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JUDGMENT SUBCOMMITTEE

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M E M O R A N D U M

July 5, 1989

TO: **JUDGMENTS SUBCOMMITTEE:**

Jack Mattison, Chair
John Buttler
Robert McConville
Martha Rodman
Larry Thorp

FROM: **Fred Merrill**

RE: **Redraft of Rule 68**

The Council charge to this subcommittee is a bit vague but I think two specific matters relating to judgments came up last year: (1) requirements for docketing judgments and (2) treatment of costs, disbursements, and attorney fee awards as judgments. The first was addressed in detail by HB 2127. The second was originally included as part of HB 2127 and then removed at our request so that we could consider the matter in detail. Under the circumstances, I think the subcommittee should start with the second problem and that is the subject of this memo.

The State Court Administrator's amendment of ORCP 68 C was Section 2 of HB 2127 (attached as Exhibit A). The problem which the Court Administrator was attempting to address was the status of an award of costs, disbursements, or attorney fees as a judgment. It is presently covered in ORCP 68 C(4), which states that costs, disbursements and attorney fees are "entered as part of a judgment", without ever describing how that is actually accomplished, particularly when the cost bill is filed subsequent to the principal judgment or there is an objection to the cost bill which is not resolved until after entry of the principal judgment. The existing rule also seems to treat the cost bill amount as part of the principal judgment even if there is objection and a separate, subsequent court order establishing the cost bill amount. The existing rule raised some questions relating to jurisdiction of the trial court to enter cost awards after appeal and whether the cost awards required an appeal separate from the appeal from the principal judgment. A legislative amendment to ORS 19.033 in 1983 took care of the problem of jurisdiction to award the fees after appeal of the main judgment, but did not clarify the status of the attorney fee award as a separate judgment.

The language in existing ORCP 68 C(4) was substantially lifted from ORS 20.210 and 20.220 in 1981. It preserved the

approach of having the clerk enter the amount in the cost bill automatically upon filing of the cost bill, subject to being changed by the court after objection. In Oregon, the court clerk has no discretion to allow or disallow fees. The clerk must enter whatever is filed in the cost bill and all discretion is exercised by the court after the filing of objections. The amount is also entered immediately upon filing the cost bill. Originally, the Oregon statutes followed the procedure used in federal courts and in most other states, where the clerk reviews the propriety of the cost bill and only taxes costs which the clerk determines are allowable, with appeal to the court. The Oregon statutes were changed to the present system in 1903. Oregon Laws, 1903, p. 209.

The rule which the Council adopted in 1981 did differ in some respects from the preceding ORS sections. It specifically says that the "judgment" entered when the cost bill is filed is stayed during the pendency of objections to the cost bill, which was not covered by the statutes. ORCP 68 C(5). It also refers to both the attorney fees contained in the cost bill and entered by the clerk under 68 C(4)(a) and the attorney fees ordered by the court after objection to the cost bill under 68 C(4)(d) as being entered "as part of the judgment", presumably the original judgment. ORS 20.210 (repealed 1981) covered entry of the cost bill by the clerk and used the reference to the fees being entered as part of judgment. ORS 20.220(1) (repealed 1981) covered attorney fees ordered by the court after objection, and it said the court should "render judgment" on the claim for costs and objections. Under ORS 20.220(3), this "judgment" on the cost bill was separately appealable. ORS 20.220(3) became ORS 20.220 after 1981 and it says: "An appeal may be taken from a judgment under ORCP 68 C(4) on the allowance and taxation of attorney fees and costs and disbursements on questions of law only, as in other cases. ..."

Perhaps the most important aspect of Rule 68 which indirectly put pressure on the procedural status of the award of costs was the shifting of all attorney fee claims to the cost bill.

The adoption of Rule 68 then did clarify the enforceability of attorney fees awards as a judgment, but may have confused the question of the relationship between the principal judgment and the attorney fee judgment, particularly for purposes of appeal. That confusion is actually addressed in Section 7 of HB 2127 by amendment to ORCP 20.220. (The amendment as it finally passed is attached as Exhibit B). That amendment makes it somewhat clearer that any cost bill judgment entered after the principal judgment is appealed is a separate judgment and must be appealed separately. Actually, this only is important as to a judicial order after objection to the cost bill. Even though a cost bill entered as a judgment without objection would be covered by the

reference in 20.220(1) to a "judgment under ORCP 68 C(4) allowing or denying" costs, without an objection at the trial court level there would be nothing to appeal.

The amendment also takes care of the problem presented when there is no appeal from the attorney fee award but the principal judgment is reversed or modified. The amendment does not make clear whether a cost bill judgment must be appealed separately if it is, in fact, entered before the principal judgment. The proposal for Rule 68 C, set out below, may help clarify the question. In any case, it is a matter of appellate procedure not covered by the rules.

ORS 20.220, as amended by HB 2128, is not particularly consistent with the language of ORCP 68 C(4) as it now stands. ORS 20.220 seems to opt for treatment of a subsequent cost bill award as a totally separate judgment for appeal purposes, whereas the rule continues to refer to the attorney fee award as part of the original judgment. ORCP 68 C(4) also retains ambiguity as the exact procedure to be followed for cost bills, particularly for a cost bill award after entry of the principal judgment.

An examination of the federal rules and statutes of a sampling of other states (California, Florida, Illinois, Michigan Minnesota, New Jersey, Ohio, Texas, Washington and Wisconsin) provided no useful drafting suggestions. None of them particularly address the question of the relationship between taxation of costs and the judgment. Most differ from Oregon in that there is an order entered by the clerk taxing costs after they are claimed, which then can be appealed to the court. For example, FRCP 54(d) says that costs are taxed by the clerk but the action of the clerk may be appealed to the court. 28 USCA 1920 says: "A bill for costs shall be filed in the case and upon allowance included in the judgment and decree".

In modifying the language of ORCP 68 C(4), the following objectives should be kept in mind:

1. Entry of the principal judgment should not be delayed for determination of questions raised by the cost bill.

2. If we want to retain the present Oregon system, the clerk should exercise no discretion in taxing costs.

3. If there is objection, enforcement of the amounts claimed in the cost bill should be stayed pending determination of the objections.

4. Amounts which become allowable from the cost bill, either due to lack of objection or order of the court, should be collectable through the mechanisms for enforcement of judgment.

5. The cost bill judgment should be enforceable as soon a possible, but not until it becomes final.

6. The status of these cost bill amounts, both in terms of enforceability and appealability should be clear and free from ambiguity.

7. The procedure to be followed by the trial court should be clear.

The Court Administrator's language in Section 2 of HB 2127 seems a good beginning point for redrafting. Two distinctions which must be observed are whether objection is filed to the cost bill or not and whether the cost award becomes final before or after entry of the principal judgment. The suggested language in HB 2127 does address the first fairly well. The second is addressed for cost awards by the court, but not where there is no objection to the cost bill. The Court Administrator's form is consistent with the approach in amended ORS 20.220 making any court determination of the cost bill, subsequent to the principal judgment, a separate supplemental judgment. Some of the language used, however, is inconsistent with that approach. I suggest the following modified form of the language.

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

* * *

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

C(1) **Application of this section to award of attorney fees.** Notwithstanding Rule 1 A. and the procedure provided in any rule of statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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. 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost or disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule

23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Amendment of statements and objections. Statements and objections may be amended in accordance with Rule 23.

C(4)(d) Entry by the clerk. If no objection to a statement of attorney fees or costs and disbursements is timely filed, the amount claimed in the statement becomes part of the judgment on the cause to which the attorney fees or costs and disbursements relate. If no judgment has been entered disposing of the cause to which the statement of attorney fees or costs and disbursements relates before the time for objection to such statement has expired, the amount claimed in such statement shall

be set forth in any judgement subsequently entered. If judgment on the cause has been entered before the time for objection to the statement of attorney fees or costs and disbursements expired, such statement shall be entered, and notice thereof shall be given to the parties, in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof. For any default judgment where attorney fees are included in the statement, the attorney fees shall not be entered as part of the judgment unless approved by the court before entry.

C(4)(e)(i) Hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(e)(ii) Memorializing the determination of the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. If no judgment has been entered disposing of the cause to which the statement of attorney fees or costs and disbursements relates, the court's determination may be included in the judgment. If a judgment on the cause has been entered before the court has determined the claim for attorney fees or costs and disbursements, the determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(f) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment awarding attorney fees or costs and disbursements shall be filed and entered, and notice thereof shall be given to the parties, in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof. An order awarding attorney fees or costs and disbursements becomes a part of the judgment on the cause to which the attorney fees or costs and disbursements relate.

C(5) Form. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 71 A(2) and (3).

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the Court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) Separate judgments for the same claim. When there

are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The redraft continues the existing practice of having the clerk exercise no discretion in entry of the cost bill. The committee should consider whether this should be changed.

The redraft follows the Court Administrator's approach of not providing for immediate entry of the cost bill. This creates an automatic 14-day delay in enforceability of the cost bill. The subcommittee should consider the desirability of this. The existing procedure is awkward. The cost bill amount becomes part of the judgment and is then suspended by filing of an objection and only becomes enforceable again after court order.

The redraft retains the requirement of verification of the cost bill. This unusual requirements seems desirable because if there is no objection, the correctness of the amount claimed is automatically allowed.

The language in C(4)(d) differs from the Court Administrator's proposal. It makes clear that, if the cost bill amount becomes final before the main judgment, it is simply included in the judgment and entered as part of the main judgment. If it becomes final after the judgment, there is a separate entry. The entered amount is still part of the main judgment and not a separate judgment. Since no appeal of the cost bill is involved, this should present no problem, even if the principal judgment has been appealed when the cost bill becomes final.

Subparagraph C(4)(e)(ii) was changed by substituting the words "supplemental judgment" for "order subsequent to the judgment". The purpose is to be consistent with ORS 22.220(1), which refers to an appeal of a judgment awarding attorney fees.

In C(4)(f), the supplemental judgment was again used rather than order. The last sentence suggested in the Court Administrator's draft was eliminated as inconsistent with the rest of the subsection and ORS 20.220. The supplemental judgment is not part of the original judgment, but is a separate judgment.

Paragraph C(5) in the Court Administrator's draft was

eliminated. It is unnecessary in light of the language now in the rest of the section. The language substituted avoids the requirement that the judgment after the cost bill objection state that an amount of costs are awarded and then say the same thing again following a "money judgment" designation. Note that if a cost award is set forth in the principal judgment, it is subject to the Rule 70 requirements.

Encs.

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

* * *

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C(1) **Application of this section to award of attorney fees.** Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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. 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost or disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed

statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Amendment of statements and objections. Statements and objections may be amended in accordance with Rule 23.

C(4)(d) Entry by the clerk. If no objection to a statement of attorney fees or costs and disbursements is timely filed, the clerk shall docket in the judgment docket the amount claimed in the statement. For any default judgment where attorney fees are included in the statement, the attorney fees shall not be entered as part of the judgment unless approved by the court before entry.

C(4)(e)(i) Hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(e)(ii) Memorializing the determination of the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. If no judgment has been entered disposing of the cause to which the statement of attorney fees or costs and disbursements relates, the court's determination may be included in the judgment. If a judgment on the cause has been entered before the court has determined the claim for attorney fees or costs and disbursements, the determination of the court shall be set forth in an order separate from the judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(f) Entry and effect of award of attorney fees and costs and disbursements. The order shall be filed and entered, and notice thereof shall be given to the parties, in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof. An order awarding attorney fees or costs and disbursements

becomes a part of the judgment on the cause to which the attorney fees or costs and disbursements relate.

C(5) **Enforcement.** Attorney fees and costs and disbursements entered [as part of a judgment] pursuant to this section may be enforced as part of [that] **the** judgment[. Upon service and filing of objections to the entry of attorney fees and costs and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to paragraph (4)(d) of this section] **on the cause to which the award of attorney fees and costs and disbursements relates on entry thereof and not before.**

C(6) **Avoidance of multiple collection of attorney fees and costs and disbursements.**

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the Court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

SECTION 7. ORS 20.220 is amended to read:

20.220. **(1)** An appeal may be taken from a judgment under ORCP 68 C.(4) [*on the allowance and taxation of*] **allowing or denying** attorney fees [*and*] **or** costs and disbursements on questions of law only, as in other cases. On such appeal the statement of attorney fees [*and*] **or** costs and disbursements, the objections thereto[,] and the judgment rendered thereon[, *and the exceptions, if any,*] shall constitute the trial court file, as defined in ORS 19.005.

(2) If an appeal is taken from a judgment under ORS 19.010 before the trial court enters a judgment under ORCP 68 C.(4), any necessary modification of the appeal shall be pursuant to rules of the appellate court.

(3) When an appeal is taken from a judgment under ORS 19.010 to which an award of attorney fees or costs and disbursements relates:

(a) If the appellate court reverses the judgment, the award of attorney fees or costs and disbursements shall be deemed reversed; or

(b) If the appellate court modifies the judgment such that the party who was awarded attorney fees or costs and disbursements is no longer entitled to the award, the party against whom attorney fees or costs and disbursements were awarded may move for relief under ORCP 71 B.(1)(e).

EXHIBIT B TO MEMO DATED 7/5/89

January 3, 1990

M E M O R A N D U M

TO: JUDGMENTS SUBCOMMITTEE:

Judge Mattison
Susan Bischoff
Judge McConville
Judge Liepe

FROM: Fred Merrill

RE: Redraft of ORCP 68 C

Since we have two new members on the subcommittee, I am sending them copies of the original memorandum to the subcommittee. I am also attaching a copy of Judge Buttler's opinion in Marquez v. Meyers, where he spells out some of the problems with the present rule.

At our last subcommittee meeting in the fall, I was asked to simplify the draft of ORCP 68 C. You also asked for one version where the attorney fee portion of the judgment would always be entirely separate and another version where the attorney fee portion of the judgment would be settled before any judgment was entered, so that the attorney fees and costs would always be part of the main judgment.

1. Separate Judgment

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

* * *

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

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C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to

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C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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. 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance

of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Amendment of statements and objections. Statements and objections may be amended in accordance with Rule 23.

C(4)(d) No objections filed - entry by the clerk. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the clerk shall sign a supplemental judgment awarding the attorney fees and costs and disbursements claimed in the statement. Where the principal judgment is by default and attorney fees are included in the statement, the supplemental judgment shall not be entered unless the attorney fees are approved by the court before entry.

C(4)(e)(i) Objections filed - hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(e)(ii) Judgment for attorney fees by the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. The determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(f) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment awarding attorney fees or costs and disbursements shall be filed and entered. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(g) Form of supplemental judgments. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 71 A(2) and (3).

C[(6)](5) Avoidance of multiple collection of attorney fees and costs and disbursements.

C[(6)](5)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C[(6)](5)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and

disbursements included in all other judgments.

COMMENT

Several conforming amendments to the ORCP would be necessary. ORCP 70 A(2)(a)(vii) should be eliminated. That subparagraph reads as follows:

> "If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C."

ORCP 70 A(1)(b) would be amended to read:

> **"Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 68 C(4)(d) or 69 B(1), by the clerk.**

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. I assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed. A separate notice of appeal would always be required to appeal the supplemental judgment.

2. Combined Judgment

This would use the form above, but C(4)(d) would read as follows:

C (4)(d) No objections filed. If no objection to a statement of attorney fees and costs and disbursements is timely filed, the amount claimed may be included in the judgment. For any judgment by default, where attorney fees are included in the statement, the attorney fees portion of the statement shall not be entered unless approved by the court before entry.

C 4(e)(ii) would read as follows:

C (4)(e)(ii) Award by the court. The court shall deny or allow in whole or in part the statement of attorney fees and

costs and disbursements. The determination of the court shall be included in the judgment. No other findings of fact or conclusions of law shall be necessary.

C (4))(f) and (g) would be eliminated. The second sentence of ORCP 70 A(2)(a)(vii) would also be eliminated.

This approach assumes that no final judgment will be entered until the attorney fees and costs and disbursements claims are settled. I suggest we can accomplish this by defining a final judgment to exist only where the claim for costs and disbursements is settled. We could add the following after the first sentence of ORCP 67 A:

> **The rights of the parties to the action are not finally determined until any claim for attorney fees and costs and disbursements is either determined or no timely claim for attorney fees and costs and disbursements is filed as provided in Rule 68 C.**

This has the advantage of using into the final judgment rule. It certainly would be possible to treat this as a claim. /1/ It also has a built-in way to get around delay in entry of the principal judgment. If the party securing the judgment is in a hurry, they can ask for an ORCP 67 B judgment on the principal amount. It also is flexible.

One problem is that the time for filing the cost bill presently begins only when there is a judgment. Under this draft, there is no judgment until the attorney fees and costs and disbursements are settled. We would have to amend ORCP 68 C(4)(a) to read:

"A party claiming attorney fees or costs and disbursement shall, not later than 14 days after entry of [judgment] <u>any order disposing of all other rights of parties to an action</u>:

/1/ In <u>Swagerty v. Joe Romania Chevrolet, Inc.,</u> 95 Or App 728, 730, 770 P2d 976 (1989), the defendant had asserted a claim for attorney fees as a counterclaim. At trial, the judge stated that attorney fees were not a counterclaim and should be asserted by cost bill. At a later point, the court entered an order dismissing the counterclaim. The Court of Appeals held that the appeal time did not begin until the counterclaim order was entered. Once asserted as a counterclaim, the fees claim must be disposed of to have a final judgment, even if it is not a proper counterclaim. The oral disposition at trial does not satisfy the requirement of a written final judgment. <u>Maduff Mortgage Corp. v. Deloitte Haskins and Sells</u>, 83 Or App 15, 17-21, 730 P2d 558 (1986).

BUTTLER, P. J.

Defendant appeals an order awarding attorney fees incurred in collecting the original judgment in this action that was entered more than eight months earlier. During oral argument, this court raised the question of whether the order is appealable. Counsel for both parties stated that they thought that it was and, after argument, defendant's counsel forwarded to us a certified copy of the Lane County judgment docket, showing that the amount of attorney fees awarded by the order had been separately docketed as a judgment. This matter is properly before us.

ORCP 68C governs the procedure for the award of attorney fees. It does not specifically require the entry of a separate judgment, as such; it requires only that the court "shall make a statement of the attorney fees * * *, which shall be entered as a part of the judgment." ORCP 68C(4)(d). It does not require the judge to sign a separate judgment. It is unclear how the clerk is expected to enter the "statement" as "part of the judgment," other than to enter it in the register and enter the amount in the docket, as was done here. If attorney fees are denied, there would be nothing for the clerk to enter. On the other hand, ORS 20.220 provides that an appeal may be taken from "a judgment under ORCP 68C(4) on the allowance and taxation of attorney fees." ORCP 67A defines a "judgment as used in these rules" as "the final determination of the rights of the parties in an action * * *." Given that definition, the disposition of ancillary issues, such as attorney fees and costs, would not constitute a judgment. Accordingly, we interpret ORS 20.220 to refer to whatever order is required by ORCP 68C(4)(d) to dispose of a claim for attorney fees.

ORCP 68C appears to contemplate that the amount awarded as attorney fees will be entered in the judgment theretofore entered in the principal action by filling in a blank left for that purpose. However, we know that that is not always the case, and we also know that, in order to appeal the award or denial of attorney fees, even though there is already an appeal from the judgment on the merits of the action, a separate notice of appeal must be filed. *See Jansen v. Atiyeh*, 89 Or App 557, 749 P2d 1230, *rev den* 305 Or 576 (1988). Given that state of affairs, to require that the award of attorney fees

be entered in the judgment in the principal action as a part of that judgment could mean that one who wished to appeal only the award of attorney fees would be confronted with the expiration of the time within which he could appeal before the award or denial of attorney fees is made. Obviously, that was not intended. Notwithstanding the confusion between ORCP 68C and ORS 20.220, we conclude that the order is appealable under ORS 19.010(2)(c):

> "For the purpose of being reviewed on appeal, the following shall be deemed a judgment or decree:
>
> "* * * * *
>
> "(c) A final order affecting a substantial right, and made in a proceeding after judgment or decree."

We recognize that our conclusion means that there is little, if any, significance to ORS 20.220. So be it.

On the merits, the question is whether attorney fees incurred in collecting a judgment may be allowed when the application therefor is made more than 10 days after entry of the original judgment, which awarded plaintiff attorney fees for prosecution of the action. Approximately eight months thereafter, plaintiff filed a supplemental statement of costs and attorney fees relating to her efforts in collecting the judgment. Defendant objected on the ground that the supplemental statement was served and filed more than 10 days after the original judgment, contrary to ORCP 68C(4)(a)(i). The trial court did not sustain defendant's objection, entertained plaintiff's motion and entered the order awarding plaintiff attorney fees from which defendant appeals.

ORCP 68 "governs the pleading, proof and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees * * *." ORCP 68C(1). Defendant does not challenge plaintiff's substantive right to the post-judgment attorney fees, but relies on the procedural requirement of ORCP 68C(4)(a)(1) that service of the statement of amount of attorney fees be made not later than 10 days after the entry of the judgment. It would appear that ORCP 68, on its face, does not contemplate an award of attorney fees incurred in collecting a judgment. However, we recognized in *Johnson v. Jeppe*, 77 Or App 685, 688, 713 P2d 1090 (1986), that

"[t]he enforcement of a judgment and final collection of

> money due are 'legal services related to the prosecution or defense of an action' and may be considered in awarding attorney fees. The difficulty lies in determining the 'reasonable value' of these services before they are rendered."

In that case, the prevailing party, in his original statement for attorney fees, sought additional fees that he anticipated would be incurred in collecting the judgment. We reversed the award of post-judgment attorney fees, because the plaintiffs offered no evidence to substantiate their claim; it was based on pure speculation.

Given our recognition that post-judgment attorney fees may be awarded if there is evidence to support them, the question is whether the 10-day limitation for claiming them precludes the court's entertaining an application made after the attorney fees have been incurred, but more than 10 days after the original judgment. ORCP 15D permits the court, in its discretion, to allow any pleading or motion to be made "after the time limited by the procedural rules." We perceive no reason why a court may not exercise discretion to entertain such a motion. Defendant argues that, if this procedure is permitted, attorney fee litigation may continue forever because, each time an award of fees is made and becomes a part of the judgment, there might be a supplemental motion for attorney fees incurred in collecting the preceding judgment for fees. Although that result is a possibility, it is within the judgment debtor's control to avoid it.

We conclude that there is no procedural or practical reason why the procedure followed here is not permissible, within the court's discretion under ORCP 15D.

Affirmed.

February 28, 1990

TO: JUDGMENTS SUBCOMMITTEE MEMBERS:

Judge Mattison
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: Fred Merrill

The following draft of our report is being faxed to you for review and comment. We are also sending a copy to Judge Buttler. The subcommittee chairer or Executive Director will contact you at the beginning of next week for comments and suggestions.

DRAFT REPORT - JUDGMENTS SUBCOMMITTEE

MEMORANDUM

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Judgments Subcommittee

RE: ORCP 68 C

The subcommittee recommends the following amendment to ORCP 68 C.:

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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. 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Amendment of statements and objections. Statements

and objections may be amended in accordance with Rule 23.

C(4)(d) No objections filed - entry by the clerk. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the clerk shall sign a supplemental judgment awarding the attorney fees and costs and disbursements claimed in the statement. Where the principal judgment is by default and attorney fees are included in the statement, the supplemental judgment shall not be entered unless the attorney fees are approved by the court before entry.

C(4)(e)(i) Objections filed - hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(e)(ii) Judgment for attorney fees by the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. The determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(f) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment awarding attorney fees or costs and disbursements shall be filed and entered. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(g) Form of supplemental judgments. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 71 A(2) and (3).

C[(6)](5) Avoidance of multiple collection of attorney fees and costs and disbursements.

C[(6)](5)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C[(6)](5)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such

judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. We assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed.

Several conforming amendments to the ORCP would be necessary. ORCP 70 A(2)(a)(vii) should be eliminated. That subparagraph reads as follows:

> "If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C."

ORCP 70 A(1)(b) would be amended to read:

> **"Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 68 C(4)(d) or 69 B(1), by the clerk.**

The subcommittee also suggests that the Council recommend that the legislature adopt the following amendment to ORS 19.026

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment upon the principal claim in the case or the supplemental judgment awarding attorney fees or costs and disbursements shall be served and filed within 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment upon the principal claim has been filed

of appeal of the judgment upon the principal claim has been filed and served before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the principal judgment shall also be a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suite or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

Enclosure: ORS 20.220

cc: Judge Buttler (w/enc.)

20.150 Recovery of costs and disbursements when party represented by another. In an action, suit or proceeding prosecuted or defended by an executor, administrator, trustee of an express trust or person expressly authorized by statute to prosecute or defend therein, or in which a party appears by general guardian, conservator or guardian ad litem, costs and disbursements shall be recovered or not as in ordinary cases, but if recovered shall be chargeable only upon or collected from the estate, trust fund or party represented or for whom appearance is made, unless the court or judge thereof shall order such costs and disbursements to be recovered from the executor, administrator, trustee, person, guardian or conservator personally for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding. [Amended by 1961 c.344 §99]

20.160 Liability of attorney of nonresident or foreign corporation plaintiff; security for costs. The attorney of a plaintiff who resides out of the state or is a foreign corporation, against whom costs are adjudged in favor of a defendant, is liable to the defendant therefor; and if the attorney neglects to pay the same, upon the information of the defendant shall be punished as for a contempt. The attorney may relieve or discharge the attorney from such liability by filing an undertaking at the commencement of the action or suit, or at any time thereafter before judgment or decree, for the payment to the defendant of the costs and disbursements that may be adjudged to the attorney, executed by one or more sufficient sureties.

20.170 Qualification of and exception to sureties; deposit in lieu of undertaking. The sureties in the undertaking described in ORS 20.160 shall possess the qualifications of sureties in an undertaking for bail on arrest, and their sufficiency may be excepted to by the defendant at any time within five days from notice of filing the same, and if so, they shall justify in an amount not less than $200, in like manner and with like effect as sureties for bail on arrest. Until the time for excepting to the sufficiency of the sureties has expired or, if excepted to, until they are found sufficient, the attorney is liable as if no undertaking had been given. A deposit of $200 or other sum which the court or judge may direct, with the clerk, may be made in lieu of such undertaking.

20.180 Effect of tender as to costs. When in any action or suit for the recovery of money or damages only, the defendant shall allege in answer that before the commencement thereof the defendant tendered to the plaintiff a certain amount of money in full payment or satisfaction of the cause, and now brings the same into court and deposits it with the clerk for the plaintiff, if such allegation of tender is found true, and the plaintiff does not recover a greater sum than the amount so tendered, the plaintiff shall not recover costs off the defendant, but the defendant shall recover them off the plaintiff.

20.190 Recovery of additional amounts as part of costs and disbursements. A prevailing party in a civil action or proceeding who has a right to recover costs and disbursements in the following cases also has a right to recover, as a part of the costs and disbursements, the following additional amounts:

(1) In the Supreme Court or Court of Appeals, on an appeal, $85.

(2) In a circuit court or district court:

(a) When judgment is given without trial of an issue of law or fact or on an appeal, $35; or

(b) When judgment is given after trial of an issue of law or fact, $60.

(3) In a small claims department, a county court or justice's court, one-half of the amount provided for in subsection (2) of this section. [1981 c.898 §18a; 1987 c.725 §6]

APPEALS ON ATTORNEY FEES AND OTHER COSTS

20.210 [Amended by 1959 c.638 §7; 1979 c.284 §60; repealed by 1981 c.898 §53]

20.220 Appeal on attorney fees and costs. An appeal may be taken from a judgment under ORCP 68 C.(4) on the allowance and taxation of attorney fees and costs and disbursements on questions of law only, as in other cases. On such appeal the statement of attorney fees and costs and disbursements, the objections thereto, the judgment rendered thereon, and the exceptions, if any, shall constitute the trial court file, as defined in ORS 19.005. [Amended by 1967 c.471 §2; 1981 c.898 §22]

20.230 [Repealed by 1981 c.898 §53]

COSTS AND DISBURSEMENTS IN APPELLATE COURTS

20.310 Costs and disbursements in Supreme Court or Court of Appeals. (1) In any appeal to the Court of Appeals or review by the Supreme Court, the court shall allow costs and disbursements to the prevailing party, unless a statute provides that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other

20.150 Recovery of costs and disbursements when party represented by another. In an action, suit or proceeding prosecuted or defended by an executor, administrator, trustee of an express trust or person expressly authorized by statute to prosecute or defend therein, or in which a party appears by general guardian, conservator or guardian ad litem, costs and disbursements shall be recovered or not as in ordinary cases, but if recovered shall be chargeable only upon or collected from the estate, trust fund or party represented or for whom appearance is made, unless the court or judge thereof shall order such costs and disbursements to be recovered from the executor, administrator, trustee, person, guardian or conservator personally for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding. [Amended by 1961 c.344 §99]

20.160 Liability of attorney of nonresident or foreign corporation plaintiff; security for costs. The attorney of a plaintiff who resides out of the state or is a foreign corporation, against whom costs are adjudged in favor of a defendant, is liable to the defendant therefor; and if the attorney neglects to pay the same, upon the information of the defendant shall be punished as for a contempt. The attorney may relieve or discharge the attorney from such liability by filing an undertaking at the commencement of the action or suit, or at any time thereafter before judgment or decree, for the payment to the defendant of the costs and disbursements that may be adjudged to the attorney, executed by one or more sufficient sureties.

