COUNCIL ON COURT PROCEDURES

Saturday, December 15, 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 November 17, 1990
2. Proposed amendment to ORCP 7 (see packet)
3. Proposed amendment to ORCP 18 (see packet)
3. Proposed amendment to ORCP 27 (see packet)
4. Proposed amendment to ORCP 36 (see packet)
5. Proposed amendment to ORCP 43 (see packet)
6. Proposed amendment to ORCP 46 (see packet)
7. Proposed amendment to ORCP 55 (see packet)
8. Proposed amendment to ORCP 68 and proposed amendment to ORS 19.026 (see packet)
9. Proposed amendment to ORCP 69 (see packet)
10. Proposed amendment to ORCP 70 (see packet)
11. Appointment of final review committee
12. Future meeting schedule
13. **NEW BUSINESS**

# # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 15, 1990

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

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

Absent: Richard T. Kropp
Robert B. McConville
William C. Snouffer

Also present were the Bob Oleson, with the Oregon State Bar, and the following attorneys: Jan Baisch, Bill Gaylord, Mike Green, Jim Griswold, Jim Hiller, John Holmes, Steve Lawrence, Bob Maloney, Bob Neuberger, Greg Smith, Charles Tauman, Charlie Williamson, and Larry Wobbrock.

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

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 November 17, 1990. Henry Kantor stated he had mentioned at the November 17, 1990 meeting that he had some concern about the potential substantive nature of the amendments to ORCP 36 and felt that they may exceed the rulemaking power of the Council. He requested that the minutes of the meeting held December 15, 1990 reflect that he had pointed out those concerns at the meeting held November 17, 1990. With that exception, the minutes of the meeting held November 17, 1990 were unanimously approved.

Pursuant to notice published in the Bar's publication, "For the Record", and the newspaper, Daily Journal of Commerce, the

Council took the following actions concerning the document entitled PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE attached to the original of these minutes (**Exhibit No. 1**). Each tentatively adopted rule was presented by the Chairer for formal promulgation or amendment. The Chairer stated that affirmative votes of 12 Council members were needed to promulgate a rule.

Agenda Item No. 7: Proposed amendment to ORCP 55. This agenda item was discussed at this time due to the fact that one of the witnesses, Bob Neuberger, had to leave to attend a deposition.

Mr. Neuberger said his concern is the problem under the current system where parties frequently send a notice of deposition and issue a subpoena duces tecum to a non-party which tells the non-party to produce the records and not attend a deposition. He said if the notice and subpoena are issued at the same time, other parties are sometimes not given an opportunity to object before the non-party makes production. He said he would recommend adding the requirement that notice of the subpoena go out 14 days before the subpoena is served on the custodian of records.

The Council then discussed the language in ORCP 55, at page 18 of Exhibit No. 1. Larry Wobbrock testified on behalf of OTLA. A copy of his letter relating to the amendments to ORCP 36 and 55 is attached to these minutes (**Exhibit No. 2**). Regarding ORCP 55, Mr. Wobbrock pointed out that often a subpoena is sent out accompanied by a letter which says that no appearance is necessary and that simply mailing the records is sufficient. He said that is still honored by medical providers. By the time the attorney receives notice that the subpoena has been served, the records have been sent (with no opportunity to object). He said the problem is that the records may have nothing to do with the issue in dispute. Mr. Wobbrock requested that the Council consider requiring that, unless the documents are produced in accordance with the correct procedure, they not be allowed into evidence.

Maurice Holland made the suggestion that "witness" not be used in the phrase "served on the witness".

The Chair suggested that Messrs. Kantor and Wobbrock work out some exact language and report back later at this meeting.

The Chair then asked about Mr. Wobbrock's other concern in his letter (**Exhibit No. 2**) in which he stated, "We submit that a chiropractor should be considered the same as physicians under Rule 44 rather than the same as a hospital under Rule 55." Mr. Wobbrock stated that the reference to "chiropractic facility" in Rule 55 H could be construed as allowing discovery of records of the chiropractor as well as hospital records. Mr. Thorp stated

the reference to chiropractic facility was already in the existing rule and that the requirement that the records be of a licenced facility would prevent any confusion with a chiropractor's or physician's records.

