M E M O R A N D U M

December 21, 1988

TO: Ronald L. Marceau, Bend (Chairer)
Henry Kantor, Portland (Vice Chairer)
Lafayette G. Harter, Jr., Corvallis (Treasurer)
Hon. Richard L. Barron, Coquille
Hon. John H. Buttler, Salem
Hon. Lee Johnson, Portland
Bernard Jolles, Portland
Hon. John V. Kelly, The Dalles
Hon. Winfrid Liepe, Eugene
Hon. Paul J. Lipscomb, Salem
Hon. R. B. McConville, Salem
Hon. Jack L. Mattison, Eugene
Douglas K. Newell, Portland
Richard P. Noble, Lake Oswego
Steven H. Pratt, Medford
James E. Redman, Milwaukie
Martha Rodman, Eugene
William F. Schroeder, Vale
J. Michael Starr, Eugene
Laurence Thorp, Springfield
Hon. George A. Van Hoomissen, Salem
Elizabeth H. Yeats, Portland

FROM: Fredric R. Merrill, Executive Director

Enclosed are the following:

(1) Minutes of 12/10/88 meeting

(2) Draft packet of amendments promulgated at 12/10/88 meeting

(3) Drafts of ORCP 44 and 55 for consideration at 1/6/89 meeting

(4) Agenda for 1/6/89 meeting

(5) The public notice for the 1/6/89 meeting

(6) Letter from Ron Marceau to Chief Justice Peterson of 12/10/88 and Chief Justice Peterson's letter to Ron Marceau dated 12/12/88

The meeting to consider the tentatively adopted Thorp amendments to ORCP 44 and 55 and changing "or" to "and" in ORCP 44 C has been formally scheduled for January 6, 1988 at 4:30 p.m. in the main conference room of the offices of Pozzi, Wilson,

Atchison, O'Leary and Conboy, 910 Standard Plaza Building 1100 S. W. 6th Ave, Portland, Oregon. The enclosed notice will appear in both the Bar Bulletin and the Oregon Advance Sheets and provides the statutory notice necessary for promulgation.

After checking with the Attorney General's Office, it appears there is no problem in using a telephone conference call for a public meeting, provided there is a place where the public can attend and listen. That place, as set out in the notice, is the Pozzi conference room where there will be a speaker phone. It is assumed that all Council members in the Portland area will attend personally at the Pozzi office. Ron Marceau has indicated he will preside from there. All Council members in the Eugene area may attend by going to Larry Thorp's office, which will be connected to the conference call and which will also have a speaker phone. Council members who are not able to attend at those two locations will be separately connected to the conference call.

Needless to say, this sounds like an administrative nightmare. Gilma Henthorne will be coordinating arrangements for the conference call from Eugene. She will try to contact you the first week in January to make final arrangements. I will be out of the state from January 4 through January 8, 1989, and will be unable to attend. We will add the rules promulgated at the January 6th meeting to the formal submission and deliver our submission to the legislature on the morning of January 9, 1989 before the session convenes.

We must have 12 affirmative votes to promulgate anything at the January 6, 1989 meeting.

After putting together the proposed amendments to ORCP 44 and 55, I have several concerns about the form of the amendment presently proposed:

First, I am worried about eliminating the words "to the officer or body conducting the hearing at the official place of business" from 55 (H)(2)(b)(iii). As the rule now stands, it provides for production in three separate subparagraphs: (i) attendance in court, (ii) a deposition (note the subsection refers to a deposition or other hearing, but provides only for production to the "officer administering the oath for the deposition"), and (iii) other hearings. We are eliminating the (iii) and replacing it with our discovery subpoena. I think there are other hearings where subpoenas are used which are not court hearings or depositions, for example, administrative hearings. I think we should leave (iii) alone and simply add our language as (iv):

> (iv) <u>if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of</u>

the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than ten days prior to service of the subpoena on the hospital.