20.170 Qualification of and exception to sureties; deposit in lieu of undertaking. The sureties in the undertaking described in ORS 20.160 shall possess the qualifications of sureties in an undertaking for bail on arrest, and their sufficiency may be excepted to by the defendant at any time within five days from notice of filing the same, and if so, they shall justify in an amount not less than $200, in like manner and with like effect as sureties for bail on arrest. Until the time for excepting to the sufficiency of the sureties has expired or, if excepted to, until they are found sufficient, the attorney is liable as if no undertaking had been given. A deposit of $200 or other sum which the court or judge may direct, with the clerk, may be made in lieu of such undertaking.

20.180 Effect of tender as to costs. When in any action or suit for the recovery of money or damages only, the defendant shall allege in answer that before the commencement thereof the defendant tendered to the plaintiff a certain amount of money in full payment or satisfaction of the cause, and now brings the same into court and deposits it with the clerk for the plaintiff, if such allegation of tender is found true, and the plaintiff does not recover a greater sum than the amount so tendered, the plaintiff shall not recover costs off the defendant, but the defendant shall recover them off the plaintiff.

20.190 Recovery of additional amounts as part of costs and disbursements. A prevailing party in a civil action or proceeding who has a right to recover costs and disbursements in the following cases also has a right to recover, as a part of the costs and disbursements, the following additional amounts:

(1) In the Supreme Court or Court of Appeals, on an appeal, $85.

(2) In a circuit court or district court:

(a) When judgment is given without trial of an issue of law or fact or on an appeal, $35; or

(b) When judgment is given after trial of an issue of law or fact, $60.

(3) In a small claims department, a county court or justice's court, one-half of the amount provided for in subsection (2) of this section. [1981 c.898 §18a; 1987 c.725 §6]

APPEALS ON ATTORNEY FEES AND OTHER COSTS

20.210 [Amended by 1959 c.638 §7; 1979 c.284 §60; repealed by 1981 c.898 §53]

20.220 Appeal on attorney fees and costs. An appeal may be taken from a judgment under ORCP 68 C.(4) on the allowance and taxation of attorney fees and costs and disbursements on questions of law only, as in other cases. On such appeal the statement of attorney fees and costs and disbursements, the objections thereto, the judgment rendered thereon, and the exceptions, if any, shall constitute the trial court file, as defined in ORS 19.005. [Amended by 1967 c.471 §2; 1981 c.898 §22]

20.230 [Repealed by 1981 c.898 §53]

COSTS AND DISBURSEMENTS IN APPELLATE COURTS

20.310 Costs and disbursements in Supreme Court or Court of Appeals. (1) In any appeal to the Court of Appeals or review by the Supreme Court, the court shall allow costs and disbursements to the prevailing party, unless a statute provides that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other

March 8, 1990

MEMORANDUM

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

FROM: **Judgments Subcommittee**

RE: ORCP 68 C

The subcommittee recommends the following amendment to ORCP 68 C:

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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. 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) No objections filed - entry by the clerk. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the clerk shall sign a supplemental judgment awarding the attorney fees and costs and disbursements claimed in the statement. Where the principal judgment is by default and attorney fees are included in the statement, the supplemental judgment shall not be entered unless the attorney fees are approved by the court before entry.

C(4)(d)(i) Objections filed - hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d)(ii) Judgment for attorney fees by the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. The determination of the court shall be set forth in a separate supplemental

judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(e) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment awarding attorney fees or costs and disbursements shall be filed and entered. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(f) Form of supplemental judgments. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70 A(2) and (3).

C[(6)](5) Avoidance of multiple collection of attorney fees and costs and disbursements.

C[(6)](5)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C[(6)](5)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. We assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed.

Several conforming amendments to the ORCP would be

necessary. ORCP 70 A(2)(a)(vii) should be eliminated. That subparagraph reads as follows:

> "If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C."

ORCP 70 A(1)(b) would be amended to read:

> **"Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 68 C(4)(d) or 69 B(1), by the clerk."**

The subcommittee also suggests that the Council recommend that the legislature adopt the following amendment to ORS 19.026

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment upon the principal claim in the case or the supplemental judgment awarding attorney fees or costs and disbursements shall be served and filed within 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment upon the principal claim has been filed and served before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the principal judgment shall also be a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suite or proceeding, may serve and file notice of appeal within 10 days after the expiration of the

time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

Enclosure: ORS 20.220

cc: Judge Buttler (w/enc.)

March 19, 1990

MEMORANDUM

TO: **JUDGMENTS SUBCOMMITTEE**

FROM: **Fred Merrill, Executive Director**

The following is the form of ORCP 68 C and ORS 19.026 after the Council changes. I will confer with Judge Liepe to develop a proposal to deal with his concerns.

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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 denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements

allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

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C(4)(c) No objections filed - entry by the court. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the court shall sign a supplemental judgment awarding the attorney fees and costs and disbursements claimed in the statement.

C(4)(d)(i) Objections filed - hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed timely, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d)(ii) Judgment for attorney fees or costs and disbursements by the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. The determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(e) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment concerning attorney fees or costs and disbursements shall be filed timely

and entered. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(f) Form of supplemental judgments. **Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70 A(2) and (3).**

C[(6)]**(5)** Avoidance of multiple collection of attorney fees and costs and disbursements.

C[(6)]**(5)**(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C[(6)]**(5)**(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. We assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed.

Several conforming amendments to the ORCP would be necessary. ORCP 70 A(2)(a)(vii) should be eliminated. That subparagraph reads as follows:

> "If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C."

The subcommittee also suggests that the Council recommend that the legislature adopt the following amendment to ORS 19.026

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment upon the principal claim in the case or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment upon the principal claim has been filed and served before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the principal judgment shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suite or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

cc: Judge Buttler

April 9, 1990

MEMORANDUM

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

FROM: **JUDGMENTS SUBCOMMITTEE**

The following is the form of ORCP 68 C and ORS 19.026 after the Council changes at the last meeting:

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

* * *

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

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C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

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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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

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or conclusions of law shall be necessary.

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COMMENT

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. We assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed.

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subparagraph reads as follows:

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The subcommittee also suggests that the Council recommend that the legislature adopt the following amendment to ORS 19.026

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(2) When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment upon the principal claim in the case or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment upon the principal claim has been filed and served before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the principal judgment shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suite or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate

court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

cc: Judge Buttler (w/enc.)

FURTHER REVISIONS

OF

AMENDMENT TO ORCP 68 C

(Suggestions by Judge Liepe,
Judge McConville, and Larry
Thorp)

JUDGE LIEPE'S SUGGESTED REVISIONS

Pages 1 and 2 contain the new suggested language, and the balance shows the changes in context.

O R C P 6 8 C

I. Revisions to allow inclusion of attorney fees, costs and disbursements when appropriate in the original judgment or in a supplemental judgment. Delete from 3/19/90 draft C(4)(c) thru C(4)(e) and substitute the following:

C(4)(c) Hearing on objections. If objections are timely filed, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees and costs and disbursements and by the objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees and costs and disbursements claimed in the statement.

C(5) Award or denial of attorney fees, costs and disbursements in a judgment or supplemental judgment.

C(5)(a) Form. The court shall deny or award in whole or in part claimed attorney fees and costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(5)(b) As part of judgment. When all issues regarding attorney fees and costs and disbursement have been determined by the court or by stipulation of the parties when a judgment is entered, the court shall include any award or denial of attorney fees, costs or disbursements in that judgment.

C(5)(c) By supplemental judgment; notice. When any issue regarding attorney fees, costs or disbursements has not been determined by the court or by stipulation of the parties when a judgment is entered, any award or denial of attorney fees, costs or disbursments made by the court after entry of the judgment shall be made by a separate supplemental judgment. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70B(1).

C(5)(d) Parties in default. When judgment is entered against a party in default, under Rule 69, the judgment may include costs and disbursement and attorney fees approved by the court. (Comment: This follows present ORCP 68C(4)(a)(ii) and 69B(3).)

Renumber C(5) of March 19, 1990 draft as C(6).

W. K. Liepe
4/9/90

II. Further revisions of C(5)(d) to allow objections by party in default.

C(5)(d) Parties in default. When judgment is entered against a party in default under Rule 69 the judgment may include costs and attorney fees and disbursements, unless objections have been filed and served under paragraph (5)(d)(i) of this section.

C(5)(d)(i) If the statement of attorney fees and costs and disbursements has been filed together with proof of service on a party in default, the party in default may file objections as provided in paragraph C(4)(b) of this Rule to be heard and determined in the manner provided with respect to parties not in default.

C(5)(d)(ii) If the statement of attorney fees and costs and disbursements has been filed without proof of service on a party in default, the party in default may file objections within 14 days after the statement has been filed. Such objections shall be heard and determined in the manner provided with respect to parties not in default and the court shall by supplemental judgment confirm, modify or deny attorney fees and costs and disbursements awarded in the judgment.

W. K. Liepe
4/9/90

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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 denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees

Rec'd 3.22-90

1

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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements

allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) No objections filed - entry by the court. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the court shall sign a supplemental judgment awarding the attorney fees and costs and disbursements claimed in the statement.

C(4)(d)(i) Objections filed - hearing on objections. If objections to a statement of attorney fees or costs and disbursements are filed timely, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d)(ii) Judgment for attorney fees or costs and disbursements by the court. The court shall deny or allow in whole or in part the statement of attorney fees and costs and disbursements. The determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

C(4)(e) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment concerning attorney fees or costs and disbursements shall be filed timely and entered. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(c) Hearing on objections. If objections are timely filed, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees and costs and disbursements and by the objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees and costs and disbursements claimed in the statement.

C(5) Award or denial of attorney fees, costs and disbursements in a judgment or supplemental judgment.

C(5)(a) Form. The court shall deny or award in whole or in part claimed attorney fees and costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(5)(b) As part of judgment. When all issues regarding attorney fees and costs and disbursement have been determined by the court or by stipulation of the parties when a judgment is entered, the court shall include any award or denial of attorney fees, costs or disbursements in that judgment.

C(5)(c) By supplemental judgment; notice. When any issue regarding attorney fees, costs or disbursements has not been determined by the court or by stipulation of the parties when a judgment is entered, any award or denial of attorney fees, costs or disbursments made by the court after entry of the judgment shall be made by a separate supplemental judgment. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70B(1).

C(5)(d)

~~C(4)(f)~~ Form of supplemental judgments. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70 A(2) and (3).

(e)

C(5)~~(d)~~ Parties in default. When judgment is entered against a party in default, under Rule 69, the judgment may include costs and disbursement and attorney fees approved by the court. (Comment: This follows present ORCP 68C(4)(a)(ii) and 69B(3).)

II. Further revisions of C(5)(d) to allow objections by party in default.

C(5)(d) Parties in default. When judgment is entered against a party in default under Rule 69 the judgment may include costs and attorney fees and disbursements, unless objections have been filed and served under paragraph (5)(d)(i) of this section.

C(5)(d)(i) If the statement of attorney fees and costs and disbursements has been filed together with proof of service on a party in default, the party in default may file objections as provided in paragraph C(4)(b) of this Rule to be heard and determined in the manner provided with respect to parties not in default.

C(5)(d)(ii) If the statement of attorney fees and costs and disbursements has been filed without proof of service on a party in default, the party in default may file objections within 14 days after the statement has been filed. Such objections shall be heard and determined in the manner provided with respect to parties not in default and the court shall be supplemental judgment confirm, modify or deny attorney fees and costs and disbursements awarded in the judgment.

W. K. Liepe
4/9/90

C§(6) ~~7(5)~~ Avoidance of multiple collection of attorney fees and costs and disbursements.

C§(6) ~~7(5)~~(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C§(6) ~~7(5)~~(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

March 30, 1990

MEMORANDUM

TO: Fred Merrill, Executive Director

FROM: Robert B. McConville

In the interest of "fine tuning" the proposal of the sub-committee on judgments, I suggest that we revise the language of our latest proposal to make clearer the distinction between the judgment on merits and the supplemental judgment for attorney fees, costs and disbursements. Toward that end, I would propose the following language. (New matter is in bold type. Deleted matter is in brackets):

C. (4.)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of **FINAL** judgment [:] **ON THE MERITS:**

C.(4.)(3) Entry and effect of judgment for attorney fees and costs and disbursements. The supplemental judgment concerning the attorney fees and costs and disbursements shall be **SEPARATELY** filed [timely] and entered. Notice of the supplemental judgment shall be given to parties in the same manner as provided in Rule 70B(1), excluding the last sentence thereof.

ORS 19.026(2). When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68C(4)(f), notice of appeal of the **final** judgment [upon the principle claim in the case] **on the merits** or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the **final** judgment [upon the principal claim] **on the merits** has been served and filed before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the **final** [principal] judgment **on the merits** shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

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(1912-1977)
JACK B. LIVELY
(1923-1979)

March 29, 1990

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

RE: ORCP 68

Dear Fred:

I reviewed your proposed revisions to ORCP 68C. I propose a number of editorial changes which I have written on the attached copy.

I am still having some problem with the proposed addition of new subsection 2 to ORS 19.026. The first sentence is fine. The second sentence, however, seems to be somewhat inconsistent with the first sentence which treats the principal judgment and the supplemental judgment as separate judgment for appeal purposes. If it were left up to me, I would simply delete the second sentence in its entirety. The argument against that is that an appellant who appeals prior to the entry of the supplemental judgment may be deceived into believing that they do not have to file a second notice of appeal as to the supplemental judgment. On the other hand, leaving the second sentence in as you proposed it, would relieve the appellant from the original judgment in the position of automatically appealing the supplemental judgment, while the respondent may make the mistake of thinking that the respondent would not have to file a separate notice of appeal on the supplement judgment which I believe would be required.

I do believe the second sentence has one other trap for the unwary. I could easily see a case in which a notice of appeal is filed with the appellant believing that it was filed "before entry of the supplemental judgment" since it often takes several days following entry before the attorneys are actually notified that the judgment is entered. It is entirely possible, that under such circumstances an appellant may believe that they have "filed and served" the notice of appeal before entry of the supplemental judgment when they have

not. This may cause an appellant to erroneously believe that it is unnecessary to file a notice of appeal from the supplemental judgment.

In light of these concerns, if we don not delete the second sentence in its entirety we should at least add the words "by either party" to the end of the second sentence. By doing so, then each party is automatically an appellant with respect to the supplemental judgment without further notice of appeal. This would, of course, put the supplemental judgment at issue in every case in which the principal judgment is appealed prior to the filing of the supplemental judgment. That will probably be the typical case in any event.

Again, given these problems, my preference is to treat both judgments as separate judgments for appeal purposes with separate notices of appeal by each party as to each judgment, but extending the time for filing notice of appeal until 30 days after entry of the supplemental judgment.

Very truly yours,

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

Laurence E. Thorp

LET:js
Enclosure
cc: Judge Winfrid Liepe
Judge Jack L. Mattison
Judge Robert B. McConville
Judge John H. Buttler

March 19, 1990

COPY

MEMORANDUM

TO: **JUDGMENTS SUBCOMMITTEE**

FROM: **Fred Merrill, Executive Director**

The following is the form of ORCP 68 C and ORS 19.026 after the Council changes. I will confer with Judge Liepe to develop a proposal to deal with his concerns.

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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 denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements

delete C(5).

allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment:

C(4)(a)(i) File with the court a verified or and detailed statement of the amount of attorney fees ~~and~~ costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. or A party may object to a statement claiming attorney fees ~~and~~ costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) ~~of paragraph (a) of this subsection~~. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C 4 (a)

C(4)(c) No objections filed - entry by the court. If no objection to a statement of attorney fees or costs and disbursement is timely filed, the court shall sign a supplemental judgment awarding the attorney fees ~~and~~ or costs and disbursements claimed in the statement.

C(4)(d)(i) Objections filed - hearing on objections. If an objections to a statement of attorney fees or costs and disbursements ~~are~~ is filed timely, the court, without a jury, shall hear and determine all issues of law ~~or~~ and fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d)(ii) Judgment for attorney fees or costs and disbursements by the court. The court shall deny or allow in whole or in part the statement of attorney fees ~~and~~ or costs and disbursements. The determination of the court shall be set forth in a separate supplemental judgment. No other findings of fact or conclusions of law shall be necessary.

Filing ~~Entry~~ and Notice of Supplemental Judgment.

C(4)(e) ~~Entry and effect~~ of judgment for attorney fees and costs and disbursements. ~~The supplemental judgment concerning attorney fees or costs and disbursements shall be filed timely~~

why do we need this sentence

filed and notice should be

~~and entered.~~ ~~Notice of~~ the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1), excluding the last sentence thereof.

C(4)(f) Form of supplemental judgments. Supplemental judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70 A(2) and (3).

C[(6)](5) Avoidance of multiple collection of attorney fees and costs and disbursements.

C[(6)](5)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C[(6)](5)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The approach in this draft allows the principal judgment to be entered without any delay relating to the cost bill. It is also the most consistent with ORS 20.220 (attached), which treats the attorney fees and costs and disbursements as a separate judgment for appeal and ORS 19.033(1), which allows a court to enter an attorney fee and costs and disbursements award after appeal. There would be no ambiguity about the separate existence and appealability of a judgment for attorney fees and costs and disbursements. On the other hand, there would be an increase in paper. Every judgment would require a separate supplemental judgment for attorney fees and costs and disbursements. We assume the attorney submitting the cost bill would always include a form of judgment for the clerk to sign and enter if no objections were filed.

Several conforming amendments to the ORCP would be necessary. ORCP 70 A(2)(a)(vii) should be eliminated. That subparagraph reads as follows:

> "If the judgment awards costs and disbursements or attorney fees, that they are awarded, ~~and any specific amounts awarded.~~ This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C."

Just delete last five words →

The subcommittee also suggests that the Council recommend that the legislature adopt the following amendment to ORS 19.026

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment ~~awarding~~ concerning attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment upon the principal claim in the case or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment upon the principal claim has been filed and served before entry of the supplemental judgment ~~awarding~~ concerning attorney fees or costs and disbursements, the notice of appeal of the principal judgment shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal by either party.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suite or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

cc: Judge Buttler

May 18, 1990

MEMORANDUM

TO: **MEMBERS, JUDGMENTS SUBCOMMITTEE:**

Judge Mattison
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill, Executive Director**

The following is a form of ORCP 68 C and ORS 19.026 after incorporating some of the changes suggested by Judges Liepe and McConville and Larry Thorp:

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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 denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees and costs and disbursements. The procedure for claiming attorney fees and costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67 A or B:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees and costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees and costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Hearing on objections. If objections are timely filed, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees and costs and disbursements and by the objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees, costs and disbursements claimed in the statement.

C(4)(e) Form of supplemental judgments. Supplemental

judgments awarding attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70 A(2) and (3).

[C(5) **Enforcement**. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C(5) Award or denial of attorney fees, costs and disbursements in a judgment or supplemental judgment.

C(5)(a) Form. The court shall deny or award in whole or in part claimed attorney fees and costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(5)(b) As part of judgment. When all issues regarding attorney fees and costs and disbursements have been determined by the court or by stipulation of the parties when a judgment is entered, the court shall include any award or denial of attorney fees, costs or disbursements in that judgment.

C(5)(c) By supplemental judgment; notice. When any issue regarding attorney fees, costs or disbursements has not been determined by the court or by stipulation of the parties when a judgment is entered, any award or denial of attorney fees, costs or disbursements made by the court after entry of the judgment shall be made by a separate supplemental judgment. Notice of the supplemental judgment shall be given to the parties in the same manner as provided in Rule 70 B(1).

C(5)(d) Parties in default. When judgment is entered against a party in default under Rule 69, the judgment may include costs and attorney fees and disbursements, unless objections have been filed and served under subparagraph (5)(d)(i) of this section.

C(5)(d)(i) If the statement of attorney fees and costs and disbursements has been filed together with proof of service on a party in default, the party in default may file objections as provided in paragraph C(4)(b) of this rule to be heard and determined in the manner provided with respect to parties not in default.

C(5)(d)(ii) If the statement of attorney fees and costs and disbursements has been filed without proof of service on a party in default, the party in default may file objections within 14

days after the statement has been filed. Upon service and filing of objections to the entry of judgment for attorney fees and costs and disbursements, enforcement of that portion of the judgment shall be stayed until the objections are heard and determined by the court. Such objections shall be heard and determined in the manner provided with respect to parties not in default, and the court shall by supplemental judgment confirm, modify or deny attorney fees and costs and disbursements awarded in the judgment.

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

* * *

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment awarding attorney fees or costs and disbursements is entered pursuant to ORCP 68 C(4)(f), notice of appeal of the judgment entered pursuant to Rule 67 A or B or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment entered pursuant to Rule 67 A or B has been filed and served before entry of the supplemental judgment awarding attorney fees or costs and disbursements, the notice of appeal of the judgment entered pursuant to Rule 67 A or B shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal by either party.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

COMMENT

Liepe Suggestions

This draft includes Judge Liepe's revisions of ORCP 68 C. It uses his second alternative which is to allow the defaulted party 14 days to come in and file objections to a cost bill, even though the cost bill amount has become part of the judgment.

I could not find any case in Oregon or elsewhere that suggests that a defaulted party has a constitutional right to appear before the court and object to the allowance or amount of attorney fees or costs and disbursements. Nonetheless, I believe that allowing an opportunity to object is consistent with the general treatment of defaulted parties in Rajneesh Found. Int'l v. McGreer, 303 OT 139, 142, and Jones v. Siladic, 52 Or App 807 (1981). Those cases hold that the defaulted party has a right to appear at the default judgment hearing or by motion and cross-examine witnesses and contest the factual and legal validity of the plaintiff's claim. If default does not waive the right to contest the substantive validity of the principal claim, it should not prevent questioning the validity or amount of attorney fees or costs and disbursements. The defaulted party has no notice of the default judgment application under the present

rule, but this will at least protect the consenting defaulting party who is following the proceeding from being blindsided by an outrageous attorney fee claim.

One thing to note about the Liepe revision is that it changes the existing Oregon approach of making amounts requested for disbursements in a cost bill (where no objection is filed) mandatory. Most jurisdictions allow the clerk, in the case of a cost bill with or without objection, to exercise discretion in allowing the amounts requested. Since before 1900 the Oregon statutes have required the clerk to enter the amount requested for disbursements (if no objections are filed). **See** Sommers v. Compton, 53 Or 341, 343 (1909). Under the Liepe revision of 68 C(4), the court may, but is not required to, enter the amount in a cost bill where no objection is filed. This approach eliminates the need for the special rule requiring court approval of attorney fee amounts which appears in the second sentence of the present ORCP 68 C(4)(a)(ii).

Since the Liepe approach retains the present system of having judgment on the cost bill entered subject to later objection, at least for default judgment, it also raises the question whether that judgment is enforceable between objection and court ruling. I added the second sentence to ORCP 68 C(5)(d (ii) which follows the existing rule making the attorney fee and costs and disbursements judgment unenforceable during the period between court ruling and objection.

McConville Suggestions

I agree with Judge Mcconville that talking about the judgment on the principal claim is an unclear way to separate the attorney fees and costs and disbursements judgment from the main judgment. I, however, do not think that using "final judgment on the merits" improves the situation. The reference to final judgment seems to exclude ORCP 67 B judgments which is inconsistent with 68 C(6). "On the merits" seems more directed to res judicata status than separating costs and principal judgment. I substituted references to "judgment entered pursuant to Rule 67 A or B" at the places suggested by Judge McConville in ORCP 68 C(4)(e) and 19.026. These two sections define judgments on the plaintiff's claims which are final, appealable, and enforceable.

Judge McConville's suggested change to ORCP 68 C(4)(e) was already picked up in the Liepe revision.

Thorp Suggestions

While I share some of Larry Thorp's feelings that our draft of ORS 19.026(2) would be better without the second sentence, the Council did rather strongly endorse that provision in earlier

discussions of the rule. I did add "by either party" at the end of the rule as Larry suggested, which avoids the question whether appeal by one party of the main judgment requires a cross-appeal by the respondent if they wish to contest the attorney fees and cost judgment.

FRM:gh

May 25, 1990

MEMORANDUM

TO: **MEMBERS, JUDGMENTS SUBCOMMITTEE:**

Judge Mattison
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill, Executive Director**

DRAFT 2. This is a modification of the May 18, 1990 draft based upon the subcommittee meeting. If you have any objections, call me. **We will send it to all Council members next Wednesday, May 30.**

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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[;]. [a]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 denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of 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 fee is asserted as provided in this subsection.

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees or costs and disbursements. The procedure for claiming attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are timely filed, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(c)(ii) The court shall deny or award in whole or in

part claimed attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements claimed in the statement.

[C(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C(5) Supplemental judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and notice shall be given to the parties in the same manner as provided in Rule 70 B(1). Supplemental judgments concerning attorney fees or costs and disbursements shall not be subject to the requirements of ORCP 70A(2) and (3).

C(5)(d) Parties in default. When judgment is entered against a party in default under Rule 69, the judgment may include attorney fees or costs and disbursements, unless objections have been filed and served.

C(5)(d)(i) If the statement of attorney fees or costs and disbursements has been filed together with proof of service on a party in default, the party in default may file objections as provided in paragraph C(4)(b) of this rule to be heard and determined in the manner provided with respect to parties not in default.

C(5)(d)(ii) If the statement of attorney fees or costs and disbursements has been filed without proof of service on a party in default, the party in default may file objections within 14

days after the statement has been filed.

C(5)(d)(iii) Upon service and filing of objections to the entry of judgment for attorney fees or costs and disbursements, enforcement of that portion of the judgment shall be stayed until the objections are determined by the court. Such objections shall be determined in the manner provided with respect to parties not in default, and the court shall by supplemental judgment confirm, modify or deny attorney fees or costs and disbursements awarded in the judgment.

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

* * *

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] through 4 of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment concerning attorney fees or costs and disbursements is entered pursuant to ORCP 68, notice of appeal of the judgment entered pursuant to Rule 67 or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment entered pursuant to Rule 67 has been filed and served before entry of the supplemental judgment concerning attorney fees or costs and disbursements, the notice of appeal of the judgment entered pursuant to Rule 67 shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal by either party.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

FRM:gh

May 30, 1990

MEMORANDUM

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

FROM: **Fred Merrill, Executive Director**

The following is the judgment subcommittee's final recommended version of ORCP 68 C.

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

* * *

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

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C(1)(b) Such items are claimed as damages arising prior to the action; or

C(1)(c) Such items are granted by order, rather than entered as part of a judgment.

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[;]. [a]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 denied and no responsive pleading shall be

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HELD JUNE 9, 1990

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necessary. Any objections to the form or specificity of allegation of 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 fee is asserted as provided in this subsection.

C(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable

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opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees or costs and disbursements. The procedure for claiming attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a verified and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9C; and

C(4)(a)(ii) Serve, in accordance with Rule 9B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be signed in accordance with Rule 17 and served and filed within 14 days after service of the statement on the party under subparagraph (ii) of paragraph (a) of this subsection. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are timely filed, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(c)(ii) The court shall deny or award in whole or in part claimed attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and

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disbursements claimed in the statement.

[C(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and notice shall be given to the parties in the same manner as provided in Rule 70 B(1). Supplemental judgments concerning attorney fees or costs and disbursements shall not be subject to the requirements of Rule 70A(2) and (3).

C(5)(c) Parties in default. When judgment is entered against a party in default under Rule 69, the judgment may include attorney fees or costs and disbursements, unless objections have been filed and served.

C(5)(c)(i) If the statement of attorney fees or costs and disbursements has been served on a party in default, the party in default may file objections as provided in paragraph C(4)(b) of this rule.

C(5)(c)(ii) If the statement of attorney fees or costs and disbursements has not been served on a party in default, the party in default may file objections within 14 days after the statement has been filed.

C(5)(c)(iii) Upon service and filing of objections to the entry of judgment for attorney fees or costs and disbursements, enforcement of that portion of the judgment shall be stayed until the objections are determined by the court. Such objections shall be determined in the manner provided with respect to

EX 1-4

parties not in default, and the court shall by supplemental judgment confirm, modify or deny attorney fees or costs and disbursements awarded in the judgment.

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

* * *

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] through 4 of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment concerning attorney fees or costs and disbursements is entered pursuant to ORCP 68, notice of appeal of the judgment entered pursuant to ORCP 67 or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment entered pursuant to Rule 67 has been filed and served before entry of the supplemental judgment concerning attorney fees or costs and disbursements, the notice of appeal of the judgment entered pursuant to ORCP 67 shall also be deemed a notice of appeal of the supplemental judgment and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal by either party.

[(2)] (3) Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is

EX 1-5

entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

EX 1-6

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

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

* * * *

C.(2) [Asserting] Alleging claim for attorney fees. A party [seeking] claiming attorney fees shall [assert the right to recover such fees by alleging] allege 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] alleged in such motion, in substantially similar form to the allegations required [by this subsection] in a pleading. [Such allegation] Any claim for attorney fees in a pleading or motion shall be taken as denied and no responsive pleading shall be necessary. 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. Any objections to the form or specificity of allegation of 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 fee is [asserted] **alleged** as provided in this subsection.

September 26, 1990

M E M O R A N D U M

TO: **JUDGMENTS SUBCOMMITTEE:**

Judge Mattison, Chair
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill**

RE: Comments on draft of ORCP 68

I am attaching comments received from Denny Hubel, Charles Burt, and Richard Weil relating to ORCP 68. You also received Bill Linden's comments directly from Ron Marceau. The purpose of this memo is to review those comments prior to a subcommittee meeting.

