*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, April 16, 1994
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order
2. Approval of January 15, 1994 minutes (see Attachment A)
3. Introduction of new members
4. Status report from Subcommittee on Council's Mission (Bruce Hamlin and John McMillan)
5. Report on proposed clarifying amendments to Rule 32 F (Maury Holland and Mike Marcus) (see Attachment B)
6. Status report regarding Rule 69 (Bruce Hamlin) (see Attachment C)
7. Status report from Subcommittee on Hospital Records (Rule 55 H)
8. Proposed amendment to ORCP 15 A (see Attachment D)
9. Report regarding trial court rulings on attorney fee petitions (Mick Alexander and Steve Shepard)
10. Report regarding ORCP 22 (Rudy Lachenmeier)
11. Other matters for consideration during 1993-95 biennium (Chair)
12. Old business
13. New business
14. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 15, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	
	Marianne Bottini	John V. Kelly
	Sid Brockley	Rudy R. Lachenmeier
	Patricia Crain	Michael H. Marcus
	William D. Cramer, Sr.	Robert B. McConville
	Robert D. Durham	John H. McMillan
	William A. Gaylord	Milo Pope
	Bruce C. Hamlin	Michael V. Phillips
	John E. Hart	Charles A. Sams
	Bernard Jolles	Stephen J.R. Shepard
Excused:	Susan Graber	
	Nancy S. Tauman	
Absent:	Nely Johnson	

The following guests were in attendance: Susan Evans Grabe, with the Oregon State Bar; Douglas Wilkinson, liaison from the Oregon State Bar Practice & Procedure Committee; Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Hart, called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of November 13, 1993 minutes. The minutes of the November 13, 1993 meeting were approved without objection.

Agenda Item 3: Introduction of new members. Everyone present introduced themselves, including the following new members: Marianne Bottini, William Gaylord, and Rudy Lachenmeier.

Agenda Item 4: Election of Treasurer. Mr. McMillan was nominated by Mr. Hart to be Treasurer for the 1993-95 biennium and *ex officio* a member of the Executive Committee. There were no other nominations; Mr. McMillan was elected unanimously.

Agenda Item 5: Report on proposed clarifying amendments to Rule 32 F. Mr. Hart called upon Mr. Phillips and Prof. Holland to give a brief explanation of the background and purpose of the

"clean-up" amendments they propose to ORCP 32 F(2) and F(3). (This proposal is set forth, with accompanying explanation, in Attachment B to the Agenda of this meeting.) Mr. Phillips gave a brief summary explanation of the 1992 amendments to Rule 32, particularly the elimination from former section 32 B of the tripartite classification scheme under which class actions were divided into three supposedly mutually exclusive categories. He further explained why the change to section 32 B left doubts about the scope of applicability of the claim provisions embodied in subsections 32 F(2) and F(3) as amended. He noted that Mr. Phil Goldsmith had recently expressed to him in phone conversation some concern that these currently proposed amendments to 32 F(2) and F(3) might not fully achieve their agreed purpose of ensuring that the claim form procedures should be limited solely to consumer or common question class actions of the kind described by the prior version of subsection 32 B(3). He added that Mr. Goldsmith's concern was that any amending language should make clear that these provisions are not intended by the Council to be applicable to damage class actions where individual monetary claims are payable out of a limited fund, such as payments under a liability insurance policy. He reported that Mr. Goldsmith was working with some members of the coalition of attorneys that has been interested in reform of Rule 32 to devise amending language intended more clearly to achieve this purpose. Mr. Phillips and Prof. Holland both commented that their current proposal was being presented only by way of preliminary introduction, and not with a view to any decision-making or voting at this meeting.

Judge Marcus questioned whether the purpose of the Phillips/Holland amendments is best achieved by using the term "judgment" in the proposed amendment to subsection 32 F (3). He wondered whether the idea might not be more aptly expressed by referring to the "relief" or "relief granted." Mr. Phillips and Prof. Holland responded that they thought this idea was worth pursuing. Judge Marcus stated that he would try his hand at drafting some alternative language he would provide to Mr. Phillips and Prof. Holland for their consideration and possible submission to the Council at a subsequent meeting.

Justice Durham questioned the use of the term "severally" in the Phillips/Holland proposal. He stated that he was not sure that this term would invariably and accurately apply to all class actions for which claim form procedures are retained. He also questioned whether this might be an issue for the jury and, if so, whether some form of special verdict relating to it might be required. Mr. Phillips and Prof. Holland said that they would give careful thought to these questions.

Judge Brockley commented that this matter should be referred back to the subcommittee for further thought and drafting before

continued discussion takes place by the Council. There was general agreement with this comment. Judge Marcus agreed to serve with Mr. Phillips and Prof. Holland as a member of the subcommittee assigned to work on this problem.