Second, I am concerned about the relationship between service of the hospital records subpoena duces tecum by mail and general service of mail under 55 D. I see no need for the use of the complex procedure in that rule for subpoenas duces tecum directed to hospitals. I would suggest we add the following between the first and second sentence of the proposed amendment adding 55 H(2)(d): Service of summons by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule. One reason for the form of 55 D is the fact that the last sentence of Rule 9 and due process seem to make it impossible to hold a person in contempt who has not been personally served with the subpoena. That problem, of course, would also apply to mail service under 55 H(2). I am not sure what could be done in the rule to avoid it. One would assume most hospitals would comply with a subpoena served by mail. If they did not, the party seeking the material might have to follow up with personal service. Perhaps the comment to the rule should point this out.

The "Errors and Omissions Committee" (Ron Marceau, Henry Kantor, and Elizabeth Yeats) are reminded that they should carefully review the enclosed draft of promulgated rules and communicate any suggestions or changes to the Council office in Eugene (686-3990) by no later than early in the week of January 2, 1989.

The Council should schedule another meeting late in January. We are trying to set up a meeting around the 12th of January with our subcommittee and the committee of the State Court Administrator's Office relating to the amendments to Rule 70. We can report the result of that meeting and the Council can decide what position it wishes to take relating to the State Court Administrator's proposed amendments. I am enclosing a copy of an exchange of letters between the chairer and Chief Justice relating to the question.

At the January meeting, we can also set a tentative schedule for the rest of the year. I will submit a summary of matters that came up during this biennium and were deferred. We also have received several other suggestions for next year. If any Council member has any suggestions for consideration next year, send them to me and I will include that in the summary.

BEST WISHES FOR A HAPPY HOLIDAY.

FRM:gh
Enclosures

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 10, 1988

COUNCIL ON COURT PROCEDURES

Members

Ronald L. Marceau, Bend (Chairer)
Henry Kantor, Portland (Vice Chairer)
Lafayette G. Harter, Jr., Corvallis (Treasurer)
Hon. Richard L. Barron, Coquille
Hon. John H. Buttler, Salem
Raymond J. Conboy, Portland (deceased 11/13/88)
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James E. Redman, Milwaukie
Hon. R. William Riggs, Portland (until 9/88)
Martha Rodman, Eugene
William F. Schroeder, Vale
J. Michael Starr, Eugene
Laurence Thorp, Springfield
Hon. George A. Van Hoomissen, Salem
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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1989 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1990, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1987-89 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Underscoring (with boldface) denotes new language while bracketing indicates language to be deleted.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received. The Council held public meetings on November 7, 1987 in Lake Oswego; February 20, 1988 in Lake Oswego; April 30, 1988 in Newport; May 21, 1988 in Salem; June 15, 1988 in Bend; September 27, 1988 in Eugene; October 15, 1988 in Lake Oswego; November 12, 1988 in Lake Oswego; December 10, 1988 in Lake Oswego, and January 6, 1989 in Portland.

JURISDICTION
(Personal)
RULE 4

E. Local services, goods, or contracts. In any action or proceeding which:

E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] **or** to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or

E(2) Arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or

E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] **defendant** to the [defendant] **plaintiff or to a third person** on the [defendant's] **plaintiff's** order or direction [or sent to a third person when

payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received **in this state** by the plaintiff [in this state] from the defendant **or by the defendant from the plaintiff,** without regard to where delivery to carrier occurred.

COMMENT

The Council amended ORCP 4 E to make the language more consistent with constitutional limits in the area covered.

The Council amended subsections 4 E(1)-(4) to eliminate reference to jurisdiction based solely upon guarantee of payment. State ex rel Sweere v. Crookham, 289 Or. 3, 609 P.2d 361 (1980.

ORCP 4 E(4) was amended to eliminate jurisdiction based solely upon receipt of goods sent from the state by the seller to the defendant-purchaser, and to permit jurisdiction based upon a defendant-seller sending goods from Oregon to a plaintiff-buyer outside the state. The form of jurisdiction included is within constitutional limits but the form excluded is of doubtful constitutionality. Neptune Microfloc, Inc. v. First Florida Utilities, 262 Or. 494, 495 P.2d 263 (1972).

ORCP 4 E(5) was amended to provide that, if a defendant either sends goods, documents of title, or other things of value into the state or receives goods, documents of title, or other things of value sent into the state, there is a basis for jurisdiction over claims relating to these matters.