1. Denny Hubel (Marceau, Karnopp, Peterson, Noteboom & Hubel)

Hubel suggests that we make the ORCP cost bill procedure apply to attorney fees claimed as damages. He cites a case where he sued for breach of a settlement contract and sought the attorney fees incurred as damages. I sympathize with his desire to have the judge rather than the jury pass on the question, but I think doing so would offend the right to jury trial. The fees sought are the actual damages in the case. If you have a right to jury trial, that must include having the jury assess the amount of damages.

2. Charles Burt

I am not sure I understand Mr. Burt's comments in the first page of the letter. He seems to assume that attorney fees can only be given by supplemental judgment and that there is no notice of the fee claim prior to this time. Neither of these are true. Attorney fees can be determined prior to the main judgment and be included under 68 C(5)(a). A party is still required to allege the basis for fees to be claimed in a pleading or motion under ORCP 68 C(2).

On page two of the letter he objects to giving a party in default a chance to question a claim for attorney fees. I think we already addressed this in our initial consideration. As I remember, there was some argument against this but the subcommittee decided, as a matter of due process and conformity

to the defaulting party's right to appear at a default judgment hearing, to allow the defaulting party to object.

3. Richard Weil

Mr. Weil points out that with supplemental judgment it may be necessary to have two writs of execution issued to collect the principal and attorney fees amounts. This actually is a point we have not addressed. I talked to Bob Lacy on our faculty about this and we believe under the present rule clearly only one writ of execution is necessary. The subsequent attorney fee award may be a separate judgment for appeal purposes but for enforcement it is "part of the judgment". Under the new rule, two writs of execution may be necessary. The matter is not clear. Under ORS 23.030, a writ of execution can be issued to the party in whose favor "a judgment" is given. ORS 23.050 requires that the writ describe "the judgment". On the other hand, there is nothing that says one writ of execution could not issue covering two judgments with the same judgment debtor and creditor. The two judgments are after all in the same case.

Whether or not two writs are required, I still think we should proceed with the supplemental judgment approach. The advantage of clarity of status of the judgments outweighs that inconvenience. If it was important enough, a party could avoid two writs of execution by proceeding under 68 C(5)(a). Finally, if this is really a problem, the better solution would be to ask the legislature to amend the execution statutes to allow one writ for both judgments.

4. Bill Linden

The most serious objection the Judicial Department raises is exempting attorney fees judgments from the money judgment requirements of ORCP 70. We did this because it seemed the cost and attorney fees judgment would always be a straightforward dollar amount. After more thought, they may have a point. The money judgment form does include some interest, interest accrual, arrearage, and periodic payment information that is desirable and would be eliminated as a requirement. I think we should require the supplemental judgment to conform to Rule 70. By the way, if we are not going to do this, we forgot to change ORCP 70 (a)(2) and take out the words "including judgments for the payment of costs and attorney fees.

The Judicial Department also does not like the separate provisions in ORCP C(5)(c) relating to default judgment. We covered this pretty carefully in our previous review. I personally prefer the simplicity of one rule for all cases, but I appreciate the problem in default cases. The Judicial Department committee may not have recognized the special problems on default and perhaps we should discuss it with them.

The third important objection raised was the amendments to ORS 19.026. I am not sure from the letter whether the objection is the form of the change for appeals or the suggested location in ORS. The memorandum from Karen Hightower does say the change has "the potential for creating a great deal of ambiguity in an area of law that is largely settled now." They discuss the problem in more detail on page 8 of their memorandum. Perhaps we need to talk to the Judicial Department about this, also.

The Judicial Department Committee also had a number of stylistic or language suggestions.

1. They do not like the use of the word "claim" in reference to the cost bill because of possible confusion with the claim for relief asserted in the main case. I do not see the problem. There is a claim for attorney fees and costs, and it is asserted in the cost bill.

2. They suggest that subsection C(2) be broken up into paragraphs and rearranged. This seems like a good suggestion. The change is set out at the end of their memorandum. I would, however, put the last sentence of the subsection as the second sentence in the new 68 C(2)(a).

3. They point out that use of the phrase "judgment pursuant to ORCP 67 " to identify a judgment for principal amount, as distinguished from the supplemental judgment for attorney fees, raises a problem. If, under ORCP 67 B, there is more than one judgment on the principal claim or claims, the existing rules allow the costs and attorney fee supplemental judgment to be entered after that judgment for that portion of the case or after entry of final judgment under ORCP 67 A. That option is provided by ORCP 68 C(6). I think we intended that if the party wished a costs and attorney fee award supplemental to the 67 B judgment only, they would have 14 days from the 67 B judgment to file the cost bill. If they preferred to wait, they could file a cost bill for the entire case 14 days after the true final judgment is entered. This does present some problem in a multiple party case where the 67 B judgment disposes of the entire case as to one of the parties. I do not think it is serious enough to tear up the draft. I am more worried about the amendment to ORS 19.026 which we are proposing. If there is a 67 B judgment in a case and two years later a supplemental costs and attorney fees judgment is entered, does appeal of the supplemental also cover the 67 B judgment? Would an appeal of the 67 B judgment also be appeal of the attorney fee judgment?

4. They question why the cost bill should be verified. I believe the original reason for retaining the verification requirement for cost bills was that the clerk was required to enter the cost bill amount no matter how outrageous and it would stay effective as a judgment in the absence of objection. This

draft changes that and gives the court the power to reject a claim even though there are no objections. In any case, the Rule 11 provisions relating to attorney signature seem a more effective deterrent for false claims than a potential perjury charge against the client. I recommend we eliminate the verification requirement.

5. They do not like "timely filed" in C(4)(c)(i) and recommend "filed timely". I am not sure about the grammatical rule but is my impression that the existing form is more commonly used. Maybe we should write Miss Grammar in the Bar Bulletin.

6. They recommend that the words "and entered" be added to C(5)(b). I agree.

7. They also have a number of specific questions as to the language in the special default provision of C(5)(a). If the committee decides to keep the special default provisions, I think their points (a), (b) and (c) are well taken.

After you have a chance to digest all this garbage, we will contact you to set up a subcommittee meeting.

FRM:gh
Encs.

cc: Ron Marceau

EXCERPT FROM DENNY HUBEL'S COMMENTS

changes to it, and the comments in ORCP 55 relative to subpoenas to non-parties, our problem would have been solved in Blaze Construction, at least in a jurisdictional sense.

Your proposed changes to ORCP 55H refer to a definition of "health care facility" in ORS 442.014. There is no ORS 442.014. I think you are most likely referring to 442.015(13)(a) through (d).

With respect to the Council's proposed changes to ORCP 68, the only question I have is whether it is now time to consider making ORCP 68 clearly the applicable procedure for claims for attorney's fees as damages, as opposed to claims for attorney's fees which are authorized by statute or by contract to be recovered as costs and disbursements. As an example, I am litigating a case in which the plaintiff entered a settlement agreement with the defendant. In breach of that settlement agreement and release of all claims, the plaintiff filed a lawsuit. We were successful on summary judgment in getting the plaintiff's claim dismissed. We were also successful on summary judgment in establishing that the plaintiff had breached her contract of settlement with us and that the reasonably foreseeable damages which flowed from the breach were our attorney's fees in defending the tort action. The Court was convinced that ORCP 68 was not the procedure to be used to determine the amount of attorney's fees as damages, but rather that was a question for a jury to decide. There is certainly no difference in the issues to be determined as to the reasonableness of an attorney fee in the case I described from one in which attorney's fees are recovered as costs and disbursements under ORCP 68. I am wondering if the Council would prefer to see all such disputes resolved by the procedure outlined in ORCP 68. I can see no reason not to resolve them all that way.

Lastly, you and I have discussed on several occasions the pros and cons of the discovery of the identity of an opponent's experts and to some extent their opinions and conclusions. Suffice it to say that my position has not changed. I remain in favor of that form of discovery. Every time I have had occasion to employ it, either in Washington state court or in Federal Court in Oregon, it has without question aided in the resolution of the cases by way of settlement.

I also am in complete agreement with Fred Merrill's decision that the Procedure and Practice Committee's recommendation to change ORCP 54 to allow for pre-judgment interest on a settlement demand which is rejected is substantive and not something that should be undertaken in a rule of civil procedure, particularly since the legislature has had before it in each of the last five sessions a bill for pre-judgment interest which has been defeated. I know that the legislature was presented with evidence in the last session from an insurance company representative who handled several states, including Oregon. Each of the other states had pre-judgment interest. Their statistics showed clearly that pre-judgment interest did nothing to speed the resolution of cases and

AUG 30 '90 10:45 ... LOMBARD & GARDNER L TO 913885410 P.02

588-5410

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RECEIVED
JUL 27 1990

MEMORANDUM

TO: All Procedure & Practice Committee Members

FROM: Charles Burt

DATE: July 26, 1990

RE: ORCP 68

I have read the proposed changes in ORCP 68 which was forwarded to me by David Brewer. It seems to me that what you are attempting to do is to streamline the proceeding and make it uniform and consistent. The only thing that I have any question about is the process of waiting ten days following the entry of judgment to petition for fees as per your section C(4)(a)(i) under Rule 9B, which appears on pages two and three of your outline. It would seem to me that some notice of the question of attorney fees should be raised prior to the entry of any judgment, either in the pleading or in a motion form. Filing the notice of hearing within ten days of the judgment does not bother me, but I would think that it would be good practice to have some notice prior to judgment of the claim of the prevailing party to have fees.

The rest of the document seems to be all right, although I note on page six, C(5)(b) provides for supplemental judgment. The fees are not determined prior to the entry of judgment pursuant to Rule 67. I am concerned that the parties, prior to the hearing on the original judgment, have notice of the claim for attorney fees and it would seem to me that we should encourage the solution of that issue, i.e. the fees, to be made prior to the entry of judgment under Rule 67 so far as we can possibly do so. Under the new code, where judgments are recorded in a very peculiar way, I would wonder if we might not lose some of the supplemental judgments on attorney fees, or at least not show them as a matter of record if we followed C(5)(b). I am not sure that I can suggest anything to make it better, but I certainly would like to have some sort of requirement that the attorney fees be settled before the judgment is entered, if at all possible.

With regard to the same thing, in C(5)(c)(i) the statement of attorney fees or costs has been served on a party in default, the party may file objections as provided in C(4)(b), it does not make sense to me that a party who is defaulted should be able to object to attorney fees. If the attorney fees are in the initial pleading, they should file an answer and object to them at that point, rather than waiting until default. C(5)(c)(ii) in fact gives them fourteen days after the statement has been filed to object to fees, even though they may have defaulted on the initial pleading. This does not seem to make much sense to me. They should either fish or cut bait on the original pleading, providing a notice of fees is in that pleading. If you combine it then with C(5)(c)(iii), they then have an additional fourteen days to hold up the signing of the judgment order while they talk about fees, even though they have defaulted on the original claim.

Somehow, this seems to be a built-in area for delay of entry of judgment by a party who does not otherwise wish to appear. I am not sure what the solution for it is, but that is the area that worries me.

cc: David Brewer
Ron Marceau

Charles

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August 27, 1990

Fred Merrill
Executive Director
U of O Law School
Eugene, OR 97403-1221

Re: Revision of ORCP Rule 68

Dear Mr. Merrill:

This letter belatedly responds to yours of June 14, 1990. Your requested input from the Family and Juvenile Law Section on a proposal to eliminate from ORCP 68, the exception for attorney fee claims in domestic relations cases.

Our section wholeheartedly supports elimination of that provision.

I have previously advised Judge Welch of our opinion.

Please let me know if you need additional information.

Very truly yours,

Paul Saucy

PS:dcm
2ps.824

cc: The Honorable Elizabeth Welch

Gerald M. Chase
Richard L. Weil*

Kathy L. Hambleton
Legal Assistant

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(503) 294-1414

August 27, 1990

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

Re: Proposed Amendments to Oregon Rules of Civil Procedure

Dear Mr. Merrill:

I have just reviewed the Council on Court Procedures proposed ORCP amendments as set forth in the August 10, 1990 advance sheets of West's Oregon Cases. I have some concern about the proposed amendment to ORCP 68C in that it requires a supplemental judgment for attorney fees and costs in most contested cases. By creating multiple judgments between the same parties in the same case, the rule greatly increases the complexity of and the possibility for error with regard to, among other things, the collection of such judgments, the filing satisfactions, and the clearing of title to real property.

By way of example, suppose a contested case in District Court results in such a supplemental judgment as set forth in the proposed amendment to ORCP 68C. The judgment creditor must then either abandon one of the judgments or be prepared to arrange and pay for the transcription of both judgments to Circuit court, other counties and states, a normal practice when voluntary payment is not made. In then preparing an execution or garnishment, the judgment creditor each time would have to prepare multiple executions or garnishments or risk missing property otherwise available to satisfy the judgments. Upon payment of the judgments, the judgment creditor would have to prepare twice as many satisfactions of judgments as is presently required.

I appreciate the Council's goal in trying to clarify procedures with regard to the determination of attorney fees and costs in contested cases. However, providing for a separate supplemental judgment in such cases, apart from the practical post-judgment problems, increases the likelihood of attorney error. As the Council's Comment points out, such multiple judgments would not be the usual case. They would, however, not be rare. An attorney is quite likely to overlook their existence, leading to harmful problems for both the attorney and the attorney's client.

In the best of all possible worlds, smiling insurance companies step forward at the end of trial with check in hand. In reality, considerable effort must be devoted to post-judgment

collection. Rather than create separate supplemental judgments, I believe a better solution to the situation would be to have one judgment, a portion of which (with a different date of entry) would concern attorney fees and costs and be separately appealable.

Very truly yours,

CHASE & WEIL

Richard L. Weil

RLW:ww

published today provides general guidance to Corps and EPA personnel on implementing the Guidelines published at 40 CFR 230.10 pursuant to section 404(b)(1) of the Clean Water Act. It does not impose requirements on or otherwise affect the rights of public parties, which continue to be determined by reference to applicable statutory and regulatory provisions. Consequently, the MOA qualifies as an "interpretative rule" and a "general statement of policy," which are exempted from the notice-and-comment requirements of the Administrative Procedure Act. Therefore the MOA has been made effective 30 days after its date of signature. (See also 5 U.S.C. 553(b)(3)(B), discussing the waiver of prior notice and comment when such process is found by the agency for good cause to be impracticable, unnecessary or contrary to the public interest.)

LaJuana S. Wilcher,

Assistant Administrator for Water.

Robert W. Page,

Assistant Secretary of the Army (Civil Works).

Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act

Section 404(b)(1) Guidelines

I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the section 404 Regulatory Program and is written to provide clarification for agency field personnel on the type and level of mitigation required to demonstrate compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1)).[1] This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA is a directive for Corps and EPA personnel and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under section 404.[2] The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: Avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation shall be based on the values and functions of the aquatic resource that will be impacted. This determination shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor. "Practicable" shall be defined as in § 230.10(a)(2) of the Guidelines. However, the level of mitigation determined to be appropriate and practicable under § 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committeed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. Notwithstanding this procedural approach, the Corps will, except as indicated below, first make a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, only as a last resort, compensate for aquatic resource values. This sequence will be considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of this MOA, as set forth at section II.B (examples of such comprehensive plans may include Special Area Management Plans,

[1] Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

[2] (except where section 404(b)(2) applies).

Advance Identification areas (section 230.80), and State Coastal Zone Management Plans). In some circumstances, it may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. Avoidance.[3] Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.[4] The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permittable, an alternative must be the least environmentally damaging practicable alternative. In addition, § 230.10(a)(3) sets forth rebuttable presumptions that (1) alternatives for non-water dependent activities that do not involve special aquatic sites [5] are available and (2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts on the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under § 230.10(a).

2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

3. Compensatory Mitigation. Appropriate and practicable compensatory mitigation will be required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. In most cases, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects will be considered as meeting the requirements of section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation will provide, at a minimum, one for one functional replacement (i.e., no net loss of values),[6] with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be relevant in some cases, as discussed in section II.B of this MOA.

C. The Guidelines are established as the environmental standard for section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the

[3] Avoidance as used in this MOA does not include compensatory mitigation.

[4] It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

[5] Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

[6] In most cases a minimum of 1 to 1 acreage replacement of wetlands will be required to achieve no net loss of values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

Guidelines to achieve these CWA environmental goals. Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guildelines requirements or to justify less rigorous Guidelines evaluations.

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved.

Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

E. Mitigation requirements shall be conditions of standard section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) (33 CFR 325.4(a)). This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

Dated: November 14, 1989.

Robert W. Page,

Assistant Secretary of the Army (Civil Works).

Dated: November 15, 1989.

LaJuana S. Wilcher,

Assistant Administrator for Water Environmental Protection Agency.

[FR Doc. 89-29109 Filed 12-13-89; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-51713B; FRL-3686-1]

Certain Chemical; Premanufacture Notice; Termination of Review Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Following the submission of additional data for the new chemical substance described in premanufacture notice (PMN) P-88-1823, EPA is revoking the remaining portion of a 90-day extension of the review period under the authority of section 5(c) of the Toxic Substances Control Act (TSCA). Therefore, the review period is terminated and the company is free to commence non-exempt commercial manufacture and import of the substance.

EFFECTIVE DATES: December 1, 1989.

FOR FURTHER INFORMATION CONTACT: Darlene Jones, New Chemicals Branch, Chemcial Control Division, (TS-794), Environmental Protection Agency, Rm. E-613, 401 M Street, SW., Washington, DC 20460, (202) 382-2279.

SUPPLEMENTARY INFORMATION: The original 90-day statutory review period under section 5(a)(1)(A) of TSCA, plus suspensions voluntarily requested by the company under 40 CFR 720.75(b), for P-88-1823 was scheduled to expire on February 13, 1989. EPA published a section 5(c) 90-day extension notice for the PMN in the Federal Register of February 22, 1989 (54 FR 7598), to provide the Agency with sufficient time to issue an Order under section 5(e). The Order would have prohibted the Company from manufacturing the PMN substance in, or importing it into, the United States pending the submission and evaluation of test data addressing the potential risk of injury to the environment. EPA's concern for toxicity to aquatic organisms was based on test data on other polyacrylates.

The review period, including the 90-day extension under section 5(c), was scheduled to expire May 14, 1989. After the 5(c) extension was published, the company suspended the notice review period and submitted additional test data. In light of this new information, EPA no longer expects the substance to present a risk of injury to the environment.

Therefore, EPA is revoking the remaining portion of the extended review period, effective immediately. The company is now free to commence non-exempt commercial manufacture and import of the substance.

Dated: December 1, 1989.

John W. Melone,

Director, Chemical Control Division.

[FR Doc. 89-29105, Filed 12-13-89; 8:45am]

BILLING CODE 6560-50-D

[OPTS-44543; FRL 3685-3]

TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the receipt of test data on octamethylcyclotetrasiloxane (OMCTS) (CAS No.556-67-2), and alkyl phthalates (CAS Nos. 84-74-2, 131-11-3 and 84-66-2) submitted pursuant to a consent order under the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: Under 40 CFR 790.60, all TSCA section 4 consent orders must contain a statement that results of testing conducted pursuant to these testing consent orders will be announced to the public in accordance with section 4(d).

I. Test Data Submissions

Test data for OMCTS was submitted by the Silicones Health Council on behalf of the Dow Corning, General Electric, Union Carbide, Rhone Poulenc and Wacker Silicones pursuant to a consent order at 40 CFR 799.5000. It was received by EPA on November 13, 1989. The submissions describe the determination of water solubility in fresh water and synthetic seawater. Fresh and salt water solubility testing is required by this consent order.

Test data for alkyl phthalates was submitted by Chemical Manufacturers Association on behalf of the Aristech Chemical Corporation, BASF

UNIVERSITY OF OREGON

October 3, 1990

M E M O R A N D U M

TO: **JUDGMENTS SUBCOMMITTEE:**

Judge Mattison, Chair
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill**

RE: **SUBCOMMITTEE MEETING:**

Thursday, October 11, 1990
4:30 p.m.
(in Larry Thorp's office)

This will confirm that we have a subcommittee meeting scheduled for Thursday, October 11. Judge Liepe will return from Europe on October 8; we understand he may be able to clear his calendar so that he can attend the meeting. Judge McConville will be unable to attend.

FRM:gh

R. WILLIAM LINDEN, JR.
State Court Administrator

(503) 378-6046
FAX (503) 378-4785

JUDICIAL DEPARTMENT
Supreme Court Building
1163 State Street
Salem, Oregon 97310

September 5, 1990

Ronald L. Marceau
Chair
Council on Court Procedures
Marceau, Karnopp, et. al
835 NW Bond Street
Bend, OR 97701

Re: ORCP 68 and ORS 19.026

Dear Ron:

Thank you for providing me with an opportunity to comment on the Council's proposed revisions to ORCP 68C and ORS 19.026. This office is very pleased with the approach the Council has taken on this issue, and we are especially supportive of the "supplemental judgment" concept.

The Judicial Department Judgment Committee discussed your proposed revisions at their August 17, 1990, meeting. I have enclosed a detailed summary of their comments for your information.

Our most serious concern is the proposed statement in ORCP 68(5)(b) that "[s]upplemental judgments concerning attorney fees or costs and disbursements shall not be subject to the requirements of Rule 70 A(2) and (3)." (Emphasis supplied.) We see no reason to create exceptions to the money judgment requirements, especially given the current wording of ORCP 70(2)(a) that "[m]oney judgments are judgments that require the payment of money, including judgments for the payment of costs or attorney fees." (Emphasis supplied.) Court clerks experience the same difficulties docketing judgments for the payment of costs or attorney fees as they do docketing other money judgments. For that reason, the Judicial Department would strongly oppose the creation of such a significant exception to the money judgment requirements of ORCP 70 A(2) and (3).

We also found the default judgment procedures of ORCP C(5)(c) to be confusing and felt that, as currently drafted, this subsection may create more difficulties than it resolves. Because our

preference would be to treat all judgments, default or otherwise, in the same manner, we recommend that subsection C(5)(c) be deleted from ORCP 68.

Lastly, the appellate representative on the Judgment Committee has concerns about the proposed amendments to ORS 19.026. In light of amendments to ORS 20.220 last session, the Council's proposed amendments may not be necessary. In any event, if the Council intends to amend statutory provisions regarding appeals from post-judgment decisions on costs and attorney fees matters, those amendments probably should be made in the context of ORS 20.220.

I hope that our comments are helpful.

Sincerely,

R. William Linden, Jr.
State Court Administrator

RWL:KH:dc/E1D90158.F

cc: Frederic Merrill
Judgment Committee

September 5, 1990

MEMORANDUM

TO: R. William Linden, Jr.
State Court Administrator

FROM: Karen Hightower and Jim Nass on Behalf of the Judgment Committee

RE: Judgment Committee Comments on Council on Court Procedures' Proposed Revisions to ORCP 68 and ORS 19.026

You asked the Judgment Committee to discuss the Council on Court Procedures' proposed revisions to ORCP 68 and ORS 19.026. The Committee had an opportunity to discuss these issues at their August 17, 1990, meeting. The Committee's comments are summarized below.

Most Significant Aspects:

1. The Committee is pleased with the direction the Council is heading in this area and is especially supportive of the "supplemental judgment" concept.

2. The Committee's most serious concern is the proposed statement in ORCP 68 C(5)(b) that "[s]upplemental judgments concerning attorney fees or costs and disbursements shall not be subject to the requirements of Rule 70 A(2) and (3)." (Emphasis supplied.) The Judgment Committee recommends that the Judicial Department strongly oppose the creation of the proposed exception to the money judgment requirements of ORCP 70 A(2) and (3).

3. The Judgment Committee found the default judgment procedure of ORCP 68 C(5)(c) to be confusing and felt that, as currently drafted, it may create more difficulties than it resolves. The Committee recommends that subsection C(5)(c) be deleted from ORCP 68.

4. The appellate court representative on the Judgment Committee opposes the proposed amendments to ORS 19.026. Any amendments to the current statutory provisions for appealing from trial court decisions on attorney fees and costs issues should be made in the context of ORS 20.220, not ORS 19.026. In addition, the proposed amendments, whether placed in ORS

19.026 or ORS 20.220, have the potential for creating a great deal of ambiguity in an area of law that is largely settled now.

ORCP 68 C(2):

1. The Committee was uncomfortable with the new use, in this subsection and other subsections, of the word "claim" in conjunction with attorney fees and costs and disbursements. The use of the word "claim" is likely to obscure the current distinction between a true claim for attorney fees as damages [see ORCP 68 C(1)(b) and Wheatley v. Safely, 92 Or App 233, 758 P2d 377 (1988)]--a relatively rare event--and the routine assertion of a right to attorney fees found in pleadings. Applying the word "claim" in this context might cause the appellate courts needlessly to reexamine the question whether a judgment is final if it does not purport to decide a request for attorney fees and costs. The Judgment Committee recommends that the "seeking" language be restored.

2. The Committee felt that because subsection (2) deals with several different concepts it should be further divided into five subsections. This would conform subsection (2) to the style of the other subsections. Also, in order to facilitate a more logical progression of ideas, perhaps the sentence, "Any claim for attorney fees in a pleading or motion shall be deemed denied and no responsive pleading shall be necessary" could be moved to appear after the sentence, "An allegation that a party is entitled to 'reasonable attorney fees' shall be sufficient."

ORCP 68 C(4):

1. Subject to the concerns detailed below, the Judgment Committee supports the Council's redrafting of ORCP 68C(4).

2. The Committee found the "entry of judgment pursuant to ORCP 67" language in subsection C(4)(a) (and in other parts of ORCP 68) to be confusing. The Committee surmises that the Council intended to differentiate between a judgment disposing of a case on its merits and a judgment for attorney fees or costs. However, the reference to "judgment pursuant to ORCP 67" is confusing in those situations where several judgments are entered in a case pursuant to ORCP 67 B. Moreover, it is fairly common in multiparty litigation that "judgments" will be entered at different times disposing of the case as to various parties. Sometimes those "judgments"

are not entered pursuant to ORCP 67 B. As to a purported judgment that disposes of fewer than all claims and is not entered pursuant to ORCP 67 B, often a truly final judgment is not entered until months or even years later. Which "entry of judgment pursuant to Rule 67" triggers the new provisions of ORCP 68 C(4)(a)? The Judgment Committee suggests that the Council clarify its intentions with regard to this issue.

3. ORCP 68 C(4)(a)(i) retains the requirement that the statement of attorney fees or costs and disbursements be verified. Pleadings are no longer required to be verified. Given the provisions of ORCP 17, is it necessary to retain the verification requirement?

4. In order to avoid splitting the verb, perhaps the first sentence in subsection C(4)(c)(i) should be revised to state, "If objections are <u>filed timely</u>, the court, without a jury..."

<u>ORCP 68 C(5)</u>:

1. Because the "notice" referred to in the second sentence in subsection C(5)(b) is a notice of "entry" of judgment, and not a notice of "filing," the Judgment Committee recommends that the second sentence be amended to read, "[t]he supplemental judgment shall be filed <u>and entered,</u> and notice shall be given to the parties in the same manner as provided in Rule 70 B(1)."

2. The last sentence of subsection C(5)(b) exempts supplemental judgments for costs and attorney fees from the judgment summary provisions of ORCP 70 A(2) and (3). The Judgment Committee opposes that exemption. The Committee sees no reason to create an exception to the requirements for money judgments generally, especially given the current wording of ORCP 70 A(2)(a) that "[m]oney judgments are judgments that require the payment of money, <u>including judgments for the payment of costs or attorney fees</u>." (Emphasis supplied.) Court clerks have experienced the same difficulties docketing judgments for the payment of costs or attorney fees as they have experienced docketing other types of money judgments. The Committee recommends that the third sentence in subsection C(5)(b) be modified to state, "Supplemental judgments concerning attorney fees or costs and disbursements shall be subject to the requirements of Rule 70 A(2) and (3)."

3. The Judgment Committee found the default judgment procedures of ORCP 68C(5)(c) to be confusing as currently drafted, and concluded that this subsection should be deleted from ORCP 68C. In the Committee's opinion, it would be most expeditious for parties and court personnel to treat all judgments for attorney fees and costs and disbursements in the same manner.

While there may be a need to expedite default judgments, the Committee felt that the proposed new procedures set forth in ORCP 68 C(4) would be sufficient and that specialized default judgment procedures are unnecessary. For example, an attorney who wished to expedite a default judgment could file and serve the statement for attorney fees and costs and disbursements 17 days in advance of the date that the default judgment is anticipated to be presented to the court. If no objections are filed within 14 days of the service of the statement, a single judgment incorporating the default judgment and costs and attorney fees could be entered. This would avoid altogether the need for the plaintiff and court personnel to deal with a "supplemental judgment" for costs and attorney fees.

4. The Committee found numerous aspects of subsection C(5)(c) to be unclear. For example:

   (a) The first sentence provides that when a default judgment is "entered" it "may" include attorney fees or costs and disbursements "unless" objections have been filed and served. Because objections may be filed <u>after</u> the default judgment is entered, what does the "unless" mean?

   (b) The special default judgment procedures provide that the 14-day period for objection runs either from the date of service or the date of filing of the statement. Since the court is not required to provide notice of the date of "filing" of a statement, it seems that it would be difficult for both the court and the parties involved in a multiple party case to track the running of the 14-day period by determining who is and is not in default and which parties have been served or have not been served with the statement of attorney fees or costs and disbursements.

   (c) The reference in subsection C(5)(c)(i) to service on a party in default when such service is <u>not</u> required is

confusing, as is the provision of subsection C(5)(c)(i) that a party in default who has not been served with a statement of costs and disbursements or attorney fees will file objections. The Committee recognizes that there will be situations in which a plaintiff will serve a statement of costs and disbursements and attorney fees on a party in default, and that even when a plaintiff does not do so, the party in default may find out about it and file objections. Nevertheless, the Committee questions whether special provisions for such events are necessary.