Agenda Item 6: Status report regarding Rule 69. Mr. Hart called upon Mr. Hamlin to report on his review of ORCP 69, specifically section 69 C as amended, in light of the Court of Appeals decision in *Weaver and Weaver*, 119 Or App 478, 851 Pad 629 (1993). After reviewing the recent history of this issue Mr. Hamlin reported he had concluded that, despite *Weaver*, section 69 C should be retained in the ORCP, though not necessarily as part of Rule 69. He stated that his reasons for favoring retention of what is now section 69 C somewhere in the rules are that there currently exist two arguably inconsistent Court of Appeals decisions on point (i.e., *Weaver* and *Van Dyke v. Varsity Club, Inc.*, 103 Or App 99, 796 Pad 382(1990)) and, secondly, because he believes that the ORCP should, insofar as possible, contain a clear and complete statement of the pertinent law so that lawyers will at least not be misled by reference to them prior to undertaking examination of case law. Mr. Hamlin further stated, however, that he shares the doubts expressed by some members on previous occasions that section 69 C appropriately belongs in Rule 69, since the point of this section is to state that a failure of a defendant having notice of trial to appear is not to be treated as a default. Many members have commented, he stated, that it seems odd to place in a rule dealing with defaults something that is, in effect, defined not to be a default. He said that good arguments could be made in favor of transferring section 69 C to either Rule 58 or 52, with his preference being the former. He also said he would like some guidance from the Council on whether a failure to show up at trial should be treated as a default, and also whether any provision should be made for a situation where a defendant literally appears but fails to participate at a trial.

Justice Durham expressed agreement with the thought that section 69 C be retained, but transferred to Rule 52. He stated that he remained of the view, expressed on earlier occasions, that neither a failure to appear at trial, in person or by counsel, nor a failure to participate in trial, is a default for any purpose of the ORCP and thus should not be dealt with in a rule that has to do with defaults in the correct sense of failure to enter an appearance or defend by answer or responsive motion. Bernie Jolles said that he did not think the issue of whether section 69 C should be transferred to some other rule is important enough to take time to debate.

Judge Marcus commented that he thought the real issue should be adequate notice of trial. He said that he believes that if a defendant has gotten proper notice of trial and fails to appear

in the sense of showing up, the trial judge should have authority to proceed to hear the evidence constituting plaintiff's prima facie case and then, if warranted, to enter judgment. Judge McConville stated that he did not see any difference between a defendant who fails to show up at trial as opposed to one who shows up but declines to put on evidence or otherwise participate, neither of which in his view constitutes a default. He added that he believed that what is now section 69 C belongs in Rule 58.

Mr. Gaylord noted that his natural inclination, if a defendant fails to show up or participate at trial, would be to look at the rule dealing with defaults. Mr. Hart remarked that possibly the best solution would be to transfer section 69 C to another, more appropriate rule, but to provide guidance by including an explanatory cross-reference in the Comments to Rule 69. Mr. Shepard observed that, in divorce cases, his experience has been that when a defendant fails to show up at trial, that is treated as a default. Several members questioned the use in section 69 C of the phrase "appear for trial." Mr. Hamlin explained that this reflected the effort to devise wording that would distinguish failing to show up at trial from failure "to appear" in the sense of entering an appearance, failure to do which does lead to an order of default. This discussion concluded with a general consensus that section 69 C should be retained in the ORCP, but should be transferred either to Rule 52 or Rule 58 and a cross-reference provided in the comment to Rule 69, with a clear preference being expressed by Mr. Hamlin and others for Rule 58. Mr. Hamlin agreed to undertake some further work on this matter and to circulate the product thereof for the Council's consideration in due course.

Agenda Item 7: Status report from Subcommittee on Hospital Records. Deferred to next meeting.

Agenda Item 8: Status report from Subcommittee on Council's Mission. Mr. McMillan reported that the subcommittee had elected Mr. Hamlin as its Chair. The latter then reported that the subcommittee had held one meeting at which the full range of issues, including the need to frame a response to the budget note, were discussed in tentative fashion. He stated that he had contacted Rep. Del Parks and was informed by him that there is not going to be an interim House Judiciary Committee. He also mentioned that he had contacted Holly Robinson of the Task Force on Court Reform to ask that he be notified should the Task Force wish to take up any issue relating to the Council. He added that he had also attempted to reach Sen. Dick Springer, but without success to this point. Prof. Holland commented that, if legislators are being contacted, it might be wise to touch base with Rep. Mannix. Mr. Hart noted the loss of Judge Wilson as a member of the Council and of this subcommittee because of her

appointment to the Circuit Court, but said that, in view of the excellent job being done by Messrs. Hamlin and McMillan, he was not inclined to nominate a successor to her as subcommittee member at least for the present.

Agenda Item 9: Proposed amendment to Rule 9. Mr. Hart asked whether the Council believed that the issue raised by Mr. Ronald Allen Johnston in his Oct. 28 '93 letter to Mr. Dennis Hubel and Prof. Holland (see Attachment C to Agenda of this meeting) ought to be pursued. There was general agreement with the position taken by the Practice and Procedure Committee, namely, that the problem described by Mr. Johnston was an isolated incident that does not warrant a rules amendment. Prof. Holland said he would so notify Mr. Johnston.

