COUNCIL ON COURT PROCEDURES

Saturday, November 17, 1990

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

A G E N D A

1. Approval of minutes of meeting held October 13, 1990

2. Expert discovery

3. Report of judgments subcommittee (Judge Mattison) (see attached memorandum dated October 22, 1990)

4. Proposed amendments; comments received (see attached Executive Director's memorandum dated September 28, 1990 and letter from Attorney Ivan S. Zackheim dated October 11, 1990)

5. Remarks by Bernie Jolles regarding sealing settlement records (see letter attached)

6. Letter from Attorney B. Kevin Burgess regarding ORCP 54 A(3) (see attached letter)

7. Letter from Attorney Donald V. Reeder regarding reduction in court filings (see attached letter)

8. Letter from Attorney Peter J. Mozena regarding adoption of a rule providing for withdrawal of attorneys (see attached letter)

9. Letter from Attorney Keith Burns regarding ORCP 39 C(7) (see attached letter)

10. NEW BUSINESS

# # # # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 17, 1990

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

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

Also present were Susan Grabe, with the Oregon State Bar, and Attorneys Larry Wobbrock and Jan Baisch.

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

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The meeting was called to order by Chairer Ron Marceau at 9:30 a.m. in the State Bar Offices in Lake Oswego Oregon.

Agenda Item No. 1: Approval of minutes of meeting held October 13, 1990. The minutes of the Council meeting held October 13, 1990 were unanimously approved.

Agenda Item No. 2: Expert witness discovery. Ron Marceau reviewed his memorandum, dated November 8, 1990, to Council members relating to procedure for consideration of an expert discovery rule **(memorandum attached as Exhibit A).** The Executive Director then reviewed the draft of ORCP 36 B(4) which he had prepared based upon suggestions at the last meeting **(draft attached as Exhibit B).** He noted that he had received suggestions from Judge Graber subsequent to the meeting which had been incorporated into the draft. Letters commenting on the draft from Judge Mattison and Larry Thorp were distributed at the meeting **(letters attached as Exhibits C and D).** Also distributed at the meeting were a letter from Attorney Michael S. Morey and a memorandum from Phil Chadsey **(attached as Exhibits E and F).** Both items pertained to expert discovery.

After extensive discussion, a motion was made by Judge Johnson, seconded by Judge Liepe, to delete "Upon request of any party, any other party" from the first sentence of 36 B(4)(a) and to have the section begin: "All parties shall ...", and to amend the last sentence of 36 B(4)(a) to eliminate the words "receiving a request for delivery of such statement". Judge Johnson stated that the purpose of the change was to do away with the requirement of a request and make disclosure of the name and qualifications of all experts automatic unless the court ordered otherwise. The vote resulted in 11 in favor, one abstention, and one opposed.

A motion was then made by Judge Johnson, seconded by Mike Starr, that the number of days in 36 B(4)(b) be changed from 14 to seven. The vote resulted in 13 in favor, with one abstention. Judge Johnson then moved, with a second by Bernie Jolles, that the words "except a party" be added at the end of ORCP 36 B(4)(c). The motion passed with 12 in favor, one opposed, and two abstentions.

A motion was made by Judge De Muniz, seconded by Bernie Jolles, to change the language in the fourth line of 36 B(4)(a) from "reasonably expects to call as an expert witness" to "intends to call as an expert witness." The motion passed unanimously.

The Council discussed the possibility of a adopting a rule limiting the number of expert witnesses which a party could call. Some doubt was expressed by Council members whether this was a rule of evidence or procedure, and no action was taken. After further discussion, a motion was made by Judge Johnson, seconded by Mike Starr, to adopt language changing "deliver" and "delivered" in 36 B(4)(a) to "serve" and "served". A vote was taken with 14 in favor and one opposed.

A motion was made by John Hart, seconded by Judge Liepe, to change seven days to 14 days in B(4)(b). After discussion, a vote was taken resulting in 5 in favor and 10 opposed.

A motion was made by Judge Liepe, seconded by Mike Starr, to provide that 36 B(4) did not apply to district courts. After discussion, a vote was taken resulting in 5 in favor and 10 opposed.

Judge Liepe indicated that he wanted to reconsider the question whether any expert discovery rule should apply to medical experts. The Chairer suggested that the matter be raised again at the December meeting.

The Council then discussed a draft of an expert discovery rule prepared by Judge McConville **(draft attached as Exhibit G).**

The Chairer pointed out that the two essential differences between the draft of 36(b)(4) just discussed and Judge McConville's version was that Judge McConville's rule would require disclosure of the subject matter of a witness's testimony, in addition to identity and qualification, and Judge McConville's rule would allow the court to order further discovery in some cases. The Chairer suggested that these differences should be resolved at the December meeting.

After discussion, a motion was made by Judge Johnson, seconded by Judge McConville, to add the words "upon which the party will rely at trial" after the word "qualifications" in the second sentence of ORCP 36 B(4)(a). After further discussion a vote was taken resulting in 3 in favor and 12 opposed.

Agenda Item No. 5 (taken out of order): Remarks by Bernie Jolles regarding sealing settlement records (letter attached to agenda). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 3: Report of judgments subcommittee (memo and redraft of ORCP 68 attached as Exhibit H). A letter from Phil Lowthian was distributed at the meeting **(attached as Exhibit I).** Consideration of the suggestions in his letter was deferred until the December 15, 1990 meeting.

The Chairer stated that Judge Mattison's subcommittee had prepared a redraft of ORCP 68 incorporating changes suggested by the Judicial Department's committee. The only disagreement between the subcommittee and the Judicial Department Committee is over whether to amend ORS 19.026. After discussion, the Chairer was asked to contact the Chief Justice of the Supreme court and the Chief Judge of the Court of Appeals to determine their attitude toward the proposed amendment to ORS 19.026. It was suggested that further action on ORS 19.026 be deferred until the December meeting.

A motion was made by Judge Johnson, seconded by Lafe Harter, to endorse the Council's revisions to ORCP 68. A vote was taken resulting in 10 in favor and 4 abstentions.