SUMMONS
RULE 7

D. Manner of service.

* * * *

D(2)d) **Service by mail.** Service by mail, when required or allowed by this rule, shall be mailed by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

* * * *

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, and streets; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and mailing <u>by registered or certified mail, return receipt</u>

requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.

D(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff, as soon as reasonably possible, shall cause to be mailed **by registered or certified mail, return receipt requested,** a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, the most recent address as shown by the Motor Vehicles Division's driver records, and any other address of the defendant known to the plaintiff, which might result in actual notice and **to** the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

COMMENT

The amendments to ORCP 7 C(4)(a)(i) and (ii) make clear that supplementary mail service to the defendant and his or her liability insurer must be by registered or certified mail, return receipt requested. It makes these provisions consistent with ORCP 7 D(4)(c).

TIME
RULE 10

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. **If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business.** 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**, including Sundays,** shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

COMMENT

The new third sentence of ORCP 10 A was added by the Council as a result of a suggestion by the Oregon State Bar Procedure and Practice Committee. The concern expressed was inability to file documents within specified time periods due to closure of the courthouse or clerk's office because of weather conditions or other unusual circumstances. The language used was taken directly from ORS 174.125. While that statute apparently would extend a time period, if a public office was closed during regular working hours, the Council felt it would be better to have all rules for computing time explicitly set out in Rule 10. The statute is also somewhat difficult to find and, on first reading, seems to relate only to serving documents on public officials rather than filing documents in civil cases.

The parenthetical material in the fourth sentence of ORCP 10 A has been added to make it clear that the time period referred to is the time period originally prescribed and not the original time period with three days added because mail service is involved.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS RULE 44

(RESERVE FOR POSSIBLE EXPANSION AFTER JANUARY 6, 1989 MEETING)

SUBPOENA
RULE 55

(RESERVE FOR POSSIBLE EXPANSION AFTER JANUARY 6, 1989 MEETING)

INSTRUCTIONS TO JURY AND DELIBERATION RULE 59

C. Deliberation.

* * * *

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

* * * *

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 general authority for the trial judge to permit separation during deliberation. The separation is still possible 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 be exercised cautiously since separation may present the risk of unavoidable and undesirable contact between jurors and other trial participants.

ALLOWANCE AND TAXATION
OF ATTORNEY FEES AND
COSTS AND DISBURSEMENTS
RULE 68

C. Award of and entry of judgment for attorney fees and costs and disbursements.

* * * *

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. 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.

COMMENT

The Council believed 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. The first sentence 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. The second sentence 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 P.2d 38, and AFSD v. Fulop, 72 Or. App. 424, 695 P.2d 979, rev'd on other grounds, 300 Or. 39, 706 P.2d 921 (1985). The waiver in the second sentence is only of objections to the form of allegation of the right to attorney fees. Any objection to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill.

DEFAULT ORDERS
AND JUDGMENTS
RULE 69

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, [and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party] **the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.**

B. Entry of default judgment.

* * *

B(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an

incapacitated person unless [they] **the minor or incapacitated person** [have] **has** a general guardian or [they are] **is** represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such a hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. [In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.]

COMMENT

Upon the recommendation of the Oregon State Procedure and Practice Committee, the Council amended ORCP 69 A to require notice in some circumstances before application for an order of default and amended ORCP 69 B to eliminate any requirement of notice before application for judgment by default. The amended provision requires written notice of intent to seek an order of default only to a party who has appeared or who has provided written notice to the party seeking default of intent to file an appearance.

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

RELIEF FROM JUDGMENT
OR ORDER
RULE 71

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, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected [under this section only with leave of the appellate court] **as provided in subsection (2) of section B of this rule.**

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be

made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

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] **sections A or B** may be filed with **and decided by** 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]. **The moving party shall serve a copy of the motion on the appellate court.** [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.] **The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.**

* * * *

COMMENT

When the ORCP were originally promulgated, the Council wished to provide some way to deal with motions to vacate

judgments which were on appeal. It provided that leave of court was required to file a motion to vacate during the pendency of an appeal. The apparent assumption was that the appellate court could allow the trial court to pass on the motion to vacate or deal with the motion itself. In fact, the trial court probably lacks authority to rule on a motion to vacate during the pendency of an appeal and the appellate courts have no authority to consider such a motion. State ex rel. Juvenile Dept. v. Shaver, 74 Or. App. 143, 145 n.2, 700 P.2d 1066 (1985).