Agenda Item 10: Mike Williams' letter of November 24, 1993 to John Hart et al. Mr. Hart asked for the Council's reaction to the suggestion made by Mr. Mike Williams in his Nov. 11 '93 letter to him and others (see Attachment D to Agenda of this meeting). Mr. Hamlin noted that the 1993 Legislature dealt with the issue of telephonic testimony in the context of non-jury trials, in SB 724. He also stated that he believed that the topic of Mr. Williams' letter concerns a rule of evidence, and is therefore beyond the scope of the Council's statutory authority. Judge Sams said he agreed with this view. Mr. Lachenmeier then asked whether the Council has made a practice of recommending to the Legislature changes relating to civil litigation, but not within the scope of the ORCP. Mr. Hamlin replied that he had a hazy recollection that some such changes were recommended by the Council to the Legislature at the beginning of its operations, in connection with the initial set of ORCP when they were first promulgated, in an effort to deal with some perceived inconsistencies with statutory law. Mr. Phillips stated that he disagreed with the idea that this was a rule of evidence, but also indicated he was not interested in drafting a rule.

Agenda Item 11: Other matters for consideration during 1993-95 biennium. Mr. Hart asked whether anyone wished to propose additional items for the Council's consideration during this biennium. He asked Mr. Jolles what response the latter had received from the inquiry he had been requested to make to the Professional Liability Fund(PLF). Mr. Jolles responded that he had spoken with the PLF Executive Director, who informed him that the PLF was planning to make some proposal regarding service under Rule 7.

Mr. Hart posed a question about the effectiveness of the Rule 32 amendments with regard to class actions already filed. Mr. Hamlin pointed out that ORCP 1 C deals with the applicability of rule changes to pending actions.

Justice Durham raised a concern he has respecting ORCP 68 C(4) and trial court rulings on attorney fee petitions. He stated that the present subsection's provision that no findings of fact or conclusions of law are needed creates serious difficulties on appellate review of trial court rulings on fee petitions and objections thereto. He added that he thought that the practice in federal court, where some minimal findings are required, might be more satisfactory, and that he would like to see this issue explored. He pointed out that when Oregon courts rule on fee petitions they are dealing with a substantive right created by the legislature. Judge Brockley said he had some concern that requiring findings would increase the workload both in the trial and appellate courts. Judge McConville asked what the standard of review would be if there were findings. Judge Marcus stated he thought that, if findings are to be required, that should only be when they are requested by a party, not routinely or in the absence of such request. Mr. Hart raised the question of whether requiring findings might create either client relations or PLF problems. Mr. Shepard stated that he thought that findings might be required only if objections are filed. Mr. Jolles noted that what some have thought to be arbitrary reductions in attorney fee awards have proven to be something of a problem in the area of indigent criminal defense, and wondered whether this might also be true in some civil contexts as well. The discussion concluded with Mr. Hart asking Mr. Alexander, Justice Durham and Mr. Shepard to get together to look further into this matter, and then let the Council know whether they have any recommendations to make for its consideration.

Mr. Lachenmeier stated that he had some concern about the wording of ORCP 22 C(1), specifically the following: "The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and the third party defendant's counterclaims and cross-claims as provided in this rule." (Emphasis supplied.) He said that he thought this language could well be read to make a third party defendant's counterclaims and cross-claims compulsory, which he believed would be anomalous because in no other context under Rule 22 are counterclaims or cross-claims compulsory. He asked whether this had indeed been the intent or whether this language had been adopted without any recognition of this ambiguity. Mr. Hart commented that this language had probably been copied from the federal rule, where transactionally related counterclaims are compulsory. Mr. Hamlin pointed out that the phrase "as provided in this rule" might resolve the doubt, because all counterclaims and cross-claims otherwise provided for in Rule 22 are permissive. He opined that the word "shall" was probably used to apply to defenses under Rule 21, which of course are in a sense

fcompulsory. Mr. Gaylord said that his understanding of this language was: if you have any counterclaims or cross-claims, this is how you assert them. In response to a request from Mr. Hart, Mr. Lachenmeier said that he would take a look at the federal rule and report back his thoughts to the Council.

Agenda Item 12: Future meeting schedule. Mr. Hart stated that, in view of the supermajority requirement and the Council's relatively light workload, he did not think there was any point in meeting every month just for the sake of meeting. Several possible future meeting dates were discussed. It was decided by consensus that meetings on the following dates are scheduled: April 16, May 14, July 16, August 13, September 10, October 15, and December 10.

Agenda Item 13: Old business. No old business was presented.

Agenda Item 14: New business. Judge Marcus distributed a compilation of rulings by the Multnomah County Motions Panel (attached) prepared in synopsis form by Judge Anna Brown. He said he thought that the Council should have this information, but did not see anything in the synopsis suggesting the need for Council action at the present time. Mr. Hart expressed appreciation to Judge Marcus for providing this information.