Agenda Item No. 6 (out of order): Letter from Attorney B. Kevin Burgess regarding ORCP 54 A(3) (attached as Exhibit J). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 7: Letter from Attorney Donald V. Reeder regarding reduction in court filings (attached as Exhibit K). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 8: Letter from Attorney Peter J. Mozena

regarding adoption of a rule providing for withdrawal by attorneys (attached as Exhibit L). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 9: Letter from Keith Burns regarding ORCP 39 C(7) (attached as Exhibit M). Consideration by the Council of this agenda item was deferred until the next biennium.

Agenda Item No. 4: Proposed amendments; comments received; Executive Director's memorandum dated September 28, 1990 (attached as Exhibit N); letter from Attorney Ivan S. Zackheim dated October 11, 1990 (attached as Exhibit O).

The Council considered the Executive Director's memorandum as set out below.

Item I of memorandum

The Council has tentatively adopted the proposed amendments to ORCP 68 C(2) (suggested by Judge Welch).

Item IIA of memorandum

The Council discussed the comments of Craig West, Denny Hubel, and Ivan Zackheim relating to the proposed amendment to ORCP 7 D. Council members indicated that Craig West's suggestion that ORCP 7 D(7) might be read to require that all forms of service available under Rule 7 be attempted before service on the Motor Vehicle Division is allowed merited further consideration. The Chairer asked the Executive Director to furnish a draft amendment that might clarify the rule for consideration at the December meeting. The Executive Director was also asked to modify the comment to Rule 7 in response to the suggestions by Craig West and Denny Hubel.

Item IIB of memorandum

The Council discussed the comments of Denny Hubel, Win Calkins, and Lauren Underwood and James Hiller.

After discussion, Judge Johnson made a motion, seconded by John Hart, to adopt James Hiller's proposal set out on page 3 of the memorandum. Larry Thorp moved to amend the motion to provide that the statement of noneconomic damages limit recovery, but that the jury not be instructed to this effect. Judge Liepe seconded the motion. The motion to amend passed with 8 in favor, four opposed, and two abstentions. A vote was then taken on the main motion which resulted in 6 in favor and 7 opposed and one abstention.

A motion was made by Judge McConville, seconded by John Hart, to leave B(3) in ORCP 18. The Chairer suggested that the

matter be considered at the December meeting and no vote was taken on the motion.

Item IIC(1) of memorandum

The Council discussed the comment by Nathan McClintock relating to ORCP 55. No action was taken by the Council.

Item IIC(2) of memorandum

The Council discussed the comment by P. Conover Mickiewicz relating to availability of documents produced by subpoena to all parties. Some Council members suggested that documents should only be available to the requesting party, and pointed out that each party could request its own production by subpoena. After discussion, a motion was made by Maury Holland, seconded by Judge Liepe, to amend ORCP 55 by adopting a new subsection F(3) (set out on page 4 of the memorandum). The motion failed with one in favor, 9 opposed and three abstentions.

The next meeting of the Council will be held on Saturday, December 15, 1990, commencing at 9:30 a.m., in the Oregon State Bar Offices in Lake Oswego.

The meeting adjourned at 12:55 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

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November 8, 1990

TO: **COUNCIL ON COURT PROCEDURES MEMBERS**

FROM: RON MARCEAU, Chair

RE: EXPERT WITNESS DISCOVERY

Enclosed is a draft, prepared by Fred Merrill, of a new Rule 36B.(4). It provides for discovery of an expert witness' name and qualification. The only comments from CCP members which Fred received were from Justice Graber.

This rule embodies the only concept which received majority support at the last CCP meeting held October 13, 1990.

Here is the procedure I suggest for further CCP consideration on the subject of expert witness discovery:

- CCP consideration should be confined to Fred's draft Rule 36B.(4) or something very much like it. The preferences expressed by the Council at the October 13, 1990 meeting suggest that there isn't any point in pursuing expert witness discovery other than this name and qualification alternative.

- A first order of business should be to determine whether any refinements are necessary to Fred's proposed Rule 36B.(4). Fred will brief the Council on why he drafted the proposal as he did.

- Unfortunately we ran into a time deadline in connection with our statutory notice requirement. We must publish "the substance of the agenda" of our December 15 meeting (when the council will formally promulgate the various rules that will be submitted to the legislature). We just learned Tuesday that we had to get this notice to the Bar by Tuesday afternoon in order to get it published

Exhibit A

Ex A-1

before the December 15 meeting. The notice will include all of the rule revisions which we have tentatively adopted. I realize the Council has not tentatively adopted an expert witness discovery rule. This would have been the first order of business at the forthcoming November 17 meeting. But because of the publication deadline, and because of the Council's heavy involvement in expert witness discovery (and the fact a bill is pending before the Legislative Interim Committee), I had Fred Merrill include in the notice that the Council will consider expert witness discovery at its December 15 meeting. This means the Council can vote expert witness discovery up or down on December 15. We should be able to finalize a proposed rule at the November 17 meeting for consideration at the December 15 meeting.

- Remember that in order to be formally adopted at the December 15 meeting, this proposed rule (as well as the others which we have tentatively adopted) must be approved by a majority of the Council. This is a 23 person Council so each proposed rule must receive 12 affirmative votes.

- If this proposed rule is formally promulgated by the Council, it will be submitted to the legislature for legislative review. The Council will go to bat for the rule during the legislative process.

Here are some assumptions I will be proceeding on at the November 17 meeting:

- The Council has heard all it wants to hear on expert witness discovery by way of testimony from the public. So unless someone not on the Council has something new and different to offer, discussion of expert witness discovery will be confined to Council members.

- Whatever the Council does (or does not do) on expert witness discovery will determine the position Council will be taking during the legislative session. If the Council does not adopt any form of expert witness discovery, then we will be going to bat against expert witness discovery during the legislative session.

If I am missing anything here, please let me know.