(d) Subsection C(5)(c)(iii) contemplates that a judgment for costs or attorney fees could be entered, and then "stayed" if objections are filed. One of the Judgment Committee's original problems with ORCP 68 as it is now written is the provision in ORCP 68 C(5) that a judgment for costs and attorney fees is "stayed" if objections are filed. The Committee feels that any judgment, including a supplemental judgment for costs and attorney fees, should be final and enforceable at the time it is entered, and not subject to contingent stay provisions. The purpose of a judgment is to provide final adjudication of parties' rights and obligations. A contingent stay, notwithstanding how temporary, runs counter to the goal of providing finality of judgments.

ORS 19.026:

1. In the Committee's opinion, it would be preferable to address the issue of how to take an appeal from a supplemental judgment for costs and attorney fees by amending ORS 20.220. ORS 20.220 deals specifically with appeals from awards (or denials) of attorney fees and costs. Any special appeal provisions needed to accommodate a supplemental judgment for costs or attorney fees under ORCP 68 should be in ORS 20.220. (Indeed, the second sentence of the proposed new subsection (2) appears to overlap 1989 amendments to ORS 20.220--see subsections (2) and (3).)

   To the extent that the award (or denial) of costs and attorney fees sometimes is incorporated into the judgment, the provisions of ORS 19.026 are and would continue to be applicable to an appeal from such a judgment, of course.

2. If the Committee is reading the proposed new subsection (2) of ORS 19.026 as the Council intended, new subsection (2) would permit an appeal to be taken from a judgment disposing of the merits of a case at the time that a supplemental judgment disposing of costs and attorney fees is entered. The Committee objects to this proposal because of the ambiguity it would create. Is the judgment enforceable during the period between the entry of the judgment on the merits and the entry of the supplemental judgment? Suppose the judgment creditor waits 30 days from the entry of the judgment on the merits to enforce the judgment, and then executes on the judgment. Can the judgment debtor obtain a stay of execution of the judgment on the merits by appealing from the judgment on the merits after entry of the supplemental judgment? Suppose a judgment debtor decided to wait to appeal from the judgment on the merits until the supplemental judgment for attorney fees and costs was entered. Could the judgment creditor deprive the judgment debtor of the opportunity to appeal by waiting more than 30 days after the entry of the judgment on the merits, and then withdraw the request for costs and attorney fees?

3. As suggested above, the proposed new subsection (2) appears to overlap with the provisions of ORS 20.220. The proposed new subsection (2) does add a new concept that a party could assign as error on appeal the trial court's decision regarding a request for costs or attorney fees, without a notice of appeal having been taken from the judgment adjudicating that request. The appellate court representative on the Judgment Committee opposes that provision (the other Committee members taking no position on the issue). Allowing assignments of error as to post-judgment events for which no notice of appeal is required will cause myriad problems. For example, unless a notice of appeal is filed with respect to a supplemental judgment for attorney fees or costs, the court reporter will not know to prepare the transcript of the hearing. Moreover, projecting the due dates of briefs and ordering the record on appeal will become hopelessly confused unless the appellate courts are aware that an appeal is being taken from a supplemental judgment.

4. The Committee had the same difficulty with the "pursuant to ORCP 67" language in the first sentence of subsection (2) as it did with the same language in subsection C(4)(a). (See the comments in paragraph 2 under ORCP 68C(4), above.)

KH:JN:dc/E4D90006.F

Proposal for ORCP 68 C.(2)

C.(2) [Asserting] Alleging claim for attorney fees.

C.(2)(a) A party seeking attorney fees shall [assert the right to recover such fees by alleging] allege 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.]

C.(2)(b) 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] alleged in such motion, in [substantially] similar form to the allegations required [by this subsection] in a pleading.

C.(2)(c) 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.

C.(2)(d) [Such allegation] Any request for attorney fees in a pleading or motion shall be [taken as] deemed denied and no responsive pleading shall be necessary. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial.

C.(2)(e) 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] alleged as provided in this subsection.

BURCH & BURNETT, P.C.
ATTORNEYS AT LAW
280 NORTH COLLIER
COQUILLE, OREGON 97423

ROBERT J. BURCH
AMANDA L. BURNETT

(503) 396-5511
REPLY FILE NO. 1532

November 9, 1990

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

Re: Proposed Amendments to Oregon Rules of Civil Procedure

Dear Mr. Merril:

I wish to comment on the proposed changes to ORCP 68. I'm concerned more with what hasn't been proposed as a change than with what has. The proposed changes appear to be very close to what is actually taking place. What isn't proposed as a change are the 2 exceptions to the application to rule 68, ORS 105.405 (2) or 107.105 (1) (i). Why partitions suits and divorce decrees should be exempt from the operation of rule 68, unless stipulated to by the parties, is a question I've never been able to answer. I've checked with the other attorneys in our office and none of them are able to answer it either. Both of them and I have had experience where opposing attorneys in divorce cases forget to seek a stipulation to the application of rule 68 or refuse to stipulate when asked. If the attorney then forgets to put on expert testimony the Court has no authority to award attorney's fees.

Perhaps there is a good reason to exempt divorce proceedings but I have practiced since 1975 and none has occurred to me. If there is a reason to exempt partition suits and divorce trials from the operation of rule 68 I would be curious to know what it is.

Yours truly,

ROBERT J. BURCH

RJB:njm

October 22, 1990

M E M O R A N D U M

TO: **JUDGMENTS SUBCOMMITTEE:**

Judge Mattison
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill**

RE: **Amendments to Rule 68**

The following is a summary of what was agreed to at the subcommittee meeting on October 11, 1990. A redraft of Rule 68 which incorporates the agreed material is also attached.

1. I was asked to suggest some amendment to the attachment statutes that would allow enforcement of both the principal judgment and the attorney fee judgment in one writ of attachment. The language is attached.

2. We agreed to eliminate the language exempting cost or attorney fee judgments from the money judgment requirement of ORCP 70 C.

3. We agreed to eliminate ORCP 68 C(5) relating to default judgments.

4. We agreed to redraft subsection C(2) as suggested by the Linden Committee.

5. We agreed to eliminate the requirement for verification of cost bills.

6. We agreed to redraft C(4)(b) to clarify the language in the second sentence.

7. We agreed to redraft C(4)(c)(i) to get rid of "timely filed".

8. We agreed to add the words "and entered" to C(5)(b).

We did not accept the Judicial Department Committee's suggestion that our proposal to amend ORS 19.026 be dropped. It was agreed that we would try to set a meeting with that group before the November meeting.

23.030 When party entitled to writ of execution; recordation. Except as otherwise provided in this section, or as otherwise provided by law, the party in whose favor a judgment **or judgments, if there is more than one judgment in a single case,** [is] **are** given, which requires the payment of money, the delivery of real or personal property, or either of them, at any time after the entry thereof, may have a writ of execution issued for its enforcement. In the case of real property:

(1) No writ shall be issued under this section unless, at the time the application for writ is made, the judgment **or judgments** upon which the writ is issued is docketed in the judgment docket.

(2) Upon issuance of the writ, the party requesting the writ shall have a certified copy of the writ or an abstract of the writ recorded in the County Clerk Lien Record of the county in which the real property is located.

23.050 Issuance of writ; contents. The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment **or judgments**, and if [it] **the judgment or judgments** [is] **are** for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows:

(1) If it is against the property of the judgment debtor, and the judgment directs particular property to be sold, it shall require the sheriff to sell such particular property and apply

the proceeds as directed by the judgment; otherwise, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the real property belonging to such debtor on the day when the judgment was docketed in the county, or at any time thereafter.

(2) If it is for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in subsection (1) of this section, and in that respect it is to be deemed an execution against property.

REDRAFT - OCTOBER 1990

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(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or

C(1)(b) Such items are claimed as damages arising prior to the action; or

C(1)(c) Such items are granted by order, rather than entered as part of a judgment.

C(2) [Asserting] Alleging claim for attorney fees. A party [seeking] **claiming** attorney fees shall [assert the right to recover such fees by alleging] **allege** 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.] **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 fee is alleged as provided in this subsection.

C(2)(b) 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] **alleged in** such motion, in [substantially] similar form to the allegations required [by this subsection] **in a pleading**.

C(2)(c) 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.

C(2)(d) [Such allegation] **Any claim for attorney fees in a pleading or motion** shall be [taken as] **deemed** 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 facts, statute, or rule which provides a basis for the award of fees shall be waived if not [asserted] **alleged** prior to trial **or hearing**. [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 fee is asserted as provided in this subsection.]

C(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements;**

entry and enforcement of judgment. Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C, with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for claiming attorney fees or costs and disbursements. The procedure for claiming attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving claim for attorney fees and costs and disbursements. A party claiming attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement claiming attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(c)(ii) The court shall deny or award in whole or in part claimed attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements claimed in the statement.

[C(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs and disbursements as part of a judgment, pursuant to paragraph

(4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B(1).

C(6) **Avoidance of multiple collection of attorney fees and costs and disbursements.**

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The Council made minor changes in ORCP 68 C(2). It changed several references to "assert" attorney fees and costs and disbursements in a pleading or motion to "allege" such fees or costs and disbursements. It made clear that no response is required to such an allegation, whether the allegation is made in a responsive pleading or a motion. It also divided the section into subsections and changed the order of the sentences in the subsections for purposes of clarity.

The Council changed the procedure for award of attorney fees or costs and disbursements in ORCP 68 C(4). The existing language refers to entry of an award of attorney fees or costs and disbursements "as part of the judgment" in the case. The new language attempts to conform the rule to the language in ORS 20.220 which treats any award of attorney fees or costs and disbursements, subsequent to the judgment on the main claim, as a separate judgment. ORCP 68 C(5)(a) provides that, if the attorney fees and costs and disbursements award is finally determined prior to entry of judgment on the principal claim, the award is included in the principal judgment. In the more usual case, where the attorney fees or costs and disbursements award is not determined before the entry of judgment on the principal claim, ORCP 68 C(5)(b) provides for entry of an entirely separate supplemental judgment.

The new language changes the procedure for entry of judgments for attorney fees or costs and disbursements in several other respects. Under the existing rule, the clerk enters

judgment for the amount claimed in the attorney fees or costs and disbursements statements. If objections are filed, the enforceability of that judgment is suspended until the court rules on the objections. Under the new rule, no judgment is entered for attorney fees or costs and disbursements until after the time for objections expires. If no objections are filed, the court enters judgment for the attorney fees or costs and disbursements. If objections are filed, the court enters judgment for attorney fees or costs and disbursements after hearing and determining such objections. Under the existing procedure, the clerk automatically entered the amount claimed in the statement of attorney fees or costs and disbursements. Under the new ORCP 68 C(4)(d), the court may enter the amount claimed in the absence of objection, but is not required to do so. The court would thus have discretion to pass on the reasonableness of the amounts claimed even if there is no objection. This eliminated the necessity of requiring court approval of attorney fees in default judgment situations.

The Council is also recommending that the legislature amend ORS 19.026. Under the amendment the time for appeal from the principal judgment in a case where there is a supplemental judgment for attorney fees or costs and disbursements is extended until 30 days after entry of the supplemental judgment. If an appeal is filed from a judgment on the principal claim before the supplemental judgment for attorney fees or costs and disbursements is entered, that appeal is also deemed a notice of appeal of the supplemental judgment by the appealing party. The appealing party may assign error in the allowance or amount of attorney fees or costs and disbursements in such appeal. The non-appealing party has 30 days from the date of the entry of the supplemental judgment in which to file an appeal to the allowance or amount of attorney fees or costs and disbursements.

ORS 19.026

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2)[and (3)] **through 4** of this section, the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) When a supplemental judgment concerning attorney fees or costs and disbursements is entered pursuant to ORCP 68, notice of

appeal of the judgment entered pursuant to ORCP 67 or the supplemental judgment concerning attorney fees or costs and disbursements shall be served and filed not later than 30 days after such supplemental judgment is entered in the register. If notice of appeal of the judgment entered pursuant to Rule 67 has been filed and served before entry of the supplemental judgment concerning attorney fees or costs and disbursements, the notice of appeal of the judgment entered pursuant to ORCP 67 shall also be deemed a notice of appeal of the supplemental judgment by the appellant, and error in allowance or the amount of attorney fees or costs and disbursements may be assigned in such appeal.

[(2)] **(3)** Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days after the earlier of the following dates:

(a) The date that the order disposing of the motion is entered in the register.

(b) The date on which the motion is deemed denied, as provided in ORCP 63 D or 64 F.

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal

against any party to the appeal by a written statement in the brief.

[(4)] **(5)** Except as otherwise ordered by the appellate court, when more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

REVISION OF AMENDED ORCP 68 TO ELIMINATE REFERENCE TO "CLAIM"

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(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

[C(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or]

C(1)[(b)]**(a)** Such items are claimed as damages arising prior to the action; or

C(1)[(c)]**(b)** Such items are granted by order, rather than entered as part of a judgment.

C(2) [Asserting] Alleging [claim for] right to attorney fees. A party seeking attorney fees shall [assert the right to recover such fees by alleging] **allege** 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.] **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 fee is alleged as provided in this subsection.

C(2)(b) 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] **alleged in** such motion, in [substantially] similar form to the allegations required [by this subsection] **in a pleading**.

C(2)(c) 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.

changed "Any claim for" to "Any allegation of a right..."

C(2)(d) [Such allegation] **Any allegation of a right to attorney fees in a pleading or motion** shall be [taken as] **deemed** 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 facts, statute, or rule which provides a basis for the award of fees shall be waived if not [asserted] **alleged** prior to trial **or hearing**. [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 fee is asserted as provided in this subsection.]

C(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C(4) **Award of attorney fees and costs and disbursements;**

entry and enforcement of judgment. Attorney fees and costs and disbursements shall be entered as part of the judgment as follows:]

[C(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C, with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading.

Statements and objections may be amended in accordance with Rule 23.]

[C(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

changed claiming to seeking

C(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

changed "claim for" & "statement of"

changed claiming to seeking

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement.

[C(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs

and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B(1).

C(6) **Avoidance of multiple collection of attorney fees and costs and disbursements.**

C(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same attorney

fees and costs and disbursements in more than one such judgment.

C(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

UNIVERSITY OF OREGON

August 30, 1989

MEMORANDUM

TO: **GENERAL INQUIRIES SUBCOMMITTEE:**

Henry Kantor, Chair
Bernard Jolles
Elizabeth Yeats

FROM: Fred Merrill, Executive Director

According to our telephone conversation, the subcommittee meeting will be held at 2:00 p.m. on Thursday, September 14, in Henry Kantor's offices in Portland. I am enclosing a response I received from Warren Deras.

FRM:gh

Encs.

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August 25, 1989

Mr. Fredric R. Merrill
School of Law
University of Oregon
Eugene, OR 97403-1221

Subject: Council on Court Procedures

Dear Mr. Merrill:

Thank you for your letter of August 22, 1989, and the enclosed copy of your memorandum on miscellaneous proposals.

In connection with the matter that I raised I thought you might find it useful to have the enclosed excerpt from a brief that I filed in Dhulst and Dhulst, 61 Or App 383 (1983). The reported decision does not discuss this issue, since the court decided that publication was not effective service under the facts of the case. The authorities I cited at the time indicate that a default judgment against an "insane" spouse is voidable, but not void. Of course it would make the judgment void if the same facts would result in a failure of service.

I suggest that in looking at this issue you should give extra consideration to the domestic relations context, since I expect that it would arise there most frequently. Obviously in that context the opposing party is ordinarily aware of the mental problem. Also in that context the consequences of service being ineffective so that the decree is "void" are significant for the remaining lives of the parties.

Your proposed solution could create new problems. What would happen if both parents of the party to be served are dead or unknown and the defendant or respondent is either (1) a "street person", or (2) living alone outside of the "care or control" of anyone or (3) living with the opposing party (as may be the case in a domestic relations matter)? Particularly in light of the modern trend towards "de-institutionalizing" persons with mental problems you cannot expect that there will always be someone obviously in charge, as is normally the case with a minor, and outside of the domestic relations context an opposing party may have no ready means of identifying an opposing party's parents.

Very truly yours,

Warren Deras

Proposed Legislation Relating to Appeals from Judgments for Costs and Attorney Fees

The Judicial Department proposes to repeal ORS 20.220 and remove the provisions of ORS 19.033(1) relating to attorney fees and costs, and place them incorporate them along with the amendments to ORS 19.026 proposed by the Council on Court Procedures into a single statute in ORS Chapter 19.

ORS 19.033(1) would be amended as follows:

(1) When the notice of appeal has been served and filed as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, [pursuant to rules of the court,] but the trial court shall have such powers in connection with the appeal as are conferred upon it by law. [and shall retain jurisdiction for the purpose of allowance and taxation of attorney fees, costs and disbursements or expenses pursuant to rule or statute. If the trial court allows and taxes attorney fees, costs and disbursements or expenses after the notice of appeal has been served and filed, any necessary modification of the appeal shall be pursuant to rules of the appellate court.]

A new section would be added to ORS Chapter 19 incorporating the relevant provisions of ORS 19.033(1), ORS 20.220 and most of the Council's proposed amendments to ORS 19.026:

> (1) Notwithstanding ORS 19.033(1), the trial court shall retain jurisdiction for the purpose of hearing and deciding requests for attorney fees or costs and disbursements pursuant to ORCP 68.
>
> (2) An appeal may be taken from a supplemental judgment under ORCP 68 C.(5) allowing or denying attorney fees or costs and disbursements only if the order or judgment to which it relates could have been appealed under ORS 19.010.
>
> (3) An appeal from a supplemental judgment under ORCP 68 C.(5) shall be taken in the same manner as an appeal from a judgment under ORS 19.010. The statement of attorney fees or costs and disbursements, the objections thereto and the supplemental judgment rendered thereon shall constitute the trial court file. The scope of review shall be as provided in ORS 19.125(1).

(4) If an appeal is filed from a judgment to which a supplemental judgment under ORCP 68C.(5) relates before the trial court enters a supplemental judgment under ORCP 68 C.(5):

(a) The appellant need not file a notice of appeal from the supplemental judgment and may assign error in the appeal relating to the supplemental judgment, and

(b) Any modification of the appeal on account of the supplemental judgment shall be pursuant to rule of the appellate courts.

(5) When an appeal is taken from a judgment under ORCP 67 to which a supplemental judgment awarding attorney fees or costs and disbursements relates:

(a) If the appellate court reverses the judgment under ORCP 67, the supplemental judgment for attorney fees or costs and disbursements shall be deemed reversed; or

(b) If the appellate court modifies the judgment such that the party who was awarded attorney fees or costs and disbursements is no longer entitled to the award, the party against whom attorney fees or costs and disbursements were awarded may move for relief under ORCP 71 B.(1)(e).

M E M O R A N D U M August 15, 1989

FROM: Fred Merrill

TO: Inquiries Subcommittee (Henry Kantor, Chairer, Bernard Jolles and Elizabeth Yeats)

RE: Miscellaneous Inquiries Received by the Council

The following are letters and other inquiries received by the Council at the end of the last biennium and since the first of the year:

1. **Limitation of noneconomic damages.** Last biennium the Council discussed a request by Bob Newell that it clarify whether a statement specifying the amount of noneconomic damages under ORCP I8 B(3) limits the amount of recovery in the same manner the prayer in the complaint limits recovery under ORCP 67 C(2). No action was taken. Since that time I have received three telephone calls asking the same question and another letter from Lorey H. Freeman. (attached as exhibit A)

I think the Council should take some action to clarify this one way or another. I have heard several times that the question is on appeal. No case has decided the question, however, and legal counsel for the court of appeals is not familiar with any case raising the question. To be consistent with ORCP 67 C(2), which opts for limiting a plaintiff to his or her expectations, the statement should be a limitation. This could be done by adding the following to ORCP 67 C(2). "If a party seeking recovery of noneconomic damages submits a statement of the amount claimed for such damages pursuant to Rule 18 B, any judgment for money damages shall not exceed that amount, unless the court allows amendment of the statement." The last part of the sentence is necessary because the authority of a court to allow amendment of the 18 B statement, as opposed to amendment of a pleading, is not clear.

It could be argued that this change will cause people to submit ridiculous statements of amounts claimed for non-economic damages to be sure they do not limit recovery. If that is correct, perhaps a better approach would be to get rid of 67 C(2) entirely. There is no reason why the amount requested by a plaintiff has to limit damages. The federal rules do not provide that limit. Also, if the limit were abolished, the awkward statement procedure in 18 B could be eliminated. It was part of the legislative "tort reform" package a few years ago. I think the purpose was simply to avoid adverse publicity flowing from astronomical unliquidated damages claims. If such claims are not necessary, because the prayer does not limit recovery,

then 18 B would not be necessary.

2. **Inconsistency between ORCP 7 D(3)(a)(iii) and 27 B(2) relating to service on a guardian ad litem.** This item comes from the letter received from Warren Deras dated October 17, 1988. (attached as exhibit B). The problem he describes assumes it is possible to have an incapacitated defendant who does not have a guardian or conservator. If this is true, his suggestion of eliminating the requirement of serving the guardian ad litem could work. As he points out ORCP 67 B(2) prohibits any default against an incapacitated person unless there is a guardian.

Rather than elimination of service on the guardian ad litem in 7 D(3)(a)(iii), we could eliminate the provision in 27 B(2) that requires to plaintiff to wait 30 days after service of summons before having the guardian ad litem appointed. I think, the purpose behind that provision, however, is to allow the relatives or friends of the incapacitated person time to get a guardian appointed or select a guardian ad litem. If it were eliminated that means the plaintiff always selects the defendant's guardian ad litem.

Perhaps a better approach would be to use the same service provision as that for defendant minors in ORCP 7 (d)(3)(ii). If the only service required is on the incapacitated person, there is a possibility that a relative or friend capable of seeking a favorable guardian ad litem would not know about the suit. The provision could read as follows:

> "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 such incapacitated person's father, mother, or any person having the care or control of the incapacitated person or with whom such incapacitated person resides."

The assumption that one could have a defendant who fit under the requirement of rule 27 because incapacitated, but had no guardian or conservator raises a larger problem. Before the ORCP, the provisions for ad litem appointment used to refer to appointment of a guardian ad litem for a person " adjudicated incompetent." That is, you were only required to have a guardian ad litem when a defendant had been the subject of some judicial proceeding which decided he or she was not mentally competent and resulted in appointment of a representative. I believe that is why the provision for service on incapacitated person assumes there is a conservator or guardian. I think the reference to ad litem was added to take care of the rare problem when the appointed conservator's or guardian's interests were adverse to the incompetent person or possibly when the guardian or conservator could not be found. I think the language "incapacitated person" was used as being more accurate that "incompetent person," but it is not clear that is limited to persons legally adjudicated to be incapacitated.

If you can have a defendant who has not been adjudicated incapacitated, but who must have a guardian ad litem under the rule, a plaintiff can be placed in a difficult position. Since a judgment secured against a minor or an incapacitated person without a guardian ad litem is void, the plaintiff must speculate on the defendant's mental capacity at the risk of a void judgment. It is also not clear what would happen if a defendant disputed that he was incapacitated. Must the court conduct a competency hearing on the petition for appointment of the guardian ad litem? Does the plaintiff have the burden of showing incapacity? On the other hand, there probably are a lot of people mentally incapable of defending themselves in a lawsuit who have never been adjudicated so. It is my impression that formal appointments of guardians are almost never used for mentally retarded persons. I am not sure what the Council wants to do about this, but the meaning of "incapacitated person" should be clarified. If it is limited to cases where a defendant has been the subject of a judicial proceeding appointing a guardian or conservator due to incapacity, ORCP 7 D(3)(a)(iii) is probably acceptable in its present form.

3. **Addition of mental health clinics to groups that may respond to subpoena duces tecum with affidavit.** Peter Wells raised this in a letter dated Dec. 27, 1989. (attached as exhibit C). There are probably many public and private institutions, other than hospitals, that could benefit from presumptive validity of return of records by affidavit. One argument would be that once you go beyond hospitals, trying to develop standards for appropriate use of 55 H procedure is impossible and it is better to limit the procedure to the known and accepted application to hospital records. On the other hand, it could be argued that anyone ought to be able to respond to a subpoena duces tecum by affidavit unless the party serving the subpoena requests personal authentication.

Confining the question to the issue presented, to accomplish what Wells suggests would require addition of the following to ORCP 55 H(1):

> As used in this section, unless the context requires otherwise, "hospital" means a hospital licenced under ors 44.015 through 441.087, 441.525 through 441.595, 441.815, 41.820, 441-990, 442.320, [and] 442-340 through 442-450[.]<u>, and mental health programs organized under ORS 430.610 through 430.700.</u>

ORS 41.930 would make such records admissible based upon the affidavit of the custodian. It says all records submitted pursuant to ORCP 55 H can be authenticated by the affidavit.

4. **ORCP 21 A defenses set forth in answer.** Hugh Collins has suggested that ORCP 21 be amended to give the court specific authority to direct that a rule 21 defense or objection, which is included in an answer, be treated as a motion. (his proposal,

transmitted on January 21, 1989, together with some correspondence with the Uniform Trial Rules Committee is attached as exhibit D)

Section 21 C, which is in the rule, is designed to do this already. It does not, however, contain a specific reference to motion treatment or to the UTCR procedure.

If the Council wants to do this I suggest that we add the following to ORCP 21 C:

> "The court may enter an order that such defense be head and determined as a motion in accordance with the procedure specified in UTCR 5.01 through 5.060."

The rest of the proposal is either unnecessary or better dealt with by the UTCR.

5. **Required filing of proof of service.** This is a suggestion put forward by Hugh Collins in a letter of January 23, 1989. (attached as exhibit E) (The letter also has a suggestion relating to motor vehicle service, which is being considered by the subcommittee concerned with that rule.) He suggests that the default rule be modified to require filing of proof of service within 9 days of service. This would be enforced by an inability to secure default if proof of service was not filed.

It might be good idea to be sure that there is a timely filing of proof of service. The return is an important part of the record. On the other hand, there is a danger of making the return of service too important and creating an inconsistency with ORCP 7 F(4). The proposal, however, does not relate to the validity of the service, only the ability to take a default.

6. **Sequence and timing of discovery.** This is a problem raised by Michael A. Greene on February 13, 1989. (attached is exhibit F) He suggests that when representing plaintiffs he usually wishes to have production and inspection before depositions. The limit on production and inspection to after 45 days from service of summons allows the defendant to secure the advantage of being the first to take depositions. He recommends change of the 45 day period to a "reasonable" time period, which he suggests would be consistent with the other discovery rules.

First, I disagree that the other discovery rules do not have specific time limits to allow a defendant to obtain an attorney. Rule 39 A, governing depositions, provides a 30 day limit, subject to an exception for emergency situations or if a plaintiff begins discovery. Rule 45 relating to admissions has the same 45 day limit as production and inspection. The only discovery rule not specifically time limited is ORCP 44 relating to physical examinations. That procedure, however, requires a court order. Presumably the time required to secure such order and the supervision of the judge would assure an adequate delay after service of summons.

Second, I think the problem may be one of controlling sequence of discovery generally. This is one of the first complaints we have had of the so called "race for discovery" type which plagued the federal courts before the 1970 amendments to the federal rules. As I understand it, prior to 1970, there were problems in federal courts relating to the order of discovery. In 1970 the federal rules were amended to put in the time limits which are now in our rules. The federal courts had also adopted the practice of directing that discovery proceed in the order requested by the parties, that is if a plaintiff first noticed several depositions and requested production that would have to be completed before defendant could take a deposition. Therefore in 1970 FRCP was amended by adding the FRCP 26 (d):

> " **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

That provision was not included in the Oregon rules in 1979 because the Council felt that the sequence and time of discovery was not a problem in Oregon. In any case, this provision would not help Mr. Greene. To the contrary, it confirms that the defendant could secure depositions while the plaintiff is waiting for the 45 day limit for discovery to expire, even though plaintiff has requested production and inspection before the defendant served the notice of deposition.

It is not clear, however, whether the problem is built into the rules or is created by Mr. Greene's pretrial strategy. It seems to me anytime one side decides to delay depositions until production and inspection is completed, the other side has an opportunity to take depositions first. The ORCP allow Mr. Greene to serve a notice of deposition with service of the complaint setting a deposition 30 days after service, and to set a deposition even earlier if the defendant begins discovery. It also seems that one price of setting a time limit on plaintiff's discovery to allow defendant to secure counsel is a risk that defendant can secure at least some discovery first.

Whatever the subcommittee wishes to do, I do not like the idea of abandoning the time limit or changing it to an indeterminate limit such as a reasonable time. Perhaps the problem with the present limit is the extra 15 days beyond the time to respond, coupled with no exception if a plaintiff responds immediately by beginning discovery. This could be cured by using the same time limit for production and inspection as that for depositions. The time limit in ORCP 45 B would then read "...a defendant shall not be required to serve answers or objections before the expiration of 30 days after service of the

summons and complaint upon such defendant, unless such defendant has served a notice of taking deposition or otherwise sought discovery. "

7. **Supersedeas stay after appeal.** Hugh Collins raised this in a letter dated July 31, 1989. (attached as exhibit #2) He suggests that Rule 72 is ambiguous and may prevent stay of proceedings by supersedeas bond if the execution has already been issued. I do not see the ambiguity. ORCP 72 B explicitly says that rule 72 does not effect the availability of stays generated by another rule or statute. ORS 19.040 is another rule that provides a stay after appeal. The second sentence of ORCP 72 A merely recited existing law and confirms that a trial judge has no power to grant a stay of execution under ORCP 72 after appeal. It does not prevent a stay created by compliance with ORS 19.040. If such a stay exists certainly any execution should be recalled. ORS 19.040 creates a stay of the proceedings when the proper bond is filed.