Mr. Doug Wilkinson, one of the Practice and Procedure Committee's two liaison persons with the Council, reported that this Committee is currently working on amendments to Rules 17, 15 A and 55. Mr. Wilkinson added that he has been surprised to learn how few lawyers know how suggestions regarding possible ORCP amendments can be brought to the Council's attention. He suggested that the Council should make more of an effort to get this word out more widely. Mr. Hart expressed appreciation for this constructive criticism.

Judge McConville noted that, in light of the schedule of future meetings just agreed to, this would be his last meeting as a Council member, adding that he had been honored and pleased to serve. Mr. Hart expressed to Judge McConville the thanks of the Council for his dedication and many fine contributions to its work.

Mr. Hart appointed Mr. Lachenmeier as an additional member of the subcommittee on hospital records.

Agenda Item 15: Adjournment. The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Maurice J. Holland

Maurice J. Holland
Executive Director

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
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PORTLAND, OREGON 97204

DEPARTMENT NUMBER 12
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MICHAEL H. MARCUS
JUDGE

John E. Hart, Chair
Council on Court Procedures
University of Oregon School of Law
Eugene OR 97403-1221

January 13, 1994

Dear Mr. Hart:

At the November meeting, I committed to bring to the Council the Multnomah County Motion Panel's decisions on recurring issues. I then recalled that Judge Anna Brown was working on a compilation of such issues, and awaited the completion of her project.

Attached is Judge Anna Brown's synopsis of publications in the MULTNOMAH LAWYER from the motion panel and presiding judges since 1986. Please note that this compilation was prepared for the use of the motion panel in determining whether previous publications are still correct statements of the panel's position (and to invite new discussion), rather than an authoritative source for current Multnomah County practice - particularly as to the older statements.

I offer Judge Brown's synopsis as a convenient indicator of recurring issues under the Rules of Civil Procedure, rather than as a suggestion of what should or should not be the Council's position on any of these issues.

Sincerely,

Michael H. Marcus
Judge

1. Arbitration Motions.

A. January, 1993: "All motions in matters transferred to arbitration are to be heard by the arbitrator as part of the arbitration referral per [UTCR] 13.040(3). A party may show cause (by application to Presiding Court) why a motion matter should not be decided by an arbitrator."

Note: This is simply a restatement of the cited UTCR.

B. January, 1988: "No Pleading Amendments After Arbitration. The Court will exercise its discretion not to allow amendments to pleadings after a court-annexed arbitration has been rendered. The mandatory program is designed to award costs against the party who does not improve his position after appealing an arbitrator's award. Amendments to the defense or recovery theories after the award is made would hamper the court's ability to identify whether the party's position had improved."

Note: Are there appellate decisions since 1988 which address amendments after arbitration? Is this a currently recurring issue justifying a Motion Panel comment?

2. Attendance at Depositions.

A. June, 1992: "May persons other than the parties and their lawyers be present at depositions? Yes, but a party may apply to the court for the exclusion of witnesses. Cf. OEC 615; ORCP 39D."

B. June, 1993: "Presence of Experts at Depositions. There is not unanimous agreement among panel judges regarding whether or not a party may have an expert sit in on a deposition. Requests will be reviewed on a case-by-case basis, but will generally be allowed."

3. Attendance at Defense Medical Exams.

A. January, 1990: "Counsel at Defense Medical Examinations. Several attorneys for plaintiffs in personal injury cases have raised the issue as to whether they can attend the medical examinations of the plaintiff conducted by the physician chosen by defense counsel. The three judge motion panel has ruled that plaintiff's counsel cannot attend the examination."

B. September, 1986: "Rule 44 Medical Examinations. Judge Crookham rules that a person examined pursuant to ORCP 44 may not require that the exam be attended by the person's counsel or other witnesses, or that the exam be recorded or memorialized in any fashion other than the report

contemplated by ORCP 44B. In State ex rel Vriesman v. Crookham, the Supreme Court declined to issue an alternative writ of mandamus on June 18, 1986, where Judge Crookham had denied plaintiff-relator's motion that the medical examination be attended by a witness and tape-recorded and that the examining physician agree to follow principles contained in a "Patient's Bill of Rights."

4. Defense Vocational Rehabilitation Exams.

A. June, 1993: "Vocational Rehabilitation Exams by Non-Physicians. The ruling announced in this column in the January, 1990 Multnomah Lawyer is reversed. The motion panel has ruled that vocational rehabilitation exams will no longer be authorized unless they are performed as part of an ORCP 44C examination by a physician or a psychologist."

B. January, 1990: (Reversed) "Defense - Vocational Rehabilitation Examinations. The three judge motion panel has also ruled that if vocational capabilities of the plaintiff is an issue, defense counsel is entitled to have plaintiff examined by a vocational rehabilitation expert, in addition to an examination by a physician."