Henry Kantor made a motion that the Council clarify ORCP 44 and 55 to make certain that the production of documents by doctors and chiropractors is covered by ORCP 44 and not ORCP 55. After discussion he modified the motion to ask that the staff comment clearly indicate that the reference to "chiropractic facility" in ORCP 55 H did not mean that records of a chiropractor or physician could be produced according to that section. Mike Starr seconded Henry Kantor's motion. A vote was taken on the motion resulting in 19 in favor and one abstention.

The next item for discussion under the proposed amendments to 55 A and B was a letter from Charles R. Markley (**Exhibit No. 3**). Mr. Markley suggested requiring the litigant who subpoenas documents to provide copies so obtained to all other litigants; he said a specific rule to that effect is needed to prevent ex parte discovery. No action was taken on this suggestion.

Agenda Items No. 4 and 6: Proposed amendment to ORCP 36 and ORCP 46. The Council then discussed the proposed amendments to Rule 36, appearing on page 10 of the packet (**Exhibit No. 1**). They discussed changing the third sentence of B(4)(b) from "may amend the statement" to "may file or amend the statement". A further suggestion was made to say, "... a party may file or amend a statement only by leave of court". This change was unanimously accepted by the Council.

A motion was made by Larry Thorp, seconded by Judge Mattison, to amend 36 B(4)(d) to read: "Except as provided by Rule 44, no other or further discovery of the opinions or qualifications of expert witnesses, or other aspects of expert witness testimony, shall be permitted except upon stipulation between or among disclosing parties." A vote was taken resulting in 14 in favor, 5 opposed, and one abstention.

Maury Holland suggested changing the words "... upon stipulation between or among disclosing parties" in ORCP 36 B(4)(d) to "between or among the parties". After a discussion, a motion was made by Larry Thorp, seconded by Maury Holland, to adopt the language suggested. The motion carried with 13 in favor, 6 opposed, and one abstention. (Bernie Jolles requested that the record show that he abstained.) Justice Graber pointed out that the last sentence in the first paragraph of the comment was incorrect. The Executive Director agreed and said that he would change it.

Bill Gaylord then testified. He objected to the exclusion of a party in 36 B(4)(c). John Hart made a motion, seconded by

Henry Kantor, that "except a party" be deleted from B(4)(c). The motion failed with 4 in favor, 15 opposed, and one abstention.

The Chair asked for further public comment regarding the amendments to Rule 36 as amended at this meeting.

Bob Maloney stated he supported the rule as amended, as did John Holmes, President of the OADC.

Jim Griswold, Greg Smith, Steve Lawrence, Bill Gaylord, and Larry Wobbrock all spoke as opponents of the amendments to Rule 36.

There were further comments from the Council members. Judge Liepe suggested that amendments to Rule 36 be considered during the next biennium and that if legislative proposals are made in 1991, they be referred to the Council.

The Chairer then called for a vote to approve for promulgation the amendments to Rule 36 and Rule 46 as a whole. A vote was taken with 11 in favor and 9 opposed. The Chairer stated the proposed amendment had not received 12 affirmative votes and would not be promulgated.

Agenda Item No. 2: Proposed amendment to ORCP 7. The Executive Director stated that because of concerns of Attorney Craig West, the Council had asked him to submit a redraft of ORCP 7 D(7) which would clearly indicate that an actual attempt to serve in all ways provided in ORCP 7 was not required and suggested the following language:

> 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, or if the plaintiff knew that service by such methods could not be accomplished.

The Executive Director stated he had made an appropriate change in the comment to conform to the proposed amendment. A motion was made by Mike Starr, seconded by Justice Graber, that the proposed amendment suggested above be adopted. The motion passed with 19 in favor and one opposed.

Justice Graber suggested that a further change be made in D(7) to delete "successfully" in the last line in page 4 of the packet, "unable to successfully complete service", so that the line would read "unable to complete service." Maury Holland made a motion, seconded by Bernie Jolles, to promulgate the amendments to ORCP 7 with Justice Graber's suggestion included. The motion passed unanimously.

Agenda Item No. 3: Proposed amendment to ORCP 18. Attached to these minutes are comment letters from James Hiller and Garry Kahn (**Exhibit Nos. 4 and 5**).

Mr. Hiller testified and said that the rule as it exists is ambiguous and it is difficult to tell what it means. He said that the legislature did not intend that the statement not limit damages.

Judge Johnson made a motion that the rule be amended to provide that there be a statement and that the amount in the statement would be a cap on the amount of damages. The motion was seconded by Judge Welch. Discussion by the Council followed. A vote was taken resulting in 4 in favor and 15 opposed. (Judge Welch had left the meeting.)