The Council amendment to ORCP 71 A and B eliminates the requirement of leave of the appellate court to file the ORCP 71 motion. It requires notice to the appellate court of the motion and its disposition. The question of the effect of the motion on the appeal and the possible modification of appeal due to a successful motion are left to the appellate rules. The Council recognized that it probably does not have authority to confer jurisdiction on a trial court to act during the pendency of an appeal. It has recommended that the legislature amend ORS 19.033 to accomplish this.

RECEIVERS
RULE 80

F. Special Notices.

* * * *

F(3) **Form and service of notices.** Any notice required by this [rule] **section** [(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 in the manner provided in Rule 9,** at least five days [(10 days for notices under section G of this rule)] before the hearing on any of the matters 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 mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.]

COMMENT

ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The Council changed the language to make clear that the service described was only for notices under section 80 F. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions for the sale of perishable property. Finally, the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof

of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

RECOMMENDED STATUTORY AMENDMENT

A BILL FOR AN ACT

Relating to administrative procedures of state agencies; amending ORS 19.033

Be It Enacted by the People of the State of Oregon:

ORS 19.033 is amended to read as follows:

* * * *

(4) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction[,]:

(a) With leave of the appellate court, to enter an appealable judgment if the appellate court determines that:

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

[(b)] **(ii)** 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.

(b) To enter an order under ORCP 71.

* * * *

ADDITIONAL PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

(ORCP 44 and 55)

(for consideration at January 6, 1989 meeting of Council)

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS RULE 44

* * * *

C. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports [or] and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

* * * *

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may [examine and make] obtain 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 36 B. [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.] Hospital records shall be obtained by subpoena in accordance with Rule 55 H.

COMMENT

The Council received reports that some attorneys and judges were interpreting the 1987 addition to ORCP 44 C of the words "or existing notations" to mean either a report or existing notations should be disclosed, but not both. The Council intended that both the report and the notations should be disclosed if requested and, to make that clear, changed "or" to "and".

The informal method for production of hospital records previously used under ORCP 44 E placed hospitals in the position of deciding what records to produce and what constitutes reasonable notice. The Council concluded a more formal process was necessary for production of hospital records. At the same time, the Council attempted to avoid creation of new discovery procedures. Therefore, the Council adopted an amendment requiring records to be obtained in accordance with ORCP 55 H.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

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)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action,name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena direct attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, [to the officer or body conducting the hearing at the official place of business] if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph (iii) of this paragraph,

then a copy of the subpoena shall be served on the injured party not less than ten days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by certified mail, return receipt requested. Proof of service of a subpoena under this section is made in the same manner as proof of service of a summons.

COMMENT

An increasing number of hospital records are subject to special nondisclosure rules under both state and federal law. See, e.g., ORS 433.045; OAR 333-12-260; 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3. In some cases, a subpoena is insufficient to permit disclosure. See 42 CFR 2.1, et seq. Therefore, the Council amended 55 H(2) to make it clear that where special criteria, such as a court order with specific findings, are prerequisites to disclosure, those criteria must be satisfied. For records for which there are no special disclosure requirements, the traditional subpoena duces tecum is permitted.

The Council also amended ORCP 44 E to require that all hospital records be obtained by subpoena (in the absence of the patient's consent). Since a subpoena will now be required, it becomes necessary to specify to whom the records are to be delivered. If a trial, deposition or hearing is scheduled, the procedure for delivery is already specified. Since the subpoena will also now be used as a discovery device, it was necessary to provide for delivery to the party seeking the records. Otherwise, the scheduling of a deposition would be required merely to obtain the records. The requirement of 10 days notice to the plaintiff before seeking access to hospital records was retained.

