COUNCIL ON COURT PROCEDURES

Saturday, October 14, 1989 Meeting
9:30 a.m.

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

A G E N D A

1. Approval of minutes of meeting of May 20, 1989
2. Introduction of new members
3. Final report on legislative session and on developments since last meeting (Ron Marceau)
4. Election of officers
5. Report of subcommittee on miscellaneous inquiries (Henry Kantor)
6. Report of subcommittee on motor vehicle service (Michael Starr)
7. Report of subcommittee on judgments (Judge Mattison)
8. Letter from Chief Justice Peterson and Ron Marceau's response (enclosed)
9. Meeting schedule
10. New business

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 14, 1989

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

Present:	Susan Bischoff	Richard T. Kropp
	Susan Graber	Robert B. McConville
	Lafayette Harter	Ronald Marceau
	Maury Holland	Jack L. Mattison
	Bernard Jolles	William C. Snouffer
	Lee Johnson	George A. Van Hoomissen
	Henry Kantor	Elizabeth Yeats
Absent:	Richard L. Barron	J. Michael Starr
	John V. Kelly	Larry Thorp
	Winfrid K.F. Liepe	
	William F. Schroeder	

Hon. Donald C. Ashmanskas, Circuit Court Judge for the Twentieth Judicial District, was also in attendance.

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

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

Agenda Item No. 1: Approval of minutes of meeting of May 20, 1989. The minutes of the meeting held May 20, 1989 were unanimously approved.

Agenda Item No. 2: Introduction of new members. The Chairer stated that the Council had been notified of the appointment of Susan Bischoff, John Hitchcock, Richard Kropp, and Allen Reel as new attorney members of the Council and of the reappointment of Bernard Jolles and Ron Marceau. He also stated that the Board of Bar Governors is reconsidering the appointments of Messrs. Hitchcock, Jolles and Reel because of statutory requirements for Council membership. The Council is required to have at least two attorney members from each congressional district and, with the appointments made, has none from the Third Congressional District.

The Chairer also stated that Susan Graber had been appointed

to replace Judge Buttler, whose term expired in September, and that the District Judges Association would be appointing Judge Lipscomb's successor at their next meeting (October 23, 1989). Justice Van Hoomison has been reappointed as the Supreme Court member of the Council. Lafayette Harter has been reappointed as the public member.

Agenda Item No. 3: Final report on legislative session and developments since last meeting (Chairer Marceau). The Chairer reported that all of the amendments to the ORCP promulgated by the Council during the last biennium will go into effect. The legislature did not amend or reject any of the changes made by the Council. The Executive Director reported that the legislature had passed four bills amending the ORCP. The Chairer stated that the civil subcommittee of the House Judiciary Committee had suggested that the Council take a more active role during the legislative session to advise the committee relating to ORCP bills. He stated that he would discuss the matter further with the chairer of the legislative subcommittee and report back to the Council.

Agenda Item No. 4: Election of officers. The Chairer stated that election of officers would be postponed until the next meeting when the membership of the Council will be completely settled.

Agenda Item No. 5: Report of subcommittee on miscellaneous inquiries (Henry Kantor). All Council members had previously received a memorandum dated 9/29/89 from the subcommittee to the Council members. A letter dated October 6, 1989 from Laurence Thorpe was distributed at the meeting. In that letter, he stated he opposed repealing 69 B(2).

Henry Kantor, Chairer of the subcommittee, opened the discussion with the first item in the memorandum having to do with whether or not a statement specifying the amount of noneconomic damages under ORCP 18 B(3) limits the amount of recovery. He stated that the subcommittee was recommending that ORCP 18 B(3) and 69 B(2) be repealed for the reasons stated in the memorandum. After a lengthy discussion, Judge Johnson made a motion, seconded by Judge McConville, to delete ORCP 18 B(3). After further discussion, Judge McConville withdrew his second and the motion was seconded by Judge Graber. Bernard Jolles then moved, with a second by Henry Kantor, to amend the motion to delete all of ORCP 18 B(3). The motion to amend passed with 9 in favor and three opposed and two abstentions. Judge Mattison then moved to table the motion as amended. Judge Snouffer seconded the motion to table. The motion to table failed with 10 opposed to the motion, 2 in favor of the motion, and two abstentions. The main motion then passed by a vote of 9 to 4 with one abstention.

