***MEMORANDUM***

March 25, 1994

TO: Council on Court Procedures

FROM: Bruce C. Hamlin

RE: ORCP 69C, Failure to Appear For Trial

FILE: 12685-88

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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."

BCH

UNIVERSITY OF OREGON

November 23, 1993

TO: **Bruce Hamlin**

FROM: **Maury Holland**

RE: **REVIEW OF COUNCIL'S WORK PERTAINING TO RULE 69 DURING 1991-93 BIENNIUM**

To assist you in your review, enclosed are the following materials:

1) Copies of excerpts from pertinent minutes (with attachments)

2) Pages 135-177 of the court reporter's transcript of the Council's December 12, 1992 meeting (a 42-page discussion of Rule 69)

3) Judge Durham's April 21, 1993 letter enclosing the decision in Weaver and Weaver and Judge Liepe's April 28, 1993 letter

4) Legislative history relating to Rule 69 contained in Merrill's 1992 Handbook (pp. 200-202)

Please let us know if you need further materials. It could be that you might want to refer to minutes of meetings in prior biennia where amendments to Rule 69 were discussed. Gilma can retrieve that information from our voluminous records.

The Council appreciates your review of the Council's work regarding Rule 69 during the 1991-93 biennium. Perhaps by the January 15th meeting we will have your opinion/recommendations.

Encs.

cc: John Hart

proof should be on those who would deny further disclosure. Mr. Tauman stated that he thought the proposal would reduce the cost of litigation because it would disincline the parties from fighting over an original protective order.

Bill Cramer wondered why an attorney in his own case could not seek to have a protective order in another related case set aside for this purpose. He felt that the proposal involved a very narrow piece of litigation. He suggested saying that protective orders may be altered or terminated at any time by the court after hearing on good cause shown.

Bernie Jolles pointed out that he thought that the proposal would give one lawyer the right in a case to obtain the same information that had already been disclosed, either voluntarily or compelled by the court.

After a lengthy discussion, Win Liepe made a motion, seconded by Bernie Jolles, to adopt the proposal as written by Susan Graber. The motion failed with 7 in favor and 9 opposed.

The Chair made a motion, seconded by Bernie Jolles, to adopt the proposal as written by Susan Graber except that "client" would be changed to "party". The motion failed with 6 in favor and 10 opposed.

Win Liepe made a motion, seconded by Mike Phillips, to adopt the proposal as written by Susan Graber but with the following sentence added: "The above provision shall not apply to any settlement agreement incorporating a protected provision." The motion failed with 5 in favor and 11 opposed.

**Agenda Item No. 8: NEW BUSINESS.** The Chair stated that Judge Mattison had written a letter to him dated June 26, 1992 (attached to these minutes), wherein he discussed a problem he had experienced with Rule 69. In that letter, he asked the Council consider amending 69 A in a manner that would eliminate any requirement for any notices of any kind in the situation he had experienced and the situation Judge Deiz had experienced in Van Dyke v. Varsity Club, Inc. (opinion attached to Judge Mattison's letter). Judge Mattison felt that when a defendant has been served, has filed an appearance, has received notice of the trial date and then failed to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment.

Bruce Hamlin had proposed the following changes to Rule 69 A:

1. Amend the first sentence to read: "... or is

otherwise subject to the jurisdiction of the court and has failed to [plead or otherwise defend] appear as provided in these rules ..." Also, amend the last sentence to read: "... against whom the order of default is sought has failed to [plead or otherwise defend] appear as provided in these rules ..."

or

2. "No written notice of an application for entry of an order of default is required if a party, after notice, failed to appear and defend at trial."

Elizabeth Welch and John Kelly both felt that this issue is a very important one and should be addressed this biennium. Welch also said that she felt that alternative number 2 would be a very adequate statement to add.

The Chair pointed out that, according to ORS 1.730(3)(d), the Council must publish to all members of the Bar at least two weeks before its final meeting of the biennium a notice which shall include the time and place of the meeting and a description of the substance of the agenda of the meeting. The Chair felt that Maury Holland should add consideration of an amendment to Rule 69 in the notice to be published in the Advance Sheets.

A discussion followed after which the Chair asked Maury Holland to prepare an amended draft of Rule 69 for the consideration of the Council at its meeting in Seaside on September 26.

Lee Johnson asked that the Council consider at its next meeting an amendment to Rule 60 on directed verdicts. A letter from Johnson to the Chair dated August 20, 1992 is attached to these minutes. He pointed out that the rule as presently written says that a motion for directed verdict can be made at the close of the evidence; the federal rule says that it can be made at any time after the party against whom it has been made has had an opportunity to be heard. He mentioned the problem when there are multiple claims and a judge is attempting to sort out the claims that are legitimate from those that are not. He suggested the following amendment to Rule 60:

"**Motion for a directed verdict.** Any party may move for a directed verdict [at the close of the evidence offered by an opponent or at the close of all the evidence] at any time during the trial after the opponent has been fully heard. ..."

After discussion, a motion was made and seconded to include a possible amendment to Rule 60 in the notice to be published in

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

JACK L. MATTISON
JUDGE

687-4257



June 26, 1992

Mr. Henry Kantor
Attorney at Law
900 SW 5th Avenue, Suite 1437
Portland, OR 97204

Re: ORCP 69A

Dear Henry:

The case of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), which interprets ORCP 69A, was brought to my attention this morning during our trial call, and it may be that the Counsel should take a hard look at 69A in light of the holding in that case. I should have been aware of it prior to today, but was not, and I would guess that my ignorance has a lot of company among members of both our bench and bar.

My situation this morning was as follows. A domestic relations case involving a decree modification issue was on today's trial docket. The responding party was pro se, but had made an appearance and had received a written trial notice from our calendar clerk. I was told that he had informed the moving party yesterday that he would not be appearing for trial, but that is not of much legal significance except perhaps as an indication that he had, in fact, received the trial setting notice. When I advised the moving party's attorney I would assign the case out to a judge for a prima facie hearing, he allowed as how he would like to do that, but under the Van Dyke ruling, he believed he had to give the respondent ten days notice of his intent to take a default before he could proceed any further. I then read the opinion, and while 69A has been amended since the case was decided, it is pretty clear that he is right.

As a consequence, although the case was set for trial and proper notice was given to all parties, the only effect the trial date has had was to trigger the mailing of a ten day notice of intent to take a default - to a party who voluntarily chose not to appear for trial. So, the case is now in a state of limbo until the plaintiff's attorney jumps through the ORCP 69 hoops.

This section was amended while I was on the Counsel, and I do not recall any discussion about it having this effect in this not uncommon fact situation, but if anything, the changes that were made from the 1988 version strengthen the Van Dyke interpretation.

I would appreciate the Counsel considering amending 69A in a manner that would eliminate any requirement for any notices of any kind in the situation I had this morning, and the situation Judge Deiz had in Van Dyke. When a defendant has been served, has filed an appearance, has received notice of the trial date, and then fails to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment. ORCP 71 is always available to the other side.

A copy of the Van Dyke opinion is attached, and thank you for your consideration of this request.

Very truly yours,

Jack Mattison
Presiding Judge

JM/rl

cc: Hon. Win Liepe

EDMONDS, J.

Petitioner moves for reconsideration of our opinion in *Mercer Industries v. Rose*, 100 Or App 252, 785 P2d 385 (1990). We held that the Board erred when it refused to award attorney fees to claimant after claimant actively litigated the issue of responsibility. Petitioner argues that claimant is not entitled to an employer-paid attorney fee, because his right to compensation was never in jeopardy.

Claimant's entitlement to receive compensation was resolved before the hearing when an order of responsibility under *former* ORS 656.307,[1] was issued. ORS 656.386(1) provides, in pertinent part:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision *denying the claim for compensation*, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee." (Emphasis supplied.)

Because claimant did not seek review from an order denying compensation, he is not entitled to attorney fees under ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611, 716 P2d 751 (1986). To the extent that *SAIF v. Phipps*, 85 Or App 436, 737 P2d 131 (1987), is inconsistent with this opinion, it is overruled.

Motion for reconsideration allowed; former opinion modified to affirm on cross-petition and adhered to as modified.

[1] ORS 656.307 was amended in 1987, after the hearing in this case, to include a provision for [illegible] of attorney fees in responsibility hearings. *See* ORS 656.307(5).



Argued and submitted May 25, reversed and remanded for further proceedings August 8, reconsideration denied September 26, 1990, petition for review denied October 23, 1990 (310 Or 476)

Lyle H. VAN DYKE,
Myrtle R. Van Dyke, Frederick G. Witham
and Rest-A-Phone Corporation,
*Respondents,*
*v.*
VARSITY CLUB, INC.,
*Appellant.*

(A8606-03623; CA A60891)

796 P2d 382

Action was brought alleging conversion, trespass and interference with business. When defense counsel did not appear on trial date for which notice had been mailed to counsel for both sides, the Circuit Court, Multnomah County, Mercedes Deiz, J., entered judgment for plaintiffs and defendant appealed. The Court of Appeals, De Muniz, J., held that: (1) evidence including presumption of receipt from correctly mailed notice of trial date supported conclusion that defendant received sufficient notice of scheduled trial that defense counsel's failure to appear was not excusable neglect warranting setting aside of judgment, but (2) trial court did not have authority to proceed with trial in absence of defendant that had engaged in extensive motion practice, but rather, should have proceeded under rule governing default that requires ten days' written notice of intent to apply for judgment when party has appeared in action.

Reversed and remanded.

1. **Evidence—Presumptions—Rebuttal of presumptions of fact**

Evidence permitted conclusion that civil defendant did not defeat presumption of delivery of notice of trial date which arose from showing that court properly mailed notice to defense counsel at his correct address and notice was not returned undelivered to court, although defense counsel claimed that he never received notice, so failure of defense counsel to appear at scheduled trial would not be considered excusable neglect warranting setting aside of judgment for plaintiffs. ORCP 71B.(1)(a); OEC 311(1)(b, m, p, q).

2. **Trial—Course and conduct of trial in general—Presence of parties and counsel—Judgment—By default—Requisites and validity**

Trial court did not have authority to proceed with scheduled trial in absence of defendant, where defendant had engaged in extensive motion practice, but failed to appear and defend at trial; rather, court should have proceeded under rule providing for default, which requires giving ten days' written notice of intent to apply for judgment with respect to party who has appeared in action. ORCP 69.

3. **Judgment—By default—Requisites and validity**

Failure of litigant who has pled to appear and defend at trial is regulated by civil rule providing for default. ORCP 69.

CJS, Evidence § 115.

Appeal from Circuit C[illegible]

Mercedes Deiz, Judge.

Patrick N. Rothwell, Portland, argued the cause for appellant. With him on the briefs was Hallmark, Keating & Abbott, P.C., Portland.

Craig D. White, Portland, argued the cause and filed the brief for respondents.

Before Riggs, Presiding Judge, and Edmonds and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded for further proceedings not inconsistent with this opinion.



DE MUNIZ, J.

Defendant did not appear for trial, and the court entered a judgment for plaintiffs. Defendant contends that the trial court should have granted its motion to set aside the judgment under ORCP 71B. We reverse.

On June 19, 1986, plaintiffs filed a complaint alleging conversion, trespass and interference with plaintiffs' business by defendant. After a series of ORCP 21 motions by defendant and repleadings by plaintiffs, plaintiffs filed a third amended complaint on July 20, 1987. Defendant filed its answer on July 28, 1987.

A trial date was set for March 13, 1989. The circuit court sent computerized trial notices to the correct addresses of the attorneys for both sides. Plaintiffs' counsel received the notice and appeared in court on March 13, 1989. Defendant's counsel did not appear. The trial court telephoned defense counsel's office but did not reach him. After waiting two hours, the trial court proceeded without defense counsel, took plaintiff's testimony and entered a judgment against defendant. Subsequently, defendant moved under ORCP 71[1] for relief from the judgment. The court denied the motion.

1. Defendant maintains that its motion to set aside the judgment should have been granted, because its counsel never received notice of the trial and, therefore, counsel's failure to appear was "excusable neglect." ORCP 71B(1)(a). The record shows that the circuit court properly mailed the notice to defendant's attorney at his correct address. The notice was not returned undelivered to the court, which was shown as the sender address on the notice. When a notice is duly directed and mailed, it is presumed to have been received in the regular course of the mail. OEC 311(1)(q); *see also* OEC 311(1)(b), (m) and (p). The trial court considered that presumption in regard to defendant's counsel's claim that he never received the notice. It concluded that the motion to set aside the judgment should be denied. There were sufficient grounds for the trial

[1] ORCP 71B provides, in pertinent part:

"(1) On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertance, surprise, or excusable neglect; * * * or (d) the judgment is void[.]"

court to conclude that defendant did not defeat the presumption of delivery of the notice. Therefore, the court acted within its discretion in concluding that defendant received sufficient notice. *Pacheco v. Blatchford*, 91 Or App 390, 392, 754 P2d 1219, *rev den* 306 Or 660 (1988).

Defendant next contends that "[t]he March 13 proceeding resulted in a judgment by default" and that the judgment was void, ORCP 71B(1)(d), because "[p]laintiff failed to comply with the notice requirements of ORCP 69 * * *."[2] Despite the fact that defendant mischaracterizes what happened in the trial court, he is correct. Although the word "default" was used several times at the March 13 proceeding, the trial judge clarified the type of judgment that she intended to enter:

> "An order of default may be entered against Varsity Club—well, actually, strike that. *There's no order of default.* They made an appearance. They've appeared, but they haven't appeared before the trial—for the trial itself." (Emphasis supplied.)