5. Discovery of Experts.

A. September, 1986: "Experts. Within the 'substantial need' language of ORCP 36B(3), Judge Crookham permits discovery of the factual observations of an expert retained by a party in anticipation of litigation for trial. When he orders production of an expert's report in this regard, Judge Crookham permits the 'white-out' of the expert's name, other identifying information, and any opinions or conclusions drawn by the expert from the factual observations referenced in the report."

B. March, 1990: "Discovery of Experts. The common wisdom among most Oregon trial lawyers is that there is very limited discovery of non-medical experts under Oregon practice. Presiding Judge Donald Londer, however, had not ruled on this issue until it came up in Vaughan v. Mazda Motors Corp., Case No. 8901-00322, December 21, 989.

"In Vaughan, Judge Londer quashed defense counsel's notice to depose "all persons retained on behalf of the plaintiff to give evidence at trial" regarding the issues of crashworthiness and enhanced injury. Judge Londer issued a six-page opinion and ruled that the general rule of discovery found in ORCP 36B(1) does not extend to the discovery of experts.

"Defense counsel has petitioned the Supreme Court for a writ of mandamus. Unless and until the Supreme Court accepts the case and reverses Judge Londer, the motion panel has agreed to follow Judge Londer's opinion."

C. April, 1990: "Discovery of Experts. The Supreme Court declined to issue a writ in Vaughan v. Mazda Motors Corp. (discussed in last month's column). Accordingly, the general rule in Multnomah County will continue to be that there is no discovery of non-medical experts.

6. Economic Damages.

A. January, 1993: "'Objectively Verifiable Monetary Losses.' The 'Tort Reform' legislation resulted in creation of the term 'economic damages' which is defined in ORS 18.560 as objectively verifiable monetary losses. However, there is no Oregon appellate interpretation of those terms, and it will be up to individual judges to decide with what degree of specificity plaintiffs must plead economic damages, such as future medical expenses."

7. Good Faith Conferences.

January, 1993: "The motion panel has decided that UTCR 5.011 is NOT satisfied by last minute phone messages or FAX transmissions immediately before filing of a motion. The judges want us to engage in a good faith effort to confer before filing motions."

8. Identity of Witnesses.

January, 1991: "The judges will require production of documents — even those prepared in anticipation of litigation — reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys are encouraged to provide a 'list' of occurrence witnesses, including their addresses and phone numbers."

9. Insurance Claim Files.

A. April, 1987: "The judges agree with the view that claims files are 'prepared in anticipation of litigation.' To reach claims files through discovery, a litigant must establish the 'substantial hardship' requirement of ORCP 36 (b)(2). In the event the moving party proves substantial hardship, the court will inspect in camera and allow discovery only to the extent necessary to offset the hardship (i.e., not the entire claims file). Those who seek claims files should remember that they may be subpoenaed for production at the time of trial. In appropriate circumstances, a trial judge may then release parts of the file."

B. January, 1991: Exactly the text from April, 1987 was reprinted.

C. June, 1992: "Are insurance claim files

'prepared in anticipation of litigation' and therefore protected by the work product doctrine regardless of whether any party has retained counsel? Yes, but subject to a showing of hardship and need under 36B(3). In the event the moving party proves substantial hardship, the court will inspect in camera and allow discovery only to the extent necessary to offset the hardship (i.e., not the entire claims file).

10. Marked-up Copy of Complaint.

June, 1992: "Does failure to attach a marked copy of the complaint to a Rule 21 motion require denial of the motion? Yes."

11. Medical Chart Notes.

A. September, 1986: "Chart Note Discovery. Judge Crookham rules that a doctor's chart notes (not contained in hospital records otherwise discoverable under ORCP 55H) are not 'written reports of any examination relating to injuries for which recovery is sought' within the meaning of ORCP 44C. Strictly speaking, chart notes are therefore not subject to a motion to compel. However, Judge Crookham agrees that production of chart notes is well within the spirit of the litigation cost containment guidelines recently adopted by OTLA and OADC and promoted by Chief Justice Peterson. Presiding Court therefore encourages parties to stipulate to production of chart notes and other 'existing' documentation of injuries."

B. April, 1987: "Doctors' chart notes. These remain unavailable under ORCP discovery rules EXCEPT when a treating practitioner refuses to provide an ORCP 44 report. Then, the judges will allow discovery of chart notes and permit the deposition of a treating practitioner at the subpoena rates for a lay witness. Remember that the party who requests an ORCP 44 report will be required to pay the reasonable charges of the practitioner for preparing the report."

C. September, 1989: "At our last committee meeting, Judge Londer discussed recurring discovery issues. The following, he said, are generally discoverable: (1) Medical chart notes, as well as medical reports, in personal injury cases; * * *."

D. January, 1991: "Doctors' Chart Notes: These are discoverable under ORCP discovery rules in addition to a report from a treating practitioner under ORCP 44. Remember that party who requests an ORCP 44 report will be required to pay the reasonable charges of the practitioner for preparing the report."