Henry Kantor then reported on item 2 in the subcommittee memorandum relating to an inquiry from Warren Deras about service of summons on incapacitated persons. As described in the memorandum, the subcommittee did not feel that there was a problem with service on incapacitated persons that required amendment of the rules. The subcommittee did feel that the phrase "incapacitated person" could be more clearly defined. Henry Kantor moved, with a second by Bernard Jolles, that the words "as defined by ORS 126.003(4)" be added to the words "incapacitated person" in ORCP 7 B, 27 B, 69 B, and any other location where they appear in the ORCP. The statute referred to was the source of the term used in the ORCP, but was not specifically referred to in the rules. Henry Kantor indicated that a copy of the statutory definition had not been attached to the memorandum and would be furnished to all Council members for closer examination. With the understanding that the matter might be raised again by Council members after closer examination of the statute, the motion passed with 13 members in favor and one opposed.

Henry Kantor then described item 3 in the subcommittee memorandum. The subcommittee recommended that a special subcommittee be appointed to review the appropriateness of the affidavit procedure to respond to a records subpoena for a variety of public and private entities other than hospitals. The chair appointed Larry Thorp, Judge Graber and Henry Kantor to the subcommittee.

Henry Kantor then reported that under items 4 through 7 in the subcommittee memorandum the subcommittee was recommending that the Council take no action. Under item 6, Kantor stated that the subcommittee recommended that the Council closely monitor the question of discovery abuse and that, if further complaints or information is received relating to misuse of the ORCP discovery rules, those rules should be reviewed. Under item 7, Council members asked that inquiry be made of the counsel for the Court of Appeals and the State Court administrator to determine the nature of the ambiguity which they perceive in Rule 72. The Executive Director said he would make further inquiry.

New Business. At this point, the Chairer suggested that Judge Ashmanskas be heard regarding his proposed amendments to ORCP 57 F relating to number of alternate jurors, number of peremptory challenges, and alternate jurors. His 9/27/89 letter addressed to Bill Linden, Fred Merrill, and Jack Olson (of the OSB Procedure and Practice Committee) had been mailed to Council members previously

The Council first discussed the first two points in Judge Ashmanskas's letter relating to the number of alternate jurors and peremptory challenges. His suggestion was that these be left

to the discretion of the trial judge. Council members pointed out that the Council had no power to change the procedure in criminal cases. Judge Ashmanskas stated that he planned to go to the appropriate bar committee involved in criminal procedure and secure support for a recommended bill to change the statutes regulating criminal trials. He would then return to the Council with a recommendation for a similar modification in the ORCP.

On Judge Ashmanskas's third point relating to the role of alternate jurors, the Chairer called the members' attention to Justice Peterson's letter of October 6, 1989 (mailed to Council members), which made a similar suggestion. The Council discussed the matter and Maurice Holland was asked to consult with Justice Peterson and report to the Council.

Agenda Item No. 6. Report of the subcommittee on motor vehicle service. Judge Johnson reported for the subcommittee. He stated that the subcommittee had met and was debating two different approaches to the amendment of ORCP 7 D and would report back to the Council at the next meeting.

Agenda Item No. 7: Report of subcommittee on judgments (Judge Mattison). Judge Mattison reported that the subcommittee had met and that the Executive Director had done some drafting relating to ORCP 68 based upon legislation proposed by Bill Linden's office during the last biennium. At the subcommittee meeting, the Executive Director was asked to do some redrafting and the subcommittee planned to meet again and report to the Council at the next meeting. Judge Mattison stated that the subcommittee needed more members. The Chairer appointed Judge Liepe and Susan Bischoff to serve on the subcommittee. The subcommittee membership now consists of Judge Mattison, Chairer, Judge McConville, Susan Bischoff, and Larry Thorp.