The Council also added a new subsection 55 H(2)(d), allowing service by mail of a subpoena duces tecum seeking hospital records.

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January 6, 1989

The Honorable John Kitzhaber
President of the Senate
State Capitol
Salem, OR 97310

The Honorable Vera Katz
Speaker of the House
State Capitol
Salem, OR 97310

Dear Mr. Kitzhaber and Ms. Katz:

Enclosed with this letter are amendments to the Oregon Rules of Civil Procedure which were promulgated by the Council on Court Procedures on December 10, 1988 and January 6, 1989. This action was taken pursuant to ORS 1.735, and this material is submitted to the Legislative Assembly through your good offices pursuant to that statute.

ORS 1.735 provides that these amendments will go into effect on January 1, 1990, unless the Legislative Assembly, by statute, takes action to amend, repeal, or modify them.

The Council has met regularly since the last legislative session. Tentative drafts of proposed rule changes have been released by the Council to members of the Bar, the public, and the press periodically throughout the biennium. The Council held public meetings on November 7, 1987 in Lake Oswego; February 20, 1988 in Lake Oswego; April 30, 1988 in Newport; May 21, 1988 in Salem; June 15, 1988 in Bend; September 27, 1988 in Eugene; October 15, 1988 in Lake Oswego; November 12, 1988 in Lake Oswego; and January 6, 1989 in Portland. At many of these meetings testimony was taken regarding possible amendments to the ORCP. In addition, the Council has considered written suggestions from many interested groups and individuals. All of the

offered comments and suggestions have been evaluated by the Council.

In addition to the rules promulgated during this biennium, the Council is also recommending enactment of a statutory change to ORS 19.033 which would give trial court's jurisdiction to pass on motions to vacate judgments during the pendency of an appeal. The change is necessary to fully implement a Council change in ORCP 71 relating to vacation of judgments. The change was developed in cooperation with the Supreme Court and the Court of Appeals. The Council, however, lacks authority to amend rules relating to trial court jurisdiction over cases, and a legislative change is required. The Council will submit the proposal for legislative change in bill form through the House or Senate Judiciary Committees.

If I can provide any further information relating to this submission, please contact me.

Sincerely,

R. E. MARCEAU
Chairman,
Council on Court Procedures

Encl.

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

1987-1989 Biennium

COUNCIL ON COURT PROCEDURES

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1989 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1990, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1987-89 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Underscoring (with boldface) denotes new language while bracketing indicates language to be deleted.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received. The Council held public meetings on November 7, 1987 in Lake Oswego; February 20, 1988 in Lake Oswego; April 30, 1988 in Newport; May 21, 1988 in Salem; June 15, 1988 in Bend; September 27, 1988 in Eugene; October 15, 1988 in Lake Oswego; November 12, 1988 in Lake Oswego; December 10, 1988 in Lake Oswego, and January 6, 1989 in Portland.

JURISDICTION
(Personal)
RULE 4

E. Local services, goods, or contracts. In any action or proceeding which:

E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] **or** to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or

E(2) Arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or

E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] **defendant** to the [defendant] **plaintiff or to a third person** on the [defendant's] **plaintiff's** order or direction [or sent to a third person when

payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received **in this state** by the plaintiff [in this state] from the defendant **or by the defendant from the plaintiff,** without regard to where delivery to carrier occurred.

COMMENT

The Council amended ORCP 4 E to make the language more consistent with constitutional limits in the area covered.

The Council amended subsections 4 E(1)-(4) to eliminate reference to jurisdiction based solely upon guarantee of payment. State ex rel Sweere v. Crookham, 289 Or 3, 609 P2d 361 (1980).

ORCP 4 E(4) was amended to eliminate jurisdiction based solely upon receipt of goods sent from the state by the seller to the defendant-purchaser, and to permit jurisdiction based upon a defendant-seller sending goods from Oregon to a plaintiff-buyer outside the state. The form of jurisdiction included is within constitutional limits but the form excluded is of doubtful constitutionality. Neptune Microfloc, Inc. v. First Florida Utilities, 261 Or 494, 495 P2d 263 (1972).

