurisdiction proper where a defendant's guarantee had caused the plaintiff to furnish or extend credit for goods purchased in Oregon by the principal obligor. In First Interstate Bank v. Tex-Ark Farms 71 Or. App. 427, 437-439, 692 P.2d 678, 684-685 (1984), limited partners who had guaranteed loans made to the limited partnership by an Oregon bank were held subject to jurisdiction under the theory that the limited partners, acting through a general partner, were engaging in extended farming and business activity in Oregon.

Despite the language of ORCP 4 K(1), a plaintiff must be domiciled in Oregon for at least six months prior to institutions of most actions for dissolution of marriage. This is required by ORS 107.075. The statutory limit cannot be avoided under ORCP 4 L, because the statute limits subject matter jurisdiction of the Oregon Courts. Pirouzkar and Pirouzkar 51 Or. App. 519, 521, 626 P2d at 381 (1981). On the other hand, the time limits in ORCP 4 k(2), for suits to enforce spousal and child support obligations, relate to jurisdiction over defendants only. In State ex. rel. State of Oklahoma v. Griggs 51 Or. App. 275, 280-281, 625 P2d at 664 (1981) the Oregon Supreme Court held that jurisdiction in an Oklahoma court over a defendant for a child support judgment, under an Oklahoma statute that allowed jurisdiction when Oklahoma had been the state of marital domicile of the parties for only three weeks and that period occurred over three years before the action was instituted, met the constitutional due process requirement. Oregon jurisdiction in such cases is therefore available under ORCP 4L, with far less contact than that required by ORCP 4 K(2).

The time limits in ORCP 4 K(2) need not be complied with in a proceeding to modify the amount of child support awarded in an Oregon divorce case judgment. The court has continuing jurisdiction, which includes personal jurisdiction if that was present at the time of the original judgment. Carlin v. Carlin 62 Or. App. 350 (1982).

In Hazen and Henderson 74 Or. App. 322, 325-328, 702 P.2d 1143 (1985), the Oregon Court of appeals held that an nonresident was subject to jurisdiction in Oregon for a proceeding to modify a Washington divorce decree to increase his child support obligation. The child and the mother had moved to Oregon after the divorce and the father had moved to Ohio. The court distinguished a contrary holding by the United State Supreme Court in Kulko v. California 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed.2d 132 (1978) on the grounds that in Kulko the defendant wanted the case heard in New York, his present residence as well as the state of marital domicile and divorce, rather than California where his ex-wife and child resided. In Hazen the Court recognized that it was a close case, but said that Oregon had a more substantial interest in exercising jurisdiction over the case than either Washington or Ohio.

The Oregon Supreme Court has suggested that one test of the existence of a constitutional basis for jurisdiction under ORCP 4 L is whether the defendant has a contact with the state that is substantively relevant to plaintiff's cause of action, that is a fact which would be alleged as part of the claim for relief. State Ex rel Michelin v. Wells 294 Or. 296, 302-303, 657 P.2d 207,210-211 (1982). In Rice v Oriental Fireworks Co. 75 Or. App. 627, 629-630, 707 P.2d 1250, 1253 (1985) the Oregon Court of Appeals held that one visit to Oregon by a defendant. to promote his business but unconnected with plaintiff's claim, would not

provide a basis for jurisdiction because it was not substantively relevant to plaintiff's claim.

Under ORCP 4 L, sufficient minimum contacts may occur in the litigation itself. A defendant who appears and asks the Oregon Court for affirmative relief is subject to personal jurisdiction in the action. O'Connor and Lerner 70 Or. App. 658, 662-663, 690 P.2d 1095 (1984). In Pacific Protective Wear Distributing Co., Inc. v. Banks 80 Or. App. 101, 720 P.2d a1320 (1986), the court said that a defendant who filed a motion to vacate a judgment for excusable neglect and fraud, and at the same time claimed the judgement should be vacated because of lack of jurisdiction over him, is submitting to the jurisdiction of the court.

A controlling shareholder of a closely held corporation, being sued personally under and "alter ego" theory, on a product liability claim based upon products distributed by the corporation, could be personally subject to jurisdiction based upon the corporations action's in Oregon, presumably under ORCP 4 L. Rice v Oriental Fireworks Co. 75 Or. App. 627, 707 P.2d 1250 (1985). See also Cascade Steel, Inc. v. Itoh & Co. (America) 499 F. Supp 829 (D. Or. 1980).