Encl.
1108ccp.mem

EX A-2

DRAFT OF EXPERT DISCOVERY RULE 36 B(4) BASED UPON ALTERNATIVE 4 IN SEPTEMBER 18, 1990 MEMORANDUM

RULE 36
GENERAL PROVISIONS CONCERNING DISCOVERY

* * * * *

B.(4) Expert Witnesses.

B.(4)(a) Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert witness at trial and shall disclose in reasonable detail the qualifications of each expert. A party receiving a request for delivery of such statement may seek an order limiting disclosure under Section C of this rule.

B.(4)(b) The statement shall be delivered not less than 14 days prior to the commencement of trial. The court may allow a shorter or longer time. The statement may be amended without leave of court any time up to 14 days before trial. Otherwise, a party may amend the statement only by leave of court or by written consent of the adverse party. Leave of court shall be freely given whenever justice so requires.

B.(4)(c) As used in this section, the term "expert witness" means any person testifying in accordance with ORS 40.410.

B.(4)(d) Except as provided by Rule 44, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

* * * * *

RULE 46
FAILURE TO MAKE DISCOVERY; SANCTIONS

* * * * *

A.(2) **Motion.** If a party fails to furnish the statement required by Rule 36 B(4), or if a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question ...

* * * * *

D. Failure of a party to furnish statement relating to expert witnesses or to attend at own deposition or respond to

Exhibit B

EX B-1

request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director of managing agent of a party or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, **or (3) to furnish the statement required by Rule 36 B(4),** the court ...

EX B-2

CIRCUIT COURT OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

JACK L. MATTISON
JUDGE

687-4257

November 15, 1990

Mr. Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon
Eugene, OR 97401

Re: Proposed Rule 36B(4)

Dear Fred:

I cannot attend the November 17 meeting, so I would appreciate your sharing what follows with the Council.

I do not believe there is any need for changes regarding the discovery of expert witnesses, but if one along the lines of your proposed one is going to be adopted, I would suggest that the second sentence of B.(4)(b) be deleted. That entry to a judge will generate a motion for production of the proposed statement much earlier than fourteen (14) days prior to trial in every professional negligence and products liability case filed. As I recall Judge Panner's advice, it was to keep the disclosure date as close as possible to the trial date, perhaps as close as seven (7) days.

Thank you.

Very truly yours,

Jack Mattison

Jack Mattison
Circuit Judge

JM/rl

Exhibit C

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

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G. David Jewett
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Douglas R. Wilkinson
J. Richard Urrutia

Jan Drury
Office Manager

Marvin O. Sanders
(1912-1977)
Jack B. Lively
(1923-1979)

November 13, 1990

VIA FACSIMILE

Mr. Fred Merrill
University of Oregon
School of Law
Eugene, Oregon 97403

RE: Council on Court Procedures

Dear Fred:

I reviewed the proposed language for ORCP 36B. My only concern is that while the statement is required to be given not less than fourteen days prior to the commencement of trial, there is no comparable requirement that the requesting party give the respondent a reasonable period of time in which to file the statement. In other words, a party requesting the statement could make the request fifteen days before trial and the responding party would have to provide the statement within twenty-four hours. That of course, could lead to some unfairness.

I would suggest that this matter be dealt with by changing the first sentence of paragraph B to read as follows:

"The statement shall be delivered not less than fourteen days prior to the commencement of trial or fourteen days after the date of the request, whichever is later."

Very truly yours,

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

Laurence E. Thorp

LET:js
cc: Mr. Ronald L. Marceau

Exhibit D

MICHAEL S. MOREY
ATTORNEY AT LAW
700 BENJ. FRANKLIN PLAZA
ONE S.W. COLUMBIA
PORTLAND, OREGON 97258

MEMBER OREGON AND WASHINGTON BARS

TELEPHONE (503) 226-3415

November 16, 1990

VIA FACSIMILE

Dr. Fredric Merrill
Council on Court Procedures
Oregon State Bar
5200 S.W. Meadows Road
P.O. Box 1689
Lake Oswego, Oregon 97035-0889

Dear Dr. Merrill and Members of the Council on Court Procedures:

I am writing to express my strong objection to the proposed modification of Oregon law on the discovery of expert witnesses. Although I am presently a member of the Oregon Trial Lawyers Association, my perceptions and comments come from having worked both sides of the plaintiff/insurance defense field. I was a member of the Oregon Association of Insurance Defense Counsel for six years and a partner in an insurance defense firm.

I am also a member of the Washington bar and am heavily involved in litigation in the State of Arizona. Both of those states allow discovery of expert witnesses.

I am firmly convinced that there is no reason to change Oregon law. To begin with, the discovery of experts unquestionably results in substantial delay of the litigation process. Insurance defense lawyers feel compelled (and perhaps justifiably so) to do extensive discovery of documents and deposing of experts in those states where it is allowed. My experience in the Arizona litigation has convinced me that this has only resulted in substantial delay while dramatically increasing the cost of litigation.

Although the present Oregon proposal is limited to disclosure of expert witnesses, even that limited change is not needed and will be detrimental to the litigation process. In particular, it is already difficult enough to get doctors to agree to testify in medical malpractice cases. I can only imagine the type of

Exhibit E

EXE-1

professional peer pressure that will result if disclosure is required.

I am also concerned that the present Oregon proposal is only the tip of the iceberg. The next logical step will be full expert discovery. Oregon's present system is working; it is fair and cost effective.

Very truly yours,

Michael S. Morey

MSM:agm

EXE-2

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April 28, 1988

Ms. Gayle L. Troutwine
Williams & Troutwine, P.C.
1100 Standard Plaza
1100 SW Sixth Avenue
Portland, OR 97204

Re: Discovery of Experts Sub-Committee of OSB P & P Committee

Dear Gayle:

Enclosed is the information which I received from a member of the New York Bar concerning that state's change in statute to allow the discovery of experts and their opinions. Apparently they have the same concerns that we have about medical experts involved in malpractice cases being intimidated, because the statute specifically excludes them from the discovery.