(503) 224-4086

LEGAL AID SERVICE
FOR MULTNOMAH COUNTY

900 BOARD OF TRADE BUILDING
310 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204

Louis Savage, Executive Director
Michael H. Marcus, Director of Litigation

July 6, 1989

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

Dear Prof. Merrill:

I am an attorney in Portland and I attended the CLE in which you lectured on the Oregon Rules of Civil Procedure. I have read the materials from that CLE and researched elsewhere, but I cannot find a conclusive answer to the following question:

> Once a defendant has demanded and received, pursuant to ORCP 18B(3), a statement specifying the amount of noneconomic damages claimed by the plaintiff, may the judgment exceed that amount [ORCP 67C(2)]?

I would appreciate it very much if you could answer this question for me.

Thank you.

Very truly yours,

Lorey H. Freeman

LOREY H. FREEMAN
Attorney at Law

Exhibit A

WARREN C. DERAS
ATTORNEY AT LAW
1400 S. W. MONTGOMERY
PORTLAND, OREGON 97201 6093
TELEPHONE (503) 222-0108

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 Deras

Exhibit B

UMATILLA COUNTY BOARD OF COMMISSIONERS
Courthouse, 216 S. E. 4th, Pendleton, Oregon 97801 • Telephone: 503-276-7111

Bill Hansell, Glenn Youngman, Jeanne Hughes
COMMISSIONERS

Peter H. Wells
LEGAL COUNSEL

Marcia Wells
OFFICE MANAGER

Deborah Warlick
PERSONNEL DIRECTOR

December 27, 1988

Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Amendments to ORCP 44 and 55

Dear Council and Staff:

I see in the Oregon State Bar publication "For the Record", December, 1988, that amendments are being proposed for ORCP 44 and 55.

I suggest that it may also be appropriate, with either these amendments or with future amendments, to provide that the provisions of ORCP 55H also apply to mental health clinics.

The Umatilla County Mental Health Program has been the subject of approximately 43 subpoenas duces tecum in the past fourteen months. The language of the subpoenas usually require the personal appearance of the records custodian in Portland, 210 miles from the site of treatment. It is only through the good graces of the issuing attorney that we have usually been permitted to appear through delivery of records only. I submit that the submission of records without the personal appearance of the records custodian is appropriate for mental health programs organized under ORS 430.610 to 430.700.

Very truly yours,

Peter H. Wells

cc Members, Council on Court Procedures

Exhibit c

OUR FILE NO.

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138

(503) 772-9034

January 21, 1989

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

Re: An addition to ORCP

Dear Professor Merrill:

Enclosed is what started out as a proposed addition to UCTR, but which temporarily halted at the jurisdictional borderland separating the UCTR Committee and the Council on Court Procedures. Would you please submit it to the Council for consideration?

My suggestion is that the following portion of the first sentence of the enclosure be adopted as an addition to ORCP 21A:

> Whenever any defense enumerated in ORCP 21A is asserted in a responsive pleading the court may, and on motion of any party shall, enter an order that such defense be heard and determined as a motion.

The remainder of the enclosed suggestion seems suited to UCTR.

Sincerely,

Hugh B. Collins

Enc

cc:
Hon Allan H. Coon
Josephine County District Court
Josephine County Courthouse
Grants pass, OR 97526

Exhibit d

OUR FILE NO.

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138

(503) 772-9034

January 6, 1989

Hon. Allan H. Coon
Josephine County District Court
Josephine County Courthouse
Grants Pass, OR 97526

Re: UCTR

Dear Judge Coon:

Enclosed is a proposed addition to UCTR, which I'd appreciate your proposing to the UCTR Committee for adoption.

The enclosure is designed to prevent surprises at trial resulting from the occasionally overlooked ORCP 21 defense in a pleading.

Sincerely,

HUGH B. COLLINS/drs

Enc.

bcc: (w/Enc.)
Hon Edwin J. Peterson
Chief Justice
Supreme Court Building
Salem, OR 97310

State of Oregon
Josephine County Circuit and District Courts

January 19, 1989

Mr. Hugh B. Collins
Attorney at Law
835 E Main Street
Medford, OR 97501

RE: UTCR Committee

Dear Hugh:

I received your letter of January 6, 1989 along with your proposed addition to the Uniform Trial Court Rules. I presented your proposal to the UTCR Committee on January 13, 1989; however, no action was taken.

Since your proposal appeared to have merit, the Committee asked me to convey their reasoning to you and perhaps suggest your next step. The Committee felt that your issue would be more properly addressed in the ORCP rather than the UTCR. The Committee is very sensitive to avoid an improper intrusion into statutory procedures and it was felt that your request would constitute such an intrusion if it was incorporated in Uniform Trial Court Rules.

It was suggested that you refer your proposal to the Counsel on Court Procedures, specifically, you may direct your proposal to Professor Fred Merrill at his office at the University of Oregon School of Law. It's my understanding that their proposals had to be made to the present legislature by early January; therefore, any referrals to the Counsel on Court Procedures Committee will not be considered by this legislature. If that is a concern for you, the UTCR Committee felt you might wish to contact your legislative representative for consideration in this legislative session.

On a personal note, I apologize for what appears to be "buck passing" of your request. However, I do see the UTCR Committee's position and I wish you well in your efforts.

Very truly yours,

Allan H. Coon

Allan H. Coon
Presiding District Court Judge

AHC:mp

MARK W. HINNEN, TRIAL COURT ADMINISTRATOR
(503) 474-5181 • JOSEPHINE COUNTY COURTHOUSE • Grants Pass, OR 97526

Whenever any defense enumerated in ORCP 21A is asserted in a responsive pleading the trial court may, and on motion of any party shall, enter an order that such defense be heard and determined as a motion in accordance with the procedure specified in UCTR 5.010 through UCTR 5.060 inclusive. The party asserting the defense must serve and file a supporting memorandum of law or a statement of points and authorities within 20 days from the date of such order; the adverse party has 20 days from the service of such supporting memorandum or statement within which to respond; and the proponent has 10 days from the date of service of said responding memorandum or statement within which to reply; the trial court may by order enlarge or reduce any said time.

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138
(503) 772-9034

OUR FILE NO.

January 23, 1989

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

Re: ORCP

Dear Professor Merrill:

Enclosed is a specimen of a suggested paragraph F to be added to ORCP 69.

Also enclosed is a suggested paragraph D.(4)(a)(iv) for addition to ORCP 7.

These are designed to make it easier on defending attorneys to appear for their clients in an orderly manner. At present, there's an increasing tendency among attorneys to withhold filing proof of service unless it becomes necessary to file it in order to obtain a default.

An increasing number of attorneys is resorting to DMV service in motor vehicle cases, without any attempt at personal or primary service and in many instances these attorneys don't bother to file proof of service unless it is needed to obtain a default.

When a defense assignment is received, among the first things an attorney should do is check the Clerk's file for the particulars of service of Summons. In those instances where the client to be defended is a responsible sort, proof of service is almost always to be found in the Clerk's file. Where the client is a flake, quite often proof of service is missing from the Clerk's file. Perhaps it is unfair to infer that there was any deliberate attempt to conceal the fact of service or to mislead the defending attorney. But it would certainly do no harm to put an end to the opportunity to conceal or mislead, alternatively to require the cooperation of plaintiff's attorneys in orderly and responsible court record keeping.

I was taught in law school that due process requires that service of summons upon a defendant be made in the manner that is most likely to give that defendant actual notice of the pending litigation.

It will be appreciated if you present these suggested amendments to the Council on Court Procedures.

Sincerely,

HUGH B. COLLINS/drs

Enc.

Exhibit E

D.(4)(a)(iv) Summons shall not be served on the Administrator of the Motor Vehicles Division or at any office of the Administrator before there has been filed with the Clerk proof of unsuccessful bona fide attempts to make personal or primary service upon the defendant concerned.

F. An order of default against a party for failure to respond to a complaint, counterclaim or third party complaint, will not be granted prior to the expiration of 21 days from the date that proof of service thereof on that party was filed with the Clerk.

Rosenthal & Greene, P.C.

ELDEN M. ROSENTHAL
MICHAEL A. GREENE
Attorneys at Law

Suite 1907, Orbanco Bldg · 1001 SW Fifth Avenue · Portland, Oregon 97204-1165 · (503) 228-3015

February 13, 1989

Ronald L. Marceau
Marceau, Karnopp, et al.
835 NW Bond Street
Bend, OR 97701

Henry Kantor
Pozzi, Wilson, et al.
910 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Re: Council on Court Procedures: Timing of Discovery, ORCP Rule 43B

Gentlemen:

I have recently encountered a problem with ORCP Rule 43B and the requirement that a "defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time period."

As you are aware, the general litigation practice throughout Oregon is to produce all documents and then proceed to take depositions. However, I have experienced a defense tactic in trying to exploit the 45 day period of ORCP 43B. In my case a request for production of documents was served with the complaint yet the defendant tried to notice the deposition of the plaintiffs prior to the expiration of 45 days from service. Defendants refused to produce documents and indeed moved for a protective order. The court denied the protective order for a number of reasons including the unfair exploitation of the 45 days waiting period of Rule 43B.

I pointed out to the court that the waiting period was to protect defendants while they obtained an attorney, not to be exploited to give any advantage in the timing of discovery by the defendants. My suggestion would be that you ought to consider a change in Rule 43B to prevent this exploitation. None of the other discovery rules contain such a limitation, but rather rely on "reasonable" time standard.

Exhibit F

I would appreciate the Council's consideration of this change in order to eliminate the opportunity for litigation gamemanship during the discovery process.

Thank you for your consideration of this matter.

Very truly yours,

Michael A. Greene

Michael A. Greene

MAG/rl

OUR FILE NO. 11394

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138

(503) 772-9034

July 31, 1989

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

Re: Clarification of ORCP 72

Dear Mr. Merrill:

Plaintiff recovers a money judgment and promptly has execution issued. Defendant promptly perfects an appeal files a supersedeas bond. Trial Court Administrator refuses to recall execution, feeling that ORCP 72 A stands in the way. Defendant contends that the net effect of ORS 19.040 (1)(a) and ORCP 72 B would be to "kill" the execution.

Staff Counsel at the Court of Appeals suggests that ORCP 72 is ambiguous as applied to the foregoing scenario, and I can certainly see his viewpoint.

Accordingly I suggest a housekeeping amendment to add to ORCP 72 B the phrase ", or when an undertaking has been filed to stay the proceedings in accordance with ORS 19.040 (a) through (d) inclusive."

Sincerely,

HUGH B. COLLINS/rme

Exhibit C

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Dissolution of the Marriage of Charlene K. Dhulst, Petitioner-Respondent and James E. Dhulst, Respondent-Appellant.	)	Multnomah County Circuit Court No. D8004-63328 Court of Appeals No. A22479

APPELLANT'S BRIEF AND ABSTRACT OF RECORD

Appeal from Order Denying Respondent's Motion and Setting Aside Restraining Order of the Circuit Court of the State of Oregon for the County of Multnomah

HONORABLE KATHLEEN B. NACHTIGAL, Circuit Court Judge

WARREN C. DERAS
1400 S.W. Montgomery
Portland, Oregon 97201
Telephone: (503) 222-3526

Attorney for Respondent-Appellant

NICK CHAIVOE, P.C.
206 Bailey Building
5441 S.W. Macadam Avenue
Portland, Oregon 97201
Telephone: (503) 221-1425

Attorney for Petitioner-Respondent

Decided
61 Or App 353
(reversed on first assignment of error - Did not reach III C)

INDEX

APPELLANT'S BRIEF

decree. Third, the court chose to ignore the provisions of the decree relative to allocation of personal property, and ruled "that the parties, despite the decree, have made a fair and reasonable division of the personal property". This is apparently based upon the property that Wife abandoned to Husband. No authority has been found for the proposition that a party to a decree which should be set aside can save it by unilaterally giving a few assets to the other party. Finally, the court below chose in essence to ignore the principal asset of the parties, the residence in which they had an equity of between $56,000.00 and $76,000.00, except to refer the existence of "some inequity in the decree".

C. Husband's Mental Condition Excused His Neglect in Responding To the Petition

In an annotation on the subject in 157 ALR 6, 86, it is stated:

> "Default judgments of divorce obtained against a defendant spouse, who, at the time of rendering the default judgment, was insane or a minor, will not be allowed to stand, and courts will not hesitate to grant relief by setting them aside."

The only Oregon authorities dealing with this subject appear to be Brandt vs. Brandt, 9 Or App 1, 495 P2d 1205 (1972), and Pierpoint vs. Pierpoint 9 Or App 11, 495 P2d 1236 (1972), which were argued and decided together. Neither case arose under ORS 18.160. Brandt was a suit to set aside a property settlement agreement and decree of divorce on the ground of fraud in which the "thrust of the complaint arises

out of the mental condition of the plaintiff". 9 Or App at 3. The complaint was not filed within a year after entry of the decree. The court cited the following rules with respect to the effect of incompetency:

> "1. The general rule is:
>
> "'* * *[A] judgment against one incompetent at the time of its rendition, and not represented by a guardian or committee, is not absolutely void, but is, at most merely voidable.' Annotation, 140 ALR 1336 (1942)." (9 Or App at 5-6)
>
> "In Beckley Nat. Bank v. Boone, 115 F2d 513 (4th Cir 1940), cert denied 313 US 558, 61 S Ct 835, 85 L Ed 2d 1519 (1941), the court said:
>
> > "'* * *The rule of law is well established that a judgment rendered against an insane person not represented by a guardian or committee is not on that account void; and it will not be set aside even upon direct attack on the ground of insanity alone. To set it aside there must also be shown a meritorious defense to the claim. * * *' 115 F2d at 518." (9 Or App at 7)

The court found that there was no proof of either inequity or fraud and denied relief.

The court in Brandt expressly distinguished the findings in that case from those in Pierpoint, which involved not a motion to set aside a decree, but one to disapprove a property settlement agreement prior to entry of the decree. This suggests that the substance of the rule is the same regardless of the point in the proceedings at which the issue of insanity is raised, whether it be before entry of the decree or two years afterwards, as in Brandt. In Pierpoint,

wife had psychiatric testimony not very different from that provided in this case. This court reversed the trial court and set aside the agreement. Applying the fault rules then in effect, the court found the agreement unjust even though wife had received roughly two-thirds of the assets. This court increased the wife's share to roughly five-sixths of the marital assets.

The trial judge, having erroneously excluded much of the psychiatric testimony, tended to belittle Husband's claim of mental incapacity. Her discussions on this subject are reproduced at Ab 8. It is suggested that that comparison of these proceedings with parental termination cases is inappropriate, the standard in such a case not being whether the mental problem excuses its victim's conduct, but rather whether it is seriously detrimental to the child. Under ORS 419.523(2), mental illness is expressly named as a possible grounds for termination. The court below also appears to be in error in suggesting that problems of the type suffered by Husband in this case would not excuse criminal conduct. See, for example, Rolfe vs. Psychiatric Security Review Board, 53 Or App 941, _____ P2d _____ (1981), for a lengthy discussion of the history of an individual suffering problems different only in marginal degree from those suffered by Husband in this case. Here, Wife's repeatedly expressed fears of physical abuse by Husband, which have resulted in the entry of two separate restraining orders in these proceedings, suggest that at least Wife thinks that Husband is not far different from Mr. Rolfe.

Even without the psychiatric testimony excluded by the court, there is significant testimony to the effect that Husband in this case was substantially disabled from engaging in ordinary activities. He had at the time of hearing been unemployed for a year and a half. The social worker who interviewed him for an alcohol treatment program, and who had a Master of Social Work degree with specialization in mental health (Tr. 12), testified that Husband had trouble focusing on questions and tracking (Tr. 13). The trial court sustained an objection to her testimony that he exhibited paranoid behavior (Tr. 15). The attorney with whom Husband consulted indicated in his affidavit that Husband was "unable to follow or hold a chain of thought" to the point that he was unable to represent him. Respondent's Exhibit 2, which was accepted in evidence (Tr. 30), is useful in that it gives the court a firsthand view of the level at which Husband was functioning during this time period. It is a complaint to the Oregon State Bar filed by Husband shortly after the decree was taken against his original attorney and Wife's original attorney. It is simply unintelligible.

With regard to this aspect of the excusability of Husband's conduct in this proceeding, consideration should be given to Oregon State Bar Legal Ethics Opinion No. 229, relating to the obligations of an attorney handling a matter for a client who is incompetent. Husband twice sought legal assistance, both times before the decree was taken. In both instances, his efforts were rejected, although he expressly understood that Mr. Bassett was representing him (Tr. 55).

Obviously, Mr. Bassett did take some steps as Husband's attorney to correspond with Wife's attorney. Opinion No. 229 construes the Code of Professional Responsibility to require an attorney in those circumstances to continue representation, to make decisions on behalf of the client where appropriate, and to obtain for his client "all possible aid". The opinion acknowledges that such representation is often difficult, but indicates "that a lawyer may not dodge the responsibilities of his profession because of difficult situations". It is suggested that this ethical opinion accurately reflects the broader responsibility of our legal system to citizens suffering under a mental impairment and that in the circumstances of this case the system has not lived up to its responsibilities to Husband, not only because Husband's attorney failed to act vigorously on his behalf, but also because Wife's original attorney, being aware of the situation, took advantage of it.

In May and May, 55 Or App 396 398, _____ P2d _____ (1981), a defaulted party's erroneous belief that she was being represented by an attorney was taken into consideration in setting aside a decree.

D. Wife's Conduct Misled Husband

With due consideration being given to Husband's mental condition, Wife's conduct prior to entry of the decree below was misleading. Although it might appear in this regard that Husband was clutching at straws, it should be kept in mind that a drowning man might feel he has no alternative.

September 26, 1989

TO THE SUBCOMMITTEE:

The following is a report (less than 2 pages) which I think reflects the decisions which you made at the subcommittee meeting. If anyone disagrees or wants to modify the language, please call me as soon as possible. If necessary, we can confer by conference call. I would like to send the report out at the end of the week with the agenda for the October 14 meeting.

Although most of the letters involved have already been sent to the Council, they should be attached because former members will have lost them and we have a number of new members.

M E M O R A N D U M

FROM: Miscellaneous Inquiries Subcommittee (Henry Kantor, Chairer, Bernard Jolles, Elizabeth Yeats)

TO: Council On Court Procedures

RE: Inquires Received after October 1988

The Miscellaneous Inquiries Subcommittee met on September 14, 1989 and discussed all suggestions for amendments to the ORCP which had been received by the Council after the amendments promulgated during the last biennium were completed. It recommends the following disposition of these inquiries:

1. Last biennium the Council discussed a request that it clarify whether a statement specifying the amount of noneconomic damages under ORCP 18 B(3) limits the amount of recovery. No action was taken. Since that time, three telephone calls and a letter have been received by the Executive Director asking the same question.

The subcommittee believed that the procedure of eliminating noneconomic damages from the prayer and requiring a statement of such damages on request is not particularly useful and would not provide a basis for limiting damages. The statement of damages may simply be a letter from one counsel to another and is not part of the trial court file. They also felt that the procedure had been created because of excessive claims for noneconomic damages in some complaints which provided adverse publicity to the defendants. Such claims were caused by ORCP 67 C(2), which limits recovery to the amount of damages requested in the prayer. The subcommittee decided the simplest way to deal with both problems was to eliminate both 18 B and 67 C(2), and recommends

this action to the Council.

2. The Council received a letter from Warren Deras dated October 17, 1988, relating to a potential problem involving service on incapacitated persons (attached as Exhibit A). The subcommittee believed that the problem presented resulted from a misinterpretation of the rules. The subcommittee reads ORCP 7 D(3)(a)(iii) and 27 B as requiring a person who sues an incapacitated person to serve both the person and any existing guardian or conservator. If there is no guardian or conservator, then the plaintiff must serve the incapacitated person and wait 30 days from that service to see if a guardian ad litem is appointed at the request of a relative or friend of the incapacitated person. If the appointment is made, the plaintiff must then serve the guardian ad litem. After the 30-day period expires, the plaintiff may move for appointment of the guardian ad litem and complete the service. The time for default would be 30 days from completion of service on the guardian ad litem.

In reviewing the ORCP, the subcommittee did decide that the phrase "incapacitated person", used in ORCP 7 D, 27 B and 67 B, is not entirely clear. The subcommittee recommends that the phrase when used in the ORCP be changed to "incapacitated person as defined by ORS 126.003(4)".

3. In a letter dated December 27, 1989, Peter Wells suggested that mental health clinics be added to the organizations that can respond to a subpoena duces tecum by affidavit (attached as Exhibit B). At present, the affidavit procedure in ORCP 55 H only applies to hospital records. The subcommittee believed that it might be desirable to expand the subpoena procedure, but that it would be a bad idea to do it on an **ad hoc** basis depending upon request. It recommends that a special subcommittee be appointed to review the procedure.

4. Hugh Collins has suggested that ORCP 21 be amended to give the court specific authority to direct that a Rule 21 defense or objection, which is included in an answer, be treated as a motion (letter to Uniform Trial Court Rules Committee attached as Exhibit C). The subcommittee believes that ORCP 21 C already addresses the question presented and recommends no change to the rule.

5. In a letter of January 23, 1989, Hugh Collins suggests that the default rule be modified to prevent a default if proof of service is not filed within 9 days of service (attached as Exhibit D). The subcommittee believes that a rule setting a time limit for filing proof of service is unnecessary and recommends no amendment of the rule.

6. In a letter of February 13, 1989, Michael A. Greene requests a change in the time limit that prevents a plaintiff

from securing production and inspection from the defendant until 45 days after service of summons (attached as Exhibit E). The subcommittee believes that the time limits in the discovery rules should be retained as they are needed to give the defendant time to secure legal assistance before discovery. The subcommittee did feel that the problems described by Mr. Greene may reflect an increasing tactical abuse of discovery by some attorneys. The Council should address the area of discovery abuse if reports or complaints continue to be received.

7. By letter of July 31, 1989, Hugh Collins suggests that ORCP 72 is ambiguous and may prevent a stay of proceedings by supersedeas bond if an execution has already issued (attached as Exhibit F). The subcommittee does not see any ambiguity. ORCP 72 B explicitly says that Rule 72 does not affect the availability of stays provided by another rule or statute. ORS 19.040 is a specific statute that provides a stay after appeal. The subcommittee recommends no amendment of the rule.

September 29, 1989

M E M O R A N D U M

FROM: Miscellaneous Inquiries Subcommittee (Henry Kantor, Chairer, Bernard Jolles, Elizabeth Yeats)

TO: Council On Court Procedures

RE: Inquires received after October 1988

The Miscellaneous Inquiries Subcommittee met on September 14, 1989 and discussed all suggestions for amendments to the ORCP which had been received by the Council after the amendments promulgated during the last biennium were completed. It recommends the following disposition of these inquiries:

1. Last biennium the Council discussed a request that it clarify whether a statement specifying the amount of noneconomic damages under ORCP 18 B(3) limits the amount of recovery. No action was taken. Since that time, three telephone calls and a letter have been received by the Executive Director asking the same question.

The subcommittee believed that the procedure of eliminating noneconomic damages from the prayer and requiring a statement of such damages on request is not particularly useful and would not provide a basis for limiting damages. The statement of damages may simply be a letter from one counsel to another and is not part of the trial court file. They also felt that the procedure had been created because of excessive claims for noneconomic damages in some complaints which provided adverse publicity to the defendants. Such claims were caused by ORCP 67 C(2), which limits recovery to the amount of damages requested in the prayer. The subcommittee decided the simplest way to deal with both problems was to eliminate both 18 B and 67 C(2), and recommends this action to the Council.

2. The Council received a letter from Warren Deras dated October 17, 1988, relating to a potential problem involving service on incapacitated persons (attached as Exhibit A). The subcommittee believed that the problem presented resulted from a misinterpretation of the rules. The subcommittee reads ORCP 7 D(3)(a)(iii) and 27 B as requiring a person who sues an incapacitated person to serve both the person and any existing guardian or conservator. If there is no guardian or conservator, then the plaintiff must serve the incapacitated person and wait 30 days from that service to see if a guardian ad litem is appointed at the request of a relative or friend of the

incapacitated person. If the appointment is made, the plaintiff must then serve the guardian ad litem. After the 30-day period expires, the plaintiff may move for appointment of the guardian ad litem and complete the service. The time for default would be 30 days from completion of service on the guardian ad litem.

In reviewing the ORCP, the subcommittee did decide that the phrase "incapacitated person", used in ORCP 7 D, 27 B and 67 B, is not entirely clear. The subcommittee recommends that the phrase when used in the ORCP be changed to "incapacitated person as defined by ORS 126.003(4)".

3. In a letter dated December 27, 1989, Peter Wells suggested that mental health clinics be added to the organizations that can respond to a subpoena duces tecum by affidavit (attached as Exhibit B). At present, the affidavit procedure in ORCP 55 H only applies to hospital records. The subcommittee believed that it might be desirable to expand the subpoena procedure, but that it would be a bad idea to do it on an **ad hoc** basis depending upon request. It recommends that a special subcommittee be appointed to review the procedure.

4. Hugh Collins has suggested that ORCP 21 be amended to give the court specific authority to direct that a Rule 21 defense or objection, which is included in an answer, be treated as a motion (letter to Uniform Trial Court Rules Committee attached as Exhibit C). The subcommittee believes that ORCP 21 C already addresses the question presented and recommends no change to the rule.

5. In a letter of January 23, 1989, Hugh Collins suggests that the default rule be modified to prevent a default if proof of service is not filed within 9 days of service (attached as Exhibit D). The subcommittee believes that a rule setting a time limit for filing proof of service is unnecessary and recommends no amendment of the rule.

6. In a letter of February 13, 1989, Michael A. Greene requests a change in the time limit that prevents a plaintiff from securing production and inspection from the defendant until 45 days after service of summons (attached as Exhibit E). The subcommittee believes that the time limits in the discovery rules should be retained as they are needed to give the defendant time to secure legal assistance before discovery. The subcommittee did feel that the problems described by Mr. Greene may reflect an increasing tactical abuse of discovery by some attorneys. The Council should address the area of discovery abuse if reports or complaints continue to be received.

7. By letter of July 31, 1989, Hugh Collins suggests that ORCP 72 is ambiguous and may prevent a stay of proceedings by supersedeas bond if an execution has already issued (attached as

Exhibit F). The subcommittee does not see any ambiguity. ORCP 72 B explicitly says that Rule 72 does not affect the availability of stays provided by another rule or statute. ORS 19.040 is a specific statute that provides a stay after appeal. The subcommittee recommends no amendment of the rule.

Enclosures

WARREN C. DERAS
ATTORNEY AT LAW
1400 S. W. MONTGOMERY
PORTLAND, OREGON 97201 6093
TELEPHONE (503) 222-0106

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 Deras

EXHIBIT A

.7

UMATILLA COUNTY BOARD OF COMMISSIONERS
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Bill Hansell, Glenn Youngman, Jeanne Hughes
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Peter H. Wells
LEGAL COUNSEL

Marcia Wells
OFFICE MANAGER

Deborah Warlick
PERSONNEL DIRECTOR

December 27, 1988

Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Amendments to ORCP 44 and 55

Dear Council and Staff:

I see in the Oregon State Bar publication "For the Record", December, 1988, that amendments are being proposed for ORCP 44 and 55.

I suggest that it may also be appropriate, with either these amendments or with future amendments, to provide that the provisions of ORCP 55H also apply to mental health clinics.

The Umatilla County Mental Health Program has been the subject of approximately 43 subpoenas duces tecum in the past fourteen months. The language of the subpoenas usually require the personal appearance of the records custodian in Portland, 210 miles from the site of treatment. It is only through the good graces of the issuing attorney that we have usually been permitted to appear through delivery of records only. I submit that the submission of records without the personal appearance of the records custodian is appropriate for mental health programs organized under ORS 430.610 to 430.700.

Very truly yours,

Peter H. Wells

cc: Members, Council on Court Procedures

EXHIBIT B

OUR FILE NO.

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138

(503) 772-9034

January 6, 1989

Hon. Allan H. Coon
Josephine County District Court
Josephine County Courthouse
Grants Pass, OR 97526

Re: UCTR

Dear Judge Coon:

Enclosed is a proposed addition to UCTR, which I'd appreciate your proposing to the UCTR Committee for adoption.

The enclosure is designed to prevent surprises at trial resulting from the occasionally overlooked ORCP 21 defense in a pleading.

Sincerely,

HUGH B. COLLINS/drs

Enc.

bcc: (w/Enc.)
Hon Edwin J. Peterson
Chief Justice
Supreme Court Building
Salem, OR 97310

EXHIBIT C

Whenever any defense enumerated in ORCP 21A is asserted in a responsive pleading the trial court may, and on motion of any party shall, enter an order that such defense be heard and determined as a motion in accordance with the procedure specified in UCTR 5.010 through UCTR 5.060 inclusive. The party asserting the defense must serve and file a supporting memorandum of law or a statement of points and authorities within 20 days from the date of such order; the adverse party has 20 days from the service of such supporting memorandum or statement within which to respond; and the proponent has 10 days from the date of service of said responding memorandum or statement within which to reply; the trial court may by order enlarge or reduce any said time.

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138
(503) 772-9034

OUR FILE NO.

January 23, 1989

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

Re: ORCP

Dear Professor Merrill:

Enclosed is a specimen of a suggested paragraph F to be added to ORCP 69.

Also enclosed is a suggested paragraph D.(4)(a)(iv) for addition to ORCP 7.

These are designed to make it easier on defending attorneys to appear for their clients in an orderly manner. At present, there's an increasing tendency among attorneys to withhold filing proof of service unless it becomes necessary to file it in order to obtain a default.