In North Pacific S.S. Co. v. Guarisco 293 Or. 341, 349-350, 647 P.2d 920 (1982), under the statutory predecessor of ORCP 4 N, the Court held that a claim based upon fraud, which was proper in an Oregon Court because the plaintiff alleged that some of defendant's fraudulent statements had been made in Oregon, could not be joined with a creditors bill to set aside conveyance of property when the defendant was not properly subject to jurisdiction in Oregon on the creditors bill claim.

For more detailed discussion, See Merrill, Jurisdiction and Summons in Oregon, 1-60, (Butterworth 1986).

The Oregon Supreme Court has held that absolute compliance with the specific methods of service of summons specified in ORCP 7 is not required. Restrictive interpretations of the rule by the Oregon Court of Appeals in Adkins v Watrous 66 Or. App 252, 254, 673 P.2d 572, 573 (1983) and Lake Oswego Review v Steinkamp 67 Or. App. 197, 203, 677 P.2d 751, 754 (1984) were reversed by the Supreme Court in Lake Oswego Review v. Steinkamp 298 Or. 607, 695 P.2d 565 (1985). In the Stienkamp case the Supreme Court upheld the validity of service by mail upon an individual, which is not a method specifically described in the rule. The Court said that the specific methods of service described in ORCP 7 are not mandatory or exclusive, but only presumptively adequate notice. Under ORCP 7D and 7G, service by any other method reasonably calculated to give notice to the defendant, particularly where the defendant actually receives the summons, is adequate service. In Jordan v. Wiser 302, Or. 50, 726 P.2d 365 (1956), however, the Supreme Court held that mere receipt of the summons does not make service adequate under ORCP 7, if it was served by the plaintiff in a manner not reasonably calculated to give notice. In Jordan a summons directed to a married and adult defendant was left at the defendant's mother's home in Oregon, rather than at the defendant's residence 200 miles away in Washington. The fact that the mother notified the defendant of the service and attempted to deliver the summons to him, did not create a valid service. In an earlier case, the Court of Appeals held that if substituted service was accomplished at defendants dwelling house or usual place of abode and the defendant actually received the papers, the failure to make the required supplementary mailing did not destroy the validity of the service. Korgan v Gantenbein 74 Or. App. 154, 158-159, 702 P.2d 427, (1985),

For effective personal service under ORCP 7 d(2)(a), actual acceptance of the papers by the defendant is not required. If a plaintiff physically locates a defendant and attempts service, and the defendant refuses to accept the papers, a valid service has been completed. Business and Professional Adjustment Company v. Baker 62 Or. App. 237, 240-241, 659 P.2d 1025 (1983)

The partnership service provisions in ORCP 7 D(3)(e) cover proper service upon the partnership, not the individual partners. One member of a partnership cannot accept service of summons or enter an appearance on behalf of another partner and subject the other partner to jurisdiction of the court sufficient to enter a judgment binding the absent partners individual property. Choi v. Hurley 86 Or. App. 425, 739 P.2d 1056 (1987).

The Oregon Court of Appeals has held that the form of service specified in ORCP 7 D(4) for motor vehicle cases meets the consitutional due precess standard of reasonable notice. Harp v Loux 54 Or. App. 840, 850. 636P.2d 976, 980 (1981). That

court has also held that before entry of any default against a defendant who has not received or rejected the letter containing the summons and complaint under ORCP 7 D(4), the plaintiff must show that the defendant could not be found at all of the addresses described in the rule. Chisum v Bingamon 46 Or. App. 1, 7, 610 P.2d 297, 300 (1980).

A showing of due diligence to find and serve a defendant in the state is no longer required under ORCP 7 D(6) as a prerequisite to service by publication or other method not specified in the ORCP. It is, however, necessary that the person seeking a court order authorizing a method of service not specified in the rule, submit an affidavit showing that service could not be accomplished by any method specified in rules 7. In re Marriage of Dhulst 61 Or. App. 383, 387-388, 657 P.2d 231,233 (1983). Under this holding, the trial court order authorizing service by a method not specified in ORCP 7 does not conclusively establish that the service is valid.

