

COUNCIL ON COURT PROCEDURES

**Saturday, April 21, 1990
9:30 a.m.**

**EMBARCADERO
1000 Southeast Bay Boulevard
Newport, Oregon 97365**

A G E N D A

1. Approval of minutes of meeting of March 10, 1990
2. Public meeting
3. Further revisions of amendment to ORCP 68 C - suggestions of Judge Liepe, Judge McConville, and Larry Thorp (attached)
4. Revision of ORCP 68 C(2) (attached) - Executive Director
5. Revision of ORCP 55 relating to discovery by subpoena (attached) - Executive Director
6. Report of discussion with John Salisbury regarding Uniform Foreign Money Claims - Executive Director
7. **NEW BUSINESS**

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of April 21, 1990

EMBARCADERO

1000 Southeast Bay Boulevard
Newport, Oregon 97365

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

(Gilma Henthorne, Management Assistant, was also present.)

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

The Chairer announced that Fred Merrill, Executive Director, had just recently been hospitalized for emergency surgery. The Council members expressed their very best wishes for his speedy recovery.

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

Agenda Item No. 1: Approval of minutes of meeting of March 10, 1990. The minutes of the meeting held March 10, 1990, were unanimously approved.

Agenda Item No. 3: Further revisions of amendments to ORCP 68 C - suggestions of Judge Liepe, Judge McConville, and Larry Thorp (attached to these minutes as Exhibit No. 1). Jack Mattison, Chair of the judgments subcommittee, stated that the subcommittee wanted to meet concerning the revisions set out in the packet entitled "FURTHER REVISIONS OF AMENDMENTS TO ORCP 68C (SUGGESTIONS OF JUDGE LIEPE, JUDGE McCONVILLE AND LARRY THORP",

attached to these minutes as Exhibit No. 1, and prepare a comprehensive proposal (starting with the April 9, 1990 draft which had incorporated the changes made by the Council at its March 10, meeting) which they could mail to Council members for their input prior to the Council's next meeting. The subcommittee would also consider the Executive Director's proposed revision of ORCP 68 C(2) (attached to these minutes as Exhibit No. 2) (**Item No. 4 on the agenda**). Judge Liepe reviewed the proposals which he had made (set out in Exhibit No. 1), and a discussion followed. The Council decided that it would await the proposal of the subcommittee.

Agenda item No. 5: Revision of ORCP 55 relating to discovery by subpoena (attached to these minutes as Exhibit No. 3). The Executive Director had been asked at the Council's March 10, 1990 meeting to prepare an amendment to ORCP 55 to allow a subpoena to be used as a discovery tool with respect to third parties without the necessity of scheduling a deposition. The Executive Director's proposed amendments to ORCP 55 are an adaptation of the proposed changes to Federal Rule 45 to conform with the Oregon form. It was suggested that the draft may be unclear as to whether a non-party has to file a motion for relief from a subpoena or whether the moving party has to file a motion to compel. It was pointed out that the only thing different about this type of subpoena with respect to production is that the subpoena does not require the individual to give testimony. Regarding inspection of premises, concern was expressed that there may be some constitutional issues involved having to do with the right of privacy. It was the consensus of the Council that the Executive Director should prepare a new draft to exclude inspection of premises.

Agenda item No. 6: Report of discussion with John Salisbury regarding Uniform Foreign Money Claims. The Executive Director will report concerning this item at the Council's next meeting.

OTHER MATTERS:

The Chair reminded the Council that he would be attending the "Law in the 90's Conference" at the Rippling River Resort in Welches, Oregon, on April 27 - 29. He asked whether anyone had any suggestions for him to bring to the Conference. Henry Kantor said that cooperation among Bar committees, the Executive Department and Judicial Department, and organizations should be further encouraged so that there would not be a repetition of the problems that occurred during the last legislative session, stressing the necessity of presenting civil procedure matters to the Council.

Mike Starr reported that Chief Justice Peterson had appointed a committee to look at the rules of appellate procedure.

The meeting adjourned at 10:27 a.m.