2, 3. The trial court did not intend to act under ORCP 69, but, rather, intended to proceed with the trial in the absence of defendant. However, the trial court had no authority to proceed in that manner. This is not the usual ORCP 69 case where a party fails to plead or to appear properly at any stage

[2] At the time of trial, ORCP 69 provided, in pertinent part:

"A. 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, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

"* * * * *

"B.(2) 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 unless they have a general guardian or they are 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. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by ult is sought has appeared in the action, the party against whom judgment is all be served with written notice of the application for judgment at least nless shortened by the court, prior to the hearing on such application."



of the proceeding. Rather, defendant engaged in extensive motion practice but failed to appear and defend at trial. Although the phrase "otherwise defend" in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial, *see, e.g., 6 Moore's Federal Practice* 55-13, ¶ 55.03(1) (2d ed 1988) the commentary to the rule indicates that, in Oregon, the failure to appear and defend *is* regulated by ORCP 69.

ORCP 69 was meant to be broader than the statute that it replaced, *former* ORS 18.080, which merely addressed default for failure to answer.[3] The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." *Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft*, Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:

> "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. *all* defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, *or failure to appear and defend at trial*, or an ordered default under Rule 46, *would be regulated by this rule.*" Commentary to Rule 69, reprinted in Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 217. (Emphasis supplied.)

Thus, under the circumstances existing here, where the defendant and counsel, without explanation, failed to appear for trial, the court should have proceeded under ORCP 69. Although an order of default could have been entered, ORCP 69B(2) required that plaintiffs give defendant 10 days written notice of the intent to apply for a judgment. That was

[3] *Former* ORS 18.080(1) provided, in relevant part:

"Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons, and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against such defendant * * *."

not done. The trial court erred in not proceeding under ORCP 69.

Reversed and remanded for further proceedings not inconsistent with this opinion.



Argued and submitted May 30, reversed August 8, 1990

STATE OF OREGON,
*Respondent,*
*v.*
MATTIE ANN MARTZ,
*Appellant.*
(10-88-04062; CA A61146)
795 P2d 616

Appeal from Circuit Court, Lane County.

George J. Woodrich, Judge.

Henry M. Silberblatt, Salem, argued the cause for appellant. With him on the brief was Sally L. Avera, Public Defender, Salem.

Michael Livingston, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed.

there is a significant gap in the current rules. Her second reason was that the proposal would confuse two different things, namely, Rule 60 as used in the context of a jury trial after the evidence is in and the other category being summary judgment.

Mr. Larry Wobbrock, Portland, spoke in opposition on behalf of OTLA, arguing that juries are expected to reach results on the basis of justice and might react differently to testimony and other evidence in the full presentation of a case than would a judge to a lawyer's summarizing of the case in chambers. He also pointed out that plaintiffs come to court prepared for trial, often with very expensive expert witnesses, and a lot of money would be lost if a trial judge granted this kind of motion and was then reversed by the appellate court.

Maury Holland said that the proposal and the opposition to it raises what might be a problem in our system, that is, how to dispose of cases lacking merit after the normal pretrial motion period is over but prior to midway through the actual trial itself. Of course, the current rule ~~might~~ deal with this reasonably well by giving judges discretion to shorten the period prior to trial before which summary judgment motions must be filed. Holland wondered whether the proposal might give judges some discretion to impose a penalty against a defendant who waited until the very eve of trial, when the plaintiff was fully prepared for trial, only then to make what in substance would be a summary judgment motion that could have been made much earlier.

Jan Stewart said that part of the problem is the reluctance to file summary judgment motions because so many judges appear to have a strong dislike for those motions. However, she expressed understanding of the point made by others who represent primarily plaintiffs about truncating the trial practice.

The Chair stated that he was concerned about the potential for serious interference with the advocacy process.

Bill Cramer stated that in many years of experience he has found that many of the litigants he has represented were better able to accept and understand an adverse verdict, provided they had been given their full opportunity to present their case, in other words, to have their day in court. His view was that our procedures are already very technical and that to make them even more technical might increase the frustration many people already feel about our legal system.

In response to a question from the Chair as to whether anyone wished to make a motion, Johnson then withdrew his proposal.

**Agenda Item No. 4: Amendment to Rule 69 (see attached proposed amendment) (Maury Holland).** The Chair asked Holland to

remind the Council about the background of the proposed amendment to Rule 69. Holland responded that at the August 1 meeting, the Council indicated they wished to consider the issue relating to Rule 69 that was raised by Judge Mattison in his June 26th letter to the Chair. Specifically, Judge Mattison referred to a recent Court of Appeals decision, Van Dyke v. Varsity Club, Inc., which seemed to hold that Rule 69 requires 10 days prior written notice before default can be entered against a defendant who has failed to show up for trial, despite notice of that trial. Holland made clear that despite what might appear from the draft amendment, there was no intention to delete the final sentence of Rule 69 A. He also explained that his proposed amendment would carve out an explicit exception to Rule 69 A, which generally does require 10 days prior written notice for cases where the default takes the form of a failing to appear at trial personally or by counsel when there had been adequate notice of that trial. He also said that his draft amendment would change "fail to appear" in 69 B(1) to "failure to plead or otherwise defend" so that the wording would be consistent with the first sentence of Rule 69 A.

The Chair commented essentially that he believed that if there is going to be an entry of an order of default for failure to defend at trial, he thought it would have to be by the court as opposed to the court or the clerk.

Stewart asked Holland what his proposed phrase "having proper notice thereof" was intended to mean. Holland responded that his thought was that the defendant should be shown to have actual knowledge of the trial date.

The Chair then asked whether there was general agreement that the question raised by Judge Mattison should be considered in a way that would essentially overrule Van Dyke.

Snouffer expressed regret that Betsy Welch was not present because he understood that this problem, of one party to a domestic relations case showing up for trial and the opposing party failing to do so without any apparent excuse, was a serious one in that area. He added that he believed that under these circumstances, the court should be able to proceed immediately to a default and after a prima facie case, enter a judgment.

Jolles stated that he thought the problem of notice to the non-appearing litigant is best solved by the procedure for setting aside default.

Bruce Hamlin then moved that the Council adopt Holland's amendment to Rule 69 A only, and the motion was seconded. The Chair called for a discussion.

John Kelly then moved to amend the proposed amendment by striking the words "having proper notice thereof." Hamlin

disagreed with the Kelly motion because he believed that the question of sufficient notice should be dealt with by the court at the outset. There followed some discussion concerning the meaning of the word "proper" and whether that might be deleted. Jolles agreed with Hamlin that the question of notice should be resolved if possible at the outset, especially since many of these cases involve pro se litigants. Holland interjected that he chose the word "proper" because he assumed that there might well be a wide variety of local court rules and other about notice of a time of trial. The intent of the word "proper" was simply to incorporate whatever local rules or other requirements might arise in a particular procedure. Jolles asked whether the word "having" was meant to imply that the defendant actually received notice. Hart said that he did not believe additional notice of an application for default should necessarily be required in the case of a litigant who had already received notice of trial and ignored it.

The Chair then called for a vote on the motion to delete the proposed language "having proper notice thereof." The motion failed with 6 in favor and 8 opposed.

Hamlin stated that having made the original motion to adopt the proposed changes in Rule 69 A, he was now willing to change the motion by simply deleting the word "proper." This was treated as a motion to amend and was seconded.

Graber then asked Holland why he used the term "defend" rather than "appear." Holland responded that, on the basis of a brief conversation with Ron Marceau at an earlier meeting, he was persuaded that whatever language is used should convey the idea that merely physically appearing in the courtroom was not enough, but that the litigant should be ready to participate in the trial.

Mr. Dennis Hubel, Bend, was then recognized for making comment on behalf of the Procedure & Practice Committee. He commented that any consideration of non-appearing defendants under Rule 69 should also include what is done about plaintiffs who fail to prosecute under Rule 54. There was general agreement, however, that Rule 54 was not presently on the Council's agenda.

Graber stated she was concerned about how the amendment might apply in the case of a defendant who actually shows up at trial but for one reason or another chooses not to put on a case. She said it did not make good sense to her that the judge could simply order entry of a default against such a defendant.

The Chair expressed some concern that whatever default might be entered, the court should make the determination--not the clerk.

Mr. Hubel stated that he was troubled by the whole idea of immediately entering a default merely because a defendant either fails to show up at trial or, having shown up at trial, does not put on evidence. Holland said that even though he had prepared the amendment, he was beginning to be persuaded by what Graber and Mr. Hubel were saying. He wondered whether under the circumstances described by Judge Mattison, many trial judges would instinctively direct the plaintiff to put on his or her case. The disadvantage to the non-appearing defendant would obviously be forfeiture of any opportunity to cross-examine or to rebut a case. If this is correct, Holland wondered whether more complicated or different amending language might be required. There then followed a brief discussion of what the Van Dyke case really stands for.

The Chair then asked whether it was the sense of the meeting that more thought and perhaps more drafting should be done. A motion to table was passed.

The Chair then asked Mr. Hubel to provide the Council with some proposed language addressed to Holland.

The Council recessed at 10:30 a.m. and resumed again at 10:47 a.m.

**Agenda Item No. 5: Class actions (Janice Stewart).** Janice Stewart, chair of the Class Action Subcommittee, stated that the subcommittee had not had an opportunity to meet since the August 1 meeting, although some additional information and proposed changes of language had been received from Mr. Phil Goldsmith. The Chair asked whether any responses had been received to the publication of possible Rule 32 changes in the Advance Sheets. Stewart responded that no material had yet come in. Stewart said that she suggested proceeding by moving through each section of Rule 32 as to which the proposed amendments in Mr. Goldsmith's letter of December 14, 1991 were unanimously endorsed by the subcommittee. She asked Council members to follow her presentation in the letter from Mr. Goldsmith rather than Holland's earlier draft.

Stewart then described the proposed change to 32 C.(1) and its purpose, and indicated the subcommittee supported it. She next described the proposed change to 32 D and expressed the reason for the change, which would be to require court approval of settlements or dismissals not only of cases certified as class actions, but also cases simply filed as class actions. She stated that initially the subcommittee was in some doubt whether court approval was necessary where dismissal occurred even before certification. Changes to 32 E.(1) and 32 E.(2) were also non-controversial and supported as being clearly useful.

Stewart then described the proposed amendment to present 32

## 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] <u>such</u> order [of default] at least 10 days, unless shortened by the court, prior to entry [of the order of default] <u>thereof</u>[.]<u>, except that no prior notice is required for entry of an order of default against a party who, having proper notice thereof, fails to defend at trial.</u>

**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)(c) The party against whom judgment is sought has been defaulted for failure to [appear] <u>plead or otherwise defend</u>;

* * * * *

Council approve the subcommittee's recommendation to repeal the claim form and damage calculation provisions of R. 32 F(2) and (3), respectively. Phillips again briefly explained the reasoning which led the subcommitte to recommend repeal, rather than amendment of 32 F(2) and (3) as the ad hoc committee proposed. He reiterated that this repeal would not deprive judges of discretionary authority to order solicitation of claim forms in cases where that seemed necessary or appropriate. He also clarified that eliminating existing 32 F(2) and (3) would not prescribe fluid recovery, but would simply remove a procedural obstacle to such recovery when that is pointed to by the relevant substantive law. Mr. Phil Emerson then addressed the Council, providing an overview of how fluid recovery and the like is being dealt with in federal courts and other jurisdictions. Holland added that, under the law of restitution, in cases of unjust enrichment the English Chancery treated wrongdoing defendants as trustees ex maleficio, who would not be allowed to retain any portion of the avails of their wrongdoing even if not all of it could be identified to specific plaintiffs who demonstrated damage. He further added that no sensible judge would imagine that fluid recovery could have any application in a personal injury or other case not involving unjust enrichment. The question on the pending motion was then called by the Chair, and the motion was adopted by unanimous voice vote. The Chair thanked the subcommittee for its hard work, and also expressed appreciation to the many who had commented by testimony or written submissions.

**Agenda Item No. 4: (Win Liepe and Bill Snouffer).** The Chair then called upon Bill Snouffer to lead off the discussion of the proposed amendments to R. 69. Snouffer said he had prepared a draft that would respond to the Van Dyke problem in the simplest and most direct manner. (See Attachment B (5) to Revised Agenda of 11/14/92 meeting.) He said that his draft would make entry of a default order mandatory upon failure of a party who had appeared in an action to appear at scheduled trial, but that he now agrees with Liepe that his proposal to make it discretionary is preferable. Snouffer then yielded to Liepe to continue the discussion.

Liepe focused his discussion on his revised draft entitled "Win Liepe Draft Proposal #2," circulated before this meeting (copy attached to these minutes). Liepe recalled that Judge Mattison had brought to the Council's attention the problem created by the present version of R. 69 that when one party appears for trial prepared with witnesses, and the other party fails to show up in person or by counsel, nothing can be done except upon ten days notice to the non-appearing party. He stated that the purpose of A(2) of his draft is to make clear that when a party fails to show up at trial, the judge has discretionary authority to order immediate entry of a default order, that his proposed A(3) would authorize immediate entry of

default judgment or allow the judge to take evidence, order a jury trail or reference, etc., if that seemed appropriate, and that the purpose of his proposed A(4) is to provide for mailing of notice of the date of entry of default judgment to the non-appearing party or attorney of record. The latter, he explained, is necessary in order to start the time running for appeal or seeking relief under R. 71. He said he regards it as important that judges have discretion to either order entry of default judgment on the basis of the allegations of the complaint, for example when damages are liquidated, or to require testimony or other proceedings when that seemed necessary. In response to a question from the Chair, Liepe clarified the fact that he thought the authority of a judge to require a prima facie case before ordering entry of judgment should be discretionary, not obligatory even in cases where it would serve no useful purpose.