Agenda Item No 8: Letter from Chief Justice Peterson and Ron Marceau's response. The Chairer brought to the attention of the Council the 9/11/89 letter from Chief Justice Peterson (mailed to the Council members previously). The Chief Justice suggested a liaison person from the Council to work with the UTCR Committee. Judge Barron and Judge McConville are members of the UTCR Committee and were appointed by the Chairer as Council liaison for that committee.

The other item which Chief Justice Peterson raised concerned depositions on oral examination. Ron Marceau had responded that Fred Merrill had reviewed the proposed revision to Federal Rule 30 concerning depositions on oral examination and observed that the Oregon rules already cover the proposed changes.

New Business. The Council discussed a letter from Henry Kantor to Michael Williams of September 26, 1989, with an attached article by Michael Williams, together with Michael

Williams' response of October 2, 1989, with a proposed amendment to ORCP 67 (copies of all of which had been mailed to Council members). Council members expressed some concern that a provision regulating attorney fees might be substantive. After an extended discussion, Council members indicated that they felt there was no strong need for the procedure and no action was taken to change the rules.

Future Meeting Schedule. The Chairer suggested that the Council should meet the second Saturday of each month, with meetings scheduled every other month at the beginning of the biennium and during the summer. He noted that the statute required public meetings in each of the congressional districts and particular forms of notice for some of the meetings. The Chairer stated he would confer with the Executive Director to arrive at a tentative schedule. The next meeting was set for December 9, 1989 at 9:30 a.m. at the State Bar Office in Lake Oswego.

The meeting adjourned at 11:53 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

COUNCIL ON COURT PROCEDURES

Meeting Schedule - 1989-91 Biennium

October 14, 1989	Oregon State Bar Center
December 9, 1989	Oregon State Bar Center
January 13, 1990	Oregon State Bar Center
February 10, 1990	OSB (PUBLIC MEETING - FIFTH CONGRESSIONAL DISTRICT)
March 10, 1990	Eugene (PUBLIC MEETING - FOURTH CONGRESSIONAL DISTRICT)
April 14, 1990	Newport (PUBLIC MEETING - FIRST CONGRESSIONAL DISTRICT)
May 12, 1990	Portland East (PUBLIC MEETING - THIRD CONGRESSIONAL DISTRICT)
June 9, 1990	Bend (PUBLIC MEETING - SECOND CONGRESSIONAL DISTRICT)
September 8, 1990	Oregon State Bar Center
October 13, 1990	Oregon State Bar Center
November 10, 1990	Oregon State Bar Center
December 15, 1990	Oregon State Bar Center

ADDITIONAL MEETINGS MAY BE SCHEDULED DURING THE SPRING OF 1991 AS NEEDED.

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

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JACK B. LIVELY
(1923-1979)

October 6, 1989

Mr. Henry Kantor
Pozzi, Wilson, et al.
910 Standard Plaza
1100 SW 6th Avenue
Portland, Oregon 97204

Re: Council on Court Procedures

Dear Henry:

I will be unable to attend the October 14 Council on Court Procedures meeting. I did review the agenda packet, and in particular reviewed the memorandum submitted by the subcommittee on miscellaneous inquiries. Generally I agree with the position the subcommittee has taken on most subjects. I am concerned, however, about the suggestion that ORCP 67C(2) be eliminated, along with ORCP 18B. I agree with the subcommittee's position that the elimination of pleading noneconomic damages probably does very little, if any, good. I believe, however, that to repeal 67C(2) is not a good solution to the problem that the legislature has created. I believe repeal of 67C(2) has the potential for fundamental unfairness.

Since I anticipate that the Council will be asked at the meeting whether to pursue the repeal of 67C(2), I want to go on record as saying I oppose doing so.

I do agree, however, with the position taken by the subcommittee on each of the other issues.

Very truly yours,

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

Laurence E. Thorp

LET:edk

cc: Fred Merrill

COUNCIL ON COURT PROCEDURES
University of Oregon School of Law
Eugene, OR 97403
Telephone: 686-3990

October 5, 1989

M E M O R A N D U M

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

FROM: Fred Merrill, Executive Director

Enclosed are the following additional agenda items for consideration under new business at the October 14, 1989 Council meeting:

1. **CORRESPONDENCE FROM HENRY KANTOR REGARDING ORCP 54 AND ORCP 67**

2. **LETTER FROM JUDGE ASHMANSKAS REGARDING ORCP 57**

FRM:gh
Enclosures

(P.2)

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LYMAN C. JOHNSON
1887 - 1966

TELECOPIER
(503) 388-5410

September 25, 1989

The Honorable Edwin J. Peterson
Chief Justice
The Oregon Supreme Court
Salem, Oregon 97310

Dear Justice Peterson:

We will bring your September 11, 1989 letter before the Council on Court Procedures at its October 14, 1989 meeting.

