COUNCIL ON COURT PROCEDURES

Saturday, June 9, 1990
9:30 a.m.

THE RIVERHOUSE
3075 North Highway 71
Bend, Oregon

A G E N D A

1. Approval of minutes of meeting of April 21, 1990
2. Report on "Law in the 90's Conference" (Ron Marceau)
3. Report on Portland public meeting on May 12, 1990 (Henry Kantor)
4. Judgments Subcommittee report - ORCP 68 (Judge Mattison) (draft attached)
5. Revision of ORCP 55 (Executive Director) (draft attached)
6. Revision of ORCP 68 C(2) (Executive Director)
7. Uniform Foreign Money Claims Act - John Salisbury (Executive Director)
8. Letter from Billy Sime (attached)
9. Staff comments and plans for publication of tentative amendments to rules (memorandum attached)
10. NEW BUSINESS

# # # # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 9, 1990

THE RIVERHOUSE
3075 North Highway 97
Bend, OR 97701

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

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

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

The Chair 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 April 21, 1990. The minutes of the meeting held April 21, 1990 were unanimously approved.

Agenda Item No. 2: Report on "Law in the 90's Conference" (Ron Marceau). Chair Ron Marceau stated that he had attended the "Law in the 90's Conference" at the Rippling River Resort in Welches, Oregon, from April 27 - 29. He stated that three items that related to the Council on Court Procedures were proposed:

1) The legislature or Council on Court Procedures should expand the right of prevailing parties to recover attorney fees.

2) A task force should be created to explore mechanisms for limiting discovery procedures, establishing discovery deadlines and increasing judicial control of

discovery, along the lines of arbitration model.

3) The Council on Court Procedures should adopt rules allowing the use of technology to save lawyer and court time, utilizing FAX, video and telephone.

He said that those items were not the leading issues of the conference and that the Council will have to await final tabulations as to what actually resulted from the conference. Chair Marceau also reported that Federal Judge Owen Panner gave a very good speech at the conference emphasizing that procedural matters -- particularly discovery -- were overwhelming the litigation process at the expense of expeditious determination. Judge Panner urged that the procedure be simplified toward the end that litigants would receive as quick a resolution of their disputes as practicable.

Agenda Item No. 3: Report on Portland public meeting on May 12, 1990 (Henry Kantor). Henry Kantor stated that he (representing the hearings committee of the Council) was present at the Red Lion Coliseum at the scheduled time of the Council's public meeting on May 12, 1990, and reported that no members of the public were present to offer comments on the actions of the Council thus far during the 1989-91 biennium.

Agenda Item No. 4: Judgments subcommittee report on ORCP 68 (Judge Mattison). Judge Mattison, Chair of the judgments subcommittee, stated that the subcommittee had met again and made further revisions to the prior draft (a copy of the judgments subcommittee memorandum is attached to these minutes as Exhibit No. 1).

The Council discussed the subcommittee's report and took the following actions:

On page 5, ORS 19.026(2), it was suggested by Judge Mattison that the words "by the appellant" be added after "supplemental judgment" in the third line from the end and that the words "by either party" be deleted at the end of the last sentence. After discussion, a motion was made by Bernie Jolles, seconded by Judge Snouffer, to adopt the suggested change. The motion passed with one opposed.

On page 5, in C(6)(a), it was decided to remove the comma after "claims" in the third line.

The Council discussed the wording in C(4)(b). After a lengthy discussion, it was suggested that the second sentence should read as follows: "The objections shall be served within 14 days after service in accordance with Rule 9 B of a copy of the statement on the objecting party." A motion was made by Judge Mattison, seconded by John Hart, to adopt the second

sentence as revised. The motion passed unanimously.

The Council discussed whether the language "signed in accordance with Rule 17" on line 4 of C(4)(b) should be included. The Council felt that the reference to signing in accordance with Rule 17 was unnecessary because Rule 17 already requires signing of the objections. The Executive Director was asked to include in the staff comment that there was no intent to change the existing requirement that the objections be signed as required by Rule 17.

