COUNCIL ON COURT PROCEDURES

Saturday, November 12, 1988 Meeting
9:30 a.m.

Oregon State Bar Offices
5200 SW Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Approval of minutes of meeting of October 15, 1988
2. ORCP 44 E (Larry Thorp letter of October 12, 1988)
3. State Court Administrator's Judgment Committee amendments to ORCP 69-70 (report of Executive Director)
4. ORCP 7 D(3)(iii) and 27 B(2) (Warren Deras letter of October 17, 1988)
5. ORCP 7 D (Robert Dickinson letter of October 17, 1988)
6. ORCP 44 C (Lawrence Wobbrock Letter of October 26, 1988)
7. ORCP 59 B (Judge Ashmanskas letter of October 27, 1988)
8. Report on letters received from Chief Justice Peterson and Edwin Daniel
9. NEW BUSINESS

* * * * *

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 12, 1988

Oregon State Bar Offices
5200 SW Meadows Road
Lake Oswego, Oregon

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

(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 minutes of the meeting held October 15, 1988 were unanimously approved.

No public comment was received.

Vice Chairer Marceau reminded the Council members of the final meeting on December 10, 1988 and urged full attendance at that meeting. He pointed out that under ORS 1.730(2)(a) an affirmative vote of a majority of the members of the Council is required to promulgate rules. The Council's normal membership is 23 but at the date of the meeting, the Council only had 21 members because of unfilled vacancies. He stated that he still believed that a vote of 12 members would be required to promulgate rules. A suggestion was made that inquiry should be made regarding the availability of a speaker phone for the December 10 meeting.

Agenda Item No. 2: ORCP 44 E (Larry Thorp letter of October 12, 1988). Copies of a memorandum prepared by the Executive Director relating to state and federal legislation restricting access to hospital records were distributed at the meeting (a

copy of the memorandum is attached to these minutes as Exhibit A).

After discussion, it was decided that Steve Pratt and Larry Thorp would submit a modified proposal to the Council before the next meeting.

Agenda Item No. 3: State Court Administrator's Judgment Committee amendments to ORCP 69-70 (report of Executive Director). Copies of a letter from Hal Linden, State Court Administrator, were delivered at the time of the meeting and copies were distributed to all present (a copy of the letter is attached to these minutes as Exhibit B).

The Executive Director and some Council members expressed reservations about the form of some of the amendments suggested by the Judgment Committee. After considerable discussion, it was decided that Vice Chairer Ron Marceau would write a letter to Chief Justice Peterson suggesting that the Judicial Department ought to submit any future proposed amendments to the ORCP to the Council for action, rather than submit proposed legislation to the legislature. The letter will also indicate that the Council recognizes the problems addressed by the Committee amendments and that the Council is willing to work with the Committee to refine the proposed legislation prepared by the Committee. Judge Mattison volunteered to work with the Executive Director to set up a meeting with Judgment Committee members to go over the proposals in detail. It was suggested that the result of this analysis could be presented, with representatives of the Judgment Committee present, at a Council meeting in January.

Agenda Item No. 4: ORCP 7 D(3)(iii) and 27 B(2) (Warren Deras letter of October 17, 1988). Mr. Deras stated in his letter that the two provisions in ORCP 7 D and 27 B (relating to service of process on an incapacitated person who does not have a conservator or guardian) appear to state that you cannot complete service until after a guardian ad litem is appointed to serve but that one cannot have a guardian ad litem appointed until after the service is made. He mentioned his experience of the court entering an order only on his motion appointing a guardian ad litem for the limited purpose of receiving service only. After discussion, the Executive Director was asked to come up with a proposal in response to the problem posed by Mr. Deras.