John Hart asked whether inclusion of the words: "after notice of the date and time of trial" in proposed A (2) was necessary or helpful. He stated that if one party were present at a scheduled trial and seeking default because the other party failed to show up, that would indicate that notice of trial had been given. If not, he added, relief could always be obtained pursuant to R. 71. Skip Durham questioned the accuracy of characterizing the procedure contemplated by the Liepe proposal as default. Liepe and Jolles responded that the problem spotted by Judge Mattison, which all the Council agrees should be promptly fixed, used the terminology of default. Thus it would be difficult to overcome the problem created by Van Dyke outside the context of R. 69 and defaults. Phillips asked how the Liepe proposal might apply in a case where, because the complaint failed to state a claim for relief or other similar reason, judgment should not necessarily or invariably be entered against the non-appearing party. Liepe responded that both A(2) and A (3) of his proposal use the phrase "the court may," not "the court shall." Thus, if the judge can see that the action is barred by limitations or the like, that would be a reason why not to enter default judgment against the non-appearing party. The Chair expressed concern that the proposal as drafted might be construed to authorize judges to enter judgment against non-appearing parties even when a complaint fails to state a valid claim. Marceau commented that he did not see any problem here, because if a complaint failed to state a claim, and a defendant were defaulted for failure to appear at trial, he or she would get notice of entry of the default judgment and would then be alerted either to apply to set it aside under R. 71 or take an appeal. Hart commented that he failed to understand why there should be undue solicitude for a defendant who received notice of trial and failed to show up. Jolles reiterated his view that the problem at the moment is to deal with Van Dyke and expressed his opinion that the Liepe proposal does just that.

The Chair again raised the question of whether it might be easier simply to deal with the Van Dyke problem in Staff Comment, which might say that it is no longer the Council's intent that failures to show up at trial are intended to be defaults within the meaning of R. 69. Snouffer asked Liepe why the latter's proposal did not simply incorporate the language of B (2).

After the Chair proposed the further discussion of A (3) in the Liepe proposal be postponed until a later date, Jolles moved that Liepe's Proposal # 2 be approved without the words in A (3): "after notice of the date and time of trial," which motion was seconded by Hart. This motion was approved by unanimous voice vote.

The Chair asked whether anyone had any new business to raise, but there was none. The Chair then reminded everyone that the next meeting of the Council will be held on Saturday, December 12, at the University of Oregon School of Law (Room 375). The Chair said that there would be no Council meeting in January and suggested that the next meeting after the December 12th meeting should be held the first Saturday in February 1993.

The meeting adjourned at 12:07 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

Attachments To 11-14-92 Agenda

(Win Liepe Draft Proposal)

**RULE 69**
**DEFAULT ORDERS AND JUDGMENTS**

**A. Entry of order of default; failure to appear for trial.**

**A.(1) Default order.** 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 parity 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.

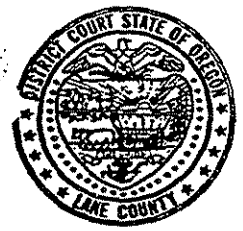
**A.(2) Failure to appear for trial. When a party who has filed an appearance fails to appear for trial after notice of the date and time of trial, the court may enter an order of default against the non-appearing party without further notice to the non-appearing party.**

**A.(3) Default judgment. When an order of default has been entered pursuant to subsection* A.(2) of this rule the court may enter a judgment by default against the non-appearing party in the manner provided in subsection* B.(2) of this rule. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate.**

(Remainder of R. 69 unchanged)

* "subsection" substituted by MJH for "paragraph" in interest of stylistic consistency.

DISTRICT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401




WINFRID K. LIEPE
DISTRICT JUDGE
687-4218

October 28, 1992

MR MAURY HOLLAND
SCHOOL OF LAW
UNIVERSITY OF OREGON
ROOM 275A
1101 KINCAID ST
EUGENE OR 97403-3720

HON WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE
MULTNOMAH COUNTY COURTHOUSE
1021 S W 4TH AVE
PORTLAND OR 97204

Re: Rule 69 and Van Dyke vs. Varsity Club, 103 Or App 99, review denied 310 Or 476 (1990)

Dear Fellow Subcommittee Members:

At the October 17 Council meeting I suggested that the Van Dyke problem be solved by an additional paragraph or two in Rule 69. I agree with Bill Snouffer that is the simplest approach.

When a party duly notified fails to appear for trial, there should be no need of further notice before entry of an order of default - or for entry of a default judgment when appropriate. I would suggest that present 69A be renumbered 69A.(1) and that two new paragraphs be added:

> "A.(2) When a party who has filed an appearance fails to appear for trial after notice of the date and time of trial, the court may enter an order of default against the non-appearing party without further notice to the non-appearing party.
>
> "A.(3) When an order of default has been entered pursuant to paragraph A.(2) of this Rule the court may enter a judgment by default against the non-appearing party in the manner provided in paragraph B.(2) of this Rule. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate."

The wording in paragraph A.(2) differs somewhat from the language proposed by Bill Snouffer. His version provides that "default

shall be entered". I would suggest "may". This should not be mandatory. There are many situations in which it would be inappropriate to enter an order of default even where one party has failed to appear for trial. It may be that the party is ill, has been in an accident, did not receive the trial notice, or has some other reasonable excuse for not appearing. If the court is reliably advised of such circumstances at the time of trial, it would be pointless to have an order of default entered only to take the additional time later on to unravel it by proceedings to set it aside under ORCP 71. In other cases it may be that the appearing party would for tactical reasons not want to have a default order entered in view of pending settlement negotiations. In some cases the appropriate solution may simply be a new trial date.

The above proposal authorizes order of default "without further notice to the non-appearing party". This is exactly what we intend. Bill suggests the phrasing "regardless of the time limits imposed by subsection A.(1) of this rule." This refers to current section 69A. Strictly speaking, this rule does not contain a "time limit" but a ten day notice requirement.

The purpose of paragraph A.(3) is to make clear that the court may in appropriate circumstances immediately proceed to enter a default judgment and to do so in the manner provided by section 69B.(2). The court could hold an immediate hearing with witnesses provided by the appearing party, or the court could simply proceed "upon affidavits" as allowed by Rule 69B.(2). This may afford considerable saving of time and money.

Attached is an excerpt from the Van Dyke case, pages 102 and 103 of 103 Or. App. Please see particularly footnote 2 on page 102. Van Dyke dealt with a former version of ORCP 69. This former version required ten days notice prior to entry of a default judgment under 69B.(2). It did not require ten day notice before order of default under 69A. Within that framework the Oregon Court of Appeals concluded that former ORCP 69 applied to failure to appear at trial.

Argument may be made that the Van Dyke reasoning does not apply to the current version of ORCP 69. The current version contains no requirement of a ten day notice before a default judgment is entered under Rule 69B.(2). Ten notice is required only with respect to entry of an order of default under Rule 69A. This applies where a party "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". Is the current version of ORCP 69A really intended to encompass failure to appear for trial? Or is it simply intended to deal with the situation where there has been some initial appearance filed or noticed and subsequent failure to file timely responsive pleadings?

We do not need to resolve that issue. It is better to clarify the current rule in any event.

At one point we should also address the policy questions on what kind of showing is required for a default judgment against a party who has failed to appear for trial. In the case of liquidated damages such as an action on a promissory note should it really be necessary to require testimony or affidavit to support the allegations of the complaint? In FED cases is a prima facie case or some affidavit necessary where plaintiff-landlord appears and defendant-tenant fails to appear for trial? Requiring a prima facie case or an affidavit usually results in mere repetition of the bare bones allegations of the complaint by some witness.

Claims involving unliquidated damages (injury to person or property, punitive damages) or other relief present more difficult problems.

A radical and efficient approach to simplifying default judgments after failures to appear for trial might include authority of the court to enter judgment based on the allegations of the complaint and such evidence (if any) the court in its discretion may require. This might be accomplished by a version of 69A.(3) reading as follows:

> "A.(3) When an order of default has been entered pursuant to paragraph A.(2), 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, in its discretion, may require evidence 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."

The policy justification for default judgments is that the court owes little or no protection to persons who would stick their heads in the sand or snub the processes of the court. This may not be charitable or perfect, but it may be fair and efficient.

Sincerely yours,

Winfrid K. Liepe
District Judge

WKL:ga
cc: Henry Kantor
Dennis Hubel
Judge Elizabeth Welch
Judge Jack Mattison

Attachment B(4)

(Bill Snouffer Draft Proposal)

## RULE 69
## DEFAULT ORDERS AND JUDGMENTS

**A. Entry of order of default; failure to appear for trial.**

A.(1) Default order. 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 parity 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.

A.2) Failure to appear for trial. When a party who has filed an appearance fails to appear at trial, an order of default shall be entered, regardless of the time limits imposed by subsection A.(1) of this rule.

(Remainder of R. 69 unchanged)

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE

(503) 248-3986

October 20, 1992

Mr. Maury Holland
School of Law
University of Oregon
Room 275A
1101 Kincaid Street
Eugene, OR 97403-3720

Hon. Winfrid Liepe
District Court Judge
Lane County Courthouse
125 E. 8th Avenue
Eugene, OR 97401-2926

Re: Rule 69 and Van Dyke

Dear Fellow Subcommittee Members:

I would like to suggest that we focus our immediate, short-term efforts to "fixing" Van Dyke v. Varsity Club, 103 Or App 99 (1990). We need a prompt solution to solving the problem faced by Judge Deiz in Van Dyke and by Judge Mattison: What to do when a party fails to appear at trial.

There are a number of additional issues lurking in Rule 69 that probably should be addressed later when (or if) we deal with comprehensive revision of the Rule. Some of these issues are discussed in Maury's memo of Oct. 5, 1992, and in Dennis Hubel's letter of Oct. 16, 1992.

I suggest, however, that, for the time being, we "fix" Van Dyke. I think there is a consensus in the Council that we do this as rapidly as possible. We need to provide a procedural mechanism for achieving pragmatic and realistic results. My guess is that Van Dyke is being honored in the breach and probably is not being followed. We should rectify that promptly and worry about long-range revision later.

I believe that whoever came up with the idea during our October 17 meeting (having a separate paragraph in Rule 69) provided the spark for the simplest (and therefore most elegant) solution. All we need to do is add a new section to indicate

that a failure to appear at trial is not subject to the 10-day notice provisions.

To achieve this, my proposal would be to divide Rule 69.A. into two sub-paragraphs. Existing Paragraph A., should be renumbered A.(1). It should be followed by a new sub-paragraph A.(2), as follows:

> A.(2). When a party who has filed an appearance fails to appear for trial, an order of default shall be entered, regardless of the time limits imposed by subsection A.(1) of this Rule.

This amendment should be coupled with a Staff Comment that the intent of the new subsection A.(2) is to revoke the procedural straight jacket imposed by Van Dyke (which admittedly relied upon the Council's own commentary to arrive at its result).

My proposal has a number of advantages. (1) It is a minimal amendment that accomplishes exactly what is required to "fix" Van Dyke. (2) It does not require any additional amendments to any other parts of Rule 69. (3) It does not impose a new procedure on litigants, lawyers and courts, but allows them to solve a problem pragmatically, and solve it in a manner that has been used historically for a number of years. (4) It does not require any additional language or changes to either Rule 52 or Rule 58, which, as Dennis Hubel pointed out, are relevant rules. (5) It does not attempt to struggle with issues of due process or with recasting Rule 69, as suggested in Maury Holland's memo of October 5 (although we may wish to do this in the future). (6) It does not try to resolve the (probably unresolvable) linguistic problem of what a default actually is; in other words, it does not try to achieve Dennis Hubel's suggestion that we use the word "default" only when discussing pleadings.

One draw-back of my suggestion is its use of "appear" -- the proposal uses "filed an appearance" in reference to pleading stages, and it uses "fails to appear" in the physical sense of presence in the courtroom for trial. The dual use or meaning is perhaps offensive to the linguistic purist. But the meaning is clear enough, and a comment reference to Van Dyke eliminates confusion.

There are times when a "quick fix" should be viewed with suspicion. This is not one of them. My suggestion states very directly that, when a litigant fails to appear at trial, the court does not have to wait 10 days before proceeding with the

case, but may immediately enter an order of default and proceed to judgment following whatever mode of trial is appropriate under Rule 69B.(2), Rule 52.A, and Rule 58.A.

Very truly yours,

WILLIAM C. SNOUFFER
Circuit Court Judge

WCS/pd

cc: Henry Kantor
Dennis Hubel
Hon. Betsy Welch
Hon. Jack Mattison

(Dennis Hubel Draft Proposal)

PROPOSED ADDITION TO ORCP 58E

When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement as set forth in ORCP 52A. If no good cause is shown, the court shall proceed to try the case. If the plaintiff has not appeared, and, therefore, fails to put on any evidence in support of plaintiff's claim, the case shall be dismissed with prejudice. If the defendant fails to appear, the plaintiff shall proceed to put on plaintiff's case and an appropriate judgment shall be entered based upon the evidence produced at trial.

Comment: More thought should be given to the possibility that one of multiple defendants or one of multiple plaintiffs does not appear while the remaining parties, plaintiff or defendant, do appear for trial. In that instance, perhaps, with respect to the plaintiff who does not appear, their claim should be dismissed for lack of evidence to support it. If it is one or more defendants who do not appear, perhaps the case should proceed to trial with the remaining parties and, at the conclusion of all evidence, both for plaintiffs and for those defendants who do appear, whatever judgment is supported by the evidence as determined by the finder of fact should be entered against the non-appearing defendant. As this possibility only occurred to me at the last moment, I have not given this a great deal of thought and there are perhaps problems with this approach that I've not anticipated.

Attachment B (8½)

Dennis J. Hubel

Admitted in Oregon and Washington

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October 16, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Maury Holland
Executive Director, Council on Court Procedures
U of Oregon, Room 275A
School of Law
1101 Kincaid Street
Eugene OR 97403-3720

Re: Proposed Amendments to ORCP 69

Dear Mr. Holland:

Thank you for providing me with a copy of the Agenda for the Council on Court Procedures meeting for Saturday, October 17, 1992, together with your October 5th memorandum regarding the ORCP 69 problems discussed at the September 26th meeting of the Council. As I agreed to do at that Council meeting, I have given some thought to and, by this letter, I am giving you my suggestions regarding a practical solution to the problem of a party failing to appear either in person or through counsel at the appointed hour for a trial. This assumes that the party has been given proper notice of the trial pursuant to whatever rules apply in the particular court.