Respectfully submitted,

Gilma J. Henthorne
Management Assistant

(for Fredric R. Merrill,
Executive Director)

GH

**FURTHER REVISIONS
OF
AMENDMENTS TO ORCP 68 C**

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

**Exhibit No. 1 to Minutes of Council
Meeting Held April 21, 1990**

EX 1-1

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 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 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).

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.

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

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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, of 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 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 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).)

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EX 1-7

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

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EX 1-8

C~~1~~(6) ~~157~~ Avoidance of multiple collection of attorney fees and costs and disbursements.

C~~1~~(6) ~~157~~(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~~1~~(6) ~~157~~(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.

EX 1-10

THORP
DENNETT
PURDY
GOLDEN
& JEWETT P.C.
ATTORNEYS AT LAW

March 29, 1990

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JACK B. LIVELY
(1923-1979)

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

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Mr. Fredric R. Merrill
March 29, 1990
Page 2

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

EX 1-12

March 1989
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

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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} 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 (a) 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 ~~an~~ 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.

~~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 shall 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 use five words.

EX 1-15

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 ^{concerning} 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 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

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.

PRODUCTION OF DOCUMENTS AND
THINGS AND ENTRY UPON AND FOR
INSPECTION AND OTHER PURPOSES
RULE 43

* * * *

D. **Persons not parties.** [This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.] A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 55.

#

SUBPOENA

RULE 55

A. **Defined; form.** A subpoena is a writ or order directed to a person and may require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce evidence or permit inspection at a particular time and place. [It also] A subpoena requiring attendance to testify as a witness requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. **For production of [documentary] evidence or to permit**

inspection. A subpoena may [also] command the person to whom it is directed to produce and permit inspection and copying of designated [the] books, papers, documents, or tangible things [designed therein; but] in the possession, custody or control of that person, or to permit inspection of premises, at the time and place specified therein. A command to produce evidence or permit inspection may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises but not commanded to also appear for deposition, hearing or trial, may within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of evidence or inspection of premises the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may

(1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things or permitting inspection of premises.

C. Issuance.

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce for evidence or to permit inspection:

(i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it

may be issued by the judge, justice, or other officer before whom the attendance is required.

C(2) **By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; service by mail; proof of service.

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party 14 days before the time designated for production or inspection in the manner prescribed in Rule 9, unless the court orders a shorter period of notice.

D(2) **Service on law enforcement agency.**

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) Service by mail.

Under the following circumstances, service of a subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

Service of subpoena by mail may not be used for a subpoena commanding production of evidence or inspection of premises, not accompanied by a command to appear at trial or hearing or at deposition.

D(4) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such

terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions or requiring production of evidence or inspection of premises; place of production or examination.

F(1) Subpoena for taking deposition. Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of evidence or inspection of premises before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B, but in that event the subpoena will be subject to the provisions of Rule 36 C and section B of this rule.]

F(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce evidence only in the county wherein such person resides, is employed or transacts business in person,

or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce evidence only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

H. Hospital records.

H(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 through 441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 441.342 through 441.450.

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

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a

party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] 14 days prior to service of the

subpoena on the hospital.

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

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

H(3) Affidavit of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital,

staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the

custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT

The above amendments to ORCP 55 are an adaptation of the proposed changes to FR 45 which appear at the end of the February 9, 1990 memo relating to amendments of the federal rules. I attempted to simplify the changes as well as adapt them to the Oregon form. The federal amendment does not seem particularly well drafted and contains a lot of useless and repetitive material. I simply eliminated 45 (c)(1) and (3) and 45 (d) and (e) from the proposed federal rule.

The one thing I am not sure of is eliminating 45 (d)(1). It has some information about compliance with the subpoena. Other than that, the federal rule does not state exactly how the recipient of the subpoena complies with it. Generally, it would seem the requirement would be to show up at the time and place required with the documents requested. I assume the subpoena could contain some specific instructions if the party wishing it so desired. Because the mode of compliance with the hospital subpoena is so specific, I just left section 55 H alone.