Sincerely,

Phil Chadsey

PDC:jss
Enclosure
cc: Mr. Jack F. Olson
Mr. Andrew K. Chenoweth
Mr. David A. Hytowitz
Ms. Janice M. Stewart

Exhibit F

EX F-1

PDCS314

DISCOVERY OF EXPERT WITNESSES

OPINION SURVEY OF EASTERN OREGON LAWYERS

A survey of Eastern Oregon attorneys from Hood River, Hermiston, Pendleton, LaGrande, Baker, Vale, Mt. Vernon and Bend indicates unequivocably that they prefer that the Oregon rule be left "as is".

Reasons given were to liberalize discovery of expert witnesses would lead to:

(1) excessive costs for expert shopping;

(2) excessive costs in paper work;

(3) for the small firm disclosure of expert witnesses tends to scare off local expert witnesses who serve in this capacity;

(4) related to all the above it tends to create a tit for tat situation, e.g., I disclose a favorable expert witness, the opposition seeks a more favorable (more expensive) counter expert and I seek a more expensive . . ., etc. etc.

In general it contributes to the paper work, additional costs, etc., which in our view, out weighs the advantages of greater disclosure, presumably for the purpose of being more proficient, perhaps leading to settlements, clarifying the issues and so forth.

I am presently involved in the WPPSS litigation and the battle of the experts is formidable. The opposition has experts from Yale and Georgetown who have written numerous treatises on the subject at hand and we have countered with an expert from Harvard who has great "TV appeal". The opposition has retaliated with an expert who presumably has a special appeal to an Arizona federal jury panel. In my opinion none of these experts contribute to the "search for truth" and "the enlightenment of the jury".

I am now involved with a case in California in which I am advised by the California attorneys to not question certain expert witnesses at this stage so that we will not have to disclose nor prepare summaries.

This survey includes primarily general practitioners who do some personal injury work, some insurance defense work; and, it also includes attorneys who do primarily defense work and attorneys who do primarily insurance defense work.

I believe the survey is an accurate representation of the Eastern Oregon lawyers' feelings on this subject.

Respectfully submitted,

M. D. Van Valkenburgh

EX F-2

Exhibit C

DISCLOSURE OF EXPERTS

1. Not later than 14 days before the date set for trial, each party shall file and serve upon all other parties to an action a statement containing the following information: (1) The name of each non-party expert whom the party intends to call as an expert witness at trial; (2) a list of all of the professional qualifications upon which the party will rely at trial to qualify the witness to give expert testimony; and (3) a description of the subject matter of the witnesses testimony, but not the opinions or facts to which the witness will testify.

2. In the event a party fails to timely serve and file the statement provided in Section 1 above, the Court shall have authority to impose an appropriate sanction or sanctions against such party, or the attorney for such party, or both, including but not limited to: (1) prohibiting or limiting the testimony of an expert witness; (2) ordering that an expert shall be subject to pre-trial discovery; (3) assessing attorney fees and reimbursement of expenses in favor of a party who has incurred or will incur additional expenses and attorney fees on account of such non-disclosure.

3. The filing and service of a statement in accordance with Section 1 shall not constitute a waiver of any privilege provided by law.

4. Unless otherwise agreed by the parties, or ordered by the Court for good cause shown, a non-party expert witness shall not be subject to pre-trial discovery as an expert.

Exhibit G

October 22, 1990

M E M O R A N D U M

TO: **JUDGMENTS SUBCOMMITTEE:**

Judge Mattison
Judge Liepe
Judge McConville
Susan Bischoff
Larry Thorp

FROM: **Fred Merrill**

RE: **Amendments to Rule 68**

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

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

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

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

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

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

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

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

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

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

Exhibit H

EX H-1

REDRAFT - OCTOBER 1990

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

* * *

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

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

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

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

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

C(2) [Asserting] Alleging claim for attorney fees. A party [seeking] **claiming** attorney fees shall [assert the right to recover such fees by alleging] **allege** the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. [A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient.] **Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded**

EX #1-2 attachment for 11-17-90 agenda

unless a right to recover such fee is alleged as provided in this subsection.

C(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be [asserted by a demand for attorney fees] alleged in such motion, in [substantially] similar form to the allegations required [by this subsection] in a pleading.

C(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to "reasonable attorney fees" is sufficient.

C(2)(d) [Such allegation] Any claim for attorney fees in a pleading or motion shall be [taken as] deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees shall be waived if not [asserted] alleged prior to trial or hearing. [Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.]

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

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

EX H-3

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.

EX H-4

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

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

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

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

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

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

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

EX H-5

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

C(4)(c) Hearing on objections.

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

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

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

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

EX H-6

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

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

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

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

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

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

Ex H-7

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

COMMENT

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

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

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

EX H-8

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

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

ORS 19.026

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

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

Ex H-9

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

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

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

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

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

Ex H-10

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 H-11

PHILIP H. LOWTHIAN
Attorney at Law
828 S.W. First Ave. (#200)
Portland, OR 97204
(503) 223-2381

November 12, 1990

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

Re: 12/15/90 final action on proposed amendments to ORCP 68C(4)(c) and (d), and 68C(5).

Dear Prof. Merrill:

Don't adopt the proposed amended ORCP 68C(4)(c)(ii), 68C(4)(d), and 68C(5).

At the very least, proposed 68C(4)(c)(ii) does not belong in proposed 68C(4)(c) which purports to deal with hearings on objections. Why should there be hearings on untimely objections, at all, as proposed? We know the judge will consider, at any hearing on untimely objections, objections which come too late; the 14 day limit on objections will thus be rendered ineffective. In other words, I know that my late objections will be considered as long as I get them to the judge before the amount of the fees are finally decided; I may even be able to argue all the way up to the entry of the "inclusion" provided by proposed C(5)(a), or the entry of the "supplemental judgment" provided by proposed 68C(5)(b).

There has been resistance, from the bench and the clerks, to implementation of present ORCP 68C(4)(a) and 68C(5); the Council should work to overcome it. The clerks resist because most have never adopted the theory that they work for the system, rather than the judges. The judges resist to protect what they think is their turf; they like to use their power over attorney fees to run the underlying cases, and to control the pesky lawyers.