The Council next discussed a letter from Judge Elizabeth Welch dated June 4, 1990 (attached as Exhibit No. 2), which was distributed at the meeting. In that letter, Judge Welch recommended that the exception in C(1)(a) for dissolution cases should be deleted. It was decided to defer final consideration of this matter until the Council's next meeting. In the meantime, Judge Johnson stated he would confer with Judge Welch regarding her proposal. It was also suggested that Judge Welch's letter be sent to the domestic relations section of the Oregon State Bar.

The Chair then asked for a motion to tentatively adopt the proposed amendments to Rule 68 and ORS 19.026(2) (as further amended at this meeting), and a motion was made by Judge Mattison, seconded by Bernie Jolles, to do so. The motion passed unanimously.

The Chair stated he would send the revised and tentatively adopted judgments subcommittee report to the State Court Administrator's committee for its review and comment, as well as to the Procedure & Practice Committee of the Oregon State Bar and to the committee (appointed by Chief Justice Peterson) which is working on the revision of ORS 19.

Agenda Item No. 6: Revision of ORCP 68 C(2) (Executive Director). The action taken by the Council relating to this item is listed out of order because it logically follows the Council's actions taken concerning the judgments subcommittee report regarding ORCP 68 C. Attached as Exhibit No. 3 is a separate amendment of 68 C(2). After discussion, a motion was made by Jack Mattison (seconded by Henry Kantor) and unanimously passed to incorporate the changes as shown in Exhibit No. 3 (with the substitution of the word "deemed" for "taken as" in the thirteenth line of that exhibit) in the judgments subcommittee May 30, 1990 report. It was noted that several changes in 68 C(2) by the judgments subcommittee had been adopted under Agenda Item No. 4 and should be included in the final revised version of 68 C(2).

Agenda Item No. 5: Revision of ORCP 55 (Executive

Director). The Executive Director had prepared a redraft of the proposed amendments to Rule 43 and Rule 55 to exclude inspection of premises (attached to these minutes as Exhibit No. 4). He stated that the redraft eliminates inspection of premises and restricts the administrative subpoena to producing evidence and permitting inspection of that evidence at a particular time and place. A letter from Larry Thorp dated June 6, 1990 was distributed at the meeting. In his letter, Larry Thorp suggested further revisions to the latest draft prepared by the Executive Director. A discussion followed.

Elizabeth Yeats pointed out that throughout the redraft of Rule 55, reference is made to producing "evidence" and stated that the term "evidence" seemed more limited than the scope of discovery under 36 B. It was decided that "books, papers, documents, or tangible things" be substituted for "evidence" throughout. It was also decided that, where appropriate, "permit inspection" would be changed to "permit inspection thereof". The Council decided not to exclude the first sentence as shown in the redraft.

It was also decided to change the word "till" to "until" in the seventh line of 55 A and to delete "inspection of premises" from the third sentence of Rule 55 B.

After discussion, the Council also decided to adopt the new sentence proposed by Larry Thorp (in his June 6, 1990 letter) to be placed at the end of 55 D(1) instead of the sentence shown in the redraft. With further amendments, that sentence would read as follows:

> "Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party fourteen days before the time designated for production, unless the court orders a shorter period."

Rick Barron moved, seconded by Judge Snouffer, to tentatively adopt the redraft of Rules 43 and 55 (as further amended at this meeting). The motion passed unanimously.

Agenda Item No. 7: Uniform Foreign Money Claims Act - John Salisbury (Executive Director). The Executive Director reminded the Council that he had received a letter from John Salisbury stating that the Uniform State Laws Committee had adopted for promulgation the Oregon Uniform Foreign Money Claims Act. He stated that the Act primarily relates to currency conversion and how claims against foreign defendants are described. The Executive Director stated that the only relation it bears to the

ORCP is that it would require a change in 70 A; he said the Committee had drafted no changes to the ORCP thus far. After discussion, the Executive Director was asked to contact Mr. Salisbury and inform him that the Council would be happy to review any proposed redraft of ORCP 70 A and to advise the legislature regarding any such redraft.