First, I think it would be helpful if we removed this hypothetical situation from Rule 69 altogether. I believe that most trial attorneys [certainly all of those to whom I spoken about this since the September meeting] believe that the term default should be restricted to those situations where a party has failed to plead or appear by way of motion in response to the Complaint. Obviously, it does have some application to those situations where a party's pleadings have been stricken for whatever reason by order of the court and they are, therefore, no longer deemed to have entered an appearance. The confusion in this area, [see Judge Diez' comments in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) and Judge Mattison's letter] seems to stem from use of the term "default" in the situation where a party has not appeared for

the appointed trial date. Therefore, I suggest that the clause "or further defend" be either removed from ORCP 69 or be qualified to exclude appearance and defense at trial. It would be helpful to make a clear line of demarcation such that Rule 69 applies to defaults or failure to defend as required by the rules when it occurs prior to the day for trial. If it occurs on the day for trial, this should be handled by an amendment to ORCP 58 TRIAL PROCEDURE. I would suggest the addition of a paragraph E to ORCP 58 that reads as indicated on the enclosure to this letter. The purpose of this addition would be to clearly define and indicate that the trial court has the power and discretion to proceed with trial on the appointed date when the court record reflects that trial notices were mailed to the party or counsel for the party and that that party has failed to appear at trial.

It is neither practicable nor economical for the court or the parties to use the ten-day notice provision for defaults under ORCP 69 to handle the problem of the non-appearing party at trial. In any case, the party who is at trial will have incurred substantial attorney's fees, costs and potentially expert witness fees in preparation for the trial. If that party is forced, with the non-appearance of the defendant, to then give ten-days written notice of the prima facie hearing, the plaintiff will have incurred the expenses and, most likely, will incur additional charges for the delayed prima facie hearing. As an aside, how many busy trial judges will find a 1 - 3 hour block of time for the prima facie hearing within ten days in their schedule? It's hard to imagine a rational due process argument against allowing the appearing party to proceed to trial, put on their evidence in an abbreviated format (absent cross-examination from the non-appearing party) and obtain his or her judgment.

Likewise, a non-appearing plaintiff should not be allowed to complain about the court dismissing the plaintiff's case for failure to produce any evidence. Certainly, the defendant who is prepared for trial and incurred the expenses necessary to do so, should not be deprived of his or her opportunity to obtain a dismissal with prejudice of the plaintiff's claim at that time. If there is some reasonable explanation for the non-appearance of a defendant or a plaintiff, certainly the service of the judgment upon the non-appearing party or their counsel will trigger their use of the procedures already existing to remedy the result. See ORCP 64B(1) and C, ORCP 71.

Since the September meeting, I have re-read the Court of Appeals decision in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). I have been puzzled continuously by the statement of the court that -

> "The trial court did not intend to act under ORCP 69, but, rather, intended with trial in the absence of defendant. However, the trial court had no authority to proceed in that manner."

Van Dyke, 103 Or App at 102.

I reviewed the Oregon Rules of Civil Procedure looking for something to suggest the trial court had no such authority. Unless ORCP 69 in its current form prohibits this procedure, I find nothing. It seems to be a strained interpretation of ORCP 69 to suggest it prohibits a trial judge from proceeding. On the other hand, ORCP 52A states,

> "When a cause is set and called for trial, it shall be tried or dismissed unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party."

It strikes me that ORCP 52A is authority and, in fact, is mandatory in its command to the trial court to try the case when called for trial without consideration of whether a party appears or not. The staff comment for the Council on Section 52A, when it was adopted, indicates that the language of 52A is new. Apparently, in 1980, a modification to the second sentence of 52A was made according to the 1980 staff comment. The last clause of that sentence was apparently suggested by the case of Spalding v. McCaige, 47 Or App 129 (1980). I am enclosing a copy of the relevant portions of that opinion. Apparently, according to the Spalding opinion, prior to the enactment of ORCP 52A, when a party failed to appear at trial, the Court of Appeals felt that the trial judge was left with two choices: (1) To default the non-appearing party; or, (2) To postpone the trial. Spalding, 47 Or App at 137. It is not clear that any court has dealt with the significance of the first sentence of ORCP 52A mandating that the court case shall be tried or dismissed once it is set and called for trial. Certainly, the Spalding case did not resolve this as it acknowledged that ORCP 52A was enacted after the trial of that case.

I am concerned about your suggestion that the second full sentence of ORCP 69A be removed. This sentence requires ten-days written notice of a party's intent to seek "an order of default" if the party against whom the default is sought (1) has filed an appearance; or, (2) has provided written notice of intent to file an appearance. In practice, defaults are becoming more difficult to set aside. When this provision was added, we had certainty in

state court practice for the first time. The court didn't have to speculate about the parties' agreements regarding an extension any more. A defendant knew precisely how to automatically trigger a requirement for ten-days written notice of default. A plaintiff knew precisely how to automatically trigger an absolute deadline for the defendant to do something. This system has worked well. It should not be eliminated.

I indicated when I appeared at the Council's meeting in September that I appeared as the liaison representative of the Oregon State Bar Procedure & Practice Committee. Our Committee has not had a meeting since your September meeting and, therefore, these comments in this letter should not be construed as the position of the Procedure & Practice Committee. Rather, they are merely my thoughts and suggestions which I will review with the Procedure & Practice Committee at our next regularly scheduled meeting on October 24, 1992.

Thank you for your consideration.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Henry Kantor, Esq.\via fax
Stephen C. Thompson, Esq.\via fax

Enclosures

End of attachments to 11-14-92 agenda

Attachment B (12)

The words scratched out were deleted at the meeting, so no need to show them struck through as here

(Win Liepe Draft Proposal #2) -

Note: Judge Mattison called attention to the Van Dyke problem. After he received my letter of October 28, 1992, he strongly recommended dealing with default judgment on failure to appear for trial as set out in A.(3) below.

## Rule 69
## DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default; failure to appear for trial.

A.(1) Default order. When a party against whom a judgment for affirmative relief is sought has been served with a 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 the 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 or 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.

A.(2) Default order on failure to appear for trial. When a party who has filed an appearance fails to appear for trial ~~after notice of the date and time of trial~~, the court may enter an order of default against the non-appearing party without further notice.

A.(3) Default judgment on failure to appear for trial. When an order of default has been entered pursuant to subsection A.(2), 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, in its discretion, may require evidence in support of a judgment by 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.

A.(4) Notice of default judgment on failure to appear for trial. The clerk shall mail notice of the date of entry of the judgment in the register as required by Rule 70B(1) also to attorney of record for the non-appearing party, or if there is no such attorney, to the non-appearing party.

amendments to which they relate should be consolidated since they are integrally related. Dick Kropp, seconded by John Hart, moved that the foregoing proposed amendments be adopted, and the motion carried by unanimous voice vote.

**Agenda Item No. 10: ORCP 68.** Jan Stewart, seconded by Dick Kropp, moved the adoption of the proposed amendment to Rule 68, which motion carried by unanimous voice vote.

**Agenda Item No. 11: ORCP 69.** Win Liepe, seconded by Bill Stouffer, moved adoption of the proposed amendment to Rule 69. There followed some inconclusive discussion on how courts should rule with respect to the continued vitality of Van Dyke if this amendment is adopted, prior to its effective date.

The Chair then recognized Mr. Douglas R. Wilkinson, on behalf of the OSB Committee on Practice and Procedure, for some comments on this proposed amendment. He stated that he was satisfied that the proposed amendment as currently worded would not force the hands of judges. He suggested that the proposal should be amended to place on the party seeking the default judgment the burden of serving upon the non-appearing party the form of the judgment that would be entered.

Robert Durham stated that he seriously questions the correctness of treating a failure to appear for trial as a "default," which has opprobrious connotations and suggests punishments or sanctions to follow. There followed a lengthy discussion as to how, if a failure to show up for trial were to be regarded as a default, that would affect the tenability of various legal defenses, such as the statute of ultimate repose. Susan Graber stated she thought the most important thing was to fix Van Dyke in the simplest and most straightforward manner, and moved adoption of a newly numbered rule to read as follows: "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." This motion was seconded by Robert McConville. It was suggested that this might be added to Rule 58, but Maury Holland pointed out that neither public notice of Council action included any reference to Rule 58. Bernie Jolles moved that the language formulated by Graber be incorporated into existing Rule 69 as 69 C, with existing section 69 C and following being redesignated accordingly. The Chair called the question on the Jolles motion, which carried by unanimous voice vote.

Jan Stewart made a clarification to the effect that the materials setting forth proposed adoptions show a second sentence of Rule 39 D reading: "At the request of a party or a witness, the court may order persons excluded from the deposition" as being struck through and thereby deleted, whereas it should have

JUDGE DURHAM: Question. This is more a statement than a question. Parties have filed briefs in a case before my court that raises the question of the viability of the Van Dyke case. I can't tell you further about it than that.

MR. KANTOR: Maybe we should do a new staff comment that relates to that.

JUDGE DURHAM: The reason it's relevant, for people that may not have been here for the last meeting where we discussed this Van Dyke case extensively, this rule is directly in response to the Van Dyke case.

JUSTICE GRABER: Would you care to couple that with a suggestion, or are you just dropping that little --

MR. HAMLIN: Let's assume that a court determines that Van Dyke was wrongly decided. It wouldn't have any effect on the adoption of these amendments to Rule 69 which provide a sensible procedure for dealing with the same situation.

MR. MARCEAU: Isn't the proposed Rule 69, what we thought Rule 69 -- the effect Rule 69 should have had anyway, but for Van Dyke?

MR. HAMLIN: And an errant staff comment.

MR. MARCEAU: Wouldn't passage of this be at least like chicken soup, it can't hurt?

JUDGE DURHAM: Probably. That's probably correct. This would be a longer -- and my reaction is, this would be a longer way of stating what was meant by Rule 69, assuming hypothetically that Van Dyke were reversed.

MR. JOLLES: There is always the possibility it would be affirmed.

JUDGE LIEPE: There is one other thing that this rule does, so that we're aware of it, that was not strictly speaking in the prior law, and that says that when there is a default for failure to appear for trial, then the court can determine the issue based on the pleadings filed by the appearing parties, which is a shortened way of dealing with disposition of the case that is not strictly available under the present law, because nowadays counsel always feels they need to run in with a prima facie case and they have a witness go on and they swear to tell the truth and they recite the complaint and that's it and they sit down. Here we avoid that.

The court can make a decision based on the pleadings, if it's appropriate, filed by the appearing parties. That is one of the effective changes from prior law.

MR. KANTOR: I made an error of procedure here. We have a public speaker on Rule 69, and I should

have invited you to speak first, sir, and I forgot.

MR. WILKINSON: I'm Douglas R. Wilkinson and I'm a member of the Bar's Practice and Procedure Committee.

We have gone through and we have reviewed Judge Snouffer's and Judge Liepe's letters and different comments on that. The comments that the committee wanted me to make were with respect to the first paragraph of A(2). There was some comment that either in this particular rule itself or in a commentary that there would be an opportunity for postponement with the procedure for costs, and we had proposed some language that would just be at the end of that where it says, party without further notice, or the court may proceed in accordance with Rule 52 to make it clear that if by telephone or something like that the nonappearing party has contacted the judge and said, "Hey, I had a car wreck," I had something, or "I just haven't been able to get my clients together," and the other side says, "Well, we don't want them to go ahead because we have all these experts here and we believe the judge still has the authority to postpone it and go ahead and require the parties requesting the postponement to pay some charges.:

That was the first comment. The --

MR. HART: Can we address those one at a

time and perhaps ask some questions?

MR. KANTOR: Sure.

MR. HART: Don't you think that's covered by the word "may"? It doesn't say the court "shall" enter a default and go forward.

MR. WILKINSON: Yes, we think it is. We just wanted to make it clear that it could indeed go the other way, and we wanted it to either be in the rule or in the commentary, but absent that, we thought that certainly it's there.

The last one is with respect to this is entitled A(4), the sending out of notice. We wanted to put the burden on the party who was getting the judgment to send out a form of judgment because we were concerned that if the clerk didn't send it, there may still be a problem with an appeal. When does the appeal start running? It starts obviously upon the entry of judgment.

We wanted some language that would require the party that received the judgment to serve that form of judgment on the other party and that a judgment taken in this manner could not be entered until that proof of service had been filed with the court, and we had language that said the judgment of default may be entered on such date as the court may deem appropriate; however, it may not be entered until service of the form of judgment has

been made and proof of service has been filed in accordance with Rule 9.

MR. KANTOR: What's the reason for that?

MR. WILKINSON: The purpose for that is if indeed the party didn't appear for trial because the notice of trial went to somebody -- went to the wrong address, the notice of this judgment would still be on the court's computer and would be sent out to the same address. That was the first thing we thought about.

The second thing was sometimes the clerks don't send it out promplty. The third thing is that if it's a judgment that doesn't involve money, then the computerized statement showing how much the judgment is isn't attached. All you get is a form that there has been a judgment entered, so we wanted the form of the judgment to be clear to the party that was having the judgment taken against them what it was, and we wanted them to be on notice for it.

So those were our comments on the two.

JUDGE LIEPE: Were you intending that that notice be sent before a judgment is entered by the court?

MR. WILKINSON: Yes, that the form of judgment has to be served, so that if indeed you made the decision that day and you held a hearing and you conducted and finished it, before that judgment could be actually

entered, the form of judgment has to be served. If the individual has already been prepared and knows they're not going to be there, they could submit to proof of service at that particular time.

JUDGE LIEPE: There is a problem with that procedure, and that's this: Let's say a form of judgment is served and then submitted to the clerk and the court looks at it and he says, Oh, that isn't exactly what I meant. I want to change it around to say thus and such and so and so, then you would have to go through all that process again before it's served.

MR. WILKINSON: That was not our intent. Our intent was that it would be the form of judgment and not the judgment itself.