To the extent possible, attorney fees should be removed from the discretion of judges. The proposed amendments go in the wrong direction, and will lengthen the process.

Yours truly,

Philip H. Lowthian

Exhibit I

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(503) 362-8726

September 10, 1990

FRED MERRILL, EXECUTIVE DIRECTOR
COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON
SCHOOL OF LAW
UNIVERSITY OF OREGON
EUGENE OR 97403

Re: ORCP 54A(3)

Dear Mr. Merrill and Committee Members:

I would appreciate the Committee's response to the following queries regarding ORCP 54 A(3):

1. Does the use of the word "may" give the court greater discretion in awarding attorney fees when a case is dismissed pursuant to ORCP 54A(1) than it otherwise would have if judgment were entered after a contested hearing; and

2. What "circumstances" justify a determination that the dismissed party is not a prevailing party, and may the court conduct a mini-trial regarding substantive issues in the case to make a determination concerning a prevailing party.

Your prompt consideration is appreciated.

Sincerely,

B. Kevin Burgess

B. Kevin Burgess

BKB:sp

Exhibit J

GLENN, SITES & REEDER
ATTORNEYS AT LAW
406 Fifth Street, Madras, Oregon 97741-1632
Telephone: (503) 475-2272
Fax: (503) 475-3944

OCT 15 1990

AVID C. GLENN
DWARD E. SITES
ONALD V. REEDER

* BOYD OVERHULSE
1934-1966 (Deceased)
SUMNER C. RODRIGUEZ
1949-1986 (Retired)

October 12, 1990

Ron Marceau
Marceau, Karnopp, et al
835 N.W. Bond Street
Bend, OR 97701

Re: Bench Bar Committee Meeting

Dear Mr. Marceau:

In reflecting upon your presentation to the Bench Bar Committee, I wish to express my concern in regards to your committee considering the two judgments in a law suit.

It seems that, in the past, when there have been changes from the court clerk's offices proposed, they are done in order to expedite their handling of the case load or to simplify the procedure. It has been my experience that there has been a continual tinkering with the judgment format which creates more confusion and lost time than if we had kept it in the form prior to the judgment summaries. Nevertheless, my biggest concern is that even if it will expedite the handling of the judgments or simplify it so that the clerks understand the judgments, it appears that there will be yet another piece of paper that will need to be filed with the clerk's office, that is, the second judgment for attorney fees.

Although this is a small matter compared to some of the other concerns regarding changes in the Oregon Rules of Civil Procedure, it still creates additional paperwork and costs to the clients that I represent whenever another piece of paper needs to be filed with the clerk's office. It seems rather ridiculous to bill my client to prepare the attorney fees judgment in order to obtain his attorney fees from a third party. It would seem equally ridiculous to the person upon whom the attorney fees are levied if part of the attorney fees billing would be preparing the attorney fees judgment. My belief is that the less that is necessary to be filed with the clerk's office, the more expeditiously they will handle their paperwork and the less expensive it will be for the litigants to go to court.

Therefore, in general, please consider my request that the reduction in court filings be one of the goals of your committee.

Sincerely,

GLENN, SITES & REEDER

DONALD V. REEDER
DVR:klf

Exhibit K

MOZENA & PERRY, P.C.
ATTORNEYS AT LAW

ADMITTED TO WASHINGTON BAR	ADMITTED TO OREGON BAR	WASHINGTON OFFICE
PETER J. MOZENA PERRY E. BUCK DARCY J. SCHOLTS GREGG C. SCHILE DEAN PONTIUS Of Counsel: ALBERT ARMSTRONG III	PETER J. MOZENA RICHARD T. PERRY	2901 MAIN STREET VANCOUVER, WA 98663 FAX (206) 695-9599 PHONE (206) 695-1677

October 9, 1990

Frederic R. Merril
Professor
359 Law Center
University of Oregon
Eugene, Oregon 97403

Dear Mr. Merril:

I have been an Oregon attorney since 1988, and a Washington attorney since 1977. I also served on the Washington State Bar Rules Committee.

After discussing withdrawal with the Oregon Bar Counsel's office and George Riemer, it became clear to me that a rule codifying withdrawal would be appropriate. When I talked to an assistant bar counsel, she was interested in the procedure that I described that existed in Washington, CR 71.

CR 71 provides notice to a client and an opportunity to object. CR 71 provides opposing counsel notice. The rule also provides a filing of record. This rule also provides an automatic withdrawal if no objection occurs, thereby providing clarity to all concerned without a required hearing.

I recommend adoption of a rule similar to CR 71. Thank you for your consideration in this matter.

Sincerely,

PETER J. MOZENA
Attorney at Law

Encl. CR 71

cc. Ed Peterson, Supreme Court Justice
George Riemer, Executive Services Director, Oregon State Bar

PJM1:sw

Exhibit L

EX L-1

RULE 69
EXECUTION

(a) Procedure. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.04, 6.08, 6.12, 6.16, 6.20, 6.24, 6.32, 6.36, and any other applicable statutes.

(b) Supplemental Proceedings. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by RCW 6.32.

RULE 70
JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

RULE 71
WITHDRAWAL BY ATTORNEY

(a) Withdrawal by Attorney. Service on an attorney who has appeared for a party in a civil proceeding shall be valid to the extent permitted by statute and rule 5(b) only until the attorney has withdrawn in the manner provided in sections (b), (c), and (d). Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court.

(b) Withdrawal by Order. A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing

EX L-2

attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

(c) **Withdrawal by Notice.** Except as provided in sections (b) and (d), an attorney may withdraw by notice in the manner provided in this section.

(1) *Notice of Intent To Withdraw.* The attorney shall file and serve a Notice of Intent To Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent To Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the clerk of the court pursuant to rule 5(b)(1).

(2) *Service on Client.* Prior to service on other parties, the Notice of Intent To Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

(3) *Withdrawal Without Objection.* The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent To Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent To Withdraw.

(4) *Effect of Objection.* If a timely written objection is served, withdrawal may be obtained only by order of the court.