Agenda Item No. 8: Letter from Billy Sime (attached to these minutes as Exhibit No. 5). Attorney Billy Sime had written a letter to the Council (in response to an article appearing in the "Litigation Journal" regarding changes the Council had made), in which he objected to the deletion of ORCP 18 B(3). The Executive Director was asked to write Mr. Sime a letter informing him that the Council would reconsider the matter at its December 15, 1990 meeting and extending the invitation to Mr. Sime to attend that meeting.

Agenda Item No. 9: Staff comments and plans for publication of tentative amendments to rules (memorandum attached as Exhibit No. 6). The Executive Director explained that publication of proposed amendments (before the Council's September 8, 1990 meeting) in the Advance Sheets would be the most effective way to obtain input from the bar. It was emphasized that the Council would be taking further actions prior to its final meeting on December 15, 1990. The Executive Director wished to have suggestions from the Council members regarding the staff comments he had prepared (shown in Exhibit No. 6) for the proposed amendments. After discussion, the following changes were made:

> On page 7 of the summary, elimination of "the form of" and "case" in the first two lines of the comment to ORCP 7 D so that it would read: "The Council amendment of ORCP 7 D makes two major changes in motor vehicle service provided by that section:"
>
> Substitution of the word "concern" for "uneasiness" in the first line of the third paragraph of the comment to ORCP 7
>
> On page 2, in the comment to ORCP 18, substitute "ORCP 18 B(3)" for "subsection 18 B(3)"

The Executive Director stated that he would be circulating draft comments for the amendments to Rules 43, 55, and 68 tentatively adopted at this meeting to the Council members.

NEW BUSINESS

The Chair stated that the Council had received a letter from David Brewer, Chair of the Oregon State Bar Procedure & Practice Committee, regarding interrogatories and expert discovery. Mr. Brewer indicated that the OSB Procedure & Practice Committee

opposed interrogatories and were evenly divided on the issue of expert discovery. At the Committee's March 3 meeting, a resolution was unanimously passed that the OSB Procedure & Practice forward to the Council: (1) copies of proposed rule changes, (2) copies of articles both for and against, and (3) the general bar response received by the Committee to the proposals.

A motion was made by Judge Johnson, seconded by Mike Starr, that the Council advise the Bar that it is not interested in adopting interrogatories. The motion passed with 12 in favor, one opposed, and one abstention.

It was suggested that a subcommittee of three be assigned to review the material sent by the OSB Procedure & Practice Committee relating to discovery of expert witnesses and report back to the Council. Chair Ron Marceau appointed Judge Johnson, John Hart, and Mike Starr to the subcommittee and stated that the charge of the subcommittee would be to review and evaluate the OSB Committee's materials and make its recommendations to the Council regarding expert witness discovery or disclosure.

The next meeting of the Council will be held September 8, 1990, commencing at 9:30 a.m., at the Oregon State Bar Center, Second Floor (Room 7), 5200 SW Meadows Road, Lake Oswego.

The meeting adjourned at 11:58 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

May 30, 1990

MEMORANDUM

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

FROM: **Fred Merrill, Executive Director**

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

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

* * *

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

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

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

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

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

C(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees[;]. [a]An allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in [substantially] similar form to the allegations required by this subsection. Such allegation shall be taken as denied and no responsive pleading shall be

EXHIBIT 1 TO MINUTES
OF COUNCIL MEETING
HELD JUNE 9, 1990

EX 1-1

necessary. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

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

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

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

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

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

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

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

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

EX 1-2

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

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

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

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

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

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

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

C(4)(c) Hearing on objections.

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

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

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

EX 1-3

disbursements claimed in the statement.

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

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

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

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

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

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

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

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

EX 1-4

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

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

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

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

* * *

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

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

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

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

EX 1-5

entered in the register.

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

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

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

EX 1-6

ELIZABETH WELCH
JUDGE

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 4
[503] 248-3008

June 4, 1990

Mr. Fred Merrill
Executive Director
School of Law
Eugene, Oregon 97403-1221

RE: June 9, 1990 Meeting of the Council on Court Procedures

Dear Fred:

ORCP
Rule 68 Revision

I am very sorry that I cannot attend the Council Meeting on June 9. There are some issues that I wanted to raise regarding Rule 68. All of them but one are solved by the subcommittees' final draft - it's wonderful.