JUDGE LIEPE: The form of the judgment -- if the judge then enters the judgment in a different form because the form that's served isn't what the judge intended or had in mind or ruled, then we would have to go through the whole process again, and there is that problem which is among the reasons we used the clerk's procedure because that's also a procedure that's involved in other cases.

JUDGE DURHAM: In regular judgments.

JUDGE LIEPE: Yes, in regular judgments, and so felt use the same procedure here.

If in fact there has been a failing by the clerk to notify, then I suppose that's going to come up at a time that later on there is going to be a motion to set aside the judgment or whatever, if that's appropriate.

Also there is, of course, if the prevailing party wants to make sure that the other side knows about it, the prevailing party may of course voluntarily send a copy to the other side also. In many cases, I'm inclined to think they might do just that because what the clerk sends out is a notice of date of entry of judgment, not the whole judgment.

MR. WILKINSON: Those things we discussed, and the reason we still wanted the form of judgment is because we thought it provided more information. Even if it was wrong, it would be more information than just the notice of the entry, and we recognize indeed that the judge might change the form from what was being submitted, but we still felt that it would be providing more information, and the other part, we wanted the adverse party, the party receiving the judgment, to have a burden to go forth and send this as opposed to relying on goodwill.

MS. BISCHOFF: Question. Don't the Uniform Trial Court rules that impose a burden on lawyers to send and submit an order or form of judgment to opposing

counsel three days prior to the time they submitted to the court remedy your concern?

MR. WILKINSON: I don't think so. I think my number is wrong. I think it's 5.100 is the uniform trial court rules, and I think it only applies to orders; it doesn't apply to judgments.

MR. KANTOR: 5.100 does say orders only, but --

MR. HAMLIN: That's in part because the rule on judgments no longer says that judgments will be served in a particular amount of time before they're presented to the court; it's up to the court to settle its own schedule.

JUDGE SNOUFFER: Just to comment, it seems to me in one sense we are regarding the nonappearing party by giving them more information than they would have been entitled to had they come to court in the first place, and in one sense I can understand that by saying if you assume somebody is not at court because of causes beyond his or her ability to control, judgment is entered, send them a copy personally in addition and over and above what 70B(1) requires, and that is perhaps some commendable solicitude for that person who is unable to get to court, but I think we're making a mistake by making this procedure more cumbersome than is already required under Rule 70B(1).

JUDGE DURHAM: Can we call for the question?

MR. KANTOR: I don't believe so. Janice Stewart?

MS. STEWART: I'm looking to the title to A(4). In the title it's talking about notice of default judgment on failure to appear for trial, but the sentence following it just says, "notice of the date of entry of the judgment". It doesn't define what judgment you're talking about, whether it's the judgment entered under A(3), which I assume you're talking about, so it seems like some clarification is necessary.

JUSTICE GRABER: It's the only judgment talked about in the rule.

MS. STEWART: It may be that we need to add some words, entry of the judgment, the default judgment under A(4), because I think later in the ruling under subsection D there is a default judgment and whatnot.

JUDGE LIEPE: A(2) and A(3) don't define the default judgment to which A(4) refers.

JUSTICE GRABER: She's just saying, I think, that the word "default" is not in A(4) on Page 30. It just says "the entry of the judgment". You're saying it should say "the entry of the default judgment"?

MR. MARCEAU: What it should say is "the

entry of a judgment pursuant to A(3)" so that it not be confused with default judgments under B, right?

MS. STEWART: Yes.

JUSTICE GRABER: I see what you're saying.

MR. MARCEAU: Two kinds of default judgments. One is appearance at trial, and two is default for failure to appear in a case.

JUDGE LIEPE: The way to fix that would be -- what would you suggest?

MS. STEWART: Just add "pursuant to A(3)" after the word "judgment" would be one way to do it.

MR. JOLLES: After the word "judgment"?

MS. STEWART: Yes, unless there's a better suggestion.

MR. KANTOR: Is that an amendment?

MR. STEWART: If no one else has a better suggestion, I will so move.

MR. SNOUFFER: I have some concerns now because you're getting into some grammatical problems concerning A(3) between between "shall mail notice as required by Rule 70B(1), so maybe we should say, "the clerk shall mail notice of the date of the judgment entered" --

JUDGE LIEPE: -- "of the judgment entered under subsection A(3)".

MR. HAMLIN: It should still say the date of entry. That's the appropriate date.

MR. JOLLES: What if we just say that "the clerk shall mail notice of the date of the A(3) judgment"?

JUDGE LIEPE: How about of the judgment entered under subsection A(3)"? Will that fix that?

MR. MARCEAU: Second.

MR. KANTOR: That was an impatient second.

MR. MARCEAU: I'm Judge Liepe's professional seconder.

JUDGE LIEPE: Trapped you, didn't I?

MR. KANTOR: We have a second to a motion which would amend A(4) to somehow include a definition of the judgment to be sure it's an A(3) judgment.

MS. STEWART: There is another option. Just say "date of entry of the default judgment on failure to appear for trial".

MR. KANTOR: Without reference to the specific rule? Maybe that's a better way to do it.

MS. STEWART: Is that grammatically better? Default judgment on failure to appear for trial -- why don't you say, date of entry in the register of the default judgment on failure -- Oh, God, that's cumbersome.

JUDGE LIEPE: Entry of the default judgment for failure to --

MS. STEWART: What if you just said --

MR. KANTOR: One moment. I am going to suggest that we go off the record unless there is an objection for a drafting session because this is something very difficult. The court reporter is getting three words here and there.

(A discussion was held off the record).

MR. KANTOR: Back on the record. Judge Snouffer, could you make the amendment?

JUDGE SNOUFFER: That paragraph A(4) is amended to read "the clerk shall mail notice of the date of entry of the subsection A(3) judgment in the register", et cetera, et cetera.

MR. KANTOR: Second?

MS. STEWART: Second.

MR. KANTOR: Any discussion of the amendment? All those in favor?

CHORUS OF COUNCIL MEMBERS: Aye.

MR. KANTOR: Opposed? Unanimous.

Judge Durham, maybe you could summarize the comments you made.

JUDGE DURHAM: I merely wanted to record a reservation of my own that this rule seems to be creating a new adjective -- a new term called "default judgment for failure to appear for trial", which is a legal misnomer.

This party is not in default. They have merely failed to appear for trial and they should not be burdened with the obligation to seek relief from default for the mere failure to show up for trial. That's not a guilty act under our rule system. I feel a bit uncomfortable calling that person in default. I think it's a mislabeling that may be misleading, although I do fully agree with the concept that Judge Liepe and others, including myself, have endorsed here, which is to streamline the procedure for the entry of a judgment when the party has failed to appear for their trial date.

MR. HAMLIN: It's not the case currently that the only type of judgment by default is for failing to file a pleading. There are other types of judgment by default. For example, under Rule 46B(2)(c), if you engage in certain kinds of discovery abuse, one of the orders that the court can record is one, quote, "rendering a judgment by default against the disobedient party", end quote.

So I'm not sure that it really is apples and oranges. You can have a default entered for a couple of reasons. One is failing to file a pleading; another is failing to conduct discovery appropriately, whatever that means; and a third now is failing to show up for trial even though you may have filed pleadings prior to that.

JUDGE DURHAM: I appreciate your comment. I think both of the items that you have mentioned, though, failing to file a pleading, that's ignoring the processes of the court; failure to engage in discovery in good faith, that's also a sanctionable act; but failing to come to trial on the day of trial is not a guilty act. It's a perfectly lawful response to a lawsuit. You file your pleadings and you're prepared to let your affirmative defense stand or fall, or whatever your pleading position might be.

MR. HAMLIN: How would your affirmative defense stand or fall if you weren't there to support it, because we don't have notice pleading, I'll grant you that. We do have pleadings of ultimate facts, but ordinarily, say, contributory fault wouldn't sort of prove itself --

JUDGE DURHAM: Certainly there may be defenses that require evidence, but others that you may just bring to the court's attention through an affirmative defense, such as the statute of frauds or statute of limitations, lack of jurisdiction, failure to state a claim. Any of those can be fully brought to the court's attention through a pleading and I'm not in default if I have filed that kind of a pleading and let my case go. I'm not ignoring the court; I'm not guilty of a

sanctionable offense.

MR. HAMLIN: I agree with you that some types of defenses are purely legal matters and wouldn't require the introduction of proof, but on the other hand, that's a pretty big burden to put on the trial judge to then have to go through all the defenses and say, "Which ones of these require proof, which ones should I search the record and try and figure out whether the statute of limitations has expired or not?"

JUDGE DURHAM: Understand, I'm perfectly ready to let that party lose their defense if they haven't proven something that needs to be proved. All I'm talking about is creating the label of default and applying it to this party who is not in default.

MR. KANTOR: Justice Graber?

JUSTICE GRABER: I share some of what Judge Durham has stated as a reservation. I think all of this got complicated by -- from the basic principle, which is simply that when one party fails to appear at trial, the judge ought to be permitted to proceed with the people who are then in the courtroom, either by way of taking evidence on a prima facie case or other appropriate actions without having to go back and start over and give notice, and maybe what has been proposed here is just overly complicated or appearing in the wrong place. Maybe

it ought to be its own rule that simply says that when one party fails to appear, the judge may proceed to do "X", without labeling it default or labeling it anything else because that's really the point of this is to avoid the need for an additional procedure, but we don't have to label it a default. We can simply say affirmatively that when a party who has filed an appearance fails to appear for trial, and then skip all the way down -- I'm sorry; I'm looking at Page 29. If you went and left out pieces of A(2) and A(3) and simply said "When a party who has filed an appearance fails to appear for trial" and skip all the way down, "the court may without taking evidence enter a judgment", leaving out the words "by default", "against the nonappearing party", take out all the wording about default and arrive at the same place.

JUDGE DURHAM: I raised that last meeting, and if I recall it correctly, I think Judge Liepe felt that it would be important to empower the trial judge to enter an order of some kind upon the nonappearance of a party, and I simply agree with how you have laid it out. I think a judge should be fully entitled without the burden of entering an order about your nonappearance, the judge ought to be able to say, "I'm entering judgment on the pleadings without taking evidence or perhaps seeing that in fact evidence is required." It's left to the

trial judge without the duty of entering an order. That was my concept.

JUDGE McCONVILLE: I support the view expressed by Judge Durham and Justice Graber, except I am troubled with the notion that the rule would say that the court could proceed without taking evidence because by the filing of the pleadings, the allegations that support the claims necessarily are controverted, but at least controverting to those, evidence would be necessary, and I think Justice Graber is correct in observing that probably the rule that best addresses this, at least looking at it as Judge Durham has suggested it be viewed, and I happen to share that view, would be a separate rule, not a default, and I might say something on the order of a caption, just failure to appear for trial, and when a party who has filed an appearance fails to appear for trial, the court may proceed to trial and judgment without further notice to the party.

JUDGE DURHAM: Would that take care of your concern? Because I'm very concerned that you raised a desire last meeting that the trial judge ought to be permitted to enter an order, that that was significant, and I'm not fully aware of why that is.

JUDGE LIEPE: I feel there ought to be some sort of order that appears in the court record that

perpetuates the fact that one of the parties hasn't appeared. It may be that the court will not be ready at that time to enter a judgment. It may be there is some other things that need to occur, maybe there is some additional evidence that needs to be taken before a judgment can be formulated, but it ought to be in a situation whereby the other party who failed to appear is then excluded from that process, and because that other party becomes excluded from the process because they failed to appear in court, that's why this is like a default situation. Default is whatever we define it to be, and it doesn't mean that the word "default" is necessarily limited to failure to file a pleading. I think default can be anything that we define it to be, if that makes sense.

JUDGE DURHAM: If a party is not in default on the pleadings, trial date is appointed, notice has gone out, it's all in due course, defendant fails to appear for trial but the judge declines to enter judgment because the appearing party says, "I need a postponement," or something, what's the problem with allowing the nonappearing party to appear on the second day for trial, because they're not in default?

JUDGE SNOUFFER: Nothing.

JUDGE LIEPE: It may depend on the

circumstances.

JUDGE DURHAM: Do you think it's important to penalize or burden or somehow give a demerit to that nonappearing party?

JUDGE LIEPE: I think it is important to penalize parties who fail to appear in court on the trial day, and that's part of the whole procedural process whereby the court ensures efficiency rather than having people traipse in later on without any reasonable excuse to drag out the proceedings.

JUDGE SNOUFFER: I just want to reiterate what I said a couple meetings ago, and that is I think what is really important to keep in mind is Van Dyke presently ties our hands and says, "If we don't have a person at trial, we have to stop, go back, give 10 days' notice and start over again."

What we were trying to do by this is simply fix Van Dyke, short-term fix. The Committee on Procedure wrote a letter as I recall somewhere in our files and got into all the things Judge Durham is talking about, about the difference between default for failing to -- a party being in default for failing to follow through on the pleadings versus what we're choosing to call a default judgment here, and those are theoretical and academic kinds of distinctions which probably have a lot of merit,

but I was hoping we could fix Van Dyke right now and then the next biennium sit down and worry about these theoretical distinctions and perhaps draw up an entirely new rule.

MR. KANTOR: Judge Graber?

JUSTICE GRABER: I think that what we were talking about earlier, though, is to try to fix Van Dyke in a simpler form. I don't think anyone -- at least I am not suggesting that we ought not fix it. I think it's a problem and I think we ought to fix it. I just think there is an easier way to do it, and I'll go ahead and propose it as an amendment, that is as a substitution for the changes now shown on Pages 29 and 30 of our materials to have a newly numbered rule entitled "Failure to Appear for Trial" that would read as follows: "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 nonappearing party."

MR. McCONVILLE: Second.

MR. KANTOR: Discussion on the proposed amendment? Bruce Hamlin?

MR. HAMLIN: We don't have gaps in the numbering because of the way that the original set of rules was produced. 1 through 64 were adopted during the first biennium. We do, however, have a Rule 58, which is

entitled Trial Procedure, and that might be a logical place to put it.