My thought is that a Council member serving on the Uniform Trial Court Rules Committee is a good idea. My guess is that the Council will also think it is a good idea. We'll let you know right after the meeting on what Council person would be suggested for service on the UTCR Committee.

Fred Merrill has reviewed the proposed revision to Federal Rule 30 concerning depositions on oral examination and observes that the Oregon Rules already contemplate the proposed changes.

Sincerely,

R. L. MARCEAU

RLM:dlh

cc: Fred Merrill

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

Salem, Oregon 97310
Telephone 378-6026

September 11, 1989

Ronald L. Marceau
Chair, Council on Court Procedures
835 NW Bond Street
Bend, Oregon 97701

Re: Uniform Trial Court Rules Committee; Depositions

Dear Mr. Marceau:

I write on two subjects. You are aware of the role of the Uniform Trial Court Rules Committee. If the Council on Court Procedures believes that it would be helpful to have one of its members serve on the Uniform Trial Court Rules Committee, I would welcome such participation. Please let me know your wishes. If you wish to designate someone as a liaison, I would be happy to do what is necessary so that he or she can participate.

The second subject upon which I write concerns depositions on oral examination. I am a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. (That is the body that drafts the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and other federal rules.)

I enclose a copy of a proposed Rule 30. Among its proposed changes, section (b)(1) would require that the notice of deposition "state the means by which the testimony be recorded." Subsection (b)(4) would provide that the deposition may be taken, as a matter of right "by sound, sound and vision or stenographic means."

Very truly yours,

Edwin J. Peterson
Chief Justice

Enclosure

cc: ✓ Professor Fredrick Merrill
Paul Connolly
Bradd Swank

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

Draft Approved by Advisory Committee on Civil Rules

April 29, 1989

Not Intended for Public Comment

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant ~~or service made under Rule 4(e)~~, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON--STENOGRAPHIC *MEANS OF* RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. *The notice shall also state the means by which the testimony will be recorded.* If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination

unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) ~~The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure~~

~~that--the--recorded--testimony--will--be--accurate--and trustworthy.------A--party--may--arrange--to--have--a stenographic--transcription--made--at--the--party's--own expense.----Any--objections-under--subdivision-(c),--any changes--made--by--the-witness,--the-witness'--signature identifying-the-deposition-as-the-witness'-own-or-the statement--of--the--officer--that--is--required--if--the witness-does-not-sign,-as-provided-in-subdivision-(e), and--the--certification--of--the--officer--required--by subdivision-(f)--shall-be-set-forth-in--a-writing--to accompany--a--deposition--recorded--by--non-stenographic means.~~ *The party taking the deposition shall bear the cost of recording the testimony and shall designate the means by which the testimony shall be recorded, which may be by sound, sound and vision, or stenographic means. Any party may, at that party's expense, with prior notice to the deponent and other parties designate an additional means of recording the testimony.*

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the requests.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), *and* 37(b)(1), ~~and 45(d),~~ a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to the deponent.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ~~ordered in accordance with~~ *authorized by* subdivision (b)(4) of this rule. If ~~requested by one of the parties~~ *testimony has been recorded by non-stenographic means, a party may cause* the testimony ~~shall~~ *to* be transcribed *at that party's expense.* All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the

party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

* * * * *

(e) SUBMISSION TO WITNESS; CHANGES; SIGNING. When the testimony is ~~fully-transcribed~~ *recorded*, the deposition shall be submitted *by the officer designated under Rule 28* to the witness for ~~examination~~ *review* ~~and shall be read to or by the witness~~, unless such ~~examination and reading are~~ *review is* waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be ~~entered upon the deposition~~ *recorded* by the officer with a statement of the reasons given by the witness for making them. *A certificate that t*The deposition *has been reviewed* shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the ~~deposition~~ *certificate* is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the

deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.