However, The Rule should delete the exception in C (1)(a) for dissolution cases. There is no discernible rationale for this exclusion. It's effect is cumbersome and wholly without redeeming value. It leaves the litigants in a position to ambush each other by requiring faithful adherence to the old stipulation process which is otherwise archaic to practitioners. It also leaves parties with pro per advisories practically without the ability to get attorneys fees.

I have mentioned to the domestic relations bar in CLE sessions my desire to seek this change and have invited comments -- no one disagrees.

Hope I have been provocative.

Kindest regards

Betsy

EXHIBIT 2 TO MINUTES
OF COUNCIL MEETING
HELD JUNE 9, 1990

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

EXHIBIT 3 TO MINUTES
OF COUNCIL MEETING
HELD JUNE 9, 1990

EX3-1

fees shall be awarded unless a right to recover such fee is [asserted] **alleged** as provided in this subsection.

EX 3-2

REDRAFT IN RESPONSE TO SUGGESTIONS AT APRIL 21, 1990 MEETING

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND 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

EXHIBIT NO. 4 TO MINUTES
OF COUNCIL MEETING HELD
JUNE 9, 1990

EX 4-1

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 at the time and place specified therein. A command to produce evidence and 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. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials 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 the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance

EX 4-2

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.

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 and 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

EX 4-3

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 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

EX 4-4

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

EX 4-5

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, 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

EX 4-C

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; place of production and 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 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

EX 4-7

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] **health care facility defined in ORS 442.014(13)(a) through (d) and** licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] **441.097 and community health programs established under ORS 430.610 through 430.700.**

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

EX 48

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] <u>14</u> days prior to service of the subpoena on the hospital.

EX 4-9

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,

EX 4.10

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

EX 4-11

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.

EX 4-12

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May 24, 1990

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

Dear Mr. Merrill:

I recently read in the Litigation Journal that the Counsel on Court Procedures has recommended an amendment to ORCP 18 which would delete ORCP 18(B)(3), which currently requires a party making a claim to supply the adverse party with the statement of the amount of non-economic damages claimed. I believe that it would be a mistake to adopt that amendment.

Prior to 1987, ORCP 18 required a party asserting a claim for relief to state the amount of damages claimed. In 1987, the Oregon Legislature adopted Senate Bill 323. Among other things, the bill amended ORCP 18 to provide that the amount of non-economic damages shall not be pleaded in a complaint, but that the party making a claim must submit a written statement to the opposing party concerning the amount claimed for non-economic damages.

The changes in ORCP 18 that were make in 1987 create several problems. Prior to 1987, it was clear that the amount claimed in the complaint set the outside limit of any recovery by plaintiff in a personal injury action. Since the change, attorneys for defendants have frequently argued that the plaintiff's statement of the amount of non-economic damages served the same function as an allegation or prayer in the pleading and set the outside limit for any recovery, even though the statement was not filed with the court. On the other hand, attorneys for plaintiffs have argued that because there is no statement filed with the court, there is no limit on the amount of non-economic damages which can be recovered (other than the statutory limit of $500,000), and that the jury should not be instructed concerning the amount of non-economic

EXHIBIT NO. 5 TO MINUTES
OF COUNCIL MEETING HELD
JUNE 9, 1990

EX 5-1

damages claimed. To my knowledge, there is no Oregon Appellate Court decision which has resolved the conflict.

I believe that a complaint in a civil action should be required to clearly state the amount of recovery sought. In the alternative, plaintiff should be required to provide a statement of the amount of damages claimed which establishes the outside limit for any recovery.

The defendant in a civil case is entitled to know the outside limit of the defendant's exposure to damages so that the defendant can make a reasoned decision in evaluating the case for settlement purposes or trial. If a defendant is not provided with some statement of the amount of non-economic damages sought, there is no way for the defendant to tell whether the claim exceeds the amount of the defendant's liability insurance, and there is no way for the defendant to know whether the excess insurance carrier should be notified.

For the above reasons, I believe that the provisions of ORCP 18 B (3) should not be deleted. I want to thank you and the Counsel of Court Procedures for considering these comments.