MR. HOLLAND: We do have some reserved numbers. Those are vacant, aren't they, for rules?

MR. KANTOR: They are.

MR. HOLLAND: They're out of order.

MR. KANTOR: They're out of order and I recommend the same thing, Rule 58, Trial Procedure.

JUSTICE GRABER: I accept that as a friendly suggestion, and if my seconder would permit that could be a new Rule 58, subsection I believe it should be E, or whatever the next subsection is, and it would have the same title and the same text, but it could be in the rule on trials because that's really what it is. It's a description of another situation in which a trial would proceed.

JUDGE McCONVILLE: I adhere to my second.

JUDGE WELCH: It's kind of six of one and half a dozen of another. I was thinking we could change the title on Rule 69 so it isn't about default judgments but about default judgments and orders taken after a party fails to appear. It's a little of six of one, half a dozen of another.

JUSTICE GRABER: I think conceptually, it makes more sense in 58 because it's one situation in which

a trial would proceed and it takes out the concept that we have to then mush the language of 69.

JUDGE LIEPE: Judge Graber, would you be willing to incorporate in your recommendation that in that situation, on failure to appear for trial, the court may without taking evidence enter a judgment against the nonappearing party on the basis of the pleadings filed by the appearing party or parties?

JUSTICE GRABER: I would not want to put that language in there, and the reason is that the wording that I have suggested is broad, and to me it suggests that the trial judge has discretion to do anything that the judge believes is appropriate that would otherwise be appropriate at the trial, and if a motion for judgment on the pleadings as to an issue would be appropriately entertained, it still arguably would be appropriately entertained at that point, so my intention is to make it simple and just simply do away with Van Dyke in the shortest possible sentence which is simply to say that -- 69 isn't about that, and in this situation, no further notice is required and things can proceed without being any more specific than that, and I would not want to make it more specific than that.

JUDGE LIEPE: One of the things that's of real concern to trial judges is this matter of evidence at

the time when there is a nonappearance, and it's really a waste of time to have required prima facie evidence under the pleadings when they're going to -- when the prima facie evidence really is going to produce nothing but the pleadings themselves, so it was the thought that in the "failure to appear for trial" situation, the judge should be able to enter a judgment on the same basis and in the same way in which a judge enters a judgment in case of a default or failure to appear at all, which is provided for in 69B(2), and so that's the reason why these other provisions are in the proposed rule.

MR. KANTOR: My feeling is that Judge Liepe's concerns are completely valid but they tend to raise a host of other related issues that go beyond the quick fix, and I think they may be more appropriate for consideration of how to deal with the problem of prima facie hearings generally than just reversing the effects of the Van Dyke case.

JUDGE LIEPE: They do both, that's right. This would address both issues, and it would deal with, for instance, in district court and F.E.D. cases, there is a failure to appear by the tenant. Those things are handled on a very -- there are a lot of those cases. They're handled on a rapid basis where you have the same kind of thing and all kinds of collections procedures and

so forth, where it makes no sense to require a witness to appear and to mouth something already in the complaint, so it would be very helpful to have a procedure such as we have outlined here.

MR. KANTOR: Currently we have Judge Graber's motion which is seconded without the language. She has declined to change her motion accordingly, so either you need to make an amendment to her amendment or wait until her amendment gets voted down.

JUDGE LIEPE: Maybe it would be approved.

MR. KANTOR: If it is, that effectively ends the discussion.

JUDGE DURHAM: Point of order. Is her motion in lieu of, and you quietly not adopt the other?

JUSTICE GRABER: It was a motion to substitute, and I don't know if that's the right word. I'm not up on those kinds of rules of procedure.

MR. KANTOR: I believe the effect of Judge Graber's motion if approved would be to terminate the discussion.

JUSTICE GRABER: Of the current material on Pages 29 and 30 of Rule 69.

MR. MARCEAU: As we say in central Oregon, I'm afraid we are getting further away from the pickup all the time. One thing we know for sure is we have to do

something, and I'm not sure I understand why we are thinking of the proposal as a quick fix, why it will not last for the ages, for instance. Specifically this proposed rule doesn't say that failure to appear at trial is a default. What it says is if you don't appear for trial, the other guy is entitled to a default order and a default judgment. What violence or damage does that do to anything? I am afraid I don't understand the consequences of putting this in place. What bad thing will happen or may happen if we do this?

JUDGE DURHAM: Typically, it's my understanding that if the party is in default, they are not entitled to be heard further on the matter because they had their opportunity and blew it. My understanding is, however, that a party who has fully met their pleading obligations and has chosen not to appear for trial is in no way confronting the court in a rude matter; they are not violating anything and they should not have any burden to seek relief from a default before they are entitled to be heard on a motion for a new trial, a motion to set aside a judgment or anything of the kind, because they are not in default, conceptually. That's why I use the apples-and-oranges notion. This is not a party who is in default.

MR. MARCEAU: This really doesn't say

you're in default if you fail to appear at trial. This just says that the other guy is entitled to do something.

JUDGE DURHAM: But if an order of default is entered against me, I am not entitled to be heard further until I go through the process of seeking relief from default, which should not be my burden. I am a party who is fully appearing and litigating.

MR. MARCEAU: How would you have that person who doesn't show be heard further?

JUDGE DURHAM: On a motion for a new trial because the judge obviously missed a completely dispositive affirmative defense, statute of limitations or the like.

MR. KANTOR: Judge Liepe was first here.

JUDGE LIEPE: With all due respect, I disagree with the basic philosophy that's expressed in the notion that someone can just not appear for trial and then expect on that basis to have actions set aside and so forth. The duty of a litigant is to appear for trial, and I think that's a duty -- a litigant has that duty also when he's filed pleadings, or she's filed pleadings. The trial is set because evidently there are disputed issues and so the court does expect both parties to be there. It's an imposition and a waste of time for the court when one of the parties isn't there, and so those persons who

are not there for trial when they're supposed to be after they have been duly notified and when they have absolutely no excuse for not appearing, they should suffer the penalties that results from what amounts to a default.

JUDGE DURHAM: I don't agree. They're not violating anything by not coming to trial.

MR. JOLLES: Skip, you've forgetten your appearance before Judge Solomon.

JUDGE WELCH: I completely agree with the last speaker. I think that this is a very graphical problem.

MR. KANTOR: It comes up in Don Morrell.

JUDGE WELCH: The idea that you can simply not show you and then move for a new trial? I don't understand that. I don't think there is a basis for a new trial. The person who doesn't show up for trial, when they file an objection or a response or an answer or whatever, has an obligation to come into court. If they don't, they're just as much in default in terms of the process as anybody else, and getting relief from a default under those circumstances if perhaps they didn't have notice, which is apparently what people are worried about, that they didn't know they belonged there, it's not that difficult to do if they can make a bona fide showing.

MR. KANTOR: Judge Sams?

JUDGE SAMS: Isn't that addressed really right in the beginning at 69(A) there about that fourth line, that the party has failed to plead or otherwise defend? Doesn't that mean coming into court?

JUDGE LIEPE: That's the way it was construed in the Van Dyke case. The Court of Appeals in the Van Dyke case tells us that failure to defend by appearing at trial is a default. That's the problem with the Van Dyke case.

MR. KANTOR: That's basically the issue and the problem. Judge Graber?

JUSTICE GRABER: I wanted actually to address a question to Judge Welch, which is that the problem, the practical problem in the Don Morrell situation, is there anything about my proposed substitute that would leave you in the lurch? So you're shaking your head no?

JUDGE WELCH: No.

JUSTICE GRABER: Either the format, the one that's currently proposed, or my substitute would allow you to go forward and deal with the parties that are there and get finished with the case.

JUDGE WELCH: I guess one of the things I'm worried about -- Yes, yes, to answer your question.

I'm worried about -- people use the

language "default" all the time in that circumstance. You don't show up in juvenile court, in domestic relations, all the high-activity -- district court, civil-type matters, people are dealing in vast volumes there and if you're not there, you're in default and the court proceeds.

JUSTICE GRABER: If you're not there the court proceeds. The question is whether we want to also say "and you're in default" in between. I can envision unusual situations where somebody might say, "The first two days of this trial are going to be about things I don't care about and my client wants me to show up at the very end to look at a question of custody," in a Don Morrell case, or to look at a question of damages where we aren't contesting liability, there are multiple parties.

I can envision multiple situations where a party does not choose to show up at the beginning of the trial but might they wish to show up later. It's possible.

MR. KANTOR: Just so you know, when we're all talking at once, I'm asking the court reporter not to take any of it down.

MR. HOLLAND: Just a technical consideration. We have not given any form of public notice of any possible amendments to Rule 58, but we did

to 69. Whether that's enough to drive us, I don't know, but --

MR. MARCEAU: That's a biggie.

MS. STEWART: That is a biggie.

MR. KANTOR: I don't think we can change another rule without notice.

MS. BISCHOFF: We could go back and change the title, Rule 69.

MR. KANTOR: I think we could do that. Otherwise, the relatively good idea --

MR. HART: We have been spending a lot of time worrying about the people that get summons and don't appear and a lot of time on what we should do for them when they appear with an answer and then they do not show up. It seems to me that that is not a big interest group that's going to challenge anything we did here and we should just move forward with the resolution. Really, the judges want it. This is all a judges' issue. It's a matter of saying, "What do you want and we'll adopt it."

MR. MARCEAU: Ignore the notice that says we're going to deal with 69 and do a 58?

MR. HART: I think Susan has hit right on it. Yes, that's exactly right. Susan said we change the number. Who is going to say we didn't give these malcontents that we're protecting most of the day?

requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B(2) is a modified form of Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See *State ex rel Nilsen v. Cushing*, 253 Or. 262, 266, 267, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. *Deane v. Willamette Bridge Co.*, 22 Or. 167, 175, 29 P. 440 (1892).

Under section 69 C, the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 B. [NOTE: 69 C referred to above has been renumbered as 69 F.]

### Council on Court Procedures, Staff Comment, 1986

It is the custom among Oregon attorneys to provide notice of an intent to take an order of default to an opposing party when they are aware that the opposing party is represented by counsel. This notice is an outgrowth of professional courtesies among members of the Bar. It is not uncommon for one attorney to grant an extension of time for making an appearance to another attorney and to then notify that attorney when extensions of time will no longer be granted. It is believed that the extension of these professional courtesies assists in the efficient handling of disputes and fosters the professionalism of the Bar.

ORCP 69 has long been read to require the provision of notice prior to seeking an order of default. The Oregon Supreme Court in *Denkers v. Durham Leasing*, 299 Or. 544 (1985), analyzed ORCP 69 and concluded that notice prior to taking an order of default is not required. Notice is required only when making application for a default judgment when the party in default has either appeared or is represented by counsel. It was suggested to the Council on Court Procedures that ORCP 69 should require notice of intent to take a default order when a party has either appeared or is represented by counsel. The Council was concerned that disparate treatment of represented and non-represented litigants in the ORCP presented problems of constitutional dimension.





This amendment requires that notice be given to all parties who have appeared but against whom a default order has been taken prior to application for judgment only in the event that it is necessary to receive evidence prior to entering judgment.

Litigants receive notice of the time within which they must appear to avoid default in the summons, ORCP 7. The extensions of courtesies among members of the Bar are not subject to regulation by the ORCP, and such attempts could make the procedural right of litigants rise or fall, depending on whether they are represented by counsel.

The Council supports these extensions of courtesy among members of the Bar and recognizes the responsibility of all lawyers to abide by established custom and practice, Code of Professional Responsibility, DR 7-106(C)(5), and *Ainsworth v. Dunham*, 235 Or. 225 (1963). The Council does not believe, however, that such courtesies can or should be the subject of procedural requirement.

### Council on Court Procedures, Staff Comment, 1988

Upon the recommendation of the Oregon State Procedure and Practice Committee, the Council amended ORCP 69 A to require notice in some circumstances before application for an order of default and amended ORCP 69 B to eliminate any requirement of notice before application for judgment by default. The amended provision requires written notice of intent to seek an order of default only to a party who has appeared or who has provided written notice to the party seeking default of intent to file an appearance.

The first sentence of ORCP 69 B(2) was amended also by the Council to cure grammatical defects.

### Council on Court Procedures, Staff Comment, 1990

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 it clear that the definition applies to the ORCP as well as ORS sections.

### Legislative History

This rule was promulgated by the Council in 1980.

**69 A.** In 1988 the Council removed the words "and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that

party." at the end of the first sentence of section 69 A and substituted the words "the party seeking affirmative relief may apply for an order of default." The Council also added the second and third sentences to section 69 A.

**69 B.** In 1986 the Council on Court Procedures added the words "court or the" to the first sentence of section 69 B(1). It also changed the last sentence of the then existing subsection 69 B(1) to a new subsection 69 B(3), removing from the sentence a reference to entry of the judgment "by the clerk." The then existing subsection 69 B(3) was renumbered as subsection 69 B(4).

In 1990 the Council added the words "as defined by ORS 126.003(4)" to paragraph 69 B(1)(b) and section 69 B(2).

The 1981 Legislature added a requirement in the last sentence of subsection 69 B(2) that notice of application for judgment be provided if the party against whom the judgment was sought was known to be represented by an attorney in the pending proceeding. 1981 Oregon Laws, ch. 898, § 8. In 1986 the Council on Court Procedures changed this to require notice of application for judgment only when judgment by default was sought against a party who had appeared in the action. In 1988 the Council removed the last sentence of subsection 69 B(2) and eliminated any requirement of notice of application for judgment by default. In 1988 the Council also changed the words "they have" in the first sentence of subsection 69 B(2) to "the minor or incapacitated person has."

**69 C.** This section was added to the rule by the Council on Court Procedures in 1986.

**69 D and E.** These sections were originally sections 69 C and D and were renumbered by the Council on Court Procedures in 1986 when a new section 69 C was inserted.