Agenda Item No. 5: ORCP 7 D (Robert Dickinson letter of October 17, 1988). Mr. Dickinson wrote in response to the Council's proposed amendment of ORCP 7 D, clarifying that the mailing to the defendant after service of summons on the Motor Vehicles Division must be by certified or registered mail, return receipt requested. Mr. Dickinson suggested that the mailing to the defendant <u>not</u> be made by registered or certified mail, but rather should be sent by ordinary mail because his experience had

been that registered letters were almost uniformly returned. After discussion, the Council took no action to amend the proposal which it had tentatively adopted.

Agenda Item No. 6: ORCP 44 C (Lawrence Wobbrock letter of October 26, 1988). Mr. Wobbrock requested that the Council reconsider its position regarding the ramifications of State ex rel Grimm v. Ashmanskas and ex parte communications by defense counsel with treating doctors (the Council had previously decided that issue involved substantive law rather than procedure and was therefore beyond the Council's jurisdiction). He also requested that the Council reconsider its recent Rule 44 changes requiring production by plaintiff's counsel of all written reports **or existing notations** of any examinations relating to injuries for which recovery is sought and that a provision should be added which allows plaintiff's counsel to withhold any documentation which he believes is outside the scope of discovery.

After a lengthy discussion, a motion was made by Henry Kantor, seconded by Dick Noble, that the Executive Director prepare a proposal to amend ORCP 44 to require that, if there has been a waiver of the physician-patient privilege, any contact between a defense attorney and the physicians providing treatment to the plaintiff only be made after notice to the plaintiff. The motion passed with 7 in favor and 5 opposed. Further discussion followed after which a motion was made by Dick Noble, seconded by Henry Kantor, that the Executive Director's draft (amending ORCP 44) also contain a provision affording the plaintiff and the plaintiff's attorney an opportunity to be present at any interview of the plaintiff's treating doctor by a defense attorney. The motion passed with 9 in favor and 3 opposed.

Agenda Item No. 7: ORCP 59 B (Judge Ashmanskas letter of October 27, 1988). Judge Ashmanskas suggested that ORCP 59 B be amended to allow a trial judge to instruct a jury orally and then reduce the oral instructions to writing and submit them to the jury after it starts deliberations. After discussion, it was decided that the Council would not amend the rule at this time.

Agenda Item No. 8: Report on letters received from Chief Justice Peterson and Edwin Daniel. Chief Justice Peterson informed the Council in his letter that amendments to the Oregon Rules of Civil Procedure promulgated by the Council could be published in the Advance Sheets.

NEW BUSINESS. The Executive Director distributed a letter received from Edwin Daniel. Mr. Daniel expressed concern about the change to ORCP 44 C in the prior biennium with the addition of "or existing notations" because it had been interpreted by some judges to mean that a defendant could have either the report or the notations, but not both. The Executive Director was asked to inform Mr. Daniel that the problem would be cured by the

Council's proposed amendment in this biennium to change the word "or" to "and", which would mean accessibility to both reports and chart notes.

Henry Kantor announced that Chairer Raymond Conboy was under 24-hour nursing care, and Mr. Kantor was asked to convey to Mr. Conboy the Council's best wishes and warm regards.

The next meeting of the Council will be held Saturday, December 10, 1988, at 9:30 a.m., at the Oregon State Bar Offices in Lake Oswego.

The meeting was adjourned at 11:52 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

November 10, 1988

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

FROM: Fred Merrill, Executive Director

(1) **ORCP 44 E - Thorp proposal**. I agree that ORCP 44 E as written presents problems. The provision was originally taken from the general statutes regulating hospitals. It did not originally require that a case be filed, and it provided for no notice to the plaintiff. The Council changed that in 1982. I think the assumption was that once the case was filed and notice required, parties seeking hospital records would use available discovery devices, i.e. subpoena duces tecum, rather than simply requesting the records. The section does not in fact create a discovery device. It regulates the scope of discovery.