ORCP 4 E(5) was amended to provide that, if a defendant either sends goods, documents of title, or other things of value into the state or receives goods, documents of title, or other things of value sent into the state, there is a basis for jurisdiction over claims relating to these matters.

SUMMONS
RULE 7

D. Manner of service.

* * * *

D(2)d) **Service by mail.** Service by mail, when required or allowed by this rule, shall be mailed by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

* * * *

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, and streets; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and mailing **by registered or certified mail, return receipt**

requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.

D(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff, as soon as reasonably possible, shall cause to be mailed **by registered or certified mail, return receipt requested,** a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, the most recent address as shown by the Motor Vehicles Division's driver records, and any other address of the defendant known to the plaintiff, which might result in actual notice and **to** the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

COMMENT

The amendments to ORCP 7 D(4)(a)(i) and (ii) make clear that supplementary mailing to the defendant and his or her liability insurer must be by registered or certified mail, return receipt requested. It makes these provisions consistent with ORCP 7 D(4)(c).

TIME
RULE 10

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. **If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business.** 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**, including Sundays,** shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

COMMENT

The new third sentence of ORCP 10 A was added by the Council as a result of a suggestion by the Oregon State Bar Procedure and Practice Committee. The concern expressed was over inability to file documents within specified time periods due to closure of the courthouse or clerk's office because of weather conditions or other unusual circumstances. The language used was taken directly from ORS 174.125. While that statute apparently would extend a time period, if a public office was closed during regular working hours, the Council felt it would be better to have all rules for computing time explicitly set out in Rule 10. The statute is also somewhat difficult to find and, on first reading, seems to relate only to serving documents on public officials rather than filing documents in civil cases.

The parenthetical material in the fourth sentence of ORCP 10 A has been added to make it clear that the time period referred to is the time period originally prescribed and not the original time period with three days added because mail service is involved.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS RULE 44

* * * *

C. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports [or] **and** existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

* * * *

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may [examine and make] **obtain** 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 36 B. [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.] **Hospital records shall be obtained by subpoena in accordance with Rule 55 H.**

COMMENT

The Council received reports that some attorneys and judges were interpreting the 1987 addition to ORCP 44 C of the words "or existing notations" to mean either a report or existing notations should be disclosed, but not both. The Council intended that both the report and the notations should be disclosed if requested and, to make that clear, changed "or" to "and".

The informal method for production of hospital records previously used under ORCP 44 E placed hospitals in the position of deciding what records to produce and what constitutes reasonable notice. The Council concluded a more formal process was necessary for production of hospital records. At the same time, the Council attempted to avoid creation of new discovery procedures. Therefore, the Council adopted an amendment requiring records to be obtained in accordance with ORCP 55 H.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

H(2) **Mode of compliance [with subpoena of hospital records].** **Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.**

* * * *

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action,name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena direct attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases **involving a hearing**, to the officer or body conducting the hearing at the official place of business**; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the**

injured party not less than ten days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

COMMENT

An increasing number of hospital records are subject to special nondisclosure rules under both state and federal law. See, e.g., ORS 433.045; OAR 333-12-260; 42 U.S.C. 290dd-3; 42 U.S.C. 290ee-3. In some cases, a subpoena is insufficient to permit disclosure. See 42 CFR 2.1, et seq. Therefore, the Council amended 55 H(2) to make it clear that where special criteria, such as a court order with specific findings, are prerequisites to disclosure, those criteria must be satisfied. For records for which there are no special disclosure requirements, the traditional subpoena duces tecum is permitted.

The Council also amended ORCP 44 E to require that all hospital records be obtained by subpoena (in the absence of the patient's consent). Since a subpoena will now be required, it becomes necessary to specify to whom the records are to be delivered. If a trial, deposition or hearing is scheduled, the procedure for delivery is already specified. Since the subpoena will also now be used as a discovery device, it was necessary to provide for delivery to the party seeking the records. Otherwise, the scheduling of a deposition would be required merely to obtain the records. The requirement of 10 days notice to the plaintiff before seeking access to hospital records was retained.

The Council also added a new subsection 55 H(2)(d), allowing service by mail of a subpoena duces tecum seeking hospital records. The ability to sanction a hospital which does not comply with a mail subpoena may be limited by the last sentence of ORCP 9 B.