The fact that ORCP 7E eliminates the specific reference to service of summons by the sheriff, which existed in the prior ORS sections governing service, does not eliminate the duty of a sheriff to serve summons if requested. Hamilton and Hamilton 66 Or. App. 936, 938-940, 676 O.2d 341, (1984).

For a more detailed discussion, See Merrill, Jurisdiction and Summons in Oregon, 137-177, (Butterworth 1986)

ORCP IN THE COURTS--RULE 8

"Process" includes only an order or writ issued by a court or an officer thereof. A summons issued by an attorney is not process. Dower Farms v. Lake County 288 Or. 669, 682 fn.15, 607 P.2d 1361, (1980); Hamilton and Hamilton 55 Or. App. 936. 939, 676 P.2d 341, (1984).

ORCP IN THE COURTS--RULE 9

The Oregon Court of Appeals has held that strict compliance with the service methods specified in ORCP 9 is not required if adequate service is in fact accomplished. The court upheld the validity of service of a cost bill, which was left at a common message drop facility in the courthouse on which the name of a party's attorney was subscribed, when the cost bill was actually received by the attorney and the party was in no way prejudiced. Murray v. Meyer 81 Or. App. 432, 434-436, 725 P.2d 947, (1986).

In Bowers Mechanical, Inc. v. Kent Associates 63 Or. App. 414, 416-417, 664 P.2d 436, (1983), the Court of Appeals held that the next to the last sentence of ORCP 9 B applied literally to allow service of affidavits in response to ORCP 47 motion for summary judgment, by mail, up to the day before the hearing on the summary judgment motion, even though such service did not result in the party moving for summary judgment receiving the papers before the hearing. In its analysis, the Court ignored ORCP 10 C which should have increased the limit for such service by mail from one day before hearing to four days before hearing. In response to the case the 1985 Council on Court Procedures changed the time limits in rule 47.

Under the last sentence of ORCP 9 B, not only must a show cause order be personally served upon a party, but the order served must state that the purpose of the show cause hearing is to determine why the party should not be held in contempt, or the court has no authority to enter a contempt order. Yowman and Yowman 79 Or. App. 43, 46, 717 P.2d 1243, (1986).

1.11 Local Services or Goods — Contracts —Defects in Goods or Services

ORCP 4 E. provides jurisdiction over claims relating to contracts to provide goods and services.[206] ORCP 4 E. does not use the words "contract" or "transaction of business."[207] Instead, it refers to jurisdiction based upon providing or receiving, or promising to provide or receive, goods and services. Unfortunately, ORCP 4 E. is not a model of clear legislative drafting. A complex variety of situations are covered by this one section in a rather confusing way.

Subsections 4 E.(1) and 4 E.(2) refer to provision of services. Subsection 4 E.(1) covers a promise to provide services and 4 E.(2) refers to claims arising out of services actually provided. These subsections require that the services be provided in the state, and apply whether the provider of the services is the plaintiff (suing for payment) or the defendant (being sued for failure to perform properly).

Subsections 4 E.(3), (4) and (5) cover arrangements to furnish "goods, documents of title, or other things of value." Subsections 4 E.(4) and (5) cover situations where the claim is related to goods that were actually provided, and 4 E.(3) relates to claims arising from a promise to provide goods.

Subsection 4 E.(4) only covers claims related to goods shipped from the state, when the defendant is the buyer being sued for non-payment. Subsection 4 E.(5) only covers claims related to goods shipped into the state when the defendant is the seller, who is being sued for defective performance.

The most confusing subsection is 4 E.(3), which covers claims that "arise[s] out of a promise" by the defendant to: (a) send goods from the state; (b) deliver goods in the state; or (c) receive goods in the state. In the first two situations, the defendant is a seller being sued for failure to perform. In the last situation, the defendant is a buyer being sued for failure to perform.

The rule could lead to confusion because none of the subsections cover the situation where the defendant is:

(a) a seller who actually sends goods from the state;
(b) a buyer who actually receives the goods in the state; or
(c) a buyer who promises to receive goods outside the state.