MR. KANTOR: I personally believe that we cannot amend Rule 58. I think that notice provision under the Procedures Act prohibits us.

MR. MARCEAU: Unless it's in our statute. It's not just the Administrative Procedures Act.

JUSTICE GRABER: Can I speak to that, because my motion is currently on the table and I would rather have a solution that is within our legitimate province than not have a solution because we didn't do the notice in that way, and I suppose another way to deal with it is to have a new subsection under Rule 69 that reads the same way as what I proposed earlier and just have different words.

MR. KANTOR: This was essentially Judge Snouffer's original proposal?

JUSTICE GRABER: Yes. It's slightly reworded from that.

MR. JOLLES: Susan, why don't we amend your amended motion and call A(2) Failure to Appear for Trial and use your language and then we've got it, haven't we? We have the right rule and we have everything you want.

JUSTICE GRABER: Should I just -- My seconder is nodding madly over here. Is that all right?

MR. JOLLES: He's been nodding off.

MR. KANTOR: What about making it Rule 69C

as compared to trying to fit it into Rule A when Rule A talks about all kinds of other things?

JUSTICE GRABER: 69C.

MR. KANTOR: It would either be a new C and pushing everything down, or an F at the end.

MR. HAMLIN: I think it would make more sense to have a new C, push everything down.

MS. STEWART: How about a B?

JUDGE LIEPE: How about F for "flunky"?

MR. HOLLAND: I would be cautious about putting anything into Rule 69 that had nothing to do with default, and I think Justice Graber's language doesn't say a word about default, and the next thing would say "setting aside default".

MR. MARCEAU: Are we all being mindful of the existing 69(C) which says, 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"?

Why doesn't that solve the problem that Judge Durham raises, and if that is important, if you put in the Judge Graber rendition, then don't the persons against whom judgments are rendered via the Judge Graber version lose that opportunity? In other words, isn't the possibility that you described, Judge Durham, going to happen by proceeding in this fashion?

JUDGE DURHAM: It's a tiny, I believe, important issue and that is that the party who has filed a pleading that states that the complaint is based on a cause of action barred by the Ultimate Statute of Repose or any other airtight affirmative defense can stay home and watch daytime TV and trust that the trial judge will dismiss the complaint, and if they don't, they can move for a new trial and should not have to show good cause for not coming to the trial because they fully appeared and fully pled an airtight, 100-percent successful defense. They can say -- they cannot say, "I have good cause for not coming because I intended to watch daytime TV and not come. I'm moving for a new trial because you have not read the Statute of Ultimate Repose defense that I asserted and you should have." It's an airtight defense. This is a tiny problem but a theoretically important one to hold on to.

MR. HAMLIN: I hope that I'm never representing such a party and that these words will come back to haunt me, but I question whether you would be entitled to a new trial under Rule 64. The obvious ones are 64(B)(1), which is, irregularity in the proceedings in court, jury or adverse party or order of the court where the use of discretion by which such party is prevented from having a fair trial. I would say, "Boy, that didn't

happen," and B(6) is error in law occurring at the trial and objected to or excepted to by the party making the application. Clearly that didn't happen because they were watching daytime TV, so I would say, "Motion for new trial denied."

MR. KANTOR: What about B(5), or that it is against the law?

JUDGE McCONVILLE: Taking Judge Durham's example, Ultimate Repose, suppose that the defendant had filed a motion for summary judgment, established it and the court nevertheless had denied the motion for summary judgment. Under the rule as it's presently proposed in the booklet, there would be a default entered and there could not be an appeal taken on the merits of the judgment, and under Justice Graber's formulation, which I support, you simply appeal and the the court would review the interlocutory ruling of the trial court erroneously denying the defense.

JUDGE DURHAM: Without burdening the appellant with the label of default.

MR. MARCEAU: Is that right, that an appeal could not be taken or that you are limited in what one may assign as error in that situation?

JUDGE McCONVILLE: You can appeal from the merits of a judgment entered on default? You appeal, do

you not, from the decision of the court not to set aside default?

JUDGE LIEPE: If there is --

MR. KANTOR: We're getting a little out of range here. Judge Liepe, on this subject. Let's see if we can finish this up.

JUDGE LIEPE: Perhaps I didn't understand the situation. If there was a motion for summary judgment and the motion was improperly denied by the court, are you saying that error would not then be preserved if the party fails to appear for trial?

JUDGE McCONVILLE: Correct. If you have an entry of default, the effect of that is to set aside the pleadings. That's just a fact.

JUDGE LIEPE: Tell me why it is that the person who knows he had a ruling against him, then why wouldn't that person want to appear for trial to preserve the record?

JUDGE McCONVILLE: Because he knows he has a perfectly valid defense that has been erroneously rejected by the trial court and he'll get it taken care of at the appellate level.

MR. KANTOR: Maury Holland?

MR. HOLLAND: May I suggest that the council consider taking Justice Graber's proposed version

and Rule 58, which we can't touch, and stick it onto Rule 69(F), and make a note to ourselves at the next biennium to shift it to the right rule number? I don't think it's going to cause great havoc and mayhem to have it in an inappropriate rule for a couple of years. It will fix it. I'll even put in a staff comment in highlighter, "This should have been in 58 and it's solving the Van Dyke."

MR. KANTOR: Dick Kropp?

MR. KROPP: I have a question. Basically, when we present this to the legislature, can't they put it under Rule 58?

MR. KANTOR: Actually, they can make any changes to what we do, and if our letter of instruction suggests that --

MR. KROPP: Why don't we follow Maury's suggestion and you as the chairman, being all-knowing, tell them that we have it under 69 but we made a mistake and it should be under 58.

MR. KANTOR: Actually, the legislature isn't the only one who can do that, but the Office of Legislative Council can move things, and they have moved some of our rules in the past.

MR. MARCEAU: The reason why I don't think we want to ask them to do that, and that's one point we made earlier, we're trying to establish ourselves as the

experts with the legislature. They look upon us as having expertise. Is it consistent with that image to go to the legislature and say we can't get our numbers straight?

JUDGE DURHAM: The real answer, I suppose, is to ask for the freedom to avoid this problem by being empowered in a meeting like this to put it on to 58 if we really feel that's appropriate. That really ought to be within our authority.

MR. MARCEAU: Let me make one more comment on the merits. This has to do with appeal. It's my belief that you can appeal a default judgment. The problem you run into is that you cannot assign anything as error because you did not raise it in the trial court. That's the rub, and that appealability really doesn't have any relevance to this discussion. This judgment for failure to appear at trial is available as any judgment, except --

MR. JOLLES: Except you can't win.

MR. MARCEAU: -- except you can't win, yes. If it's a pleading issue, it would seem to me that you could raise that, if you have pleaded, which I think is Judge Durham's scenario.

MR. CRAMER: My thought, you know it's been mentioned, summary judgment, it's real common for people to file a summary judgment based upon a motion for

judgment on the pleadings, in effect, is what we used to call it, and to raise these pleading issues and say, "Look, the pleadings by themselves show that we are entitled to win this issue or maybe this case," I don't think the court has the burden of deciding those things the way he thinks they should be decided if there has been no motion filed, and furthermore, I would be terribly shocked if I go into court with a controversy in the pleadings like this, like a good example he gave is the Statute of Limitations. You know, the Statute of Limitations does not bar or does not destroy a cause of action. All it does is give you the right to affirmatively raise that issue and prove it, that this is barred by statute. The cause of action still exists; you just can't collect on it.

So I don't think the judge has the right in that situation to go in and make a decision that this case is done because the Statute of Limitations says so when I'm there ready to go and proceed with the trial and the other attorney doesn't bother to show.

JUDGE WELCH: I agree with him.

MR. JOLLES: There are nonwaivable defenses, like want of jurisdiction.

JUDGE DURHAM: That is a much better example. Mine is a defense that must be proven.

MR. JOLLES: A party files an answer, no jurisdiction; you don't waive that by not raising it, and I don't know if you enter a default. I think that would probably be appealable even on a default judgment. I would defer to Justice Graber on that.

JUSTICE GRABER: I'm not sure of the answer on that.

MR. KANTOR: Subject matter of jurisdiction is certainly always raisable.

MR. JOLLES: Suppose you file for divorce in the district court or something? We have had some judges that would grant it.

JUDGE McCONVILLE: Are we ready for the question?

MR. KANTOR: John Hart has pointed out that the statute is a little mushy on what our rights are and in one sentence it talks about giving notice of a proposed change to a rule, and then the next sentence or two down says that we're supposed to give notice of the substance of our proposed amendment. I'm not sure how they can be reconciled, if we tried to distinguish this.

MR. JOLLES: As I understand it, there is a motion to use Susan Graber's language as section C of Rule 69. I move the question.

MR. CRAMER: Ron raised an issue that was

very valid here. He said, look, if you don't use the word "default" in here, you don't get the benefits of the present section C. If you put this in section C, you're going to throw out the old section C.

MR. JOLLES: Move it down.

MR. CRAMER: But then it wouldn't apply to this kind of action, and I think you have screwed it up.

MR. KANTOR: Unless we also change Rule 69C to have it apply to any order under this rule.

MR. PHILLIPS: I don't think you need to do that. Rule 69C existed because it applied to an order and allowed you to mess with it before the judgment was entered.

MR. KANTOR: That relates to an order.

MS. STEWART: Although there are slightly different grounds showed on an order.

MR. MARCEAU: 69C relates to order and judgment.

JUSTICE GRABER: I think that Mike's point was that Rule 70 by its terms applies to all judgments and it would thus apply to a judgment entered after failure to appear for trial, Rule 71.

MR. MARCEAU: That is giving notice of the judgment.

JUSTICE GRABER: I'm sorry; I misspoke

myself.

MR. KANTOR: Any further discussion, or do you want to vote on Judge Graber's amendment?

MR. HAMLIN: I need to hear it again.

JUSTICE GRABER: The title of the section would be Failure to Appear for Trial and the text would read "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 nonappearing party."

MR. HOLLAND: Can I make a final appeal that you resolve -- that the council resolve this issue? I think that's an excellent formulation, but I think we look kind of silly putting that totally non-germane thing in the context of defaults, and therefore, I would urge the council to consider -- be gutsy; do it under 58E and construe that statute -- we certainly did give notice of the substance in the advance sheet.

JUSTICE GRABER: In a sense, the whole point of it is to say, "We don't agree with Van Dyke which put this problem under Rule 69 to begin with."

MR. KANTOR: I certainly don't think there would be any harm or prejudice. I'm concerned somebody will challenge the legal effect.

MR. MARCEAU: Because our notice said ORCP

69 default judgment may be entered without notice.

MR. HART: If anybody read the material they would know it was the Van Dyke problem, and that's the substance of our many hours of discussion and there is nothing in ORS 1.730 says you have to give them notice that it was Rule 58 we were taking up today. It was the Van Dyke problem.

MR. MARCEAU: This doesn't say Van Dyke. Maybe we have some customers who say that's fine as long as it's a default judgment but if it's something else --

MR. HART: I think it's interesting nobody has even written to us about these problems.

MR. KANTOR: We have had several speakers.

Janice Stewart?

MS. STEWART: I would frankly prefer to keep it under Rule 69 just from the standpoint that if you are researching this issue, you're going to come across Van Dyke in Rule 69 and that's where the change ought to be at this point in time. If the legislature wants to move it, fine, but from the practitioner point of view, I'd rather see it in Rule 69.

MR. WILKINSON: From a practitioner point of view, it's all called a default.

MR. KANTOR: Further discussion, or shall we call the question?

MR. KROPP: Question.

JUSTICE GRABER: Question.

MR. KANTOR: Those in favor of substituting Justice Graber's proposal as a new subsection of Rule 69 to the proposal in the materials presented today?

CHORUS OF COUNCIL MEMBERS: Aye.

MR. KANTOR: Opposed?

JUSTICE GRABER: Now, it's been substituted. Now don't we vote on its merits, or is that it?

MR. KANTOR: We substituted.

JUDGE LIEPE: I think we need to say if we want to adopt it.

MR. KANTOR: Just in case, let us do that before anybody leaves.

MR. JOLLES: I have one short item of new business.

MR. KANTOR: We're not done with Rule 69.

JUSTICE GRABER: I now move that we adopt the mertis of what we substituted.

JUDGE McCONVILLE: Second.

MR. KANTOR: Discussion? Those in favor?

CHORUS OF COUNCIL MEMBERS: Aye.

MR. KANTOR: Opposed?

MS. STEWART: I need to back up to Rule 39

STATE OF OREGON
COURT OF APPEALS
THIRD FLOOR
JUSTICE BUILDING
SALEM, OREGON
97310

ROBERT D. DURHAM
JUDGE

(503) 378-6342

April 21, 1993

Mr. Henry Kantor
Kantor & Sacks
1100 Standard Plaza
1100 SW 6th Ave.
Portland, OR 97204

Re: Council on Court Procedures - ORCP 69A

Dear Henry:

I want to bring to your attention the April 21, 1993, decision of the Court of Appeals in Weaver and Weaver, ___ Or App ___, a copy of which is enclosed. In Weaver, this court concluded that, contrary to the holding in Van Dyke v. Varsity Club, Inc., 103 Or App 99, 796 P2d 382 (1990), the court will no longer construe the phrase "has failed to plead or otherwise defend" in ORCP 69A to encompass a nonappearance for trial.

As you recall, the Van Dyke holding lead the Council on Court Procedures to recommend changes in the ORCP to eliminate any need for a trial court to suspend its proceedings upon a defendant's failure to appear for trial and to follow the 10-day notice of default procedure in ORCP 69A. Weaver holds that when a party has filed an appearance and has been notified of a trial date, the party's failure to appear for trial does not prevent the court from proceeding with trial and entering an appropriate judgment. Because that party's nonappearance for trial is not a failure to "plead or otherwise defend" within the meaning of ORCP 69A, the 10-day notice procedure under that rule is not applicable.