E. January, 1993: "Medical Records of Other/Prior Injuries. ORCP 44C authorizes discovery of prior medical records 'of any examinations relating to injuries for which recovery is sought.' The test for disclosure of prior

records will be whether or not the party seeking discovery has articulated why the records sought relate to the injuries for which recovery is sought. Generally, records relating to the 'same body part or area' should be discoverable, and the court needs to be satisfied that the records sought actually related to the presently claimed injuries."

12. Net Worth/Punitive Damages.

September, 1989: "At our last committee meeting, Judge Londer discussed recurring discovery issues. The following, he said, are generally discoverable: * * * (4) Statements of net worth in punitive damages cases."

13. Non-economic Damages in Excess of $500,000.

January, 1993: "Motions to strike non-economic damages pleaded in excess of the $500,000 'tort reform' cap will be denied until the constitutionality of the cap is decided. Plaintiffs may plead and prove to the jury their full measure of non-economic damages without reference to the cap. Post-verdict motion practice (perhaps based upon affirmative defenses) will result in adjustments in accord with the cap."

14. Photographs.

September, 1989: "At our last committee meeting, Judge Londer discussed recurring discovery issues. The following, he said, are generally discoverable: * * * (5) Photographs."

15. Praecipe Requirement.

June, 1992: "Does failure to file a praecipe require denial of the motion? Yes, the 'praecipe rule' stands unless good cause is shown why it should be waived."

16. Psychotherapist-patient Privilege.

A. June, 1992: "Is the psychotherapist-patient privilege waived by a party who puts a mental or emotional condition in issue by a pleading, so as to permit, inter alia, a defendant to depose a plaintiff's psychiatrist? Yes. OEC 504(4) provides: '(b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient: (A)In any proceeding in which the patient relies upon the condition as an element of the party's claim or defense * * *."

B. January, 1993: The apparent inconsistency in OEC 504(4)(b)(A) and OEC 511 has resulted in less than unanimous support for the view published in this column in June, 1992, that the psychotherapist privilege does not shield discovery in cases in which the patient relies upon the condition as an element in

the patient's claim or defense. However, the majority of the motion panel supports the plain language of OEC 504, even though it makes little sense and seems out of synch with OEC 511."

17. Speaking Objections.

January, 1993: "Speaking Objections. The panel has recommended that the Multnomah County Deposition Guidelines be amended to include a stronger statement regarding speaking objections as follows:

> 'OBJECTIONS. *** Attorneys do-not-need-to should not state anything more than the legal grounds for the abjection to preserve the record, and objection should be made without comment . ***'"

18. Tax Returns.

A. September, 1986: "Tax Return Discovery. In a wage loss claim, discovery of those portions of tax returns showing an earning history is appropriate — i.e., W-2 forms — but not those part of returns showing investment data or non-wage information.

"In punitive damage claims, Judge Crookham favors the production of sworn financial statement or balance sheets. He 'invites' paarties to prepare these in lieu of the court ordering production of complete copies of tax returns for a long period of time." (emphasis original).

B. September, 1989: "At our last committee meeting, Juddge Londer discussed recurring discovery issues. The following, he said, are <u>generally</u> discoverable: * * * (3) Tax returns, in cases where lost wages are claimed; (4) Statements of net worth in punitive damages cases; * * *."

19. Videotaping Depositions.

A. June, 1992: "When may a party videotape a discovery deposition as a matter of right (i.e., absent consent of all parties)? Videotaping shall be permitted only if the videotape is the sole official record of a discovery deposition, and so designated in the notice of deposition. ORCP 39C(4). Caveat: This issue is before the Oregon Supreme Court, which has allowed a petition for alternative writ of mandamus in <u>State ex rel Larson v. Cenciceros</u>, S38851."

B. January, 1993: "Deposition Videos Revisited. Some persons reported confusion after the last communication on videotaped depositions (June, 1992). Videos are allowed with the requisite notice and the notice must designate the form of the official record. There is no prohibition of use of BOTH a stenographer and a video, so long as the above requirements are met."

20. Witness Statements.

A. September, 1989: "At our last committee meeting, Judge Londer discussed recurring discovery issues. The following, he said, are generally discoverable: * * * (2) Witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement; ***."

B. June, 1992: "Are witness statements taken before a defendant learns that a plaintiff has retained counsel discoverable, and if so, when? Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, are subject to the work product doctrine. Notwithstanding the above, the judges will require production of documents -- even those prepared in anticipation of litigation -- reflecting names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys are encouraged to oprovide a 'list' of occurrence witnesses, including their addresses and phone numbers. Attorneys are also reminded that ORCP 36B(3) specifies that any person, whether party or not, may obtain his or her previous statement concerning the action or its subject matter wiwthout a showing of undue hardship."