An increasing number of attorneys is resorting to DMV service in motor vehicle cases, without any attempt at personal or primary service and in many instances these attorneys don't bother to file proof of service unless it is needed to obtain a default.

When a defense assignment is received, among the first things an attorney should do is check the Clerk's file for the particulars of service of Summons. In those instances where the client to be defended is a responsible sort, proof of service is almost always to be found in the Clerk's file. Where the client is a flake, quite often proof of service is missing from the Clerk's file. Perhaps it is unfair to infer that there was any deliberate attempt to conceal the fact of service or to mislead the defending attorney. But it would certainly do no harm to put an end to the opportunity to conceal or mislead, alternatively to require the cooperation of plaintiff's attorneys in orderly and responsible court record keeping.

I was taught in law school that due process requires that service of summons upon a defendant be made in the manner that is most likely to give that defendant actual notice of the pending litigation.

It will be appreciated if you present these suggested amendments to the Council on Court Procedures.

Sincerely,

HUGH B. COLLINS/drs

Enc.

EXHIBIT D

F. An order of default against a party for failure to respond to a complaint, counterclaim or third party complaint, will not be granted prior to the expiration of 21 days from the date that proof of service thereof on that party was filed with the Clerk.

D.(4)(a)(iv) Summons shall not be served on the Administrator of the Motor Vehicles Division or at any office of the Administrator before there has been filed with the Clerk proof of unsuccessful bona fide attempts to make personal or primary service upon the defendant concerned.

Rosenthal & Greene, P.C.

ELDEN M. ROSENTHAL
MICHAEL A. GREENE
Attorneys at Law

Suite 1907, Orbanco Bldg · 1001 SW Fifth Avenue · Portland, Oregon 97204-1165 · (503) 228-3015

February 13, 1989

Ronald L. Marceau
Marceau, Karnopp, et al.
835 NW Bond Street
Bend, OR 97701

Henry Kantor
Pozzi, Wilson, et al.
910 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Re: Council on Court Procedures: Timing of Discovery, ORCP Rule 43B

Gentlemen:

I have recently encountered a problem with ORCP Rule 43B and the requirement that a "defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time period."

As you are aware, the general litigation practice throughout Oregon is to produce all documents and then proceed to take depositions. However, I have experienced a defense tactic in trying to exploit the 45 day period of ORCP 43B. In my case a request for production of documents was served with the complaint yet the defendant tried to notice the deposition of the plaintiffs prior to the expiration of 45 days from service. Defendants refused to produce documents and indeed moved for a protective order. The court denied the protective order for a number of reasons including the unfair exploitation of the 45 days waiting period of Rule 43B.

I pointed out to the court that the waiting period was to protect defendants while they obtained an attorney, not to be exploited to give any advantage in the timing of discovery by the defendants. My suggestion would be that you ought to consider a change in Rule 43B to prevent this exploitation. None of the other discovery rules contain such a limitation, but rather rely on "reasonable" time standard.

EXHIBIT E

I would appreciate the Council's consideration of this change in order to eliminate the opportunity for litigation gamemanship during the discovery process.

Thank you for your consideration of this matter.

Very truly yours,

Michael A. Greene

Michael A. Greene

MAG/rl

OUR FILE NO. 11394

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138

(503) 772-9034

July 31, 1989

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

Re: Clarification of ORCP 72

Dear Mr. Merrill:

Plaintiff recovers a money judgment and promptly has execution issued. Defendant promptly perfects an appeal files a supersedeas bond. Trial Court Administrator refuses to recall execution, feeling that ORCP 72 A stands in the way. Defendant contends that the net effect of ORS 19.040 (1)(a) and ORCP 72 B would be to "kill" the execution.

Staff Counsel at the Court of Appeals suggests that ORCP 72 is ambiguous as applied to the foregoing scenario, and I can certainly see his viewpoint.

Accordingly I suggest a housekeeping amendment to add to ORCP 72 B the phrase ", or when an undertaking has been filed to stay the proceedings in accordance with ORS 19.040 (a) through (d) inclusive."

Sincerely,

HUGH B. COLLINS/rme

EXHIBIT F

COUNCIL ON COURT PROCEDURES
University of Oregon School of Law
Eugene, OR 97403

July 13, 1989

M E M O R A N D U M

TO: **ORCP 7 D Subcommittee:**

Mike Starr, Chair
John Buttler
Lee Johnson

FROM: **Fred Merrill**

RE: **Review of ORCP 7 D**

This memorandum will provide some background on the special service provision for automobile accident cases in ORCP 7 D. The history of the present provision is quite complicated and may shed some light on the reason for the language presently used in the rule. I will also list some possible areas of review for the subcommittee. These are, of course, preliminary at best, but should provide a starting point for the work of the subcommittee.

HISTORY OF ORCP 7 D

A statute providing for service upon nonresident motorists for claims arising from automobile accidents in the state was first passed in Oregon in 1929. 1929 Oregon Laws, Ch. 389, Sec. 1. ORS 15.190 (rep. 1979). At that time, Oregon joined the majority of other states using an implied consent theory to exercise jurisdiction over foreign motorists after that theory was upheld by the United States Supreme Court in Hess v. Powloski, 274 U.S. 352 (1927).

The Oregon statute followed the national pattern of requiring in-state service on a state official, followed by mailing of a "notice of the service" to the defendant. The original Oregon statute required service on the Secretary of State. In 1955, the Oregon service was changed to service upon the Motor Vehicles Division. 1955 Oregon Laws, Ch. 287, Sec. 15. The statute originally applied only to the operator of the motor vehicle, but was amended in 1939 to cover claims against the owner as well. 1939 Or. Laws, Ch. 499, Sec. 1. The original statute applied only to nonresident defendants. In 1973, it was amended to include residents. 1973 Oregon Laws, Ch. 60, Sec. 1.

Until 1955, ORS 15.190 required no court order authorizing

service. Originally, the plaintiff was simply allowed to serve the Secretary of State in any motor vehicle case. In 1947, this was changed to require that the plaintiff file a certificate of the sheriff of the county in which the action was filed that the defendant could not be found in the state. 1947 Oregon Laws, Ch. 464, Sec. 2. In 1959, in response to Mullane v. Hanover Bank and Trust Co., 339 U.S. 306 (1950), where the Supreme Court held that due process required that summons provide the best notice possible under the circumstances, the statute was amended to require an affidavit by the plaintiff showing that the defendant "after due diligence cannot be found within the state" and a court order authorizing service upon the Motor Vehicles Division. 1959 Oregon Laws, Ch. 440, Sec. 1.

The Oregon Supreme Court then decided a series of cases treating a deficient showing of a diligent search for the defendant as a jurisdictional defect and very strictly requiring a demonstration of a diligent search. The plaintiff was required to make inquiry at a defendant's last known address, followed by inquiry of the post office, former employers, utility companies, neighbors, relatives, and friends. The plaintiff had to recite the exact details of the search in an affidavit. The leading case interpreting the diligence inquiry strictly was Ter Har v. Backus, 259 Or 478 (1971).

In response to these cases, the 1973 Legislature amended the statute to provide: "Due diligence is satisfied when it appears from the affidavit that the defendant cannot be found residing at [certain specified addresses]." 1969 Oregon Laws, Ch. 389, Sec 1. In 1973, the statute was amended again, dropping the requirement of a preliminary affidavit and order authorizing service. The plaintiff could merely make service, and only if a default judgment was sought against a "defendant who has not either received or rejected the registered or certified letter containing the notice of such service" was it necessary to make a showing of a diligent search. In such case, a showing that an attempt had been made to find defendant at the address given by the defendant at the time of the accident was sufficient to satisfy the requirement of a diligent search. 1973 Oregon Laws, Ch. 60, Sec. 1.

When the Council on Court procedures first promulgated ORCP 7 in 1979, they totally eliminated any special provision for service of summons in motor vehicle cases. The Council felt that from a jurisdictional perspective no special rule was needed because of the broad sweep of Rule 4. See 1979 Staff Comment to Rules 4 C and D. The legislature amended the rule promulgated by the Council and reinserted a provision for service in motor vehicle cases. 1979 Oregon Laws, Ch. 284, Sec. 9. The reason for the special provision was to provide a reliable method of service of summons when the plaintiff could not find the defendant or when the statute of limitation time was so short

there was no opportunity to conduct an exhaustive search.

The legislature went back to the language in ORS 15.190. It eliminated the reference to due diligence, but service could be made and default secured if the defendant could not be found at listed addresses. It, however, eliminated the service on the Motor Vehicles Division and provided that the summons be mailed to any address on record with the Motor Vehicles Division or any address known to the plaintiff, if the defendant could not be found at those addresses. In 1981, this change was reversed and service was again required on the Motor Vehicles Division. 1981 Oregon Laws, Ch. 898, Sec. 4. The defense insurance companies wanted a record of service which they could check without having to rely upon the defendant who might not receive or forward the summons. For an appropriate fee, the Motor Vehicles Division apparently will notify insurance companies when summons is served upon one of their insureds. The plaintiffs' attorneys felt that the service on the Motor Vehicles Division would provide a certain time that would satisfy the statute of limitation.

The 1981 amendment still differed slightly from ORS 15.190 by changing the primary address for mailing from the most recent address "furnished by the defendant to the Administrator of the Motor Vehicles Division" to the most recent address "as shown by the Motor Vehicles Division driver records." The ORCP provision also differs from the statute in that a copy of the summons and complaint must be mailed to the defendant, not a notice of the service on the Motor Vehicles Division. The 1981 amendment also changed ORCP 7 D(2) to provide that service was complete upon service upon the Motor Vehicles Division and mailing to the defendant. This, of course, does not control absolutely for limitations purposes.

In 1982, the Council added a requirement in subparagraph 7 D(4)(a)(i) and (ii) that a copy of the summons and complaint be sent to the defendant's insurance carrier if known. This was a response to Harp v. Loux, 54 Or App 840 (1981), where the plaintiff had negotiated with defendant's insurance company but did not notify them of the suit. The summons did not reach the defendant and the insurance company was unable to get a $40,000 default judgment vacated.

During the last biennium, Judge Liepe raised a question as to the form of mailing required under 7 D(4). He pointed out that the provision relating to service on the insurance company in 7 D(4)(a)(i) only said the summons and complaint should be mailed but that the default provision in 7 D(4)(c) referred to registered or certified mail. A provision was drafted which would have required service on the insurance carrier "in accordance with ORCP 7 D(2)", which is the service by mail provision requiring registered or certified mail and return receipt requested. At the 1988 June meeting, it was also

suggested that the mailing method for the defendant was not clear and the same stricter service requirement be incorporated in 7 D (4)(a)(ii). Both of these changes were tentatively adopted. The Council also discussed the fact that the requirement in ORCP 7 D(4)(c) (that the defendant either receive or reject the certified letter) was confusing, and that led to the formation of this subcommittee.

At the 1988 December meeting, where final action was taken on the tentatively adopted amendments, Judge Buttler raised a question whether mailing to the insurance company was part of service and necessary to complete service and satisfy the statute of limitations. The Council then changed the amendment to 7 D(4)(a) (i) and (ii) from "service in accordance with 7 D(2)(d)" to "registered or certified mail, return receipt requested." Judge Buttler then moved to amend ORCP 7 D(4)(a)(ii) to provide that service would not be complete until the copy of the summons and complaint were mailed to the insurance company. That amendment failed to pass. A copy of the final 1988 amendment promulgated by the Council is attached as Exhibit A.

ISSUES FOR SUBCOMMITTEE REVIEW

1. **Should there be any special provision at all for motor vehicle claims?** The answer to this is probably yes. Although the original Council thought not, it considered the matter only in terms of Rule 4 creation of jurisdiction--not in terms of a method of service. The provision does provide an easy and clearly described method of service that is prima facie acceptable service under Rule 7. Without the provision, a plaintiff who could not locate a defendant in a motor vehicle case could use any method reasonably calculated to give notice to defendant and still satisfy the standard of 7 D(1). The plaintiff could also secure a court order authorizing some method of service not specified in Rule 7. Neither of these would probably result in as simple and well accepted service method as that provided in ORCP 7 D(4). Even if a party were willing to risk using service on the Motor Vehicles Division or a court ordered it, in the absence of a specific rule such as ORCP 7 D(4), the Division would not accept service. The party would probably end up simply mailing to a last known address and lose the advantage of prima facie approval in the rule and the Court of Appeals holding in Harp v. Loux that ORCP 7 D(4) is sufficient under the constitutional standard for due process.

2. **Should the method of service be changed?** This to me presents a more difficult question. The provision provides an easy method of service, but perhaps it is too easy--at least for uninsured defendants.

Under the present rule, there is highly satisfactory notice for defendants known by the plaintiff to be insured. The

insurance company is mailed a copy of the summons and complaint, and the insurance company provides the defense. I am not sure how much authority the insurance company has to defend a case where they cannot find the defendant and have received notice directly, but that seems to be a problem to be handled in insurance contracts--not in the rules.

For uninsured defendants or perhaps where the fact of insurance is unknown, the rule is satisfied simply by inquiry at any addresses furnished by the defendant to the Motor Vehicles Division or any other last known address, followed by service on the Motor Vehicles Division and mailing to the addresses. That has never seemed like a very reasonable form of notice to me. To quote one of my favorite procedural authors:

> "Neither the Oregon Supreme Court nor the United States Supreme Court has passed on the validity of the procedure. Inquiry at former addresses of a defendant, without even asking where the defendant has gone, followed by mailing to such addresses, despite the defendant's absence, is still sufficiently questionable as a form of service that a cautious plaintiff would be well advised to inquire further." Merrill, Jurisdiction and Summons in Oregon, p. 216, fn. 243.

Put a little more bluntly, sending a letter to an address where you have determined a person does not live, without ever even asking where the person went, is a stupid way to give reasonable notice of anything. I am aware that the Court of Appeals said that the procedure did meet constitutional standards in Harp v. Loux. As indicated in the quote, the Court of Appeals may not be the last word on the subject. In any case, the Council should not be concerned with only minimal constitutional standards, but with formulation of the best rule.

The argument to the contrary would be that motor vehicle cases are a special situation. Most defendants are insured. If the defendant is insured and the insurance company is aware of the accident, it arguably should protect itself by checking service on the Motor Vehicles Division for the limitation period. If a defendant is not insured or the insurance company is not aware of the accident, this does not protect the defendant. It can also be argued that a person involved in a motor vehicle accident has a duty to notify the Motor Vehicles Division of any change of address. ORCP 7 D(4)(b). Oregon licenced drivers also have a duty to notify the Motor Vehicles Division of any change of address under ORS 807.560. If a defendant is not at the addresses listed with the Motor Vehicles Division, any inability to find them results from their own disregard of a legal duty. The problem with this argument is that it ignores reality. Few, if any, motorists are aware of the duty under ORCP 7 D(4). Few of us change the address on our driver's license until we renew

it.

It could also be argued that requiring a more extensive search for the defendant before service can be made upon the Motor Vehicles Division invites a return to the almost impossible requirements of the prior statute established by Ter Har v. Backus and similar cases. That is not necessarily true, if the provision were carefully drawn. Rather than require some vague standard like "due diligence", a limited and specific set of inquiries could be required such as: (1) ask anyone at the address given by defendant where the defendant went, and (2) check whether there is a forwarding address at the post office, and (3) do the same for any new addresses produced by these inquiries.

3. **Should the mailing to the defendant's insurance company be part of the formal requirements to complete service?** This is the question raised by Judge Buttler during the last biennium, and it needs to be addressed. It was my sense at the meeting that the Council members were not necessarily rejecting a clarification as much as desiring time to consider the matter. As a policy matter, I believe that the mailing to the insurance company ought to be part of the service and necessary to complete service. As indicated above, mailing to the insurance company is the only really effective step to give notice in the existing provision.

The Council, of course, has no power to deal with the question of what is required to satisfy the limitation period, but it can provide what is necessary to complete service for the rules, particularly to commence the 30-day default period. The present rule provides in ORCP 7 D(4)(c) that mailing to the insurance company is a prerequisite for default, but that does not indicate when the default period starts. ORCP 7D(4)(a)(ii) does provide in the last sentence that service is complete upon "such mailing", which I think was intended to refer to all the mailings in the previous sentence, both to the defendant and the insurance company. "Such mailing" may be ambiguous and it may be better to change the last sentence to say:

> "For purposes of computing any period of time prescribed or allowed under these rules, service under this paragraph shall be complete upon both mailing to the defendant and mailing to defendant's insurance carrier, if any, as required by the preceding sentence of this subparagraph."

The only reason I can think of not to make mailing to the insurance carrier part of the service is a fear that you are somehow making the insurance company a party to the case. I do not think that is the case. You can make mailing to anybody a condition of service on the defendant. The named defendant is still the only party and a default judgment can only be obtained

against the individual defendant.

4. **Should the plaintiff be required to seek out the defendant's insurance company?** The existing rule only requires mailing to an insurance carrier by the plaintiff "if known" (ORCP 7 D(4)(a)(i)) and prevents a default unless the plaintiff provides a return receipt of service on defendant's insurance carrier or presents an affidavit that defendant's insurance carrier is unknown. Since the accident report requires a statement of insurance, and all local licenced drivers must give the Motor Vehicles Division proof of insurance, does this require the plaintiff to check these sources or is notice to the carrier only necessary if the plaintiff actually is aware without inquiry of the identity of the insurance company? I believe that, given the importance of notifying the insurance company of any effective notice, inquiry should be required. In any case, I think the existing language (which was put in by the legislature) is ambiguous and should be clarified. I suggest that the end of the second sentence of ORCP 7 D(4)(a)(i) be changed to read:

> "...and the defendant's insurance carrier, if the identity of such carrier is known to the plaintiff or can be determined by examination of any records kept by the Motor Vehicles Division."

I suggest that ORCP 7 D(4)(c) be changed to read:

> "...or that the defendant's insurance carrier is unknown to the plaintiff and could not be determined by the plaintiff through examination of any records kept by the Motor Vehicles Division."

5. **Should mailing to the defendant and the insurance company be by certified and registered mail, return receipt requested?** This was the issue the Council resolved during the last biennium (correctly, I believe). This does make the mailing form for motor vehicle service different from the mailing form for office and abode service. Under Willis v. Edwards, 92 Or app 35, 37-39 (1988), supplementary mailing for abode service or office service can be by ordinary mail. The service in the motor vehicle case, however, differs substantially from abode and office service. In the latter two cases, the summons and complaint are left in places where the defendant is likely to get it. In motor vehicle cases, the summons left with the Motor Vehicles Division is unlikely to get to the defendant without some affirmative action by defendant's insurance company, and the mailing is really the service.

6. **Should mailing to the defendant continue to be at all three addresses listed in ORCP 7 D(4)(a)(ii) and 7 D(4)(c)?** The rule now requires a mailing to the defendant at any address given by the defendant at the time of the accident, or the most recent

address shown in the Motor Vehicles Division driver records or any other address actually known by the plaintiff to be defendant's residence address. Chisum v. Bingamon, 46 Or App 1, 7 (1980) holds (correctly) that these mailings were intended to be cumulative--not alternative, despite the fact that they are connected by "or" rather than "and". The first requirement recognized that an address would be given by the defendant at the time of the accident. The second was intended to primarily cover resident drivers who would have an address given in their drivers' licences.

I think the cumulative mailings should continue to be required, but the language could be cleaned up. Perhaps "and" should be used rather than "or" to avoid having to check the Chisum case. Also, the reference to the Motor Vehicles Division's "driver records" is not clear. It does not clearly cover addresses given by a defendant who licenses a vehicle. The service provision in ORCP 7 D covers owners as well as drivers. It also does not clearly pick up an out-of-state defendant who moves and does in fact comply with ORCP 7 D(4)(b) by furnishing a new address. The reference to "Motor Vehicles Division driver records" should be changed to "any records kept by the Motor Vehicles Division".

6. **Could we simplify the return procedure for this type of service?** Although paragraph 7 D(4) does not clearly describe the requirements for return of service, it seems that the plaintiff would have to show both service upon the Motor Vehicles Division and the required mailings. ORCP 7 D(4)(c) only refers to an affidavit relating to the mailing, but surely some certificate of the person serving the summons would be required by ORCP 7 F. The means that two proofs of service end up being submitted. Also, one of them must be an affidavit, rather than a certificate. If we are willing to accept a certificate for all other types of service, why not for the supplemental mailing here? I suggest that ORCP 7 D(4)(c) be changed to require a certificate by the plaintiff or plaintiff's attorney that the plaintiff caused a summons to be served upon the Motor Vehicles Division and the necessary supplemental mailings to take place.

7. **Does the reference to a defendant who has neither received nor rejected the registered or certified letter in the first sentence of ORCP 7 D(4)(c) make any sense?** This is probably part of a larger problem, which is: who is a defendant who "cannot be found" at one of the magic addresses, as those words are used in the first sentence of ORCP 7 D(4)(c)? I have always interpreted this, and this memo is written under the assumption, that a defendant could only not be "found" at an address if he or she no longer resided there. If he or she simply was not home at the time of the inquiry, abode service should be used--not service under ORCP 7 D(4). If that is true, then the "received or rejected" language make some sense. If the

plaintiff made inquiry and used this service method rather than abode service, because plaintiff believed that the defendant no longer resided at the address known, and the plaintiff turned out to be wrong or that defendant had left forwarding addresses to which the letter went, the question of whether the defendant actually resided at the address used or whether inquiry was made of that fact seems immaterial. The summons caught up with the defendant and he either received it or refused to accept it.

The language is, however, terribly confusing. As indicated above, it suffers from the basic defect that the alternative to the letter catching up to the defendant is a form of notice that may not be reasonable under the circumstances. The language is also awkward and perhaps unnecessary. It refers to a default entered against a defendant served by mail, which was the original 1981 form of service, when the service is now by delivery to the Motor Vehicles Division and not pure mail. Also, in the face of ORCP 7 G, if the supplementary mailing does in fact catch up with the defendant, you probably have good service no matter what else happened. Why repeat that at the beginning of the motor vehicles provision? Why not let the question of validity of service, where a plaintiff does not comply exactly with 7 D but defendant receives the summons, be decided under ORCP 7 D(1) and (g) as with other forms of service that do not comply exactly with the language of Rule 7?

ORCP 7 D(4)(c) also seems to require a showing that defendant "cannot be found" at the magic addresses and also that inquiry was made a reasonable time before service reasonably was made. Presumably, the time when the plaintiff could not be found would be the time when the inquiry was made. The language, "reasonable" time before service, is not clear.

I suggest that ORCP 7 D(4)(c) be changed to read as follows (this draft incorporates the changes suggested in all of the preceding sections of this memo):

> "No default shall be entered against any defendant served under this subsection unless the plaintiff submits a certificate showing that the plaintiff caused a copy of the summons and complaint to be served upon the Motor Vehicles Division as required by subparagraph D(4)(a)(ii) of this rule, and that 14 days or less before such service the plaintiff caused inquiry to be made at the address given by the defendant at the time of the accident or collision and at any other address in the records of the Motor Vehicles Division, and at any other address actually known by the plaintiff to be defendant's residence address, and that defendant no longer resided at any of those addresses and no one present at such addresses at the time of inquiry knew where defendant had moved and defendant had left no forwarding addresses with the appropriate post office, and

that plaintiff caused a copy of the summons and complaint to be mailed to defendant and to defendant's insurance company, if any, as required by subparagraph D(4)(a)(i) and (ii) of this rule."

If the plaintiff did not make the necessary inquiry, but the mailing in fact caught up with the defendant, this would not be a service under 7 D(4) but still might be a valid service under the general standard of 7 D(1) and 7 G.

Enclosure: Exhibit A

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).

UNIVERSITY OF OREGON

August 22, 1989

TO: **MEMBERS, RULE 7D SUBCOMMITTEE:**

Mike Starr, Chair
John Buttler
Lee Johnson

FROM: **Fred Merrill**

Attached is a letter received by the Council from Hugh Collins, relating to ORCP 7D, which I forgot to note in the last memo.

FRM:gh

Enclosure

SCHOOL OF LAW • EUGENE, OREGON 97403-1221 • TELEPHONE (503) 686-3837

HUGH B. COLLINS
ATTORNEY AT LAW
835 EAST MAIN STREET
BOX 1764
MEDFORD, OREGON 97501-0138
(503) 772-9034

OUR FILE NO.

January 23, 1989

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

Re: ORCP

Dear Professor Merrill:

Enclosed is a specimen of a suggested paragraph F to be added to ORCP 69.

Also enclosed is a suggested paragraph D.(4)(a)(iv) for addition to ORCP 7.

These are designed to make it easier on defending attorneys to appear for their clients in an orderly manner. At present, there's an increasing tendency among attorneys to withhold filing proof of service unless it becomes necessary to file it in order to obtain a default.

An increasing number of attorneys is resorting to DMV service in motor vehicle cases, without any attempt at personal or primary service and in many instances these attorneys don't bother to file proof of service unless it is needed to obtain a default.

When a defense assignment is received, among the first things an attorney should do is check the Clerk's file for the particulars of service of Summons. In those instances where the client to be defended is a responsible sort, proof of service is almost always to be found in the Clerk's file. Where the client is a flake, quite often proof of service is missing from the Clerk's file. Perhaps it is unfair to infer that there was any deliberate attempt to conceal the fact of service or to mislead the defending attorney. But it would certainly do no harm to put an end to the opportunity to conceal or mislead, alternatively to require the cooperation of plaintiff's attorneys in orderly and responsible court record keeping.

I was taught in law school that due process requires that service of summons upon a defendant be made in the manner that is most likely to give that defendant actual notice of the pending litigation.

It will be appreciated if you present these suggested amendments to the Council on Court Procedures.

Sincerely,

HUGH B. COLLINS/drs

Enc.

Exhibit E

D.(4)(a)(iv) Summons shall not be served on the Administrator of the Motor Vehicles Division or at any office of the Administrator before there has been filed with the Clerk proof of unsuccessful bona fide attempts to make personal or primary service upon the defendant concerned.

F. An order of default against a party for failure to respond to a complaint, counterclaim or third party complaint, will not be granted prior to the expiration of 21 days from the date that proof of service thereof on that party was filed with the Clerk.

October 10, 1989

M E M O R A N D U M

FROM: Fred Merrill

TO: Motor Vehicle Subcommittee (Mike Starr, Chairer, Judge Buttler and Judge Johnson)

RE: Redraft of ORCP 7 D(4)

Set out below are two alternative revisions of ORCP 7 D(4). They are labeled the Johnson version and the Buttler version for their proponents at our subcommittee meeting. The format is that of legislative amendment; the bracketed material is removed, and the underlined material is new.

Both revisions reflect the subcommittee's ideas expressed at our meeting. They separate the elements necessary for adequate service from the conditions necessary for a default judgment. Subparagraphs 7 D(4)(a)(i) and (ii) of the current rule are combined into one new provision, 7 D(4)(a)(i), which states that service in motor vehicles cases may be made by service upon the DMV and mailing to defendant's addresses. The provision differs from the existing rule by allowing the plaintiff to mail the summons to the DMV by registered or certified mail. I talked to Pete Higgins, the Department of Justice attorney working with DMV, and they would have no problem with mail service to their head office. I suggested that without personal delivery, DMV might be less sure that the $12.50 fee would be tendered. He suggested that would be the plaintiff's problem. Allowing mailing to the DMV would save a substantial amount of money.

Service for both versions is complete on mailing to the defendant. Presumably, this would satisfy the statute of limitations, although it should be remembered that the Council does not have power to modify the statute of limitations directly. Mailing must be by enhanced mail and to all addresses known.

The conditions for default appear in 7 D(4)(c). I have tried to clean up the language and make it absolutely clear what must appear before default is possible when motor vehicle service is used. In both versions, the plaintiff must submit an affidavit showing service upon the DMV and the required mailing to the defendant's addresses. The affidavit also must show either mailing to the defendant's insurance carrier or that the

identity of such carrier is unknown and could not be determined from the DMV records. Mailing must again be by registered or certified mail. The DMV records reflecting liability insurance are open. Under ORS 805.220, all records of the DMV are public, except accident reports. Insurance information required for vehicle registration is then open to the public. No insurance information is required by the DMV for licensing of drivers except certain drivers who have been convicted of DUI. For the accident reports, ORS 802.220(5)(a)(B) provides that DMV shall disclose "the names of any companies insuring the owner or driver of a vehicle involved in an accident" to "any party involved in the accident or to their personal representative or any member of the family of a party involved in the accident". The only hook is the information is only available "Upon written request", and the DMV enforces that. Higgins said that, not only do they furnish the name of the company, they also have a record of the company address from the Insurance Commission and they will furnish that. ORS 802.230 allows DMV to set a reasonable fee for furnishing the information.

The difference in the two versions is whether motor vehicle service is an alternative primary service method, or a secondary alternative which is only available when service cannot be completed any other way. ORCP 7 D(4)(a)(i) of the Johnson version follows the present scheme of making motor vehicle service available at the plaintiff's option. Actually, the present rule has one limitation: motor vehicle service cannot be used when defendant is a foreign corporation with a registered agent in the state. That exception is retained. ORCP 7 D(4)(a)(i) of the Buttler version allows motor vehicle service only when service cannot be had by any other method specified in ORCP 7 D(3). In other words, the plaintiff must try to accomplish service by the appropriate method specified in D(3). For example, for an individual, the plaintiff must use personal, abode, or office service if possible. Only if that cannot be done will motor vehicle service be allowed. Since a requirement that registered agent service be used against any corporation, if that is possible, is already built into the Buttler version, the specific language relating to foreign corporations is removed.