(d) **Withdrawal and Substitution.** Except as provided in section (b), an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, Washington State Bar Association membership number, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or

EX L-3

offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

9. Appeals
(Rules 72–76)

[Reserved]

10. Superior Courts and Clerks
(Rules 77–80)

Rule 77
SUPERIOR COURTS AND JUDICIAL OFFICERS

(a) Original Jurisdiction. [Reserved. See RCW 2.08.010.]

(b) Powers of Superior Courts.

(1) *Powers of Court in Conduct of Judicial Proceedings.* [Reserved. See RCW 2.28.010.]

(2) *Punishment for Contempt.* [Reserved. See RCW 2.28.020.]

(3) *Implied Powers.* [Reserved. See RCW 2.28.150.]

(c) Powers of Judicial Officers.

(1) *Judges Distinguished From Court.* [Reserved. See RCW 2.28-.050.]

(2) *Judicial Officers Defined—When Disqualified.* [Reserved. See RCW 2.28.030.]

(3) *Powers of Judicial Officers.* [Reserved. See RCW 2.28.060.]

(4) *Judicial Officer May Punish for Contempt.* [Reserved. See RCW 2.28.070.]

(5) *Powers of Judges of Supreme and Superior Courts.* [Reserved. See RCW 2.28.080.]

(6) *Powers of Inferior Judicial Officers.* [Reserved. See RCW 2.28-.090.]

(7) *Powers of Judge in Counties of His District.* [Reserved. See RCW 2.08.190.]

(8) *Visiting Judges.*

(A) Assignments.

(i) Visiting judges at direction of Governor. [Reserved. See RCW 2.08.140.]

(ii) Visiting judges at request of judge or judges. [Reserved. See RCW 2.08.140 and 2.08.150.]

(iii) Court administrator—make recommendations. [Reserved. See RCW 2.56.030(3).]

EX L-4

KEITH BURNS
ATTORNEY AT LAW
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TELEPHONE (503) 222-2411
FAX (503) 222-4429

October 24, 1990

Professor Frederic R. Merrill
Director, Oregon Council on
Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Fred:

I represent The Oregon Court Reporters Association. The members of this organization are both the official reporters and the freelance reporters.

A problem that has arisen over the years was the authority of court reporters to administer the oath upon taking depositions. This is usually taken care of by stipulation or the fact that the court reporter was a notary public and had the authority to give oaths under ORS 44.320.

In the 1989 session of the legislature that statute was amended to include "Certified Shorthand Reporters" as those who could take testimony, administer oaths, etc.

A problem arises under telephone depositions provided for in ORCP 39 C.(7) which provides for telephone depositions. While again this is generally taken care of by stipulation and with the new ORS 44.320. When it involves a deposition being taken in Oregon with one of the parties being represented by an out-of-state attorney a questions sometimes arises. There isn't any place in the Certified Court Reporters statute that discusses oaths because they rely upon ORS 44.320.

I believe a very simple way to resolve any problem in the minds of attorneys who are participating in a deposition in this state while they are practicing in another state, would be an amendment to 39 C.(7) by adding the following: "The deposition shall be preceded by an oath or affirmation as provided in Rule 38 A.

Exhibit M

EX M-1

Perhaps at your convenience you could give me a call on this matter, which I would appreciate.

Sincerely,

KEITH BURNS

KB:db

ER M-2

September 28, 1990

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: OCTOBER MEETING

I. Attorney fee procedure for dissolution cases

The following is a draft of ORCP 68 C(1) as suggested by Judge Welch:

> C. Award of and entry of judgment for attorney fees and costs and disbursements.
>
> C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees except where:
>
> [C.(1)(a) ORS 105.405 (2) or 107.105 (1)(i) provide the substantive right to such items; or]
>
> C.(1)[(b)])(a) Such items are claimed as damages arising prior to the action; or
>
> C.(1)[(c)](b) Such items are granted by order, rather than entered as part of a judgment.

II. Comments on tentatively adopted rules

A copy of a memorandum regarding the tentative rules from Denny Hubel to Ron Marceau is attached. The other comment letters referred to were either attached to the agenda for the last meeting or distributed at the meeting.

A. RULE 7

1. Craig O. West

Exhibit N

EX N-1

Craig West's first point is that the revision of ORCP 7 D(7) requires the plaintiff to "attempt" service by all methods specified in Rule 7 before using DMV service and this will require sending a process server to all addresses known for defendant, whether or not there is any reasonable chance to complete such service. He may have a point. We could add the words **"or if the plaintiff knows that service by such methods could not be accomplished"** at the end of ORCP 7 D(7).

He also argues that regular mail provides better notice than registered or certified mail, return receipt requested. I think the Council members have rather thoroughly reviewed the merits of various forms of mailings for this service over the last three years and settled on the more formal method of service for substantial reasons. One approach that could be used would be to require regular mailing, in addition to the more formal mailing.

He suggests that we simply require mailing to the insurer at the time of supplemental mailing to the defendant rather than the language in D(4)(c)(2). The problem with this it would defeat the central idea of making clear that notice to the insurer is not actually part of the service. The statute of limitations is satisfied by DMV service and mailing to the defendant. If you mail to the insurer at that time, you can take a default in 30 days. If you neglect to mail to the insurer, you have to mail and wait 14 days before any default.

Finally, I agree with his complaint that motor vehicle service seems to change every two years. I still think the best idea was that of the first Council which simply eliminated it. Perhaps this revision will get to the heart of the problems and give us some peace.

2. Denny Hubel

Denny Hubel is worried about ambiguity in the staff comments. Depending upon what we do in response to the West comment above, I will try to clarify the staff comment.

I am not sure I understand the problem in the case he refers to with Tom Howes. I assume the defendant, or the defendant's insurance company, got actual notice and appeared. If that had not happened, under the existing rule, no default could have been taken because the plaintiff could not show that inquiry had been made and defendant could not be found at the DMV addresses, which is required by ORCP 7 D(4)(c).