The last situation, which is not covered by the rule, was apparently excluded because it would exceed constitutional limits.[208] The reason for excluding situations (a) and (b) from the rule is not clear.[209] Both of these situations appear to be within constitutional limits:

(a) The first situation is within constitutional limits because a defendant seller who has performed by shipping goods from the state has acted in the state, and a claim of defective performance, including a claim of defective product, arises from those local acts.[210] This would be true even where the defendant is not actually in the state, but purchases goods in the state for resale and shipment to an out-of-state buyer.[211]

(b) The second situation is within constitutional limits because a defendant buyer who has actually received goods in the state has derived the benefits of plaintiff's performance and reasonably should anticipate being responsible for payment in the courts of the state.[212] If a promise to receive the goods in the state, which is explicitly covered by 4 E.(3), is a sufficient minimum contact, the actual receipt of the goods in the state should be sufficient to satisfy constitutional limits.[213]

Most of the situations explicitly covered by section 4 E.would be within constitutional limits. Under ORCP 4 E.(1) and (2) the performance of services in the state, either by the plaintiff or the defendant, would involve actual economic impact in the state. An out-of-state defendant who causes an in-state plaintiff to perform services in the state would be subject to jurisdiction in the state.[214] The Oregon court so held in *State ex rel Academy Press, Ltd. v. Beckett*.[215] The key element is that the services are performed in the state. If the services are or will be performed outside the state, the requirements of subsections 4 E.(1) and (2) are not met.[216] A problem arises when the services are to be performed in more than one state. The courts have usually upheld jurisdiction, as long as a substantial or important part of the services were to be performed in the forum state.[217]

Where a defendant has provided services in the state and is being sued for defective performance, there is a clear case of economic impact in the state.[218] Again, though, the services must actually have been provided in the state.[219]

Under subsection 4 E.(5), the defendant seller who actually ships goods into the state is engaging in activities in the state.[220] Where there is some privity between seller and in-state buyer, a products liability case fits under section 4 E. rather than under section 4 D., and the additional factors required by section 4 D. do not apply.[221]

In the specific situations involving executory contracts for sale of goods, where the performance contemplated in the state has not taken place, jurisdiction under 4 E.(1) and (3) is nevertheless generally within constitutional limits. A defendant who promises to send goods to or from the state, or to receive goods in the state, or to perform or pay for services in the state, has knowingly

become involved with the state and should anticipate being sued there on any dispute relating to the contract.[222]

A mere promise to pay money in the state or to a state resident, where the defendant has no other contacts with the state, will not support jurisdiction. Even though ORCP 4 E.(3) refers to promises to ship "things of value" into the state, this does not include an agreement to send money.[223] If subsection 4 E.(3) were read to authorize this, it would literally always create jurisdiction in a seller's home state, and would exceed the constitutional limits discussed below.[224]

There are, however, two serious constitutional problems presented by the language used in section 4 E. First, the section allows jurisdiction based solely upon receiving shipment of goods from the state; second, the provisions relating to jurisdiction over guarantors are too broad.

Subsection 4 E.(4) provides that all claims that relate to goods shipped from this state by the plaintiff to the defendant, or on the defendant's order or direction, are within the jurisdiction of the Oregon courts. In *Neptune Microfloc, Inc. v. First Florida Utilities*,[225] an Oregon manufacturer shipped sewage treatment settling tubes to a Florida purchaser. The court held that the purchaser was not subject to jurisdiction in Oregon for an action to recover the purchase price. In an earlier case, *State ex rel White Lumber Sales, Inc. v. Sulmonetti*,[226] the plaintiff was an Oregon plywood dealer who shipped plywood to a Florida purchaser. The court there held that the plaintiff could maintain an action in Oregon to recover the purchase price. The court in *Microfloc* distinguished *White Lumber Sales* on the following grounds:

(1) In *White*, the out-of-state purchaser came to Oregon and solicited the purchaser; in *Microfloc* the Oregon seller went to Florida and solicited the sale.

(2) In *White*, the purchaser was engaged in interstate business; in *Microfloc* the purchaser was not engaged in interstate business.

(3) In *White*, the goods were specially manufactured in Oregon to fill the defendant's order; in *Microfloc* the record did not indicate that the goods had been custom-made.