The problem for the hospital is indeed serious. In addition to the federal statutes mentioned in Larry's letter, I found two others (42 USCA 4582, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Program, and 38 USCA 653, which governs patient records in VA hospitals) that prohibit disclosure of patient records without a court order. In addition, a number of other statutes either make policy statements relating to protection of records in specific areas or require that hospitals develop or the Secretary of HEW promulgate regulations relating to confidentiality of patient records. These include:

10 USCA 1102; Military hospitals
38 USCA 3305; Veterans Administration facilities
42 USCA 254b; Migrant health centers
42 USCA 254c; Community health centers
42 USCA 300b-3; Research programs on genetic diseases, hemophilia, and sudden infant death programs
42 USCA 300z-5; Adolescent family life projects
42 USCA 1395i-3; Bill of rights for state skilled nursing facilities
42 USCA 1396r; Bill of rights for intermediate care facilities for mentally retarded
42 USCA 3027; State programs for the aging
42 USCA 9501 and 10841; Bill of rights for state mental health programs

In addition, Westlaw shows 109 separate sections of the Code of Federal Regulations dealing with confidentiality of patient records.

I, however, think the solution suggested in the letter will not completely take care of the problem. If we are going to require that a defendant seeking hospital records use only a formal discovery device, it has to be a deposition. A subpoena duces tecum is not itself a discovery device. The subpoena can only require testimony at scheduled trial or deposition. In Vaughn v. Taylor, 79 Or App 359, 363-364, 718 P2d 1387 (1986), the Supreme Court held that an attorney who merely served a subpoena upon a nonparty directing it to produce material, without scheduling a deposition, acted improperly. A party seeking discovery of material in the hands of a nonparty must give notice of deposition to all parties. The party seeking discovery must at least intend to take some testimony identifying the material sought. Under ORCP 55H, in a case involving hospital records, the testimony may be by affidavit, but the subpoena duces tecum can only require that material be furnished at a deposition or trial.

The mere use of a subpoena also would not provide notice to the plaintiff that the records are to be revealed so that the plaintiff could seek a cover order under ORCP 36 C.

I therefore suggest that if the Council wants to take action, ORCP 44 E be modified as follows:

> ... Any party seeking access to hospital records under this section shall [give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person] **obtain them by deposition scheduled pursuant to ORCP 39 and 55**.

The injured person would receive notice in the form of notice of a deposition of the hospital records custodian. As with any deposition, this must be reasonable notice. This would give the plaintiff time to seek a cover order under ORCP 36 C. The plaintiff would have an opportunity to question whether the records were, in fact, relevant to the case, and the hospital would not be required to decide whether the records were within the scope of discovery. If the plaintiff failed to object to the deposition or secure a cover order, or the court determined that discovery was allowable after objection, the records would be discoverable. Presumably, the hospital would only present the records for the deposition when it received a subpoena duces tecum.

The only apparent problem for the hospital is that a subpoena is not a court order. Under some of the confidentiality provisions, the hospital cannot produce without a court order. If the hospital feels that is the case, it can go and present the problem under ORCP 38 C or ORCP 55 before the time scheduled for

the deposition. It could also have the records custodian appear for the deposition and assert the privilege involved. The party seeking the records would have to get a court order under ORCP 46 A. In either case, the suggested 55 H(2) is a good idea.

(2) Judicial Department Judgment Committee-Linden letter of October 11, 1988. As requested, I checked with Linda Hightower regarding the nature of the "Judgment Committee" and whether the changes in ORCP 70 were being submitted to the Council for action. She stated that the committee was formed by the Court Administrator, R. William Linden, but under the authority of the Supreme Court. Chief Justice Peterson was apparently not directly involved. The committee was formed because of an overwhelming number of complaints submitted by local clerks about the summary of judgment requirement. As you know, that requirement was legislatively inserted into Rule 70 by a group seeking reform of garnishments, and it demonstrates limited knowledge of judgments and judgment procedure. Apparently, after the faulty amendment the chickens came home to roost most frequently in the court clerk's office.