Very truly yours,

Billy M. Sime

BMS:pc

EX 5-2

May 31, 1990

M E M O R A N D U M

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

FROM: **Fred Merrill, Executive Director**

RE: **SUMMARY OF COUNCIL'S ACTIONS TAKEN TO DATE DURING THIS BIENNIUM**

The next meeting of the Council will be held September 8, 1990. We need to submit the proposed amendments, which the Council has tentatively adopted, to the State Court Administrator's Office for publication in the Advance Sheets before that meeting. I am, therefore, submitting a summary of what we have done so far with staff comments for your review.

1. At its October 14, 1989 meeting, the Council held a discussion as to whether or not a statement specifying the amount of noneconomic damages under ORCP 18 B(3) limits the amount of recovery. Henry Kantor, Chair of the miscellaneous inquiries subcommittee, stated that the subcommittee was recommending that ORCP 18 B(3) and 69 B(2) be repealed. No action concerning 69 B(2) was taken at the October 14 meeting, but the Council voted (9-4) to delete all of ORCP 18 B(3). Rule 18 (as amended) is set forth below:

CLAIMS FOR RELIEF

RULE 18

Claims for relief.

A. A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A(1) A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

A(2) A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, except as provided in section B of this rule; relief in the alternative or of several different types may be demanded.

EXHIBIT NO. 6 TO MINUTES
OF COUNCIL MEETING HELD
JUNE 9, 1990

EX6-1

B(1) The amount sought in a civil action for noneconomic damages, as defined in ORS 18.560, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

[B(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.]

COMMENT

The 1987 Legislature provided in ORCP 18 B that noneconomic damages not be pleaded in the complaint. In subsection 18 B(3), the legislature did require that the party making the claim provide the defendant with a written statement of noneconomic damages claimed. The Council received a number of inquiries whether the statement of noneconomic damages actually limited the amount that could be recovered. The Council felt the simplest way to resolve the question was to eliminate subsection 18 B(3). Since the statement was expressly not part of the record in the case, it appeared to have no binding effect limiting damages or controlling the amount of damages actually claimed at trial.

* * * *

2. Henry Kantor also reported at that meeting concerning an inquiry from Warren Deras relating to service of summons on incapacitated persons. He stated that the subcommittee did not feel there was a problem with service on incapacitated persons that required amendment of the rules. However, the subcommittee did feel that the phrase "incapacitated person" could be more clearly defined. The Council voted to add the language "as defined by ORS 126.003(4)" to the words "incapacitated person" in ORCP 7 B [sic - should be D], 27 B, 69 B, and any other location where they appear in the ORCP.

SUMMONS
RULE 7

* * * *

D. Manner of service.

* * *

D(3)(a)(iii) **Incapacitated persons.** Upon an incapacitated person <u>as defined by ORS 126.003(4)</u>, by service in the manner

EX6-2

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

* * *

MINOR OR INCAPACITATED PERSONS
RULE 27

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person as defined by ORS 126.003(4), who has a conservator of such person's estate or a guardian, is a party to any action, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

* * * *

DEFAULT ORDERS AND JUDGMENTS

RULE 69

* * *

B. Entry of default judgment.

B(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon the contract;

EX6-3

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person **as defined by ORS 126.003(4)** and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against home judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), &D(3)(e) or 7 D(3)(f).

B(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person **as defined by ORS 126.003(4)** unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

* * *

COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to make clear that the definition applies to the ORCP as well as ORS sections.

EX6-4

3. At its December 9, 1989 and January 13, 1990 meetings, the Council adopted the following amended version of ORCP 7 D:

SUMMONS
RULE 7

D. Manner of service.

* * * *

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

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

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf [, except a defendant which is a foreign corporation maintaining a registered agent within this state,] **who cannot be served with summons by any method specified in subsection 7 D(3) of this rule,** may be served with summons [by personal service upon the Motor Vehicles Division and mailing by registered or certified mail, return receipt requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.]

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

EXC-5

D(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.] **unless the plaintiff submits an affidavit showing:**

(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

EX6-6

(iii) that service of summons could not be had by any method specified in subsection 7 D(3) of this rule.