All three of these factors probably would not be required in order to authorize jurisdiction. The most important is the last: A defendant who causes substantial economic impact in Oregon should be subject to jurisdiction irrespective of the nature of its business or who solicited the sale.[227] Whether initial solicitation in Oregon or engaging in general interstate activities would alone

justify jurisdiction, when coupled with shipment from the state, is less clear. In a case involving a foreign defendant who had borrowed money from an Oregon lender, *State ex rel Jones v. Crookham*,[228] the court refused to find jurisdiction based only upon the fact that the foreign defendant had initiated the transaction through the seller of the goods that were financed by the loan, and pointed out that the defendant was not generally engaged in interstate business and created no significant economic consequences in Oregon.[229]

The main point is that *Microfloc* holds that a defendant who purchases goods shipped from Oregon is not always subject to jurisdiction in Oregon for an action to recover the purchase price. ORCP 4 E.(4), however, specifically authorizes jurisdiction in all cases arising out of shipment of goods from the state. It could be argued that the *Microfloc* decision is merely an interpretation of "transacting business" under the then-existing long-arm statute. Analysis in the opinion, however, is in constitutional terms.[230]

Under the present constitutional analysis of jurisdiction used by the United States Supreme Court,[231] a person whose only contact with Oregon is purchase of goods shipped from Oregon with a promise to send payment to the state probably could not reasonably anticipate being subject to suit in Oregon. An out-of-state purchaser merely receiving goods shipped from Oregon and promising to send payment to Oregon neither acts in nor causes the sort of economic impact in Oregon ordinarily required to provide a reasonable basis for jurisdiction. Requiring out-of-state buyers to defend in the seller's home state raises the specter of a giant mail order company subjecting all of its customers to jurisdiction in the company's home state.[232]

The fact that ORCP 4 E.(4) can literally be read to cover a case of this nature may have been a drafting error in the original Wisconsin statute. The drafting notes and the exact language used are not consistent.[233] But Wisconsin and other states having language equivalent to ORCP 4 E.(4) have refused to extend jurisdiction in a situation such as *Microfloc*.[234] It is unfortunate that the problem was carried into the Oregon rule, but ORCP 4 E.(4) cannot be applied literally. In addition to the fact that the goods were shipped from the state and payment was to be sent to plaintiff in the state, the presence of some other factor is required.[235]

A variation of the same problem would be the in-state seller who, by a declaratory judgment action for a declaration of non-liability, seeks to avoid a products liability suit by an out-of-state purchaser. Again, jurisdiction over the buyer solely on the basis that the goods were shipped from the state does not seem constitutionally sufficient, despite the fact that it is literally

authorized by ORCP 4 E.(4).[236] The situation is identical to the purchase price cases. If, however, the buyer caused substantial economic consequences in the state or had other reasonable contacts with the state, jurisdiction may be proper.[237]

These cases must be distinguished from the case where an out-of-state agent has had goods shipped to an out-of-state buyer and is a codefendant in a suit brought by the buyer against the local seller. The agent's contact with the state would be shipment of goods from the state, but the agent would be sued as a seller, not as a purchaser. The situation does not literally fit within ORCP 4 E.(4) and is more properly analyzed in terms of jurisdiction over defendants who send goods from the state.[238] The important issue is not whether the defendant is the ultimate consumer, but whether the defendant is a buyer or a seller.[239]

The second constitutional problem with the language in ORCP 4 E. relates to jurisdiction over guarantors of contractual obligations. In *State ex rel Ware v. Hieber*,[240] the Oregon Supreme Court held that defendants, who were officers and majority stockholders of a Nevada corporation which was purchasing motor homes from an Oregon corporation, could be sued in Oregon upon their written guarantee of payment. The court said that where a party to a contract would be subject to jurisdiction in Oregon, a guarantor of that party's performance would also be subject to jurisdiction in Oregon.[241] Relying upon this opinion, the Council on Court Procedures added language to subsections 4 E.(1)-(4)[242] which was not in the Wisconsin statute, and which specifically provided jurisdiction over guarantors.[243]

The reference to guarantors presents some problems. In the first place, under any analysis, to have jurisdiction over the guarantors there must be jurisdiction over the principal obligor. To the extent subsection 4 E.(4) would extend jurisdiction beyond constitutional bounds in some situations involving persons purchasing goods shipped outside the state, the language in that subsection applying to guarantors also exceeds constitutional limits.[244]

In any case, jurisdiction for each party must be examined separately. In *State ex rel Sweere v. Crookham*,[245] an Oregon corporation appointed a North Dakota corporation as its distributor for territory outside Oregon. As part of the agreement, the Oregon corporation sent products to Minnesota that were purchased by the North Dakota corporation. The purchase price was not paid. Several months later the Oregon corporation's president went to Minnesota and secured a guarantee of performance from an individual who was employed by the North Dakota corporation. When the goods were not returned or paid for, the Oregon corporation sued the North