EX N-2

B. RULE 18

1. Denny Hubel, Win Calkins, and Lauren Underwood

All three commentators make the same point about the elimination of the statement of claimed noneconomic damages. They suggest that it will lead to many situations where insurance companies will be forced to send an excess letter to an insured because there is no guarantee that noneconomic damages will be less than policy limits. This argument assumes that, if the statement is retained, it actually limits recovery. That certainly is not clear now and language to that effect would be required. The only question I have about the argument is what insurance companies do in the federal system and the majority of the states where the prayer does not in fact limit damages. Do they always send excess letter? If this is a serious problem, why do these other systems not limit recovery to demand?

2. James Hiller

James Hiller's argument for retaining the statement and making it a limit on damages is based upon the original legislative intent in creating 18 B. If the Council does wish to retain the statement, I like Hiller's suggested language making it a limit on recovery. I would change his suggestion slightly as follows:

> Once the statement has been given, it can be amended only upon written leave of the court or stipulation of the adverse party and leave shall be freely given when justice so requires. Upon request of any party, the jury shall be instructed as to the amount of the noneconomic damages claimed and any judgment for noneconomic damages shall not exceed the amount claimed.

This language provides some discretion in the trial judge to avoid the limit by amendment. It also provides a mechanism that inserts the limit into the trial record. Finally, it puts the burden of enforcement of the limitation on the defendant in the form of a requested instruction.

C. RULE 55

1. Nathan McClintock

Nathan McClintock inquired whether the requirement of a 10-day notice to opposing counsel before subpoena of hospital records is clearly spelled out in ORCP 55 H. I think the last sentence of paragraph ORCP 55 H(2)(b) does clearly make this a requirement.

EX N-3

2. P. Conover Mickiewicz

P. Conover Mickiewicz suggests that the requirement of advance notice to the opposing party is not clear and it also is unclear whether the opposing party has a right to be present at production and inspect and copy what is produced. I think the last sentence of 55 D(1) clearly answers the notice problem. Regarding the second problem, she does have a point. We should add the following as a new subsection F(3):

> F.(3) **Books, papers, documents, and tangible things produced.** When books, papers, documents or things are produced in response to a subpoena which does not command appearance for deposition or trial, all parties are entitled to be present and inspect and copy any material produced.

3. Denny Hubel

Denny Hubel correctly points out that our health care facility reference in 55 H(1) should be to ORS 442.015(13)(a) through (d) and not to 442.014.

Ex H-4

MEMORANDUM October 15, 1990

TO: Fred Merrill (cc: Council on Court Procedures)

FROM: Susan P. Graber

RE: ORCP 42 - Expert Witness Discovery

Here are some thoughts concerning your proposed "Draft 4."

1. The last sentence is unnecessarily vague and ambiguous. We should consider replacing it with something more concrete. For example:

> "Additional discovery from or about expert witnesses or their opinions is not permitted except in accordance with ORCP 36 B., ORCP 37, ORCP 43, ORCP 44, or ORCP 45, or by agreement of the parties. Discovery from or about expert witnesses or their opinions may not be limited except in accordance with ORCP 36 C. or ORCP 46 or by agreement of the parties."

There may be more (or different) cross-references that people prefer, but we still should think about being specific. If people do not want to be specific, HB 3140 (1989), ORCP 42 E. was a clearer general formulation.

2. We should state that the discovery restriction in this rule applies to a person who is both an ordinary fact witness and an expert witness only as to the person's expert opinion and the grounds for it. In other words, the person may be deposed with respect to facts.

3. Consider whether the rule should be "on request" or 14 days before trial. In either case, we should state, here or through incorporation by reference, that the duty is ongoing, to add to and to subtract from the list of witnesses. As soon as a party reasonably expects to call the witness (after the

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ADMITTED TO PRACTICE
IN OREGON & CALIFORNIA

October 11, 1990

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

RE: Proposed amendments to Oregon Rules of Civil Procedure

Dear Professor Merrill:

In reviewing the proposed amendments to the Oregon Rules of Civil Procedure, I am astounded and dismayed with the proposed change to ORCP 7 D 4(a)(i). The primary effect of this amendment is to remove DMV as the main recipient of service of summons and complaint. This is a disastrous idea.

I am equally concerned that the comments to this amendment have buried this main thrust of the amendment with the deceptive explanation that the changes reflect "some concern regarding the effectiveness of notice to a defendant."

The present method of serving DMV also requires notice being mailed to the defendant at the address provided at the time of the accident as well as the last known address of DMV. It further requires notice to the insurance company. Any concern about whether a default judgment can be obtained under these circumstances has little logical relationship to the removal of DMV as a primary recipient of summons and complaint.

I submit that this amendment has two intended beneficiaries: process services and automobile liability insurers.

The very nature of an automobile collision is a transitory event which occurs at no one's residence. The fact that all drivers on public roads in the State of Oregon have authorized DMV to accept service is a great relief to any individual who has been injured by another driver's negligence. I would point out that traffic accidents are investigated less and less frequently by police departments; that there are many uninsured drivers in the State of Oregon; and that many individuals involved in an accident fail to provide accurate information at the time of the collision.

What truly outrages me about this amendment is that it destroys a previously effective procedure for obtaining jurisdiction on a driver involved in a collision on a public highway. This change is only minimally "procedural." It is a policy change cloaked in the guise of an amendment to a rule of civil procedure. The wording and placement of the explanatory comment on this provision confirms my suspicion that the unstated objective of this amendment is to deprive injured parties of a fair, fast and clearly understandable means of obtaining jurisdiction over those who have injured them. I am truly disappointed with this proposed amendment.

Very truly yours,

Ivan S. Zackheim

ISZ:dlm
cc: Ray Thomas, attorney at law

MOZENA & PERRY, P.C.
ATTORNEYS AT LAW

ADMITTED TO WASHINGTON BAR	ADMITTED TO OREGON BAR	WASHINGTON OFFICE
PETER J. MOZENA PERRY E. BUCK DARCY J. SCHOLTS GREGG C. SCHILE DEAN PONTIUS Of Counsel: ALBERT ARMSTRONG III	PETER J. MOZENA RICHARD T. PERRY	2901 MAIN STREET VANCOUVER, WA 98663 FAX (206) 695-9599 PHONE (206) 695-1677

October 9, 1990

Frederic R. Merril
Professor
359 Law Center
University of Oregon
Eugene, Oregon 97403

Dear Mr. Merril:

I have been an Oregon attorney since 1988, and a Washington attorney since 1977. I also served on the Washington State Bar Rules Committee.