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
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MICHAEL H. MARCUS
JUDGE

Prof. Maury Holland
Executive Director
Council on Court Procedures
University of Oregon
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1101 Kincaid Street
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February 26, 1994

Dear Prof. Holland:

Although I expected to be added to the class action subcommittee, it wasn't until I received Phil Goldsmith's letter that I realized the next step was mine, but here's my suggestion for what it's worth:

F(2) When the court awards monetary relief to class members other than named parties and the amount of such relief depends upon individual calculation of the loss, harm or injury sustained by such class members, the court shall **Prior to the final entry of a final judgment against a defendant, the court shall request members of the class who may be entitled to monetary relief to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.**

Of course, I would have no objection to a provision allowing the court to dispense with a claim form if it has all the information it needs upon which to base any calculation, or if the parties waive the claim form requirement, but I suspect the former would exceed our delicate mission. Should we meet or conference call??

Sincerely,

Michael H. Marcus

Attachment B

MEMORANDUM

March 25, 1994

TO: Council on Court Procedures

FROM: Bruce C. Hamlin

RE: ORCP 69C, Failure to Appear For Trial

FILE: 12685-88

At the January 15, 1994 meeting of the Council on Court Procedures, I recounted to the Council the history of ORCP 69, as construed in two Court of Appeals cases: Van Dyke v. Varsity Club, Inc., 103 Or App 99, 706 P2d 382 (1990), and Weaver and Weaver, 119 Or 478, 851 P2d 629 (1993). The Council will recall that ORCP 69C (which became effective January 1, 1994), was a response to Van Dyke, but made arguably unnecessary by Weaver.

I believe the consensus at the January 15 meeting was that the text of 69C should be retained, but that it should be moved to ORCP 58. What follows is the text of ORCP 69, followed by the text of ORCP 58, with conforming changes in the suggested staff comments:

RULE 69. DEFAULT ORDERS AND JUDGMENTS

A. Entry of Order of Default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with

written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

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 7D(3)(a)(i), 7D(3)(b)(i), 7D(3)(e) or 7D(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 a 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.

B(3) *Amount of Judgment.* The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) *Non-military Affidavit Required.* No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with the Act.

[C. Failure to Appear for Trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.]

C[D]. Setting Aside Default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71B and C.

D[E]. Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67B.

E[F]. "Clerk" Defined. Reference to "clerk" in this rule shall include the clerk of the court or any person performing the duties of that office.

COMMENT: 69C. The text of former ORCP 69C was moved to ORCP 58B in order to emphasize that the procedures for a default order or judgment contained in the remainder of ORCP 69 do not apply to a party that fails to appear at trial. Such a party is not in "default" as that term is used in ORCP 69.

RULE 58. TRIAL PROCEDURE

A. Order of Proceedings on Trial by the Court. Trial by the court shall proceed in the order prescribed in subsections (1) through (4) of section C [B] of this rule, unless the court, for special reasons, otherwise directs.

B. Failure to Appear for Trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

C. Order of Proceedings on Jury Trial. When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

C(1) The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim or both.

C(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

C(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense, or counterclaim.

C(4) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The

plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

C(5) Not more than two council shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

C(6) The court then shall charge the jury.

D. Separation of Jury Before Submission of Cause; Admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

E. Proceedings if Juror Becomes Sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

COMMENT: 69C. The text of former ORCP 69C was moved to ORCP 58B in order to emphasize that the procedures for a default order

or judgment contained in the remainder of ORCP 69 do not apply to a party that fails to appear at trial. Such a party is not in "default" as that term is used in ORCP 69.

When I reported to the Council on January 15, I had not yet been able to speak with former Council member and District Judge Winfrid K. F. Liepe. The Council may recall that Judge Liepe felt that the court should have a maximum amount of flexibility in the case of a party that failed to appear at trial. For that reason, in 1993, he proposed language making it clear that the court could proceed in a variety of ways besides conducting an evidentiary hearing.

When I recently spoke with Judge Liepe to find out whether he believed that such language was still necessary after the adoption of ORCP 69C, he said that he believed that it was, and recommended the following language:

> "When an order of default has been entered pursuant to _____, the court may, without taking evidence, enter a judgment by default against the non-appearing party on the basis of the pleadings filed by the appearing party or parties; provided that the court may require evidence in support of a judgment of default by hearing, jury trial, order of reference, affidavits, or other proceedings. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate."

I don't believe that such language is necessary. If any language is necessary, I suggest that the Council fall back on language taken from ORCP 69B(2):

> "To enable the court to enter judgment or carry it into effect, the court may conduct such a hearing, determine any matter upon affidavits, make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper."

BH

Attachment C-7

THORP
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January 26, 1994

MAURICE J HOLLAND
EXECUTIVE DIRECTOR
COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON SCHOOL OF LAW
EUGENE OR 97403-1221

Re: OSB Practice and Procedure Committee
Recommendations for Revision to ORCP 15A

Dear Maurie:

There appears to be some confusion over the amount of time a party has to file their reply to a counterclaim. Some lawyers appear to read ORCP 15A as indicating 30 days and others say that the reply to a counterclaim of a party summoned under the provisions of Rule 22D is the only reply that is entitled to a 30-day time frame. Accordingly, the Oregon State Bar Practice and Procedure Committee voted to recommend to the Council on Court Procedures that ORCP 15A be amended by deleting language so that it reads as follows:

> "A. Time for Filing Motions and Pleadings. A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim [~~of a party summoned under the provisions of Rule 22D~~] shall be filed with the clerk by the time required by Rule 7C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed."