For default in the Johnson version, in addition to service and mailing to the insurance carrier, the plaintiff must show either that the defendant received or rejected the mailed summons and complaint or that prior to service the known addresses were checked and defendant no longer resided at any of them. For default in the Buttler version, the plaintiff must show that service could not be accomplished by any method specified in ORCP 7 D(3). In the Buttler version, the required attempt to complete service some other way before motor vehicle service is used would presumably include checking known addresses of the defendant to determine if abode service could be used. It might also include some further checking to determine that office service and

personal service could not be accomplished. Also, in the Buttler version, the fact that the letter caught up to the defendant does not in itself make default possible.

I personally prefer the Buttler version. As you may have noticed, I have grave doubts about the efficacy of motor vehicle service without notice to an insurance company. If, however, motor vehicle service is only used when no better method is available, service meets the general standard of best notice under the circumstances. There are arguments the other way. If motor vehicle service is not successful in reaching the defendant, it is partly due to the failure of the defendant to comply with the legal requirements of ORCP 7 D(4)(b) and the drivers' licence laws. Also, requiring an attempt to perfect service by other methods, before motor vehicle service can be used, contains the danger that the courts will insist on excessive due diligence in such attempt.

Following the two versions is a short summary of the nonresident motorist statutes which exist in other states.

JOHNSON VERSION

SUMMONS
RULE 7

D. Manner of service.

* * * *

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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant**. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] mailing **to the defendant**.

D(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by

mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule; and (2) either, (a) if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, or (b) that the defendant's insurance carrier is unknown; and (3) either (a) that the defendant received or rejected the registered or certified letter containing the copy of summons and complaint, or (b) that within a reasonable time preceding the service of summons the plaintiff caused inquiry to be made at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant and that defendant could not be found residing at any of such addresses.

BUTTLER VERSION

SUMMONS

RULE 7

D. Manner of service.

* * * *

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,] **who cannot be served with summons by any method specified in subsection 7 D(3) of this rule,** 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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant.** For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] mailing **to the defendant**.

D(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist

or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] **unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule; and (2) either, (a) if the**

identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, or (b) that the defendant's insurance carrier is unknown; and (3) that service of summons could not be had by any method specified in subsection 7 D(3) of this rule.

* * *

SUMMARY OF NONRESIDENT MOTORISTS STATUTES IN THE UNITED STATES

Out of the 51 other states and the District of Columbia, 29 still have nonresident motor vehicle statutes. Most of the statutes have very similar language and would appear to derive from one of the early statutes approved in Hess v. Powlasky or Wuchter v. Pizzutti . They uniformly apply only to nonresident motorists or to resident motorists who move after the accident but before suit. They all contain an elaborate recitation of implied consent for persons using the highways. They all provide for service of the summons and complaint on either the Secretary of State or some motor vehicle related official, followed by mailing the summons and complaint by registered or certified mail to the defendant. All require a copy of a return receipt form attached to the return of service. Most have a provision that allows the court to grant a continuance to allow defendant time to appear.

Most of the statutes do not require court permission to use motorist service. No showing of inability to serve by other means is required. New Mexico has an unusual statute that allows motorist service only upon court order and then requires personal service on the defendant.

The primary difference in the statutes is the address or addresses specified for mailing. Fourteen of the states simply require that the summons and complaint be mailed to defendant, without reference to any particular address (Alaska, Arizona, D.C., Delaware, Idaho, Illinois, Indiana, Kentucky, Maine, New York, North Carolina, South Carolina, Tennessee, Vermont). In these states, there is some variation when there is no evidence (in the return reciept) that the defendant actually received or

rejected the mailed summons and complaint. Most treat the service as valid and allow default. In a few jurisdictions, e.g. Delaware and D.C., no default can be taken without evidence of either reciept or rejection. In New York and South Carolina, if the registered mail is not received or rejected, the plaintiff must send a copy of the summons and complaint by ordinary mail. Illinois allows default without proof of actual receipt or rejection, but the judgment is subject to being reopened for five years.

Ten states require mailing to defendant's "last known address" (Arkansas, Mississippi, Missouri, Montana, North Dakota, Ohio, South Dakota, Texas, Wisconsin, Wyoming). Most allow default based upon this, but Texas requires personal service on the defendant if the return receipt does not show receipt or rejection.

Only four states specify an exact address for the mailing. Rhode Island says that the summons shall be sent to the address shown on defendant's registration or operator's licence. It is not clear how this is accessible to the plaintiff, but presumably it would be on the accident report. Massachusetts says that if the plaintiff knows that the defendant is the holder of a motor vehicle registration or operator's licence issued by another state or country, the mailing shall be to the address of record for the registration or licence. If plaintiff does not know where defendant is registered or licenced, the mailing must be to the last known address. Nevada requires mailing to the address of defendant shown in the accident report, and if none is shown, to the best address known to the plaintiff. The only state with a provision anywhere near as detailed as Oregon is Virginia. A copy of the Virginia statute is attached. It has some interesting language making a failure to keep drivers licence or accident report addresses current a waiver of notice.

My general conclusion is that other state statutes are not much help. A surprising number of states still have motor vehicle service. Most do not seem too concerned about actual notice or require an attempt to make better service before use of mailing to the defendant. The detailed provisions relating to addresses and notice to the insurance carrier which appear in the Oregon statute are unique.

Enclosure

cc: Ron Marceau
Henry Kantor

address so reported without making provision for forwarding to him of mail directed thereto, shall be deemed to be a waiver of notice and a consent to and acceptance of service of process served upon the Commissioner of Motor Vehicles as provided in this section.

B. For the statutory agent appointed pursuant to the provisions of Title 13.1, the address for the mailing of the process as required by § 8.01-312 shall be the address of the corporation's registered office most recently filed with the State Corporation Commission.

C. For the statutory agent appointed pursuant to § 26-59, the address for the mailing of process as required by § 8.01-312 shall be the address of the fiduciary's statutory agent as contained in the written consent most recently filed with the clerk of the circuit court wherein the qualification of such fiduciary was had or, in the event of the death, removal, resignation or absence from the Commonwealth of such statutory agent, or in the event that such statutory agent cannot with due diligence be found at such address, the address of the clerk of such circuit court. (Code 1950, § 8-67.2; 1954, c. 333; 1970, c. 680; 1972, c. 408; 1976, c. 26; 1977, c. 617; 1983, c. 467.)

Section set out twice. — The section above is effective until January 1, 1985. For this section as amended effective January 1, 1985, see the following section, also numbered § 8.01-313.

The 1983 amendment divided the former single sentence of the introductory language of subsection A into the present first and second sentences, by substituting "However" for "provided that" at the beginning of the present second sentence and added subsection C.

§ 8.01-313. (Effective January 1, 1985) Specific addresses for mailing by statutory agent. — A. For the statutory agent appointed pursuant to §§ 8.01-306, 8.01-308 and 8.01-309, the address for the mailing of the process as required by § 8.01-312 shall be the last known address of the nonresident or, where appropriate under subdivision 1 or 2 of § 8.01-310 B, of the executor, administrator, or other personal representative of the nonresident. However, upon the filing of an affidavit by the plaintiff that he does not know and is unable with due diligence to ascertain any post-office address of such nonresident, service of process on the statutory agent shall be sufficient without the mailing otherwise required by this section. Provided further that:

1. In the case of a nonresident defendant licensed by the Commonwealth to operate a motor vehicle, the last address reported by such defendant to the Division of Motor Vehicles as his address on an application for or renewal of a driver's license shall be deemed to be the address of the defendant for the purpose of the mailing required by this section if no other address is known, and, in any case in which the affidavit provided for in § 8.01-316 of this chapter is filed, such a defendant, by so notifying the Division of such an address, and by failing to notify the Division of any change therein, shall be deemed to have appointed the Commissioner of the Division of Motor Vehicles his statutory agent for service of process in an action arising out of operation of a motor vehicle by him in the Commonwealth, and to have accepted as valid service such mailing to such address; or

2. In the case of a nonresident defendant not licensed by the Commonwealth to operate a motor vehicle, the address shown on the copy of the report of accident required by § 46.1-400 filed by or for him with the Division, and on file at the office of the Division, or the address reported by such a defendant to any state or local police officer, or sheriff investigating the accident sued on, if no other address is known, shall be conclusively presumed to be a valid address of such defendant for the purpose of the mailing provided for in this section, and his so reporting of an incorrect address, or his moving from the address so reported without making provision for forwarding to him of mail

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DECISIONS UNDE

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directed thereto, shall be deemed to be a waiver of notice and a consent to and acceptance of service of process served upon the Commissioner of the Division of Motor vehicles as provided in this section.

B. For the statutory agent appointed pursuant to the provisions of Title 13.1, the address for the mailing of the process as required by § 8.01-312 shall be the address of the corporation's registered office most recently filed with the State Corporation Commission.

C. For the statutory agent appointed pursuant to § 26-59, the address for the mailing of process as required by § 8.01-312 shall be the address of the fiduciary's statutory agent as contained in the written consent most recently filed with the clerk of the circuit court wherein the qualification of such fiduciary was had or, in the event of the death, removal, resignation or absence form the Commonwealth of such statutory agent, or in the event that such statutory agent cannot with due diligence be found at such address, the address of the clerk of such circuit court. (Code 1950, § 8-67.2; 1954, c. 333; 1970, c. 680; 1972, c. 408; 1976, c. 26; 1977, c. 617; 1983, c. 467; 1984, c. 780.)

Section set out twice. — The section above is effective January 1, 1985. For this section as in effect until January 1, 1985, see the preceding section, also numbered § 8.01-313.

The 1984 amendment, effective January 1, 1985, substituted "a driver's license" for "an operator's or chauffeur's license" and inserted "the Division of" preceding "Motor Vehicles" in subdivision A 1 and inserted "the Division of" preceding "Motor Vehicles" in subdivision A 2.

§ 8.01-314. Service on attorney after entry of general appearance by such attorney. — When an attorney authorized to practice law in this Commonwealth has entered a general appearance for any party, any process, order or other legal papers to be used in the proceeding may be served on such attorney of record. Such service shall have the same effect as if service had been made upon such party personally; provided, however, that in any proceeding in which a final decree or order has been entered, service on an attorney as provided herein shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt, either civil or criminal, unless personal service is also made on the party.

Provided, further, that if such attorney objects by motion within five days after such legal paper has been so served upon him, the court shall enter an order in the proceeding directing the manner of service of such legal paper. (Code 1950, § 8-69; 1977, c. 617; 1981, c. 495.)

REVISERS' NOTE

The only significant change in former § 8-69 accomplished by § 8.01-314 is the inversion of the present provision requiring five days' notice before entry of an order directing service on the attorney of record so that service on the attorney is good without more unless the attorney objects within five days of receiving such service. The change allows the same amount of time for the attorney served to act, but requires service to be made only once rather than twice as under the former statute. Service would be made in accordance with Rule 1:12.

DECISIONS UNDER PRIOR LAW.

Editor's note. — The case cited below was decided under corresponding provisions of former law. The term "this section," as used below, refers to former provisions.

This section deals, in broad language, with cases generally. Davis v. Davis, 206 Va. 381, 143 S.E.2d 835 (1965).

UNIVERSITY OF OREGON

November 9, 1989

MEMORANDUM

TO: MOTOR VEHICLE SUBCOMMITTEE:

Mike Starr, Chair
John Buttler
Lee Johnson

FROM: Fred Merrill

Enclosed is the subcommittee draft. If you want any changes made, let me know by the end of next week. I will send the report with the agenda.

FRM:gh
Enc.

DRAFT
(date)

M E M O R A N D U M

FROM: Motor Vehicle Subcommittee (Mike Starr, Chairer, Judge Buttler and Judge Johnson)

TO: Council on Court Procedures

RE: Redraft of ORCP 7 D(4)

Set out below is a revision of ORCP 7 D(4) recommended by a majority of the members of the subcommittee. The format is that of legislative amendment; the bracketed material is removed, and the underlined material is new.

One member of the subcommittee, Judge Johnson, recommends that ORCP 7 D(4) be repealed. He believes that the provision was originally enacted as a jurisdictional statute and not to provide a method of serving summons and that the method provided does not give reliable notice. Judge Johnson also recommends that, if the Council does not repeal ORCP 7 D(4), it be revised to apply only to resident defendants. His suggested revision to accomplish this is attached to this report.

The revised language separates the elements necessary for adequate service from the conditions necessary for a default judgment. Subparagraphs 7 D(4)(a)(i) and (ii) of the current rule are combined into one new provision, 7 D(4)(a)(i), which states that service in motor vehicles cases may be made by service upon the DMV and mailing to defendant's addresses. The provision differs from the existing rule by allowing the plaintiff to mail the summons to the DMV by registered or certified mail. The subcommittee consulted the Department of Justice attorney working with DMV and the DMV does not object to mail service to their head office. Allowing mailing to the DMV would save a substantial amount of money in costs to the plaintiffs.

Service is complete on the date of the first mailing to the defendant. With discovery of multiple addresses more than one mailing might be made. Presumably, this would satisfy the statute of limitations, although it should be remembered that the Council may not have power to modify the statute of limitations directly. Mailing must be by enhanced mail and to all addresses known.

The conditions for default appear in 7 D(4)(c). The revision makes it clear what must appear before default is possible when motor vehicle service is used. The plaintiff must submit an affidavit showing service upon the DMV and the required mailing to the defendant's addresses. The affidavit also must show either mailing to the defendant's insurance carrier or that the identity of such carrier is unknown and could not be determined from the DMV records. Mailing must again be by registered or certified mail. Note, the revision requires the plaintiff to make inquiry of the DMV. The DMV records reflecting liability insurance are open. Under ORS 805.220 all records of the DMV are public, except accident reports. Insurance information required for vehicle registration is open to the public. No insurance information is required by the DMV for licensing of drivers except certain drivers who have been convicted of DUI. For accident reports, ORS 802.220(5)(a)(B) provides that DMV shall disclose "the names of any companies insuring the owner or driver of a vehicle involved in an accident" to "any party involved in the accident or to their personal representative or any member of the family of a party involved in the accident". The only hook is the information is only available "Upon written request" and the DMV enforces that. The DMV furnishes the address as well as the name of the company. ORS 802.230 allows DMV to set a reasonable fee for furnishing the information.

The most important revision in the new rule is that the language makes service on the DMV a secondary alternative which is only available when service cannot be completed any other way. Under the existing rule, DMV is an alternative primary service method. It may be used even though the defendant could be served in some other way. In the new rule, ORCP 7 D(4)(a)(i) allows motor vehicle service only when service cannot be had by any other method specified in ORCP 7 D(3). In other words, the plaintiff must try to accomplish service by the appropriate method specified in D(3). For example, for an individual, the plaintiff must use personal, abode, or office service if possible. For a corporation, the plaintiff must serve corporate agents or a registered agent if that is possible. Only if that cannot be done will motor vehicle service be allowed. Since a requirement that registered agent service be used against any corporation, if that is possible, is already built into the new rule, the specific language in the present rule relating to foreign corporations is removed.

To secure a default under the new rule, the plaintiff must show that service could not be accomplished by any method specified in ORCP 7 D(3). The required attempt to complete service by some other method before use of motor vehicle service would presumably include checking known addresses of the defendant which is required by the present rule. The fact that

the letter caught up to the defendant does not in itself make default possible.

SUBCOMMITTEE REVISION

SUMMONS
RULE 7

D. Manner of service.

* * * *

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,] **who cannot be served with summons by any method specified in subsection 7 D(3) of this rule,** 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 or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested. The plaintiff, as soon as reasonably possible after service upon the Motor Vehicle Division, 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, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at 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.] to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete and the action shall be deemed to have been commenced upon [such] the date of the first mailing to the defendant.

D(4)(a)[(iii)] (ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist

or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] **unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to**

defendant required by subparagraph D(4)(a)(i) of this rule have been made; and (2) either, (a) if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, or (b) that the defendant's insurance carrier is unknown; and (3) that service of summons could not be had by any method specified in subsection 7D(3) of this rule.

JOHNSON VERSION

(AS MODIFIED)

SUMMONS
RULE 7

D. Manner of service.

* * * *

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 is an individual domiciled in this state and 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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant**. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] mailing **to the defendant**.

D(4)(a)[(iii)] (ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) Notification of change of address. Every individual domiciled in this state [motorist or user of the roads, highways, and streets of this state] who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) Default. No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, it if appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by

mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defedant's insurance carrier or that the defendant's insurance carrier is unknow.] unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule; [and] (2) [either, (a)] that if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, [or (b) that the defendant's insurance carrier is unknown;] and [(3) either (a)] that either [the] defendant received or rejected the registered or certified letter containing the copy of summons and complaint, or (b) that [within a reasonable time preceding the service of summons the] plaintiff caused inquiry to be made at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant and that defendant could not be found. [residing at any of such addresses.]

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

LEE JOHNSON
JUDGE
DEPARTMENT NO. 10

COURTROOM 528
(503) 248-3165

November 22, 1989

MEMO: TO MEMBERS OF COUNCIL ON COURT PROCEDURES

FROM: LEE JOHNSON

SUBJ: MINORITY REPORT OF SUBCOMMITTEE ON RULE 7(D)(4)

PRESENT RULE 7(D)(4):

Under present Rule 7(D)(4) any defendant in a motor vehicle accident may be served by service on DMV. I share the subcommittee's concern that under some circumstances such service is probably constitutionally inadequate. For example, it is a fiction to require mailing to "the most recent address as shown by Motor Vehicles Division" if defendant is a non-resident or non-licensed.

SUBCOMMITTEE PROPOSAL:

The Subcommittee proposes to replace the whole baby. Under its proposal service on DMV only can be used after personal service and substituted service at defendant's abode or office has failed. It is under these circumstances that service on DMV takes on its fictional character. If primary method of service is personal service and that service fails, the Court supervised alternative service under Rule 7(D((3) is more consistent with due process than the DMV fiction.

If the Council concludes that primary service has to be personal service then I would recommend repeal of Rule 7(D)(4).

AN ALTERNATIVE:

Neither the Subcommittee nor my proposal to repeal addresses what is a salutary purpose for Rule 7(D)(4) which is to provide a simple method of service which also established a time certain for tolling the Statute of Limitations. That objective can be attained without constitutional infirmity if Rule 7(D)(4) is limited to resident motorists.

My rationale is that every resident driver is required to maintain a current address with DMV. Failure to comply should not lead to a default judgment. However, the noncomplying citizen should not be able to complain that the Statute of Limitations started running before he got actual notice. Service would be accomplished by mailing to DMV, the address given at the accident, the address shown in DMV records and any other address known to plaintiff. However, before default occurred, plaintiff would have to satisfy the court that (1) he had made the required mailings; (2) mailed a copy to the insurance carrier; and (3) if no return received that he has made reasonable inquiry to ensure actual notice.

Sincerely,

Lee Johnson

LJ/jim

November 28, 1989

M E M O R A N D U M

FROM: Motor Vehicle Subcommittee (Mike Starr, Chairer, Judge Buttler and Judge Johnson)

TO: Council on Court Procedures

RE: Redraft of ORCP 7 D(4)

Set out below is a revision of ORCP 7 D(4) recommended by a majority of the members of the subcommittee. The format is that of legislative amendment; the bracketed material is removed, and the underlined material is new.

One member of the subcommittee, Judge Johnson, recommends that ORCP 7 D(4) be repealed. He believes that the provision was originally enacted as a jurisdictional statute and not to provide a method of serving summons and that the method provided does not give reliable notice. Judge Johnson also recommends that, if the Council does not repeal ORCP 7 D(4), it be revised to apply only to resident defendants. His suggested revision to accomplish this is attached to this report.

The revised language separates the elements necessary for adequate service from the conditions necessary for a default judgment. Subparagraphs 7 D(4)(a)(i) and (ii) of the current rule are combined into one new provision, 7 D(4)(a)(i), which states that service in motor vehicles cases may be made by service upon the DMV and mailing to defendant's addresses. The provision differs from the existing rule by allowing the plaintiff to mail the summons to the DMV by registered or certified mail. The subcommittee consulted the Department of Justice attorney working with DMV and the DMV does not object to mail service to their head office. Allowing mailing to the DMV would save a substantial amount of money in costs to the plaintiffs.

Service is complete on the date of the first mailing to the defendant. With discovery of multiple addresses more than one mailing might be made. Presumably, this would satisfy the statute of limitations, although it should be remembered that the Council may not have power to modify the statute of limitations directly. Mailing must be by enhanced mail and to all addresses known.

The conditions for default appear in 7 D(4)(c). The revision makes it clear what must appear before default is possible when motor vehicle service is used. The plaintiff must submit an affidavit showing service upon the DMV and the required mailing to the defendant's addresses. The affidavit also must show either mailing to the defendant's insurance carrier or that the identity of such carrier is unknown and could not be determined from the DMV records. Mailing must again be by registered or certified mail. Note, the revision requires the plaintiff to make inquiry of the DMV. The DMV records reflecting liability insurance are open. Under ORS 805.220 all records of the DMV are public, except accident reports. Insurance information required for vehicle registration is open to the public. No insurance information is required by the DMV for licensing of drivers except certain drivers who have been convicted of DUI. For accident reports, ORS 802.220(5)(a)(B) provides that DMV shall disclose "the names of any companies insuring the owner or driver of a vehicle involved in an accident" to "any party involved in the accident or to their personal representative or any member of the family of a party involved in the accident". The only hook is the information is only available "Upon written request" and the DMV enforces that. The DMV furnishes the address as well as the name of the company. ORS 802.230 allows DMV to set a reasonable fee for furnishing the information.

The most important revision in the new rule is that the language makes service on the DMV a secondary alternative which is only available when service cannot be completed any other way. Under the existing rule, DMV is an alternative primary service method. It may be used even though the defendant could be served in some other way. In the new rule, ORCP 7 D(4)(a)(i) allows motor vehicle service only when service cannot be had by any other method specified in ORCP 7 D(3). In other words, the plaintiff must try to accomplish service by the appropriate method specified in D(3). For example, for an individual, the plaintiff must use personal, abode, or office service if possible. For a corporation, the plaintiff must serve corporate agents or a registered agent if that is possible. Only if that cannot be done will motor vehicle service be allowed. Since a requirement that registered agent service be used against any corporation, if that is possible, is already built into the new rule, the specific language in the present rule relating to foreign corporations is removed.

To secure a default under the new rule, the plaintiff must show that service could not be accomplished by any method specified in ORCP 7 D(3). The required attempt to complete service by some other method before use of motor vehicle service would presumably include checking known addresses of the defendant which is required by the present rule. The fact that

the letter caught up to the defendant does not in itself make default possible.

SUBCOMMITTEE REVISION
SUMMONS
RULE 7

D. Manner of service.

* * * *

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,] **who cannot be served with summons by any method specified in subsection 7 D(3) of this rule,** 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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicle Division by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant.** For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete **and the action shall be deemed to have been commenced** upon [such] **the date of the first** mailing **to the defendant**.

D(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] **unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in**

subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and (2) either, (a) if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, or (b) that the defendant's insurance carrier is unknown; and (3) that service of summons could not be had by any method specified in subsection 7D(3) of this rule.

JOHNSON VERSION

(AS MODIFIED)

SUMMONS
RULE 7

D. Manner of service.

* * * *

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 is an individual domiciled in this state and 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

EX 1-7

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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant**. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] mailing **to the defendant**.

EX 1-8

D(4)(a)[(iii)] (ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) Notification of change of address. Every individual domiciled in this state [motorist or user of the roads, highways, and streets of this state] who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) Default. No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, it if appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by

EX 1-9

mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defedant's insurance carrier or that the defendant's insurance carrier is unknow.] unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule; [and] (2) [either, (a)] that if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, [or (b) that the defendant's insurance carrier is unknown;] and [(3) either (a)] that either [the] defendant received or rejected the registered or certified letter containing the copy of summons and complaint, or (b) that [within a reasonable time preceding the service of summons the] plaintiff caused inquiry to be made at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant and that defendant could not be found. [residing at any of such addresses.]

EX 1-10

M E M O R A N D U M 12-19-89

FROM: Fred Merrill

TO: RULE 7 D SUBCOMMITTEE:

Mike Starr, Chair
John Buttler
Lee Johnson

RE: Revision

Below is a revision of ORCP 7 D reflecting the changes requested by the Council at the last meeting. A copy of a preliminary draft of the minutes which show the changes requested is enclosed.

REDRAFT 12-19-89

SUBCOMMITTEE REVISION
SUMMONS
RULE 7

D. Manner of service.

* * * *

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,] who cannot* be served with summons by any method specified in subsection 7 D(3) of this rule, 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 authorized to accept summons or by mailing

such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles Division by registered or certified mail, return receipt requested. The plaintiff 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant.** For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] **the date of the first** mailing **to the defendant**.

D(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] **unless the plaintiff submits an affidavit showing:**

(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) that service of summons could not* be had by any method specified in subsection 7 D(3) of this rule.

For the diligence language required by Judge Johnson's motion, I would suggest adding the words "with reasonable diligence" to ORCP 7 D(4)(a)(ii) line 8 and 7 D(4)(c)(iii) line 1, where the asterisks appear in the draft. I suggest "reasonable" rather than "due" diligence to stay away from the overly strict interpretation given "due diligence" in the previous statute (even though the only comparable language in the rules in ORCP 37 A(2) uses "due").

I read the Council vote as not deciding to accept a diligence standard, but asking to see possible language. I think using diligence language in ORCP 7 D(4) is a bad idea. However we phrase it, we invite a return to the overly difficult requirements of Ter Har v. Backus. Rule 7 has three other conditional preferences in service (individuals - 7 D(3)(a)(i), corporations - 7 D(3)(b), and court order - 7 D(6)), and none of them contain any requirement of diligence prior to use of the secondary method. The Court of Appeals seems to have had no trouble with the language of ORCP 7 D(6), relating to court ordered service, which has language identical to that now included in 7 D(4). It has required that the affidavit recite an inability to get service by all specified methods provided in Rule 7, but has not suggested any undue recitation of extended efforts to accomplish service. Dhulst and Dhulst, 61 Or App 383 (1983). In Dorsey v. Gregg, 89 Or App 194 (1988), the Court held that an affidavit which said it was impossible to accomplish personal service, but which did not explain why abode service could not be accomplished, was not sufficient to meet the requirements of ORCP 7 D(6).

Enc.

JOHNSON VERSION

(AS MODIFIED)

SUMMONS
RULE 7

D. Manner of service.

* * * *

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 is an individual domiciled in this state and 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 **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles by registered or certified mail, return receipt requested**. The plaintiff, as soon as reasonably possible **after service upon the Motor Vehicle Division**, 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, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** 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.] **to the defendant**. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] mailing **to the defendant**.

D(4)(a)[(iii)] (ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) Notification of change of address. Every individual domiciled in this state [motorist or user of the roads, highways, and streets of this state] who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) Default. No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, it if appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by

mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defedant's insurance carrier or that the defendant's insurance carrier is unknow.] unless the plaintiff submits an affidavit showing: (1) that summons was served as provided in subparagraph D(4)(a)(i) of this rule; [and] (2) [either, (a)] that if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicle Division accessible to plaintiff, that the plaintiff caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, [or (b) that the defendant's insurance carrier is unknown;] and [(3) either (a)] that either [the] defendant received or rejected the registered or certified letter containing the copy of summons and complaint, or (b) that [within a reasonable time preceding the service of summons the] plaintiff caused inquiry to be made at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant and that defendant could not be found. [residing at any of such addresses.]

January 12, 1990

MEMORANDUM

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: ORCP 7 D(4) Subcommittee

The subcommittee suggests the addition of the following language to ORCP 7 D relating to the standard for attempt of service under ORCP 7 D(3). This language would apply not only to motor vehicle service under ORCP 7 D(4) but also service by court order under ORCP 7 D(6). The subcommittee submits two versions of the language for your consideration. One includes a specific reference to a good faith attempt to accomplish service under ORCP 7 D(3).

ORCP 7 D(7). **Defendant who cannot be served**. A defendant cannot be served with summons by any method specified in subsection 7 D(3) of this rule if the return of service shows that the plaintiff attempted service of summons by all of the methods specified in subsection 7 D(3) and was unable to successfully complete service.

ORCP 7 D(7). **Defendant who cannot be served**. A defendant cannot be served with summons by any method specified in subsection 7 D(3) of this rule if the return of service shows that the plaintiff made a good faith effort to serve summons by all of the methods specified in subsection 7 D(3) and was unable to sucessfully complete service.

BOGLE & GATES

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March 1, 1990

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Re: Uniform Foreign-Money Claims Act

Dear Sirs and Madam:

I am writing as a member of the Uniform State Laws Committee of the Oregon State Bar. Enclosed is a copy of the Uniform Foreign-Money Claims Act with commentary and prefatory notes, and a copy of my report to the Committee. On February 21, 1990, the Committee met and approved the adoption of the Act subject to review and approval of the Act by the Council and Sections which you direct or chair.

On behalf of the Committee, I ask that your council or section review the Act and make a written report to the Uniform State Laws committee of your position with respect to this Act. The Committee has the Act on its May meeting agenda and therefore requests your responses by May 16, 1990.

If you have any questions, please do not hesitate to call or write. If you desire, I would be happy to meet with the members of your group to discuss the Act.

Thank you.