* * *

D(7). Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection 7 D(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection 7 D(3) and was unable to successfully complete service.

COMMENT

The Council amendment of ORCP 7 D makes two major changes in the form of motor vehicle case service provided by that section: (1) The new language separates the requirements necessary for adequate service of summons from the conditions for securing a default, and (2) service of summons on the Department of Motor Vehicles under ORCP 7 D(4) becomes an alternative form of service which is only available when service cannot be made upon the defendant by any of the methods specified in ORCP 7 D(3).

The first major change was a reaction to Hoyt v. Paulos, 96 Or App 91, 93-94 (1989). In that case, the Oregon Court of Appeals held that delivery of a copy of the summons and complaint to the defendant's insurance company was not part of service of summons for limitation purposes. The new language makes clear that under 7 D(4)(a)(i) the actual service of process only requires service upon the Department of Motor Vehicles and supplementary mailing to the defendant. Presumably this would satisfy the statute of limitations. However, no default is possible under 7 D(4)(c) until 14 days after the defendant takes the added step of mailing to defendant's insurer if one is known or can be identified. The amended language clearly requires the plaintiff to make inquiry of the Department of Motor Vehicles to determine whether their records show an insurer for the defendant. It also allows service on the DMV to be by mail as well as personal delivery to a DMV office. The new language makes clear that if mailing is required to multiple addresses for a defendant, service is complete upon the first mailing.

The second major change reflects some uneasiness regarding the effectiveness of notice to a defendant by service upon the Department of Motor Vehicles. By making such service only available as an alternative to forms of service under ORCP 7 D(3), DMV service when used would be the most reasonable one available under the circumstances. A new subsection, ORCP 7 D(7), makes clear that the plaintiff is only required to show a reasonable attempt to use any method available under ORCP 7 D(3), similar to the showing required for use of 7 D(6), and not the extensive search for defendant required in cases interpreting

EX6-7

earlier statutory language such as Ter Har v. Backus, 259 Or 478 (1971).

4. At its February 10, 1990 meeting, the Council voted unanimously to adopt the proposal of the ORCP 55 H subcommittee to amend 55 H(1) as follows:

H. Hospital records.

H(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a [hospital] health care facility defined in ORS 442.014(13)(a) through (d) and licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] 441.097 and community health programs established under ORS 430.610 through 430.700.

COMMENT

The Council decided that the existing definition of "hospital" in ORCP 55 H(1) was incorrect. The corrected definition includes traditional hospitals which treat the mentally or physically ill, rehabilitation centers, college infirmaries, chiropractic facilities, facilities for the treatment of alcoholism or drug abuse, and any other facilities which the Health Division determines are classified as "hospitals". Also included are: hospital-associated ambulatory surgery centers, which are surgery centers operated by hospitals but independently from the hospital campus; long-term care facilities, including both skilled nursing facilities and intermediate care nursing facilities; free-standing ambulatory surgery centers, such as those operated by many physicians groups; and, county mental health clinics. All of these, except county mental health clinics, were included in the prior definition. The new definition excludes some organizations that were covered by the prior definition, including free standing birthing centers, health maintenance organizations, and hospital facility authorities.

5. The Council at its February 10, 1990 meeting also voted 10-4 to amend ORCP 70 C as follows:

FORM AND ENTRY OF JUDGMENT
RULE 70

* * *

C. Submission of form of judgment. Attorneys shall submit proposed forms for judgment at the direction of the court rendering the judgment. The proposed form must comply with section A of this rule. [When so ordered by the court,

EXG-8

the proposed form of judgment shall be served five days prior to the submission of judgment in accordance with Rule 9 B. The proposed form of judgment shall be filed and proof of service made in accordance with Rule 9 C.]

COMMENT

The Council decided that the existing language in ORCP 70 C relating to service of proposed forms of judgment by the parties was unclear. It decided to leave the question of the conditions relating to the submission of judgment to direction of the court in the particular case. The court in directing submission of proposed judgment forms has ample authority to direct the circumstances of such submission. The Council eliminated the last two sentences of ORCP 70 C.

EX6-9