The committee consisted of three judges, Hargreaves from Lane County, Smith from Columbia County, and Abrams from Klamath County. There were also two State Court trial administrators and people who work in various department in the State Court Administrator's Office.

Ms. Hightower also said that the committee apparently had not intended to submit the changes in rules to the Council for action but just for comment. They are preparing legislation which they intend to have the judicial department submit during the next legislative session.

An examination of the proposal shows a number of changes in the rules. Some of them are badly needed but they also seem complicated enough that it would be difficult to analyze then in detail in the short time remaining to the Council this biennium.

The proposal would clarify exactly what is required for a summary of judgment and the effect of a failure to have a correct summary in a judgment. It requires that a discrete section of the judgment itself be devoted to the summary, lists the contents of the summary, and states that the judgment will not be docketed in the judgment docket without a proper summary. It remains unclear what effect a defective summary has on enforceability of the judgment. The amendment gets rid of the troublesome and unworkable requirements for submission and certification of the summary. The committee proposal is not consistent with what the council has tentatively done. It still contains some of the improper references to "part", etc., and does not totally eliminate the summary of attorney fees and costs.

The committee proposal would clarify ORCP 70 B to define entry of judgment. It changes the mailing requirement for the clerk to include an indication whether the judgment was docketed.

The proposal changes the procedure for entry of the attorney fee and costs portions of judgments in ORCP 68. Some change is probably badly needed. The procedure described was taken right out of the old ORS sections. The language goes back to 1855 and is not terribly clear. The procedure they suggest still remains extremely complicated, and I think it needs to be thought through carefully. For example, section C(4)(f) provides that the court's decision on objection to a cost bill and amounts awarded becomes part of the main judgment, and C(5) says it is enforced as part of that judgment. What happens if the main judgment has been appealed? Is it necessary to file a separate notice from the costs and disbursements portion?

The proposal also makes a number or changes in the ORS sections relating to docketing judgments and satisfaction of judgments. At least one of these areas, satisfaction, has been the subject of a comprehensive proposal by Judge Liepe which is presently pending for consideration during the next biennium.

The question before the Council is what action should be taken regarding this proposal. If there is no time for detailed review and promulgation of the ORCP amendments before our deadline for this biennium, should we do anything else?

THORP
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GOLDEN
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October 12, 1988

Mr. Fredric Merrill
Executive Director
Council on Court Procedures
University of Oregon
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Eugene, Oregon 97403

Dear Fred:

One of the things we will be considering at Saturday's meeting is possible revisions to ORCP 21 through 64. I represent a couple of hospitals for whom we have had considerable difficulty under ORCP 44E 55H. While it is probably too late to do anything with respect to the 1989 Legislative Session, I wanted to record my concerns so that they may be considered during the next biennium.

ORCP 44E generally allows a defendant who is sued for personal injury complete access to all hospital records of the plaintiff "within the scope of discovery under Rule 36B." The procedure by which the records are obtained is simply to give notice to the adverse party "at a reasonable time prior to" seeking the records. Unfortunately, this raises a whole series of problems for hospitals.

1. The first problem is that the scope of the rule runs counter to a number of different laws.

a. State Policy. ORS 192.525 states that it is the policy of the State of Oregon to preserve medical records from disclosure except with the consent of the patient. ORS 179.495, et seq., dealing with public institutions, is generally to the same effect. It is fairly clear in light of Humphers v. First Interstate Bank, 298 Or. 706 (1985), that if a hospital releases records in violation of state policy, it is exposed to liability.

b. Confidentiality Laws. There are also both state and federal laws which restrict access to certain types of information. ORS 433.045 (as implemented by OAR 333-12-260) restricts access to information concerning AIDs. In addition, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C.

290dd-3) and the Drug Abuse Office and Treatment Act of 1972 (42 U.S.C. 290ee-3), as well as implementing regulations (42 CFR Part 2.1 et seq.) restrict access to various types of information concerning drug and alcohol abuse patients. While all of these laws do permit access to various records under court order, ORCP 44E requires no such order or even a subpoena. In addition, under some of these laws a subpoena alone is insufficient to permit disclosure.