Justice Graber made a motion, seconded by Henry Kantor, to eliminate all of 18 B and delete "except as provided in section B of this rule" from ORCP 18 A(2). A vote was taken on the motion to amend, resulting in 12 in favor, 6 opposed, and one abstention. Justice Graber then moved, seconded by Henry Kantor, to promulgate this as the amendment to ORCP 18. The vote resulted in 12 in favor and 7 opposed.

Agenda Item No. 8: Proposed amendment to ORCP 68 and proposed amendment to ORS 19.026. Ron Marceau stated that he had talked with Karen Hightower and Jim Nass in the State Court Administrator's Office regarding the most recently tentatively adopted version of ORCP 68. He said they agreed that the Council's revision of ORCP 68 addressed all of their concerns. He said that Mr. Nass suggested another form of statutory amendment (attached as **Exhibit No. 6**) which would incorporate most of the Council's proposed amendments to ORS 19.026. The Council then agreed not to recommend any amendment to ORS 19.026 at this time and to allow Mr. Nass to proceed with his suggested amendment.

Mr. Nass also recommended that Judge Joseph of the Oregon Court of appeals recommended eliminating use of the word "claim" in ORCP 68. The Executive Director submitted a redraft of tentatively adopted ORCP 68, with the word "claim" changed to "seek", together with other conforming changes (attached as **Exhibit No. 7**). A motion was made by Judge Mattison, seconded by Judge Johnson, to promulgate the tentatively adopted form of ORCP 68 as redrafted in Exhibit 8. The motion passed with 18 in favor and 1 opposed. The adoption did not include recommending amendment to ORS 19.026.

Agenda Item No. 9: Proposed amendment to ORCP 27. A motion was made by Henry Kantor, seconded by Judge Johnson, to adopt for final promulgation the definitional amendment to ORCP 27, and it

passed unanimously.

Agenda items No. 5 and 7: Proposed amendments to ORCP 43 and ORCP 55. It was pointed out that these two amendments should be considered together. Henry Kantor read proposed language which had been developed by Mr. Wobbrock and others. A lengthy discussion by the Council followed. Justice Graber suggested the following language for the line beginning with "deposition" in the last sentence of 55 D(1) on page 18 of **Exhibit No. 1:**

> "..., shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period."

A vote was taken and this change was unanimously adopted. The Council then voted unanimously to promulgate the tentatively adopted changes to ORCP 55 and ORCP 43 as amended.

Agenda Item No. 9: Proposed amendment to ORCP 69. A motion was made by Judge Johnson, seconded by Bill Schroeder, to promulgate the tentatively adopted amendment to Rule 69. The Council voted unanimously to adopt for final promulgation the definitional amendment of ORCP 69.

Agenda Item No. 10: Proposed amendment to ORCP 70. A motion was made by Judge Johnson, seconded by Bill Schroeder, to adopt for final promulgation the amendments to ORCP 70. The vote resulted in 17 in favor and 2 opposed.

Agenda Item No. 11: Appointment of final review committee. The Chair and Vice Chair were appointed as the committee to oversee preparation of the final submission to the legislature.

Agenda Item No. 12: Future meeting schedule. Chair Marceau suggested that due to budget constraints there would probably not be very many meetings before July 1, 1990. No future meeting was scheduled, but if developments during the legislative session require a meeting, the Chair will schedule one. He also said that individual Council members may be called upon to appear before legislative committees.

The meeting adjourned at 12:50 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

BURT, SWANSON, LATHEN, ALEXANDER & McCANN, P.C.

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December 6, 1990

Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403-1221

Dear Fred:

Thank you for your November 30, 1990, letter with enclosures on the proposed discovery provisions regarding expert witnesses. Please forward the attached memoranda to the council prior to its final deliberations on this issue.

Thank you again for your efforts in this matter.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER & McCANN

Gregory A. Smith

GAS/de

cc: Larry Wobbrock
Michael Shinn
William Gaylord
Michael Williams
Arthur Johnson

MEMORANDUM

TO: COUNCIL ON COURT PROCEEDINGS

FROM: GREGORY A. SMITH (BURT, SWANSON, LATHEN, ALEXANDER & MCCANN, P.C.)