INSTRUCTIONS TO JURY
AND DELIBERATION
RULE 59

C. Deliberation.

* * * *

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

* * * *

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 general authority for the trial judge to permit separation during deliberation. The separation is still possible 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 be exercised cautiously since separation may present the risk of unavoidable and undesirable contact between jurors and other trial participants.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

C. Award of and entry of judgment for attorney fees and costs and disbursements.

* * * *

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. 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.

COMMENT

The Council believed 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. The first sentence of the amendment to ORCP 68 C(2) 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. The second sentence of the amendment is totally new and would change the result in cases such as Dept. of Human Resources v. Strasser, 83 Or App 361, 732 P2d 38 (1987), and State ex rel AFSD v. Fulop, 72 Or App 424, 695 P2d 979, rev'd on other grounds, 300 Or 39, 706 P2d 921 (1985). The waiver in the second sentence is only of objections to the form of allegation of the right to attorney fees. Any objection to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill.

DEFAULT ORDERS
AND JUDGMENTS
RULE 69

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, [and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party] **the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.**

B. Entry of default judgment.

* * *

B(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an

incapacitated person unless [they] **the minor or incapacitated person** [have] **has** a general guardian or [they are] **is** represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such a hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. [In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.]

COMMENT

Upon the recommendation of the Oregon State Procedure and Practice Committee, the Council amended ORCP 69 A to require notice in some circumstances before application for an order of default and amended ORCP 69 B to eliminate any requirement of notice before application for judgment by default. The amended provision requires written notice of intent to seek an order of default only to a party who has appeared or who has provided written notice to the party seeking default of intent to file an appearance.

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

RELIEF FROM JUDGMENT
OR ORDER
RULE 71

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, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected [under this section only with leave of the appellate court] as provided in subsection (2) of section B of this rule.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be

made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

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] **sections A or B** may be filed with **and decided by** 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]. **The moving party shall serve a copy of the motion on the appellate court.** [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.] **The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.**

* * * *

COMMENT

When the ORCP were originally promulgated, the Council wished to provide some way to deal with motions to vacate judgments which were on appeal. It provided that leave of court was required to file a motion to vacate during the pendency of an appeal. The apparent assumption was that the appellate court could allow the trial court to pass on the motion to vacate or deal with the motion itself. In fact, the trial court probably lacks authority to rule on a motion to vacate during the pendency of an appeal and the appellate courts have no authority to consider such a motion. State ex rel Juvenile Dept. v. Shaver, 74 Or App 143, 145 n.2, 700 P2d 1066 (1985).

The Council amendment to ORCP 71 A and B eliminates the requirement of leave of the appellate court to file the ORCP 71 motion. It requires notice to the appellate court of the motion and its disposition. The question of the effect of the motion on the appeal and the possible modification of appeal due to a successful motion are left to the appellate rules. The Council recognized that it probably does not have authority to confer jurisdiction on a trial court to act during the pendency of an appeal. It has recommended that the legislature amend ORS 19.033 to accomplish this.

RECEIVERS
RULE 80

F. Special Notices.

* * * *

F(3) **Form and service of notices.** Any notice required by this [rule] **section** [(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 the person to be notified, or such person's attorney, at their post-office address, and deposited in the United States Post Office, with the postage thereon prepaid] **served in the manner provided in Rule 9,** at least five days [(10 days for notices under section G of this rule)] before the hearing on any of the matters 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 mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.]

COMMENT

ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The Council changed the language to make clear that the service described was only for notices under section 80 F. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions

for the sale of perishable property. Finally, the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

RECOMMENDED STATUTORY AMENDMENT

A BILL FOR AN ACT

Relating to administrative procedures of state agencies; amending ORS 19.033

Be It Enacted by the People of the State of Oregon:

ORS 19.033 is amended to read as follows:

* * * *

(4) Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction[,]:

(a) With leave of the appellate court, to enter an appealable judgment if the appellate court determines that:

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

[(b)] **(ii)** 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.

(b) To enter an order under ORCP 71.

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