(1) The officer shall certify ~~on the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. *Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign as provided in subdivision (e), and the certification of the officer shall be set forth in a writing to accompany the record of the deposition.* Unless otherwise ordered by the court, the officer shall then ~~securely seal~~ *file* the deposition *and certificate* in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]"~~ and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing~~.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

* * * * *

POZZI WILSON ATCHISON O'LEARY & CONBOY

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DONALD ATCHISON
DAN O'LEARY
RAYMOND J. CONBOY
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September 26, 1989

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RE: ORCP 54 E

Dear Mike:

As vice-chair of the Council on Court Procedures, I read your article in the September, 1989 issue of the Oregon Litigation Journal with interest. If you have any specific language in mind or any empirical data on how such a rule would work, including regulatory or case law from other jurisdictions, please feel free to forward it to me to present to the Council. Otherwise, you should send your proposal and/or materials to Professor Fred Merrill of the University of Oregon Law School, who is the Council's Executive Director.

Very truly yours,

Henry Kantor

Henry Kantor

HK:pap
cc: Mr. Ronald L. Marceau
Prof. Fredric R. Merrill ✓

THE EDITOR'S CORNER:

ORCP 54E (and Fed. R. Civ. P. 68) should be made reciprocal and equitable by permitting plaintiffs to make a "demand for judgment."

by Michael L. Williams, Editor-in-Chief

(In keeping with what is now a nine year old tradition of this journal, your Editor sticks his neck out once again with a proposal for a change in procedural rules. Any reader who wishes to attack, support, or merely comment upon this proposal, or any other matter of interest to members of the Litigation Section, is urged to send a letter or article to the Editor.)

Both the Oregon and Federal Rules of Civil Procedure permit a defendant, but not a plaintiff, to put pressure on the other side to settle a case for a sum certain. Refusal to accept the settlement places the declining party at peril of losing claims for costs, disbursements, and attorney fees, if the ultimate outcome of litigation is less favorable to the declining party than the settlement proposal. This is known as an "offer of judgment." It appears in ORCP at 54E, and in Rule 68 of the Federal Rules.

I believe that the Council on Court Procedures should consider and adopt a counter-balancing amendment to ORCP 54E, permitting a plaintiff to make a "demand for judgment" under similar terms, which would place a defendant at peril of paying additional costs, pre-judgment interest, and attorney fees if the defendant declines to confess to judgment in the amount demanded, and subsequently fares less well at trial.

There should be no question that the Council would have authority to promulgate such a rule change, since it already has authority over a rule giving such leverage to defendants in civil cases, and because it has authority over other rules pertaining to costs, disbursements, and attorney fees.

I believe such a change would increase the chance of settling cases, thus reducing the burden of civil trials on our court system, and reducing the costs of litigation for parties to civil actions.

Needless to say, such a proposal would be highly controversial. This year in the Legislature, one of the top priorities of the Oregon Trial Lawyers Association legislative agenda was the pre-judgement interest bill. The bill was effectively watered down in the Senate Judiciary Committee, primarily due to the efforts of Senator Robert Shoemaker of Portland, a partner in the prestigious Portland law firm of Lindsay, Hart, Neil and Weigler. Later, the watered-down version of the pre-judgment interest bill evaporated entirely in the House.

However, simply because the proposal is controversial does not mean the Council should not consider it. The present version of ORCP 54E allows the defendant, and only the defendant, to raise the stakes of going to trial by making an offer of judgment. Plaintiffs should be given an equal and reciprocal procedural tool.

The Oregon Litigation Journal
is published by the
LITIGATION SECTION
OF THE
OREGON STATE BAR

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October 2, 1989

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Subject: ORCP 54 E

Dear Henry:

Thank you for your interest in my "demand for judgment" idea. I haven't done any research on the topic, but I am unaware of any other specific rule in other states, except for those states that have pre-judgment interest.

I enclose a proposed amendment to ORCP 67.