2. Procedural Problems. ORCP 44E also has caused considerable problems simply because of the way in which it is utilized.

a. I have had client hospitals come to me on more than one occasion and show me a letter from an attorney simply demanding that the hospital turn over all medical records. The purported notification to the adverse attorney was simply a carbon copy.

b. A concurrent and related problem is that once the hospital receives the letter, it has no way of knowing what constitutes a reasonable time before it has to deliver the records, or even if a motion for a protective order is pending. It has not been uncommon for the attorney demanding the records to expect them within a matter of two or three days. The hospital has no idea what is a reasonable amount of time to allow the adverse attorney to obtain a protective order, if the adverse party even intends to do so.

c. In addition, the hospital is to provide only those records "within the scope of discovery under Rule 36B." Who decides what is within the scope of discovery? Certainly the hospital cannot, because it normally does not even know what the case is about.

With all of this background, it appears to me that part of the solution to the problem is to require that access to hospital records under 44E be obtained through utilization of the subpoena procedure outlined in Section 55H. That procedure works very well and I can think of no real reason why it should not be utilized under Section 44E. This change could be implemented simply by rewriting 44E to read as follows:

"E. Access to Hospital Records. Any party against whom a civil action is filed for compensation or

damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36B. Any party seeking access to hospital records under this section shall obtain them by subpoena in accordance with ORCP 55H [give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person].

In addition, since a subpoena is insufficient to permit disclosure under some regulations (see 42 CFR 2.61, et seq., Section 55H needs to be amended to reflect those limitations. I suggest that 55h(2) be amended to read:

"H.(2) Mode of Compliance [with subpoena of hospital records]. If disclosure of hospital records is restricted by law, such records may only be disclosed in accordance with such law. In all other cases hospital records may be obtained by subpoena duces tecum as provided in this section.

"H.(2)(a) * * *"

It would probably be appropriate to develop a staff comment to explain the purpose of both changes. I have not done so, since it is inappropriate to do so until the council has indicated support for the proposed changes..

I would appreciate any comments you might have about this proposal.

Very truly yours,

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

Laurence E. Thorp

LET:edk

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October 17, 1988

Council and Court Procedures
University of Oregon
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Gentlemen:

I note that the Council is considering a proposed amendment of ORCP 7D, clarifying that the mailing to the defendant after service of Summons on the Motor Vehicles Division must be by certified or registered mail, return receipt requested.

I would suggest just the opposite, that the mailing sent to the defendant not be made by registered or certified mail.

I would keep the requirement of a certified or registered mailing to the defendant's insurance company.

The typical case that I deal with is an uninsured motorist case where the defendant has moved from the address given at the time of the accident and the address that the Motor Vehicles Division to places unknown.

Typically, the address given at the time of the accident or given to the Motor Vehicles Division is the address of a relative or friend of the defendant. That relative or friend may not go to the Post Office to pickup a registered letter, but will keep the letter that arrives in the mail box to advise the defendant of the lawsuit.

It has been my experience that the registered letters are almost uniformally returned, but the letters sent by ordinary mail result in a greater percentage of defendants who receive actual notice of the lawsuit. There is also a problem in that some Post Offices will not let a relative or friend sign for the registered or certified mail.

Since the goal of the Summons is the best manner reasonably calculated to apprise the defendant of the existency and pendency of the lawsuit, I think that mailing by regular mail is much preferred and the ORCP 7D should be so amended.

Thank you for taking the time to read and consider my letter.

Very truly yours,

Robert G. Dickinson

sjc

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October 17, 1988

Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97405

Subject: Service on Incapacitated Persons

Gentlemen:

The article in this month's Bar Bulletin about the proposed changes to the ORCP's reminded me of a problem I had a few years ago concerning service of process on an incapacitated person who does not have a conservator or guardian.