Enclosed are OSB publications indicating that the time for reply to a counterclaim is ten (10) days.

Sincerely,

THORP, PURDY, JEWETT,
URNESS & WILKINSON, P.C.

Douglas R. Wilkinson

DRW:sak
encl.
cc: OSB Practice and Procedure Committee
F:\ATTORNEY\DRW\COMMITTEE\PAP\HOLLAND.LTR

Attachment D-1

		OREGON	FEDERAL
	Petition for Removal		Within 30 days after receipt of initial pleading, or within 30 days after service of summons (without a complaint), whichever is shorter. 28 USC §1446(b). If case not removable on initial pleading, within 30 days of receipt of a copy of amended pleading which first shows it to be removable. 28 USC §1446(b).
(§3.43)	REPLY TO ANSWER	Only to assert any affirmative allegations in avoidance of any defenses asserted in an answer unless court orders otherwise. ORCP 13 B. Within 10 days of service of answer. ORCP 15 A.	Only if ordered by the court. FRCP 7(a). 20 days after service of order unless otherwise ordered. FRCP 12(a).
(§3.44)	**REPLY TO COUNTER-CLAIM**	**10 days after service. For new party joined to respond to counterclaim 30 days after service. ORCP 15 A, 7 C(2).**	**20 days after service of answer. 60 days for U.S. after service on U.S. attorney. FRCP 12(a).**
(§3.45)	**RESPONSIVE PLEADING**	***To Amended Pleading* within 10 days after service of amended pleading or within time remaining for response to original pleading, whichever is longer. ORCP 15 C.**	***To Amended Pleading* within 10 days after service of amended pleading or within time remaining for response to original pleading, whichever is longer. FRCP 15(a).**

ALERY v. ALERY, JR., 193 Or 332, 238 P2d 769 (1951). Replevin action seeking recovery of personal property and damages for wrongful withholding. Defendants' answer contained a general denial and a purported separate defense, set forth affirmatively, in which defendants alleged that the property in question was owned by them and their daughter. Plaintiff failed to reply, and judgment on the pleadings was entered for defendants. *Held*: Reversed. As defendants' purported affirmative defense could have been proved under their general denial, it was not "new matter" and no reply was required.

STEARNES v. TUCKER, 239 Or 105, 395 P2d 881 (1964). Plaintiff's complaint for return of earnest money alleged that the written earnest money agreement was subject to an oral condition. Plaintiff's reply alleged that the agreement was not binding because of defendant's breach of fiduciary duties to plaintiff. The trial court struck this allegation, and defendant appealed. *Held*: Affirmed. The reply could not assert a basis for relief different from that pleaded in the complaint.

TRACY AND BAKER v. CITY OF ASTORIA, 193 Or 118, 237 P2d 954 (1951). Action for damages for injuries to plaintiffs' realty by landslides allegedly caused by defendant's negligence in dumping material on adjoining land. Defendant alleged affirmatively that the damage was caused by plaintiffs' unauthorized removal of lateral support to a hill, which caused the soil adjacent to a ravine to move downward and a drainage system to break, creating the landslides. In their reply, plaintiffs alleged that the damage was caused by the city's negligence in failing to maintain its drainage system in conjunction with the dumping of material into the ravine. Judgment for defendant was entered. On appeal, plaintiffs urged, inter alia, that their complaint and reply should be construed together, giving plaintiffs the benefit of the charges of negligence contained in both. *Held*: Affirmed. The reply cannot aid the complaint by broadening its scope or adding new grounds of relief, and plaintiffs must prevail, if at all, upon the matters alleged in their complaint.

B. (§21.34) Time for Filing Reply

A reply to a counterclaim must be filed within 10 days after service. ORCP 15 A. However, if the person served with a counterclaim is a new party summoned under the provisions of ORCP 22 D, that person has 30 days within which to respond. ORCP 15 A, 7 C(2).

The court may, in its discretion, allow a reply to be filed after the prescribed time. ORCP 15 B. D.

C. (§21.35) Failure to Reply

Failure to reply to allegations in a counterclaim results in admission of those allegations unless they concern the amount of damages. ORCP 19 C. But allegations in affirmative defenses are taken as denied and need not be denied in a reply. ORCP 13 B, 19 C. For example, failure to deny a counterclaim for trespassing results in admission of the counterclaim; but the plaintiff's failure to deny an affirmative defense alleging assumption of risk does not constitute admission of that allegation. However, failure to file a reply asserting new matters in avoidance of affirmative defenses raised in an answer results in inability to raise those new matters at trial. ORCP 13 B. Thus, in the foregoing example, if plaintiff wishes to present evidence

OSB Pleading & Practice