DATE: December 6, 1990

RE: THE PROPOSED RULE ON EXPERT WITNESS DISCOVERY

ORCP 36 EXPERT WITNESS DISCOVERY

This is a brief follow-up note to my oral presentation to you regarding my opposition to an extension of the discovery rules relating to expert witness identity, etc., in **medical negligence cases.** As I discussed in my statement and its subsequent follow-up memorandum, I believe that the discovery of expert identities, etc., works only to the benefit of the powerful insurance industry and defendants **in medical negligence litigation.** This belief goes back to the well known "conspiracy of silence" among medical practitioners; has been repeatedly discussed before you and does not need to be expanded on in this memo.

While I congratulate the council on refraining from "opening up a can of worms" regarding unlimited discovery of experts (including opinions, depositions, curriculum vitae, etc., I would like the council to ask itself what purpose discovery of the **identity** of any expert in a medical negligence claim seven days or more before trial would serve? We all know that a Plaintiff who fails to provide expert testimony in a **medical negligence** trial will have his/her case dismissed before it is submitted to the jury. Accordingly, it is a <u>given</u> in this type of litigation that both sides will, in fact, have expert witnesses available to testify.

Given the disparity (both politically and economically) between injured patients and doctors in **medical negligence litigation,** combined with the "conspiracy of silence," disclosure of the identity of experts will serve no **true** discovery purpose. It will only allow for the opportunity (perhaps rarely exercised - perhaps more frequently) for injured patient's experts to be contacted by "well meaning" medical peers and questioned as to their motives, opinions, and beliefs in challenging the actions of a colleague.

If the true purpose of this proposed rule is to assure adequate preparation by a Plaintiff so as to reduce the number of frivolous law suits filed against physicians, a far more economical and less intrusive rule would accomplish more. A rule which required the affirmation by the Plaintiff's attorney upon filing of the complaint that he has reviewed the merits of the case and consulted with and **obtained opinions from medical experts** regarding the validity of the case would cause no inconvenience to deserving Plaintiffs while weeding out frivolous claims at the earliest possible stage. Provisions could be included to allow for the filing of a claim shortly before the statute of limitations and allowing a 90 day period for submission of such affirmation.

In summary, compelling discovery of the identity of experts seven days or more before trial in **medical negligence claims** achieves nothing in the "search for truth" which should be the goal of our discovery process. It merely allows for a subversion of that process. Consideration into alternative rules which may more precisely meet defined discovery goals may be appropriate.

Gregory A. Smith, R.N.
Attorney at Law

Oregon Trial Lawyers Association

Suite 750 • 1020 SW Taylor Street • Portland, Oregon 97205 • (503) 223-5587

December 11, 1990

Mr. Ronald L. Marceau
Marceau, Kamopp, et al.
835 N. W. Bond Street
Bend, Oregon 97701

Mr. Frederic R. Merrill
University of Oregon
School of Law
Eugene, Oregon 97403

RE: AMENDMENTS TO ORCP 36 AND 55

Gentlemen:

We are concerned with the following changes to ORCP 36 and 55:

1. As you know, we oppose any change with respect to discovery of experts; however, if experts are to be discovered, we do not believe ORCP B.(4)(d) will be sufficient to prevent depositions. The rule prohibits "further discovery of the opinions of expert witnesses"; however, it does not prohibit depositions to go into the qualifications, bases of opinions, other knowledge of the expert in the area of his or her opinions, what tests and other procedures they went through in forming their opinions, and similar matters. Indeed, the present proposed rule could be interpreted to allow questioning of the expert on virtually anything related to the case and their opinion except their actual opinions.

In sum, contrary to the advice of Judge Panner, the present rule as proposed would allow depositions of experts adding significantly to the cost of litigation. While the seven-day rule will to some degree constrain the time in which depositions can take place, most cases are reset at least once; and there will therefore often be months in which to conduct expert depositions on everything except their ultimate opinions in the case.

2. The changes proposed to ORCP 55 include a chiropractic facility in addition to a hospital. We submit that a chiropractor should be considered the same as physicians under Rule 44 rather than the same as a hospital under Rule 55.

EXHIBIT NO. 2 TO MINUTES OF
COUNCIL MEETING HELD 12/15/90

EX 2-1

Further, Rule 55 presently contemplates when a party is served with a notice of a records deposition, the person whose records are being requested will have an opportunity to object and assert any applicable privileges prior to the time of the deposition. Unfortunately, under the proposed change to Rule 55, a records custodian will be served with a subpoena and will likely produce the records immediately prior to any assertion of privilege. We submit that some advance notice to the other parties in the case should be provided prior to service of the subpoena on the records custodian.