ORCP 7D.(3)(a)(iii) requires that service be made:

> Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

ORCP 27 B.(2) provides for appointment of a guardian at litem:

> When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

Read literally, these two provisions appear to state that you cannot complete service until after a guardian ad litem is appointed to serve, but you cannot have a guardian ad litem appointed until after service is made. In my case I the court entered an order on my motion appointing a guardian ad litem for the limited purpose of receiving service only.

It seems to me that improvements could be made to these rules. Otherwise in some cases a party plaintiff could be compelled to file conservatorship proceedings to assure that service is proper. It does not seem to me that someone with an adverse claim should be in that position. I suggest that the requirement of service on a guardian ad litem be eliminated in favor of the provision in ORCP 69 prohibiting taking a default against an incapacitated person without one being appointed.

Very truly yours,

Warren C. Deras

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October 26, 1988

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

Re: Ex Parte Communications With Doctors

Dear Professor Merrill:

Some time ago I submitted a request to the Council on Court Procedures asking that the Council consider the ramifications of State ex. rel. Grimm vs. Ashmanskas, 298 Or 206, 690 P.2d 1063 (1984) and ex parte communications by defense counsel with treating doctors.

I subsequently received a response from Henry Kantor, one of the Council members, indicating that the Council had voted not to address the issue on the grounds "that it involved substantive law rather than procedure, and therefore was beyond the Council's jurisdiction." (See letters of May 6, 1988 and May 10, 1988).

I believe the Council should reconsider its actions. While the existence or waiver of the physician/patient privilege may be an issue involving substantive law, once the privilege has been waived, the procedure for communication with the doctor involved is clearly one within the Council's jurisdiction.

I would propose that ORCP 44(c) be amended to allow depositions of treating doctors "only upon good cause shown."

I am enclosing an article recently published in the Tort and Insurance Practice Section of the American Bar Association, Fall 1987 issue, presenting the arguments pro and con against such ex parte communications.

I would further ask the Council to reconsider its recent Rule 44 changes requiring the production by plaintiff's counsel of "all written reports or existing notations of any examinations relating to injuries for which recovery is sought" ORCP 44(c).

LAWRENCE WOBBROCK
ATTORNEYS AT LAW

I believe a provision should be inserted into the rule which allows plaintiff's counsel to withhold that documentation which he believes is outside the scope of discovery. For example, notations of unrelated injuries or conditions need not be disclosed if they are not discoverable. Notification of opposing counsel and the opportunity for an in-camera inspection of those documents should then be the subsequent procedure specified in the rule if there be a dispute as to what is, in fact, "discoverable."

Thank you for the Council's attention to this matter. I await your response.

Sincerely yours,

Lawrence Wobbrock, Esq.

LW:dat

Enclosure

cc: Raymond J. Conboy, Esq. (w/enclosure)
Henry Kantor, Esq. (w/enclosure)
Daniel O'Leary, Esq.
Richard P. Noble, Esq. (w/enclosure)
Kathryn Clarke, Esq.

DONALD C. ASHMANSKAS
Judge

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CIRCUIT COURT OF OREGON

TWENTIETH JUDICIAL DISTRICT

October 27, 1988

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

Re: ORCP 59B - Charging the Jury

Dear Fred:

May I suggest that ORCP 59B be amended to allow a trial judge to instruct a jury orally and then reduce the oral instructions to writing and submit them to the jury after it starts deliberations.

This suggestion is prompted by a recent experience involving a five-defendant, 22-count, criminal jury trial that lasted seven weeks. At the conclusion of the trial I instructed the jury, my court reporter reduced my oral instructions to writing and then I sent 12 copies into the jury room. This process was very favorably received by all the jurors and most of the attorneys.

I recommend the amendment because I believe some would argue that my procedure is not consistent with the existing language of ORCP 59B.