Dakota corporation and the Minnesota guarantor in Oregon to recover the purchase price. The guarantor objected to jurisdiction and the Oregon Supreme Court sustained the objection. Under *State ex rel Ware v. Hieber*,[246] the guarantor would have been subject to jurisdiction because the North Dakota corporation was subject to jurisdiction.[247] The *Sweere* court said:

> Our statement in Ware, to the effect that the contacts between the forum state and a foreign corporation may be attributed to the corporation's guarantors, must be limited to circumstances in which the guaranty plays a more integral part in causing or promoting significant economic consequences in Oregon than it did in this case. As a general proposition the statement is too broad, because it would sanction the assertion of jurisdiction by an Oregon court over a nonresident who never set foot in Oregon, and whose extra-territorial acts caused no important business consequences here. [248]

The *Sweere* court distinguished *Ware* on the ground that the guarantee in *Ware* had caused the sellers to ship the goods. The *Sweere* court also pointed out that the *Ware* guarantors were officers and majority stockholders in the corporation whose obligation was being guaranteed.[249] In the *Ware* case, the guarantee caused important economic consequences in Oregon, but this was not so in *Sweere*.[250] In any case, a guarantor who does no more than promise to pay money to an Oregon resident would not be subject to jurisdiction in Oregon resident would not be subject to jurisdiction in Oregon whether or not the party to the underlying transaction is subject to jurisdiction.[251]

1.12 Local Property — Ownership, Use, or Possession — Deficiency Judgments

ORCP 4 F. provides jurisdiction for claims arising from the presence of property in the state and differs from the Wisconsin statute. The Wisconsin statute has two sections separately covering ownership of local property and claims for deficiency judgments relating to local property.[252] The language used in ORCP 4 F. is an expanded version of the local property section of ORS 14.035c (repealed 1979), the prior Oregon long-arm statute. ORCP 4 F., however, applies to personal as well as real property and makes specific reference to deficiency judgments. The Council did not use the Wisconsin language because it was felt to be more limited than constitutionally required in some respects, and to present constitutional problems in others.[253]

233. The drafter of the Wisconsin statute specifically indicated that the language equivalent to subsections 4 E.(4) and (5) was limited to defective products cases:

> Arrangements under which either party is to deliver or receive possession of goods within the state are dealt with in sub. (5)(c). Actions arising out of defects in goods actually received in or shipped from the state by either party are the subject of subs. (5)(d) and (e).

Foster, *supra* note 206 at 70. (Emphasis added.) (Wisconsin secs. 5(d) and (e) are equivalent to ORCP 4 E.(4) and (5)). The section does not, in fact, cover claims against a seller for defective goods shipped from the state. *See* discussion at notes 210 and 211, *supra*.

Subsection 4 E.(3), which governs promissory situations, refers to a defendant seller who agrees to deliver goods to the state or to send goods from the state, and to a defendant buyer who agrees to receive goods in the state; there is no reference to a defendant buyer who has promised to receive goods outside the state. In the examples given by the drafter of the type of cases that would be covered by this section, the claim against an out-of-state buyer for goods shipped from the state is conspicuously absent:

> In summary actions arising out of isolated bargaining transactions have been regarded as supporting the exercise of personal jurisdiction in numerous situations where the transactions involved, or contemplated, some substantial contact with the forum state. Among the contacts thought sufficient are: agreements under which either party promised to perform services in the forum; agreements either to take delivery in the state of goods from the plaintiff, or to deliver goods to the plaintiff in the state; and agreements under which the plaintiff took delivery of goods f.o.b. the defendant's place of business outside the state, but under circumstances in which the defendant had reason to know the plaintiff would use or consume the goods in the forum state.

Foster, *supra* note 206 at 74.

The problem is that, despite the fact that it is supposed to deal with "defects in goods . . . shipped from the state," subsection 4 E.(4) has the out-of-state buyer, not the out-of-state seller, identified as the defendant. It is this specific language that creates the problem.