I am sending a copy of this letter and the proposed amendment to Ron Marceau and Fred Merrill as well.

Again, thank you for your interest. If I can be of any help, assuming the Council on Court Procedures takes this matter up, please give me a call.

Yours truly,

WILLIAMS, TROUTWINE & BOWERSOX, P.C.

Michael L. Williams

MLW:tmf/052
Enclosure

cc: Mr. Ronald L. Marceau
Prof. Frederic R. Merrill

PROPOSED AMENDMENT TO ORCP 67
TO INCLUDE A "DEMAND FOR JUDGMENT"
TO PROMOTE EARLY SETTLEMENT

1. ORCP 67 C shall be amended as follows (language to be deleted is in brackets, and the new language is in bold):

C. Demand for Judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been [demanded] prayed for in the pleadings, except:

C(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for the [demand for judgment] **pleadings**. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the [demand for judgment] **pleadings**, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

C(2) [Demand] Prayer for Money Damages. Where a [demand] **prayer** for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

C(3) Pre-Trial Demand for Judgment. In any action where a party claims money damages from another, the claimant may file with the court and serve upon the other party a "pre-trial demand for judgment," specifying the amount of the judgment sought. This pre-trial demand for judgment may not be filed or served until the party from whom judgment is sought has appeared in the action, and the pre-trial demand for judgment will not be effective unless it is filed and served at least 30 days before any assigned trial date.

The party on whom the pre-trial demand for judgment is served shall have 14 days in which to file and serve a response. The response shall take one of the following three forms:

C(3)(a) The party may accept the demand for pre-trial judgment by filing a notice of acceptance with the court. The court shall promptly enter judgment against the accepting party in the amount demanded and accepted.

C(3)(b) The party on whom the demand for pre-trial judgment was made may reject the demand by filing and serving a notice of rejection.

C(3)(c) The party on whom the demand for pre-trial judgment is made may object to the demand as premature, by filing and serving a notice of objection. The notice of objection shall contain any objections to the form or timing of the pre-trial demand for judgment, as well as a list of all those persons, including any party, whom the responding party believes should be deposed before the demand for judgment can be evaluated, and a list of any other discovery matters which must be completed before the demand for judgment can be evaluated. The parties shall then confer and attempt to agree on a reasonable method and schedule for completing the requested discovery. If, after conferring in good faith, the parties are unable to agree on the methods or timing of the requested discovery, the party making the pre-trial demand for judgment may move the court for an order setting forth the methods and timing of the discovery that must be completed before the party on whom demand for pre-trial judgment has been made must respond to the demand for pre-trial judgment.

C(4) If the party upon whom the pre-trial demand for judgment is made files no response within 14 days, the demand for judgment shall be deemed rejected. If the party upon whom demand is made files timely objections, then the time for filing an acceptance or rejection of the demand for judgment shall be extended as the parties may agree or as the court shall order.

C(5) If a pre-trial demand for judgment is rejected, either by the filing of a formal notice of rejection or by the expiration of the time for filing a notice of acceptance or rejection, and if the party making the demand for judgment ultimately obtains a judgment for money damages against the party upon whom the demand was made that equals or exceeds the sum specified in the pre-trial demand for judgment, then the court shall, in addition to the money damages awarded, provide in the judgment for the following additional sums:

C(5)(a) Pre-Judgment interest at the legal rate on the principal amount of damages awarded, from the date of the commencement of the action.

C(5)(b) The claimant's reasonable attorney fees, costs, disbursements, and litigation expenses, including reasonably

necessary and reasonably valued depositions, travel, investigation, experts, copy charges, and long distance telephone charges.

C(6) Any litigation expenses awarded under this rule shall be determined in the same manner as provided in ORCP 68 for the allowance and taxation of attorney fees and costs and disbursements.

C(7) No party may serve more than three pre-trial demands for judgment on any other party in a single case.

GUARDIANSHIPS AND CONSERVATORSHIPS

(General Provisions)

126.003 General definitions. As used in chapter 823, Oregon Laws 1973, unless the context requires otherwise:

* * *

(4) "Incapacitated person" means an adult whose ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety or to manage the person's financial resources. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

* * *