Very truly yours,

BOGLE & GATES

John P. Salisbury

JS3/kay

cc: Stanley R. Loeb, Chair
Wendell G. Kusnerus, Secretary

REPORT

TO: Oregon State Bar Uniform State Laws Committee

DATE: January 31, 1990

FROM: John P. Salisbury

RE: Uniform Foreign-Money Claims Act

I. OVERVIEW

This act sets forth rules for dealing with foreign money claims. It determines which currency is the proper money of a claim if the parties have not otherwise agreed, determines the amount of money for certain contract claims involving foreign money, and determines the date for converting foreign money into United States dollars whether in ordinary actions or in "distribution proceedings" (liquidation proceedings or the like). The act also validates agreements which vary from the rules set down in the act and authorizes judgments to be entered in foreign money. The act has rules concerning prejudgment and judgment interest on foreign-money claims and has rules for determining the United States dollar value of foreign-money claims for the purpose of facilitating enforcement of provisional remedies. The act also deals with currency revalorization.

Oregon appears to have no law, whether statutory or common law, concerning the subject of this act. Foreign-money claims according to the Prefatory Note to the act, have increased greatly. There is a lack of uniformity among the states concerning foreign-money claims and the United States treats recoveries on foreign-money claims differently than most of our major trading partners.

This act would not require any wholesale amendment of existing Oregon law because no Oregon law covers this subject matter of this act. ORS 73.1070 and ORCP 70A. might have to be modified.

II. RECOMMENDATION

I recommend the adoption of the act subject to review of this act by the Oregon State Bar debtor-creditor and international law sections. This act would substantially clarify many issues involving foreign-money claims. The rules appear to be clear and would meet the reasonable expectations of litigants. Passage of the act would promote uniformity and certainty.

III. DISCUSSION OF ACT AND COMPARISON WITH OREGON LAW

As stated above, Oregon law concerning the subject matter of this act is nonexistent. ORS 73.1070(1), part of the Uniform Commercial Code, however, makes promises or orders to pay a sum in foreign money negotiable and states that if an instrument specifies a foreign currency as the medium of payment, the instrument is payable in that currency. Eighteen states have statutes which can be interpreted to require all judgments to be entered in dollars, but Oregon is not one of them.

A section-by-section analysis of this act follows.

Section 1 contains definitions. Important definitions are:

1. "Conversion Date" which essentially means the banking date next preceding the date money is paid.

2. "Distribution Proceeding" means a proceeding for the distribution of funds such as a liquidation, an accounting, the distribution of an estate and the like, in which a foreign-money claim is asserted.

3. "Money of the Claim" is the money determined by agreement or law as the proper money in which the claim is to be paid.

4. "Spot Rate" is the rate of exchange at which foreign money is sold by a bank for immediate or next day availability or for settlement by immediate payment or by an agreed delayed settlement not exceeding two (2) days.

Section 2 of the act states that the act applies only to foreign-money claims in actions or distribution proceedings and that the act applies to foreign-money issues even if other law under the conflict of law rules of the forum applies to other issues in the action or distribution proceeding.

Section 3 allows the effect of the act to be varied by agreement and allows the parties to a transaction to agree upon money to be used in a transaction and agree to use different monies for different aspects of the transaction.

Section 4 provides a number of rules for determining the money in which the claim is to be paid. The rules apply in the order stated in Section 4. They are:

1. The money in which the parties to a transaction have agreed that payment is to be paid.

2. The money regularly used between the parties as a matter of usage or course of dealing.

3. The money used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved.

4. The money in which the loss was ultimately felt or will be incurred by the claimant.

Section 5 of the act contains rules for exchanges. The rules are if there is a contract to pay in foreign money, the amount is to be determined on the conversion date, i.e., the banking date be next preceding the date of payment.

If an amount is to be paid in a foreign money to be measured by a different money at the rate of exchange prevailing on a date before default, that rate applies only to payments made within a reasonable time after default, not exceeding thirty (30) days. Example: "Pay on November 30, 1989, 5,000 Swiss francs in pounds sterling at the exchange rate prevailing on June 30, 1989." This agreement is only upheld if payment is made within a reasonable time after default, not to exceed thirty (30) days.

Section 5 also validates claims against defenses of usury or unconscionability when the agreement is that the amount of a debtor's obligation to be paid in the debtor's money must equal a specified amount of the foreign money of the country of the creditor. If a Japanese bank buys dollars with yen and then loans the dollars, it can require payment in dollars of an amount which would repurchase the amount of yen used to acquire the dollars advanced. A drop in the value of dollars against yen would not allow the debtor to claim usury or unconscionability.

Section 6 allows foreign money claims to be made, allows opposing parties to allege and prove that a claim is in a different money than that asserted by the claimant, allows an opposing party to allege and prove that a claim is in a different money than that asserted by the claimant, and allows a person to assert defenses or counterclaims in any money without regard to the money of the other claims. The determination of the proper money of the claim is a question of law.

Section 7 states that a judgment on a foreign-money claim must be stated in the amount of the money of the claim and makes the judgment payable in that foreign money or, at the option of the debtor, in the amount of United States dollars which would purchase that foreign money on the conversion date at a bank-offered spot

rate. Costs must be entered in United States dollars. Part payments in dollars must be accepted and credited in the amount of the foreign money that can be purchased by the dollars on a date before the payment. Judgments with counterclaims, set-offs, recoupments, etc. must be netted.

Section 7 also sets forth a prescribed judgment form with specific language for judgments on foreign money claims. Section 7(g) deals with judgments on contracts where there is an amount contracted to be paid in a foreign money which is measured by a specified amount of a different money or the contract for foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default. Section 7(h) provides that a foreign money judgment must be filed, docketed, recorded, etc., in the same manner as other judgments and has the same effect as a lien as other judgments.

Section 8 provides for distribution proceedings and states that the rate of exchange on the day before the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding.

Section 9 deals with pre-judgment and judgment interest and states that such claims are to be governed by the conflict-of-laws rules of the forum. Section 9(c) states that a judgment on a foreign-money claim bears interest at the rate applicable to judgments of the forum.

Section 10 concerns enforcement of foreign judgments and requires foreign money judgments to be entered, whether or not the foreign judgment confers an option to pay an equivalent amount of United States dollars. Section 10(b) allows a foreign judgment to be enforced in accordance with any statute of the forum providing for a procedure for its recognition. In Oregon, the statute is the Uniform Foreign-Money Judgments Recognition Act in ORS Chapter 24. Section 10(e) states that a judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in the forum in dollars only.

Section 11 deals with determining the value in the United States dollars of assets to be seized or restrained pursuant to prejudgment proceedings such as attachments, garnishments, executions, or other legal process and requires a party seeking such relief to compute in dollars the amount of the foreign money claimed on the exchange rate prevailing on the banking day next preceding the filing of the request or application for prejudgment relief. The party seeking such relief must file an affidavit or certificate executed in good faith by its counsel or a bank officer stating the market quotation used. The statute provides immunity for court officials to rely on such affidavits.

Section 12 deals with currency revalorization and provides that if a new money is substituted in place of an old money by a country, the obligation is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes. This section further requires a judgment to be amended if there is a revalorization. The act takes no position on the effect of a money repudiation or revalorization which is in effect a confiscation.

Section 13 supplements the provisions of this act by other principles of law and equity.

Section 14 states that the law shall be applied and construed to effectuate its general purpose to make uniform the law.

Section 15 provides a short title for the act.

Section 16 is a severability clause.

Section 17 provides that the act becomes effective on January 1, following its enactment.

Section 18 makes the act applicable to all actions and distribution proceedings commenced after its effective date.

Section 19 reminds the legislature to repeal acts and parts of act in accordance with the act. ORCP 70 and ORS 73.1070 dealing with the form of judgments would probably have to be modified.

VI. CRITIQUE OF THE ACT

A. Uniformity.

There is no doubt that this act would further the goal of uniformity among the states. This is precisely the kind of act which should be uniform throughout the country and world.

B. Certainty.

This law provides clear rules for determining the date on which exchange rates are to be determined. The only other sources of law on this subject appear to be in conflicting case law and Section 823 of the Restatement (3rd) of the Foreign Relations Law of the United States. That section provides a much less certain rule stated as follows:

> (2) If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid awarding a debtor who has delayed in carrying out the obligation.

The commentary to Section 823 makes clear that the court is given substantial discretion to determine the conversion rules. The restatement is much less certain than the precise rules of the act. As of February 8, 1990, only Connecticut had adopted this Act.

C. Budgetary Impact.

This act might create some additional duties for court personnel in entering, satisfying, and otherwise handling foreign money judgments, but this impact should be minimal.

VI. OUTSIDE COMMENT

I spoke with Tilman Hasche, immediate past chair of the international law section of the Oregon State Bar. He said that he would have an interest in reviewing this act on behalf of the International Law section. I will contact the chair of that section and also transmit the act to the chair of the Debtor Creditor section.

VII. CONCLUSION

This act should be adopted subject to review and approval of the act by the international law section and the debtor creditor section.

John P. Salisbury

John P. Salisbury, Member
Uniform State Laws Committee

/10 Salisbury

UNIFORM FOREIGN-MONEY CLAIMS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-EIGHTH YEAR
IN KAUAI, HAWAII
JULY 28 - AUGUST 4, 1989

UNIFORM FOREIGN-MONEY CLAIMS ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Foreign-Money Claims Act was as follows:

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Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
676 North St. Clair Street, Suite 1700
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UNIFORM FOREIGN-MONEY CLAIMS ACT

PREFATORY NOTE

This Act facilitates uniform judicial determination of claims expressed in the money of foreign countries. It requires judgments and arbitration awards in these cases to be entered in the foreign money rather than in United States dollars. The debtor may pay the judgment in dollars on the basis of the rate of exchange prevailing at the time of payment.

A Uniform Act governing foreign-money claims has become desirable because:

These claims have increased greatly as a result of the growth in international trade.

Values of foreign moneys as compared to the United States dollar fluctuate more over shorter periods of time than was formerly the case.

United States jurisdictions treat recoveries on foreign-money claims differently than most of our major trading partners.

A lack of uniformity among the states in resolving foreign-money claims stimulates forum shopping and creates a lack of certainty in the law.

American courts historically follow one of two different rules in selecting a time during litigation for converting foreign money into United States dollars. These are called the "breach day rule" - the date the money should have been paid - and the "judgment date rule" - when judgment is entered. Many other countries use the "payment day rule" - when the judgment is paid. See Miliangos v. George Frank (Textiles) Ltd., (1976) A.C. 1007. The merits of this approach have begun to be recognized in this country. The payment day rule is endorsed by this Act.

The three rules produce wildly disparate results in terms of making an injured person whole. This is illustrated by the following example:

An American citizen (A) owes 18,790 pounds sterling to a British corporation (BCo) suing in New York, and the pound is falling against the dollar. Due to the declining value of the pound, the three rules worked out as follows:

Date	Rate of Exchange	BCo Gets
Breach day	Pound = $2.20	$41,338
Judgment day	Pound = $1.50	$28,185
Payment day	Pound = $1.20	$22,548

A judgment of $41,338 may be entered based on the breach day rule. However, the payment in dollars was worth 34,449 pounds ($41,338 divided by $1.20) when eventually received, an excess of L15,659 over the actual loss.

This example is adapted from an actual case. See Comptex v. LaBow, 783 F.2d 333 (2d Cir. 1986). The facts are simplified.

If conversion is delayed until the date of actual payment, the creditor is recompensed with its own money or the financial equivalent in United States dollars; the debtor bears the risk of a fall in the debtor's money or reaps the benefit of a rise therein. If conversion is made at breach or judgment date, the risk of fluctuation in value of a money not of its selection falls on the creditor.

The real issue is where the risk of exchange rate fluctuation should be placed. This Act recognizes the right of the parties to agree upon the money that governs their relationship. In the absence of an agreement, the Act adopts the rule of giving the aggrieved party the amount to which it is entitled in its own money or the money in which the loss was suffered.

The principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred. Thus, for example, if oil is spilled on the coast of France by an American ship, the loss is felt by the French in francs and a judgment of an American court for damages should reflect this fact. Courts should enter judgments in the money customarily used by the injured person.

The payment day rule, on which the Act is based, meets the reasonable expectations of the parties involved. It places the aggrieved party in the position it would have been in financially but for the wrong that gave rise to the claim. States which adopt it will align themselves with most of the major civilized countries of the world.

The Act also covers other issues that may arise in connection with foreign-money claims. These include revalorization and interest. In order to determine aliquot shares for distributions from funds created in insolvency and estate proceedings, the Act specifies use of the date the distribution proceeding was initiated for conversion of foreign money into United States dollars.

UNIFORM FOREIGN-MONEY CLAIMS ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Action" means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim.

(2) "Bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate.

(3) "Conversion date" means the banking day next preceding the date on which money, in accordance with this [Act], is:

(i) paid to a claimant in an action or distribution proceeding;

(ii) paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or

(iii) used to recoup, set-off, or counterclaim in different moneys in an action or distribution proceeding.

(4) "Distribution proceeding" means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund.

(5) "Foreign money" means money other than money of the United States of America.

(6) "Foreign-money claim" means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money.

(7) "Money" means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by inter-governmental agreement.

(8) "Money of the claim" means the money determined as proper pursuant to Section 4.

(9) "Person" means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint venture, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(10) "Rate of exchange" means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. If separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim.

(11) "Spot rate" means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next day availability or for settlement by immediate payment in cash or equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days.

(12) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

COMMENT

1. "Action." A suit or arbitration may be legal or equitable in nature, but it must be based on a pecuniary claim.

2. "Bank-offered spot rate" is the rate at which a bank will sell the requisite amount of foreign money for immediate or nearly immediate use by the buyer.

3. "Conversion date." Exchange rates may fluctuate from day to day. A date must be picked for calculating the value of foreign money in terms of United States dollars. As used in the Act, "conversion date" means the day before a foreign-money claim is paid or set-off. The day refers to the time period of the place of the payor, not necessarily that of the recipient. The exchange rate prevailing at or near the close of business on the banking day before the day payment is made will be well known at the time of payment. See Comment 2 to Section 7.

4. "Distribution proceeding." In keeping with the concept underlying Section 2, the coverage of this statute is limited to judicial actions and nonjudicial proceedings which involve the creation of a fund from which pro-rata distributions are made to claimants. As provided in Section 8, a different conversion date is required where either input to or outgo from a fund involves two or more different moneys. Thus, the term includes a mortgage foreclosure proceeding, judicial or under a trust deed, distribution of property in divorce

and child support proceedings, distributions in the administration of a trust or a decedent's estate, an assignment for the benefit of creditors, an equity receivership, a liquidation by a statutory successor, a voluntary dissolution of a business or a nonprofit enterprise or the like when in each case a fund must be shared among claimants and where, usually, the fund will not satisfy all claimants of the same class. An asset or a liability of the fund must also involve one or more foreign-money claims, but not all of the claims can be in the same money.

5. "Foreign money." Since only the federal government has the power to coin money and regulate the value thereof, the term "foreign" means a government other than that of the United States of America. Special Drawing Rights of the International Monetary Fund are foreign money even though the United States is a member of the Fund. Foreign governments included are all those whose moneys are, in the currency markets of the world, exchangeable for the money of other currencies even though the government is not recognized by the United States.

6. "Foreign-money claim." The term "claim" is not limited to any one party to an action or a distribution proceeding and may be asserted by a plaintiff or a defendant or by a party to an arbitration or distribution proceeding. It may be based on a foreign judgment, or sound in contract, quasi-contract, or tort.

7. "Money." The definition includes composite currencies such as European Currency Units created by agreement of the governments that are members of the European Monetary System or the Special Drawing Rights created under the auspices of the International Money Fund. These are "stores of value" used to determine the quantity of payment in some international transactions.

8. "Money of the claim." See Section 4 and the Comment thereto.

9. "Party." This combines the Uniform Commercial Code's definitions of "person" and "organization," but is limited to those who are parties to transactions or involved in events which could give rise to a foreign-money claim.

10. "Rate of Exchange." A free market rate is to be used rather than an official rate if both exist. Some countries have transactional differences in

exchange rates with slightly different rates; for example, in Belgium one rate prevails for commercial and another for financial transactions. Both rates are recognized in money market transactions. The last sentence of the definition indicates that the rate appropriate to the transaction is the rate to be used.

11. "Spot rate" is the term used in the financial markets of the United States for the rate of exchange for immediate or nearly immediate transfers from one money to another, as distinguished from the rates for future options or future deliveries.

In the foreign exchange markets, as in the stock markets, quotations are either "bid" or "ask," and the spread between is where the dealer makes a profit. An "offered spot rate" is the rate at which the offeror will sell the particular money. It is, of course, higher than the rate at which that person will buy the same money. "Spot" refers to the time the trade is made, not the time for settlement, which in spot transactions is often two days after the date of the trade.

12. "State." The definition, as in other Uniform Laws, is extended to include areas given the same, or nearly the same, treatment in law as the states.

SECTION 2. SCOPE.

(a) This [Act] applies only to a foreign-money claim in an action or distribution proceeding.

(b) This [Act] applies to foreign-money issues even if other law under the conflict of laws rules of this State applies to other issues in the action or distribution proceeding.

COMMENT

Under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) removes any doubt.

SECTION 3. VARIATION BY AGREEMENT.

(a) The effect of this [Act] may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.

(b) Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.

COMMENT

1. A basic policy of the Act is to preserve freedom of contract and to permit parties to resolve disputed matters by contract at any time, even as to choice of law problems. The parties may agree upon the date and time for conversion. After entry of judgment the parties may agree upon how the judgment is to be satisfied.

2. Subsection (b) covers cases where, for example, claims for petroleum may be settled in United States dollars but settlement for joint costs of exploration may be in pounds sterling. The parties also may agree on the money to be used for damages. The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money. The principle of freedom of contract allows the parties to allocate the risks of currency fluctuations between foreign moneys as they desire. Sections 4 and 5 provide rules in the absence of special agreements by the parties for determining the money to be used. Parties may by agreement select a particular market or foreign exchange dealer to be used for exchange purposes.

SECTION 4. DETERMINING MONEY OF THE CLAIM.

(a) The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

(b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

(1) regularly used between the parties as a matter of usage or course of dealing;

(2) used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or

(3) in which the loss was ultimately felt or will be incurred by the party claimant.

COMMENT

1. Subsection (a) uses "payment" in a broad sense not related to just the price, but to any obligation arising out of a contract to transfer money. See also Section 3(b).

2. Subsection (b) states rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates. The three rules will normally apply in the order stated. Prior dealings may indicate the desired money. If there are none, it is appropriate to use the money indicated by trade usage or custom for transactions of like kind. The final rule of subsection (a) is one established in English cases. See The Despina R and the Folias, (1979) A.C. 685. An example is the use of an operating account in United States dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Appropriateness of a rule is to be determined by the judge from the facts of the case. See Section 6(d).

SECTION 5. DETERMINING AMOUNT OF THE MONEY OF CERTAIN CONTRACT CLAIMS.

(a) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.

(b) If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding 30 days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

(c) A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly.

COMMENT

1. Subsections (a) and (b) cover different interpretation problems. One arises where the amount of the money to be paid is measured by another money, one of which is foreign. An example is "pay 5,000 Swiss francs in pounds sterling." The issue is the time at which the rate of exchange into pounds sterling is to be applied. Subsection (a) says in a "measured by" situation with no rate specified, the rate of exchange that controls is the one prevailing at or near the close of business on the day before the day of payment. See Section 1(2), the definition of "conversion date."

2. Another problem arises when an exchange rate in effect before a default is used, as in "pay on November 30, 1989, 5,000 Swiss francs in pounds sterling at the exchange rate prevailing on June 30, 1989." In this case, the issue is how long does the specified exchange rate control in the absence of a clear expression of intent?

Inclusion of a fixed rate as of a date before default, under subsection (b), remains effective only if payment is made within a reasonable time after default, not to exceed 30 days. The 30-day limitation accords usually with the expectation of the parties. Parties may agree to a longer time.

3. The most common application of subsection (c) will be found in international loan transactions. For example, a loan by a Japanese bank to an American company could be made with dollars purchased by yen for the purpose. The loan agreement could provide for repayment in dollars of an amount which, when received by the lender, would repurchase the amount of yen used to acquire the dollars advanced.

An exemption is needed from the application of usury laws that may be interpreted to hold that the indexing of the principal amount creates additional interest. See Aztec Properties, Inc. v. Union Planters National Bank, 530 S.W.2d 756 (Tenn. Sup. Ct. 1975). The subsection removes all doubts as to the legal enforceability of such agreements under theories such as usury, merger in a judgment, unconscionability, or the like.

SECTION 6. ASSERTING AND DEFENDING FOREIGN-MONEY CLAIM.

(a) A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars.

(b) An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

(c) A person may assert a defense, set-off, recoupment, or counterclaim in any money without regard to the money of other claims.

(d) The determination of the proper money of the claim is a question of law.

COMMENT

1. Subsection (a) covers not only the claim of a plaintiff but also the assertion by a defendant of a defense, set-off, or counterclaim. Subsection (b) provides that the money asserted as the money of its defenses by the defendant need not be the same as that of the plaintiff.

2. The money to be used as the money of the claim is a threshold issue to be determined, if contested, by the court after any factual issues as to expenditures, custom, usage, or course of dealing are decided. See subsection (b). If a payment is made or a debt incurred in a money other than that in which the loss was felt, the party asserting the foreign-money claim should establish the amount of the money of the claim used to procure the money of expenditure and the applicable exchange rate used.

3. Judgments may be entered in more than one money when dealings impact on more than one area. An inn-keeper in Mexico, for example, in taking in customers from many countries, should be held to foresee

that treatment for injuries at the inn would occur not only in Mexico, but also in the native land of the injured party or in a third country.

SECTION 7. JUDGMENTS AND AWARDS ON FOREIGN-MONEY CLAIMS; TIMES OF MONEY CONVERSION; FORM OF JUDGMENT.

(a) Except as provided in subsection (c), a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

(b) A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars which will purchase that foreign money on the conversion date at a bank-offered spot rate.

(c) Assessed costs must be entered in United States dollars.

(d) Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

(e) A judgment or award made in an action or distribution proceeding on both (i) a defense, set-off, recoupment, or counterclaim and (ii) the adverse party's claim, must be netted by converting the money of the smaller into the money of the larger, and by subtracting

the smaller from the larger, and specify the rates of exchange used.

(f) A judgment substantially in the following form complies with subsection (a):

[IT IS ADJUDGED AND ORDERED, that Defendant _____(insert name)_____ pay to Plaintiff _____(insert name)_____ the sum of _____(insert amount in the foreign money)_____ plus interest on that sum at the rate of _____(insert rate - see Section 9)_____ percent a year or, at the option of the judgment debtor, the number of United States dollars which will purchase the _____(insert name of foreign money)_____ with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of _____(insert amount)_____ United States dollars.]

[Note: States should insert their customary forms of judgment with appropriate modifications.]

(g) If a contract claim is of the type covered by Section 5(a) or (b), the judgment or award must be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars which will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

(h) A judgment must be [filed] [docketed] [recorded] and indexed in foreign money in the same manner, and has the same effect as a lien, as other judgments. It may be discharged by payment.

COMMENT

1. Subsection (a) changes a number of statutes in the states which can be construed to require all values in legal proceedings to be expressed in United States dollars. Professor Brand, in his article in the Yale Journal of International Law, Vol. 11:139 at page 169, identified 18 states having statutes which could require all judgments to be entered in dollars. They are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Brand, ibid. fn. 166. Hence, direct statutory authority must be given the courts in those states, and will be helpful in other states. In some states other statutes may need amendments. See, e.g., Wisc. Stats. §§ 138.01, 138.02, 138.03, and 779.05.

2. Subsection (d) gives defendants the option of paying in dollars which are, at the payment date, practically the economic equivalent of the foreign money awarded. The judgment creditor should be indifferent to whether the debtor exercises the right to pay in dollars as the only difference is a small bank charge for exchanging the dollars for the foreign money. The concept of the rate of the banking day next before the payment day is taken from Section 131 of the Province of Ontario, Canada, Courts of Justice Act (Ch. 11 Ont. Stats. (1984) as recently amended). It gives the defendant and the sheriff conducting the sale the necessary conversion rate comfortably ahead of its use. Newspaper quotations are usually said to be "at or near the close of business" on the stated date, so that phrase is used in this Act.

3. Subsection (e) provides for netting the affirmative recoveries of a defendant and plaintiff, whether in the same money or in different moneys, but preserving the quantum of each for appellate purposes. The theory is that when claims are reduced to money, they become mutual debts and should be set-off, so that a person's exchange rate fluctuation risk continues only

for the surplus in its money of the claim. The set-off is made by the judge or arbitrator.

4. The form of judgment in subsection (f) should be varied appropriately where the money to be paid is measured by a foreign money. See Section 5.

SECTION 8. CONVERSIONS OF FOREIGN MONEY IN DISTRIBUTION PROCEEDING. The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

COMMENT

All claims must be in the same money when determining aliquot shares in a distribution proceeding. The Act requires use of the date the proceeding was initiated for applying the exchange rate to convert foreign-money claims into United States dollars. See Re Lines Bros. Ltd., (1982) 2 All E.R. 99. A claim may be amended to show the proper conversion rate and the proper amount of United States dollars.

SECTION 9. PRE-JUDGMENT AND JUDGMENT INTEREST.

(a) With respect to a foreign-money claim, recovery of pre-judgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding, except as provided in subsection (b), are matters of the substantive law

governing the right to recovery under the conflict-of-laws rules of this State.

(b) The court or arbitrator shall increase or decrease the amount of pre-judgment or pre-award interest otherwise payable in a judgment or award in foreign-money to the extent required by the law of this State governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

(c) A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this State.

COMMENT

1. As to pre-judgment interest, the Act adopts the majority rule in the United States that pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate. English courts use a different rule, i.e., the borrowing rate used by plaintiff or prevailing in the country issuing the money of the judgment. See Helmsing Schiffarts G.M.B.H. v. Malta Drydock Corp. (1977) 2 Lloyd's Rep. 44 (Maltese money but borrowed in West Germany; German rate); Miliangos v. George Frank (Textiles) Ltd. (No. 2) (1976) 1 QB 487 at 489 (Swiss money, Swiss interest rate). Although pre-judgment interest is one form of damages, provision for pre-judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages. Cf. Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd. (1981) 1 N.Z.L.R. 361 (exchange loss due to delay as additional damages).

2. Allowances of pre-judgment interest in some states depend upon a party's conduct with respect to settlement or delay of the proceeding. Subsection (b) treats these state laws as either procedural in nature or expressions of a significant policy, in either case

to be governed by the law of the forum state.

3. Interest on a judgment is considered to be procedural and also goes by the law of the forum. There is a problem here in that there is great discrepancy among the states in the rates for judgment interest. When a judgment is in a foreign money, United States interest rates may result in some overcompensation or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. But in both the United States and in foreign countries, most jurisdictions have fixed statutory rates that do not readily respond to the inflation or deflation of the value of their money in the world market. Hence it was decided to apply the usual rules of the conflict of laws.

SECTION 10. ENFORCEMENT OF FOREIGN JUDGMENTS.

(a) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this State as enforceable, the enforcing judgment must be entered as provided in Section 7, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

(b) A foreign judgment may be [filed] [docketed] [recorded] in accordance with any rule or statute of this State providing a procedure for its recognition and enforcement.

(c) A satisfaction or partial payment made upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the

judgment, notwithstanding the entry of judgment in this State.

(d) A judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in this State in United States dollars only.

COMMENT

1. Some states have special acts that simply cover the recognition, entry, and enforcement of foreign judgments. Common law enforcement is by action. Subsection (a) refers to the common law method; it is subject to subsection (b) which refers to statutory procedures. Subsection (c) applies to both procedures.

2. Subsection (d) avoids constitutional issues under the full faith and credit clause by requiring that judgments of sister states be enforced as entered in the sister state.

SECTION 11. DETERMINING UNITED STATES DOLLAR VALUE OF FOREIGN-MONEY CLAIMS FOR LIMITED PURPOSES.

(a) Computations under this section are for the limited purposes of the section and do not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

(b) For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved

for a surety bond or other court-required undertaking, must be ascertained as provided in subsections (c) and (d).

(c) A party seeking process, costs, bond, or other undertaking under subsection (b) shall compute in United States dollars the amount of the foreign money claimed from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

(d) A party seeking the process, costs, bond, or other undertaking under subsection (b) shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate.

COMMENT

This section protects those who must determine how much should be held subject to a levy or other collection process or what the dollar amount of a supersedeas or other surety bond should be. If the judgment debtor is damaged by a gross overstatement of the dollar amount in the affidavit or certificate of

counsel for the judgment creditor or the bank officer, recovery should be against that person.

SECTION 12. EFFECT OF CURRENCY REVALORIZATION.

(a) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.

(b) If substitution under subsection (a) occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money.

COMMENT

1. Subsection (a) refers to situations in which a country authorizes the issue of a new money to take the place of the old money at a stated ratio. An example is Brazil's recent abolition of cruzieros for cruzados. The subsection mandates that foreign money claims should be subjected to the same ratio.

2. The Act takes no position on the effect of money repudiations or revalorizations so drastic as to be, in effect, confiscations. Remedy, if any, for these is usually found through diplomatic channels. Equally, the Act takes no position on the effect of exchange control laws. The effect, if any, on obligations to pay is left to other law.

SECTION 13. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW. Unless displaced by particular provisions of this [Act],

the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions.

COMMENT

The section is taken from Section 1-103 of the Uniform Commercial Code.

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 15. SHORT TITLE. This [Act] may be cited as the Uniform Foreign-Money Claims Act.

SECTION 16. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 17. EFFECTIVE DATE. This [Act] becomes effective on January 1st following its enactment.

SECTION 18. TRANSITIONAL PROVISION. This [Act] applies to actions and distribution proceedings commenced after its effective date.

[SECTION 19. REPEALS. The following acts and parts of acts are repealed:

(1) [Any statute requiring judgments to be entered in United States dollars.]

(2) _____.

(3) _____.]