Thank you very much for your consideration of our views.

Very truly yours,

Lawrence Wobbrock
Chair, Legislative Committee

LW/rw

EX 2-2

GREENE & MARKLEY, P.C.
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SUSAN E. ANDERSON†
STEPHEN T. BOYKE
DAVID A. FORAKER
S. WARD GREENE†
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†OREGON AND MINNESOTA STATE BARS

December 6, 1990

Professor Fredric R. Merrill
University of Oregon
School of Law
Eugene, OR 97403

RE: Oregon Rules of Civil Procedure

Dear Professor Merrill:

The proposed amendments to ORCP 55A and B are satisfactory as far as those amendments go. The proposed amendments allow a litigant to obtain documentary evidence without actually going through a deposition. Apparently, the subpoened person need only mail the documents to the requesting party to satisfy the terms of the subpoena.

It is imperative that the other parties to the judicial action be allowed access to those documents. In the course of my practice I have been refused copies (or even inspection) of the documents obtained from the subpoened person. The excuses given are: (1) work product privilege; (2) you can obtain the documents the same way I got them.

It seems abusive for the subpoened person to be required to make multiple copies for multiple parties, figure out where to send those copies and be subjected to multiple subpoenas for the same documents.

I suggest requiring the litigant who subpoenas the documents to provide copies so obtained to all the other litigants. A specific rule to that effect is needed to prevent "ex-parte" discovery.

Yours very truly,

Charles R. Markley

CRM:jhm
5.1\merrill.ltr

EXHIBIT NO. 3 TO MINUTES OF
COUNCIL MEETING HELD 12/15/90

LANE
POWELL
SPEARS
LUBERSKY

December 13, 1990

BY FAX (346-3985)

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

Re: ORCP 18

Dear Fred:

From the sideline, I have been watching the progression of the proposed amendment of Rule 18, eliminating the statement of noneconomic damages and thereby eliminating any binding effect of this statement. I was very disappointed to see that a version of my substituted amendment to Rule 18 was voted down by a vote of 7 to 6 at your November meeting.

As I stated in my letter of September 6, 1990 (copy attached), when Rule 18 was amended by Senator Frye and the 1987 Legislature, there was no intent to eliminate the concept of a binding cap set by plaintiff for noneconomic damages, but only to take the amounts claimed by plaintiff out of the headlines. To change the Rule in light of this legislative history, I believe, would violate the spirit of ORS 1.735. That is to say, under ORS 1.735, the legislature can effectively "veto" or amend the Council's work. Here, the elimination of Rule 18B(3), specifically placed in the ORCP by the 1987 Legislature, would amount to the Council vetoing the legislature's work.

At last month's meeting, there was a vote to change my proposed amendment to Rule 18, in any event, so that the jury would not be instructed as to the damage cap. This is not a major issue to me. But keep in mind that such a rule would lead to a situation where the jury is instructed on the dollar limit for every item of damage (see UCJI 30.03A), except one. This seems a bit inconsistent to me, and an invitation for problems. The

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EXHIBIT NO. 4 TO MINUTES OF
COUNCIL MEETING HELD 12/15/90

EX 4-1

jury is instructed on damage limits so as to avoid post-trial motions and arguments over what should be done with a jury verdict in excess of the amount asked for. Wouldn't it make sense to instruct the jury on all limits?

In summary, the "clean-up" amendment currently on the table would make a major substantive change in the law, contrary to the intent of the 1987 Legislature, and would effectively veto the 1987 legislative changes. I urge the Council to either clean-up Rule 18 with my proposed language or similar language, or simply leave Rule 18 as it is.

I will try to make the meeting this Saturday, but I did want to put my thoughts on paper in case I am unable to attend.

Very truly yours,

James L. Hiller

Enclosure

cc (w/enc): Ronald Marceau (by fax)

EX 4-2

LANE
POWELL
SPEARS
LUBERSKY

September 6, 1990

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

Re: ORCP 18

Dear Mr. Merrill:

I am writing to you to oppose the proposed amendment to ORCP 18, which would eliminate subsection B(3).

My term on the Uniform Civil Jury Instruction Committee has just expired, and the Committee spent much time in the past three years discussing the tort reform amendments to ORCP 18 (substituting the prayer from the complaint with a statement of the amount of noneconomic damages).