TELEPHONE
(503) 963-1008

ERIC W. VALENTINE
District Judge

District Court of Oregon
For Union County
1007 Fourth Street - La Grande, Oregon 97850

PAUL L. BOLEY LAW LIBRARY
Northwestern School of Law

April 20, 1988

Honorable Winfrid K. Liepe
District Court Judge
Lane County Courthouse
Eugene, Oregon 97401

Honorable Paul S. Lipscomb
District Court Judge
Marion County Courthouse
Salem, Oregon 97301

"Out, out, brief candle!" When it comes to third party practice, I think we have allowed the candle to burn too long. ORCP22 C (1) allows a defending party, as a third party plaintiff, to serve a complaint "as a matter of right" not later that ninety days after service of the plaintiff's summons and complaint on the defending party. That type of rule drastically dilutes the time lines set out in chapter five of the uniform trial rules. Just when a Judge thinks the case is coming to issue, the defendant can suddenly expand the basic nature of the lawsuit, as well as the time it is going to take to bring it to trial.

Recognizing that a defending party needs time to gather the facts and determine if there is in fact third party liability, I feel granting him ninety days is far too much time. I would suggest that it be halved to forty five days.

Besides, most third party complaints are "full of sound and fury, signifying nothing."

Thanks for your good work.

Sincerely yours,

Eric W. Valentine
District Judge

EWV/sc

MCEWEN, GISVOLD, RANKIN & STEWART
(FOUNDED AS CAKE & CAKE-1886)
ATTORNEYS AT LAW
1408 STANDARD PLAZA
1100 S. W. SIXTH
PORTLAND, OREGON 97204
(503) 226-7321

DOCUMENT TRANSMISSION
(503) 226-7321

DONALD W. McEWEN
DEAN P. GISVOLD
ROBERT D. RANKIN
JANICE M. STEWART
DON G. CARTER
JAMES RAY STREINZ*
ALLEN B. BUSH
SUSAN K. EGGUM
DENNIS J. HEIL
VIRGINIA MILLER BEDOR*
DAVID B. PARADIS
KAREN D. RANDOLPH
JANET M. GRAVDAL
WAYNE E. HARRIS

*ADMITTED IN OREGON AND WASHINGTON

SOUTHWEST WASHINGTON OFFICE
COMMUNITY FIRST FEDERAL BUILDING
1220 MAIN STREET
P. O. BOX 366
VANCOUVER, WASHINGTON 98660
(206) 693-6947

RALPH H. CAKE
(1891-1973)
NICHOLAS JAUREGUY
(1886-1974)
HERBERT C. HARDY
RETIRED

May 10, 1988

Mr. Raymond J. Conboy, Chair
Council on Court Procedures
Pozzi, Wilson, Atchison,
O'Leary & Conboy
910 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

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

Re: ORCP 10 A

Gentlemen:

At our meeting last Saturday, May 7, Mike Starr brought to the attention of the Procedure and Practice Committee the existence of ORS 174.125 which addresses the same concerns in our proposed revision to ORCP 10 A. Our subcommittee was rather embarrassed by not having discovered this statute earlier.

As a result of the existence of ORS 174.125, our Committee withdraws its proposed change to ORCP 10 A. However, because of the difficulty in locating ORS 174.125, our Committee requests that ORCP 10 A be amended by adding, "Subject to ORS 174.125" at the beginning of the second sentence of ORCP 10 A. Although we now our informed that the commentary to ORCP 10 A makes reference to the statute, most lawyers do not use the commentary on a regular basis. Therefore, referencing the statute in the rule itself would be helpful.

We are also uncertain why the statute regarding computation of time periods is buried in ORS Chapter 174. Therefore, I will be asking the Legislative Counsel's Office to consider changing its location.

Thank you for your attention to this matter.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lpi

cc: Mr. Michael J. Starr

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
SALEM, OREGON 97301

ROBERT B. McCONVILLE, *Judge*
Rm. 251
(503) 588-5027

May 10, 1988

Prof. Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon Law School
Eugene, OR 97402

Dear Fred:

In my letter of May 6, 1988, I suggested that Judges might employ a procedure of deferring the signing and filing of money judgments so as to avoid any requirement for the filing of a second summary of judgment to cover an award of costs and disbursements and attorney fees. However, upon review of Rule 70 B. (1), I wonder if such a procedure would be permissible. The last sentence of Rule 70 B. (1) provides, "Entry of judgment shall not be delayed for taxation of costs, disbursements, and attorney fees under Rule 68.".

Best regards.

Very truly yours,

Robert B. McConville
Circuit Court Judge

RBM/b