Thank you for your consideration.

Sincerely,

Ash

DONALD C. ASHMANSKAS
Circuit Court Judge

DCA:jmc

R. WILLIAM LINDEN, JR.
State Court Administrator

JUDICIAL DEPARTMENT
Supreme Court Building
Salem, Oregon 97310

November 10, 1988

Fredric R. Merrill
Executive Director
Council On Court Procedures
University of Oregon
School of Law
Eugene, OR 97403-1221

Re: Proposed Civil Judgment Bill--Oregon Judicial Department Judgment Committee

Dear Fred:

I understand that the Council will be meeting this Saturday, November 12, and that the proposed civil judgment bill is on your agenda. Unfortunately, I will be unable to attend your meeting because of a previous commitment, but I would like to take just a moment to explain the reasons that the Judicial Department is proposing changes to ORCP 68 and 70 and briefly outline the specific changes proposed.

To begin with some background information, in June of 1988, I set up an internal Judicial Department "Judgment Committee" to study civil judgments. The courts have been experiencing a number of problems in the civil judgment area since the passage of the 1987 "judgment summary" legislation. As a result of this legislation, court clerk work load has increased substantially. Court clerks are currently comparing the accuracy of the judgment "summary," signed by the attorney, against the judgment document, itself, signed by the judge. The judgment summary requirement has raised a number of questions for the courts, including such issues as: (1) what should a court clerk do when a judgment summary is not supplied; (2) under what circumstances must a judgment summary be filed; and (3) how should a summary be corrected if it is incorrect, etc. The Judgment Committee came up with a number of recommendations and concluded that revisions to ORCP 68 and 70 would resolve some of the largest problems in this area. The Committee recommended that a civil judgment "package" be submitted to the legislature which would include many <u>statutory</u> changes as well as changes to ORCP 68 and 70.

Specifically, the proposed changes to ORCP 68C(4) and (5) are intended to clarify how and when courts should enter attorney fees and costs. The Judgment Committee did not intend to make substantive changes to this rule, but felt that the order of ORCP 68C(4) needed to be changed for the sake of clarity. The proposed changes to ORCP 68C(4) and (5) would:

1. Clarify that a clerk may enter the amount of attorney fees and costs claimed without an order signed by a trial judge under some circumstances (i.e., when no objections are filed) and under other circumstances (in default cases or when objections are filed) wait to enter the amounts claimed until an order (rather than a "statement") is signed by a judge.

2. Change the number of days for filing and serving a claim for attorney fees and costs from 10 to 14 days (following a national trend towards uniform 14-day time limits).

3. Make an order for costs and disbursements enforceable only upon entry. (The end result is essentially the same; only the approach is different.)

The proposed changes to ORCP 70 would:

1. Require that all judgments be clearly "titled" as a judgment. (The courts are still receiving documents titled "Judgment Order." The word "titled" was inserted to distinguish the caption at the top of the document from the "labelling" of the "summary" section at the end of the judgment.)

2. Eliminate the judgment "summary" as a separate document.

3. Make the judgment "summary" information the essential elements of a money judgment under ORCP 70.

4. Require that all the essential elements of a money judgment (or the "summary" judgment information) be presented in a specified order in a separate, clearly labeled section of the judgment immediately preceding the judge's signature.

5. Require that costs and attorney fees be included in the judgment only if awarded, and further, that the specific amount of costs and attorney fees awarded need not be included in the judgment at the time that it is first docketed if they will be determined later under ORCP 68C.

6. Create an enforcement mechanism whereby those judgments which are governed by ORCP 70 and which do not have a separate "summary" section will not be docketed in the judgment docket unless a clerk is otherwise instructed by a judge.

I would like to work with the Council in every way that I can, and I look forward to receiving your comments and suggestions on these proposed changes.

Sincerely,

R. William Linden, Jr.
State Court Administrator

RWL:KH:dc/E1D88172.F