Given the political nature of the UCJI committee (it is composed, generally, with an equal number of plaintiff and defense personal injury lawyers), we did not reach a consensus as to how to instruct the jury. See UCJI 30.01A and the Comment thereto. But I believe it is fair to say that we did reach a consensus as to the background of the 1987 changes to ORCP 18.

As you probably know, the 1987 changes to ORCP 18 were the brainchild of Senator Frye, who wanted to get big numbers, taken from personal injury complaints, out of the headlines. Senator Frye never publicly stated any intent to do away with the concept of a cap, set by plaintiff, on the amount a plaintiff can recover. It appears that Senator Frye believed this new statement of noneconomic damages would substitute for the old prayer.

Anchorage, AK
London, England
Los Angeles, CA
Mount Vernon, WA
mpia, WA
.tland, OR
Seattle, WA
Vancouver, WA

Tokyo, Japan

EX 4-3

It seems obvious that Senator Frye and the Legislature intended the same procedural rules apply to this new statement of damages as applied to the old prayer. That is, one would need a stipulation or order of the court to amend the statement, and the statement would set a cap as to the amount of noneconomic damages recoverable. It is not unusual for things not "part of the trial court file" to have a binding effect in the case. (This is true of most discovery now. That is, most discovery is no longer filed with the court, but often is brought to the court's attention by affidavit or otherwise, and is used by the court to make rulings, both pretrial and at trial.)

If you want "to fix" Rule 18, don't eliminate subsection 18(B)(3). Rather, you could eliminate Rule 18(B) altogether (and the exception provided in Rule 18(A)(2)). But in keeping with Sentator Frye's intent, I would suggest the following language be added to Rule 18(B)(3):

> "Once the statement has been given, it can be amended only upon ~~written~~ leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. The jury, upon request of any party, shall be instructed as to the amount of noneconomic damages claimed, which will be the limit of noneconomic damages which can be recovered."

The first sentence adopts language from Rule 23 relating to amendment of pleadings. The second sentence reflects Oregon law relating to the prayer of the complaint. I believe my language takes care of the inquiries received by the Council and reflects the original intent of the 1987 Rule 18 tort reform changes. On the other hand, the Council's proposed elimination of Rule 18(B)(3) does not reflect the original intent of these 1987 changes.

Please call me if you have any questions. Thanks for your consideration of this matter.

Very truly yours,

James L. Hiller

EX 4-4

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GARRY L. KAHN

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November 20, 1990

Mr. Frederic R. Merrill
Executive Director
Council on Court Procedures
c/o University of Oregon
School of Law
Eugene, Oregon 97403

Re: Rule 18

Dear Fred:

It would be a mistake to make the "statement" provided for in Rule 18B(3) a limit on damages. This would just be a trap for lawyers. If such a rule was in place, it would be appropriate for lawyers that were uncertain about the amount of damages claimed at the time the request was made for such a statement to just state "the maximum allowed by law."

The only reason for changing the rule is so that insurance companies will know whether or not a claim is being made beyond the policy limits. If we want to rewrite the rules to accommodate the insurance companies, then so be it. Perhaps the best way to solve any supposed problem is to allow parties to bring their claims against the real party in interest and name the insurance company as the Defendant. In so doing, we could eliminate the deception that takes place every day in the courts of Oregon. We could also eliminate mistrials whenever that terrible word "insurance" is mentioned.

I suggest that we leave the rule as it is.

Very truly yours,

Garry L. Kahn

Garry L. Kahn

GLK:de

cc: Mr. Ronald L. Marceau

EXHIBIT NO. 5 TO MINUTES OF COUNCIL MEETING HELD 12/15/90

Proposed Legislation Relating to Appeals from Judgments for Costs and Attorney Fees

The Judicial Department proposes to repeal ORS 20.220 and remove the provisions of ORS 19.033(1) relating to attorney fees and costs, and place them incorporate them along with the amendments to ORS 19.026 proposed by the Council on Court Procedures into a single statute in ORS Chapter 19.

ORS 19.033(1) would be amended as follows:

(1) When the notice of appeal has been served and filed as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, [pursuant to rules of the court,] but the trial court shall have such powers in connection with the appeal as are conferred upon it by law. [and shall retain jurisdiction for the purpose of allowance and taxation of attorney fees, costs and disbursements or expenses pursuant to rule or statute. If the trial court allows and taxes attorney fees, costs and disbursements or expenses after the notice of appeal has been served and filed, any necessary modification of the appeal shall be pursuant to rules of the appellate court.]