After discussing withdrawal with the Oregon Bar Counsel's office and George Riemer, it became clear to me that a rule codifying withdrawal would be appropriate. When I talked to an assistant bar counsel, she was interested in the procedure that I described that existed in Washington, CR 71.

CR 71 provides notice to a client and an opportunity to object. CR 71 provides opposing counsel notice. The rule also provides a filing of record. This rule also provides an automatic withdrawal if no objection occurs, thereby providing clarity to all concerned without a required hearing.

I recommend adoption of a rule similar to CR 71. Thank you for your consideration in this matter.

Sincerely,

PETER J. MOZENA
Attorney at Law

Encl. CR 71

cc. Ed Peterson, Supreme Court Justice
George Riemer, Executive Services Director, Oregon State Bar

PJM1:sw

RULE 69
EXECUTION

(a) Procedure. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.04, 6.08, 6.12, 6.16, 6.20, 6.24, 6.32, 6.36, and any other applicable statutes.

(b) Supplemental Proceedings. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by RCW 6.32.

RULE 70
JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

RULE 71
WITHDRAWAL BY ATTORNEY

(a) Withdrawal by Attorney. Service on an attorney who has appeared for a party in a civil proceeding shall be valid to the extent permitted by statute and rule 5(b) only until the attorney has withdrawn in the manner provided in sections (b), (c), and (d). Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court.

(b) Withdrawal by Order. A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing

attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

(c) Withdrawal by Notice. Except as provided in sections (b) and (d), an attorney may withdraw by notice in the manner provided in this section.

(1) *Notice of Intent To Withdraw.* The attorney shall file and serve a Notice of Intent To Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent To Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the clerk of the court pursuant to rule 5(b)(1).

(2) *Service on Client.* Prior to service on other parties, the Notice of Intent To Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

(3) *Withdrawal Without Objection.* The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent To Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent To Withdraw.

(4) *Effect of Objection.* If a timely written objection is served, withdrawal may be obtained only by order of the court.

(d) Withdrawal and Substitution. Except as provided in section (b), an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, Washington State Bar Association membership number, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or

offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

9. Appeals
(Rules 72–76)

[Reserved]

10. Superior Courts and Clerks
(Rules 77–80)

Rule 77
SUPERIOR COURTS AND JUDICIAL OFFICERS

(a) Original Jurisdiction. [Reserved. See RCW 2.08.010.]

(b) Powers of Superior Courts.

(1) *Powers of Court in Conduct of Judicial Proceedings.* [Reserved. See RCW 2.28.010.]

(2) *Punishment for Contempt.* [Reserved. See RCW 2.28.020.]

(3) *Implied Powers.* [Reserved. See RCW 2.28.150.]

(c) Powers of Judicial Officers.

(1) *Judges Distinguished From Court.* [Reserved. See RCW 2.28-.050.]

(2) *Judicial Officers Defined—When Disqualified.* [Reserved. See RCW 2.28.030.]

(3) *Powers of Judicial Officers.* [Reserved. See RCW 2.28.060.]

(4) *Judicial Officer May Punish for Contempt.* [Reserved. See RCW 2.28.070.]

(5) *Powers of Judges of Supreme and Superior Courts.* [Reserved. See RCW 2.28.080.]

(6) *Powers of Inferior Judicial Officers.* [Reserved. See RCW 2.28-.090.]

(7) *Powers of Judge in Counties of His District.* [Reserved. See RCW 2.08.190.]

(8) *Visiting Judges.*

(A) Assignments.

(i) Visiting judges at direction of Governor. [Reserved. See RCW 2.08.140.]

(ii) Visiting judges at request of judge or judges. [Reserved. See RCW 2.08.140 and 2.08.150.]

(iii) Court administrator—make recommendations. [Reserved. See RCW 2.56.030(3).]

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OCT 15 1990

DAVID C. GLENN
EDWARD E. SITES
DONALD V. REEDER

BOYD OVERHULSE
1934-1966 (Deceased)
SUMNER C. RODRIGUEZ
1949-1986 (Retired)

October 12, 1990

Ron Marceau
Marceau, Karnopp, et al
835 N.W. Bond Street
Bend, OR 97701

Re: Bench Bar Committee Meeting

Dear Mr. Marceau:

In reflecting upon your presentation to the Bench Bar Committee, I wish to express my concern in regards to your committee considering the two judgments in a law suit.

It seems that, in the past, when there have been changes from the court clerk's offices proposed, they are done in order to expedite their handling of the case load or to simplify the procedure. It has been my experience that there has been a continual tinkering with the judgment format which creates more confusion and lost time than if we had kept it in the form prior to the judgment summaries. Nevertheless, my biggest concern is that even if it will expedite the handling of the judgments or simplify it so that the clerks understand the judgments, it appears that there will be yet another piece of paper that will need to be filed with the clerk's office, that is, the second judgment for attorney fees.

Although this is a small matter compared to some of the other concerns regarding changes in the Oregon Rules of Civil Procedure, it still creates additional paperwork and costs to the clients that I represent whenever another piece of paper needs to be filed with the clerk's office. It seems rather ridiculous to bill my client to prepare the attorney fees judgment in order to obtain his attorney fees from a third party. It would seem equally ridiculous to the person upon whom the attorney fees are levied if part of the attorney fees billing would be preparing the attorney fees judgment. My belief is that the less that is necessary to be filed with the clerk's office, the more expeditiously they will handle their paperwork and the less expensive it will be for the litigants to go to court.

Therefore, in general, please consider my request that the reduction in court filings be one of the goals of your committee.

Sincerely,

GLENN, SITES & REEDER

DONALD V. REEDER
DVR:klf