A new section would be added to ORS Chapter 19 incorporating the relevant provisions of ORS 19.033(1), ORS 20.220 and most of the Council's proposed amendments to ORS 19.026:

(1) Notwithstanding ORS 19.033(1), the trial court shall retain jurisdiction for the purpose of hearing and deciding requests for attorney fees or costs and disbursements pursuant to ORCP 68.

(2) An appeal may be taken from a supplemental judgment under ORCP 68 C.(5) allowing or denying attorney fees or costs and disbursements only if the order or judgment to which it relates could have been appealed under ORS 19.010.

(3) An appeal from a supplemental judgment under ORCP 68 C.(5) shall be taken in the same manner as an appeal from a judgment under ORS 19.010. The statement of attorney fees or costs and disbursements, the objections thereto and the supplemental judgment rendered thereon shall constitute the trial court file. The scope of review shall be as provided in ORS 19.125(1).

(4) If an appeal is filed from a judgment to which a supplemental judgment under ORCP 68C.(5) relates before the trial court enters a supplemental judgment under ORCP 68 C.(5):

(a) The appellant need not file a notice of appeal from the supplemental judgment and may assign error in the appeal relating to the supplemental judgment, and

(b) Any modification of the appeal on account of the supplemental judgment shall be pursuant to rule of the appellate courts.

(5) When an appeal is taken from a judgment under ORCP 67 to which a supplemental judgment awarding attorney fees or costs and disbursements relates:

(a) If the appellate court reverses the judgment under ORCP 67, the supplemental judgment for attorney fees or costs and disbursements shall be deemed reversed; or

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

EX 6-2

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

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

* * *

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

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

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

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

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

C(2) [Asserting] <u>Alleging</u> [claim for] <u>right to</u> attorney fees. A party seeking attorney fees shall [assert the right to recover such fees by alleging] <u>allege</u> 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.] <u>Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded</u>

EXHIBIT NO. 7 TO MINUTES OF
COUNCIL MEETING HELD 12/15/90

EX 7-1

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

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

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

EX 7-2

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 7-3

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.]

Changed claiming To seeking

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

Changed "claim. Fo To statement of

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

Changed claiming To seeking

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

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

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

changed claiming to seeking

C(4)(c) Hearing on objections.

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

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

new

New Language substituted for "claimed"

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

changed claimed to sought

[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

EX 7-5

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

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

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

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

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

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

EX 26

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.

EX 2-7

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

(for final consideration at 12-15-90 meeting)

Exhibit 1 to minutes
of Council meeting held 12/15/90

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

Contents

SUMMONS
RULE 7

* * * * *

D. Manner of service.

* * * * *

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

* * * * *

D(3)(a)(iii) **Incapacitated persons.** Upon an incapacitated person **as defined by ORS 126.003(4)**, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

* * * * *

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

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

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf [, except a defendant which is a foreign corporation maintaining a registered agent within this state,] **who cannot be**

served with summons by any method specified in subsection 7 D(3) of this rule, may be served with summons [by personal service upon the Motor Vehicles Division and mailing by registered or certified mail, return receipt requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.]

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

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

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

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

that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown] **unless the plaintiff submits an affidavit showing:**

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

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

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

* * * * *

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 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.

The Council amendment of ORCP 7 D makes two major changes in motor vehicle 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 concern 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 effort to use the methods 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 earlier statutory language such as Ter Har v. Backus, 259 Or 478 (1971). This would not require a defendant to actually attempt all forms of service described in ORCP 7 D(3), only to investigate whether service could be completed by any of those methods.

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.

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 ORCP 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 ORCP 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.

MINOR OR INCAPACITATED PERSONS
RULE 27

* * * * *

A. 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.

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.

RULE 36
GENERAL PROVISIONS CONCERNING DISCOVERY

* * * * *

B.(4) **Expert witnesses.**

B.(4)(a) [Upon request of any party, any other party] **All parties** shall [deliver] **serve** a written statement signed by the [other] party or [the other] **that** party's attorney giving the name and business address of any person **that** the [other] party [reasonably expects] **intends** 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] **served** not less than [14] **seven** 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] **seven** 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] **subsection**, the term "expert witness" means any person testifying in accordance with ORS 40.410**, except a party**.

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.

* * * * *

COMMENT

At the request of the State Bar Procedure and Practice Committee, the Council reviewed the area of discovery of information relating to expert witnesses. Subsection 36 B(4) is intended to provide an exclusive definition of available discovery of expert witnesses and ORCP 36 B(4)(d) so provides. The rule only allows discovery of the identity and qualifications of a person that a party intends to call as an expert witness. No deposition or further discovery is possible. A court may restrict discovery under ORCP 36, but there is no judicial discretion to allow discovery beyond that provided in the rule. Under paragraph 36 B(4)(c), the requirement of disclosure does not apply to a party who is testifying as an expert.

The requirement of a statement containing the name and qualifications of expert witnesses is automatic. No motion or request is required. The names and qualifications may be served at any time up to seven days before trial. After a statement is served, it may also be amended without leave of court up to seven days before trial. Amendment less than seven days before trial requires consent of adverse parties or leave of the court is required.

Sanctions for failure to disclose names and qualifications of expert witnesses are included with other sanctions in ORCP 46. Since the statement of expert witnesses must be served and filed, a party who lists the names of expert witnesses which that party does not truly expect to call would expose that party to the sanctions specified in ORCP 17.

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

* * * * *

D. Persons not parties. **A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55.** 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.

COMMENT

See comment to ORCP 55.

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 propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

* * * *

D. Failure of a party to furnish statement relating to expert witnesses or to attend at own deposition or respond to 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 in which the action is pending on motion may make such orders in regard to the failure as are just, including among other it may take any action authorized under paragraphs (a), (b), and (c) of subsection B(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

ORCP 46 A(2) and 46 D were amended to provide sanctions for failure to furnish names and qualifications of persons that a party expects to call as expert as required by ORCP 36 B(4). The opposing party may either seek to force the opponent to comply with the requirements of ORCP 36 B(4), by securing an order to that effect under 46 A(2), or seek sanctions listed in ORCP 46 B. At the discretion of the trial judge, the sanctions available under ORCP 46 B could include preventing the undisclosed expert witness from testifying.

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 books, papers, documents, or tangible things and permit inspection thereof at a particular time and place**. [It also] **A subpoena requiring attendance to testify as a witness** requires that the witness remain [till] **until** the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of [documentary evidence] books, papers, documents, or tangible things and 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 books, papers, documents, or tangible things and permit inspection thereof 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 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 books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

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

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

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

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other

person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). **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 14 days before the time designated for production, unless the court orders a shorter period.**

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

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

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena

may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

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

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

D(3) **Service by mail.**

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

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

D(3)(b) The attorney, or the attorney's agent, made

arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

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

D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

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

E. Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; 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 books, papers, documents, or tangible things 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 books, papers, documents, or tangible things** 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 books, papers, documents or tangible things** only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be

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

H. Hospital records.

H(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS 442.015(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 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.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the

custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

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

H(3) **Affidavit of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state

in the affidavit, and shall send only those records of which the affiant has custody.

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

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

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

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

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

the contrary.

COMMENT

The Council revised ORCP 55 and 43 to provide for use of a subpoena to require a non-party to produce books, papers, documents or tangible things and permit inspection thereof without scheduling a deposition. In Vaughan v. Taylor, 79 Or App 359 (1986), the Court of Appeals held that production of documents in the hands of a non-party could only be accomplished by scheduling a deposition. Under the new procedure, a subpoena for production may be used without scheduling a deposition.

The subpoena must be served on each party 14 days before the required time for production. The non-party subject to such subpoena may either secure a court order to control production or simply file objections to the requested production. If objections to production are filed, the party seeking production is required to secure a court order before any production is allowed. Service by mail would not be allowed for a non-deposition subpoena for production. A non-deposition subpoena also cannot be used to force a non-party to allow entry upon land.

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.

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C(4)(c) Hearing on objections.

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

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

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

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

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

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

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

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

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

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

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

COMMENT

The Council changed ORCP 68 C(1) to make the procedure for recovery of attorney fees and costs and disbursements in Rule 68 applicable to dissolution cases.

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

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

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

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

ORS 19.026

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

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

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

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

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

[(3)] **(4)** Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file notice of appeal within 10 days after the expiration of the time allowed by subsections (1) [and] **through** [(2)] **(3)** of this

section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in the brief.

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

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 contract;

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 whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 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.

FORM AND ENTRY OF JUDGMENT
RULE 70

* * * * *

C. Submission of forms 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, 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.