In light of Weaver, you may wish to reconsider whether it is still necessary for the Council to propose changes in the ORCP to circumvent the holding in Van Dyke.

I am forwarding copies of this letter and enclosure to Professor Maurice Holland, the Council's Executive Director, and to Hon. Winfrid Liepe, who played an active role in the Council's discussion of the Van Dyke case and the Council's proposed amendments to ORCP 69A.

If I can answer any questions, please call me.

Yours truly,

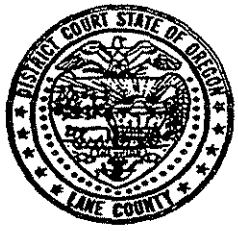
Robert D. Durham

Robert D. Durham
Judge

RDD:lw
Enclosure

cc: Prof. Maurice Holland
Hon. Winfrid Liepe

DISTRICT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401




WINFRID K. LIEPE
DISTRICT JUDGE
687-4218

April 28, 1993

MR HENRY KANTOR
ATTORNEY AT LAW
1100 STANDARD PLAZA
1100 S W 6TH AVE
PORTLAND OR 97204

Re: Council on Court Procedures - ORCP 69A

Dear Henry:

I have just received Skip Durham's letter of April 21 forwarding the Court of Appeals decision in Weaver and Weaver. The holding cures the problem created by Van Dyke v. Varsity Club, 103 Or App 99 (1990). As construed in Weaver the current version of ORCP 69A does not require a ten day notice before entry of judgment against a party who fails or refuses to appear for trial after due notice.

I agree with Judge Durham's suggestion that our amendment of ORCP 69 is no longer necessary.

If it is still possible to take steps to withdraw the proposed amendment, I would recommend that we do so.

I agree with the Weaver decision both on the reasoning as well as the result. As a practical matter I think we would find that many (perhaps most?) trial judges have not followed the Van Dyke case under the current version of ORCP 69. In my letter of October 28, 1992 to Maury Holland and Bill Snouffer (copy to you) I noted in part:

> "Argument may be made that the Van Dyke reasoning does not apply to the current version of ORCP 69. The current version contains no requirement of a ten day notice before a default judgment is entered under Rule 69B.(2). Ten day notice is required only with respect to entry of an order of default under Rule 69A. This applies where a party "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". Is the current version of ORCP 69A really intended to encompass failure to appear for trial? Or is it simply intended to deal with the situation where

there has been some initial appearance filed or noticed and subsequent failure to file timely responsive pleadings?"

The Weaver case has now answered these questions. ORCP 69A does not require ten day notice prior to entry of judgment against a party who failed to appear for trial.

Sincerely yours,

/s/ Winfrid K. Liepe

Winfrid K. Liepe
District Judge

WKL:ga

cc: Honorable Robert D. Durham
Professor Maurice Holland

FILED: April 21, 1993

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

DONALD A. WEAVER, JR.,

Respondent,

and

APRIL A. WEAVER,

Appellant.

(15-90-07502; CA A68718)

Appeal from Circuit Court, Lane County.

Edwin E. Allen, Judge.

Argued and submitted December 2, 1991.

Marjorie A. Schmechel, Eugene, argued the cause and filed the brief for appellant.

James J. Kolstoe, Eugene, argued the cause and filed the brief for respondent.

Before Richardson, Chief Judge, and Deits and Durham, Judges.

DURHAM, J.

Affirmed. Costs to husband.

## DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[xx] Costs allowed, payable by: Appellant

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

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## MONEY JUDGMENT

| | Judgment #1 | Judgment #2* |
|---|---|---|
| Creditor: | _____ | State of Oregon, Judicial Department |
| Debtor: | _____ | _____ |
| Costs: | _____ | Unpaid filing fee: |
| Attorney fees: | _____ | |
| TOTAL AMOUNT: | $_____ | $_____ |

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

---

## NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $ _____.

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

---

Appellate Judgment
Effective Date:

COURT OF APPEALS
(seal)

DURHAM, J.

Wife appeals from an order denying her motion to set aside the judgment of dissolution of her marriage, which was entered after her failure to appear for trial. We affirm.

The parties separated in July, 1990, when wife moved with their three children from Oregon to California. Husband filed a petition for dissolution in Lane County on August 23, 1990. Wife was served on September 17, 1990, at her mother's residence, where she was living in California. She did not file a response, and, on October 19, husband filed notice of his intent to apply for a judgment by default. That notice was also served on wife at her mother's address. On November 16, wife filed a motion to dismiss husband's petition pursuant to ORCP 21, arguing that California was the proper forum under the Uniform Child Custody Jurisdiction Act (UCCJA) to decide the child custody issue. A hearing was held on the motion on December 17. Both parties and their attorneys were present. The trial court held that Oregon was the proper forum for determining custody and denied wife's motion. It also granted wife temporary custody of the children subject to husband's visitation.

Wife filed an appearance on December 31, 1990, and moved back to Oregon. The trial court granted husband an order restraining wife from removing the children from Oregon. The restraining order was served on wife's attorney, and wife had actual knowledge of the order. In January, 1991, wife took the

children back to California and rented an apartment near her mother's home. Wife's attorney moved to withdraw from the case on January 4, 1991, because wife had dismissed him. Although the motion failed to state wife's address, as required by UTCR 3.140(1),[1] the trial court granted it. Trial was set for January 30, 1991. On January 10, 1991, a trial notice was sent by certified mail to wife at her mother's address. It was returned as "no forwarding order on file, unable to forward." Wife acknowledged, however, that her mother had told her that a certified letter had come for her. On January 18, husband also mailed to wife, at her mother's address, a copy of a letter to the trial court, which gave the trial date.

A trial was held on January 30. Wife did not appear. The trial court took testimony and heard argument by husband's counsel. The court found that wife had violated the restraining order and granted the judgment of dissolution, which gave custody of the children to husband and prohibited wife from visiting them. The judgment was entered on February 4, 1991, and on February 11, wife was served with a copy of the judgment. On February 25, 1991, wife filed a motion to set aside the judgment, arguing that she was entitled to relief under ORCP 71 and ORCP 69, because she was not served with either notice of the trial date or notice of intent to seek an order of default. The trial court denied wife's motion.

Wife first assigns error to the trial court's

determination that she was not entitled to relief under ORCP 71B(1)(a). She argues that her inadvertence or excusable neglect caused her not to receive notice of the trial date. We review the court's decision for abuse of discretion. Pacheco v. Blatchford, 91 Or App 390, 392, 754 P2d 1219, rev den 306 Or 660 (1988). The trial court found, and we agree, that wife knew or should have known that the dissolution proceeding was pending and that she was obligated to advise the court of her mailing address, but failed to do so. A copy of the letter stating the trial date was mailed to her mother's address, the last address that she had provided to the court. Wife was in close communication with her mother, knew of the attempted delivery of the certified letter and still failed to act. We conclude that the trial court did not abuse its discretion in deciding that wife was not entitled to relief under ORCP 71B(1)(a) for inadvertence or excusable neglect.

Wife also argues, relying on Van Dyke v. Varsity Club, Inc., 103 Or App 99, 103, 796 P2d 382, rev den 310 Or 476 (1990), and ORCP 69A, that we should set aside the judgment under ORCP 71B(1)(d), because she did not receive 10 days' notice of husband's intent to apply for an order of default. ORCP 69A provides:

> "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."

Van Dyke held that, under an earlier version of ORCP 69A,[2] a judgment entered against a defendant who had appeared by filing numerous motions but failed to appear for trial was a judgment by default and was void because the party who sought it had failed to give 10 days' notice of intent to apply for a judgment. The court reached that result by construing the phrase "failed to * * * otherwise defend" in ORCP 69A to apply to a party's nonappearance for trial.

Before Van Dyke was decided, ORCP 69A was amended to require 10 days' notice of an intent to apply for an order of default, not for a judgment by default. This case concerns the amended rule. The issue is whether we should follow the rationale of Van Dyke and construe the amended rule to apply to a party's failure to appear for trial.

In construing the ORCP, we follow ordinary principles of statutory construction to discern the drafters' intent. We first analyze the text and context of ORCP 69A. See Boone v.

Wright, 314 Or 135, 138, 836 P2d 727 (1992). In Columbia Steel Castings Co. v. City of Portland, 314 Or 424, 430, 840 P2d 71 (1992), the court stated a rule of statutory construction that applies equally to the construction of ORCP:

> "Generally, and in the absence of some specific indication of a contrary intent, terms are read consistently throughout a statute. See Knapp v. City of North Bend, 304 Or 34, 41, 741 P2d 505 (1987) ('Absent any indication to the contrary, we assume that statutory terms have the same meaning throughout a statute')."

The key phrase in ORCP 69A, "otherwise defend as provided in these rules," does not demonstrate that the drafters regarded a failure to appear for trial as a default. As we noted in Van Dyke:

> "[T]he phrase 'otherwise defend' in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial * * *." 103 Or App at 103.

Except for matters involving compulsory attendance procedures that are not relevant here, see, e.g., ORCP 8 (process), nothing in ORCP requires a party to defend by appearing for trial.

We turn to the context of ORCP 69A. Other rules clarify the drafters' intention in using the term "defend" in that rule. ORCP 7C(2) provides:

> "If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication." (Emphasis

supplied.)

ORCP 15A provides:

> "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 22 D. shall be filed with the clerk by the time required by Rule 7 C.(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." (Emphasis supplied.)

Those rules impose the obligation, which the summons describes, to file a pleading or motion. See also ORCP 19A; ORCP 21A. The rules uniformly employ the phrase "appear and defend" to refer to a party's assertion of factual or legal contentions in a pleading or motion, not to a party's appearance at trial. None of the rules regarding trials use the term "defend" to obligate a party to physically appear for a trial. See ORCP 50, 51, 56 and 58. Because the drafters of ORCP used the term "defend" consistently to describe the obligation to file a pleading or motion, we assume that that term was used in the same sense in ORCP 69A.

In Van Dyke v. Varsity Club, Inc., supra, 103 Or App at 103, we said:

> "ORCP 69 was meant to be broader than the statute that it replaced, former ORS 18.080, which merely addressed default for failure to answer.[3]

---

"[3] Former ORS 18.080(1) provided, in relevant part:

> "'Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons,

> and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against such defendant * * *.'"

We adhere to that statement. Former ORS 18.080(1) applied only to a defendant's failure to file an answer. ORCP 69A applies to any party's failure to file a required responsive pleading or motion. See ORCP 15A. However, that expansion of the rule does not suggest that the drafters also intended it to encompass a nonappearance at trial.

Van Dyke held that ORCP 69A applied to a nonappearance at trial because the commentary to the proposed and final version of the rule indicated that it applied to a failure "to appear and defend at trial."[3] We decline to follow that rationale. Although the staff commentary may be helpful in explaining how the drafters developed the language used in the rules, see Johnson v. Johnson, 302 Or 382, 392, 730 P2d 1221 (1986), we are reluctant to rely on it when, as here, it contradicts the rule's text and context. Professor Merrill said:

> "The rules submitted are accompanied by and comments for each rule prepared by the Council staff. The comments represent staff interpretation of the rules and of the intent of the Council, and were not officially adopted by the Council." Merrill, Oregon Rules of Civil Procedure: 1992 Handbook 278.

That indicates that the commentary represents a staff interpretation of the intent of the Council on Court Procedures, not a statement of intent by the Council itself. The

contradiction between the text and context of ORCP 69A and the commentary's reference to defending "at trial" suggests that the commentary does not accurately reflect the Council's intent on that point.

That inference is strengthened by the commentary's statement that "[t]his rule is a combination of ORS 18.080 and Federal Rule 55."[4] Citing federal case law, Professor Moore indicates that, under the federal rule, a party's failure to "plead or otherwise defend" refers to the obligation to file a responsive pleading and does not apply to a failure to appear at trial:

> "The language 'plead or otherwise defend' relates to the provisions of Rule 12, which, in general, requires the defendant to present any defenses in an answer served within 20 days of the date on which process was served, but permits the raising of certain defenses by motion, at the option of the pleader. * * *
>
> "Sanctionable conduct, such as the failure to obey discovery orders or the failure to appear at trial or at pretrial conferences, should not be construed to be a failure to 'otherwise defend' under Rule 55(a)." 6 Moore, Moore's Federal Practice, 55-15-16, ¶ 55.03(1) (2d ed 1992). (Emphasis supplied.)

We assume that the Council on Court Procedures was aware of that accepted construction of the federal rule and intended ORCP 69A to have the same interpretation. The statement in the staff commentary that ORCP 69A was intended to apply to a failure to appear for trial was erroneous.

We have also considered the practical effect of the Van Dyke holding on trial procedure. We can discern no sound reason

to require a trial court to halt a trial so that a party seeking affirmative relief can give a 10-day notice to an opponent who has disregarded a trial notice.[5] That impairs trial court efficiency and serves only the nonappearing party's interest in delaying entry of a judgment. The drafters of ORCP 69A did not intend to afford the procedural advantage of a 10-day notice to a party who fails or refuses to appear for trial after due notice. For these reasons, we no longer construe the phrase "otherwise defend" in ORCP 69A to refer to an appearance for trial.

We conclude that ORCP 69A did not require the trial court to delay the trial so that husband could follow the default procedures in ORCP 69A.

Affirmed. Costs to husband.

**FOOTNOTES**

[1] UTCR 3.140(1) provides, in part:

> "An application to resign made pursuant to ORS 9.380 shall contain the name, address and telephone number of the party and of the new attorney, if one is being substituted."

[2] Van Dyke was decided under the former version of ORCP 69A, which provided, in part:

> "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, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party." (Emphasis supplied.)

[3] Van Dyke v. Varsity Club, Inc., supra, 103 Or App at 103, says:

> "The commentary to the proposed rule noted that '[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial.' Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft, Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:
>
> "'This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule.'" Commentary to Rule 69, reprinted in Merrill,

Oregon Rules of Civil Procedure: 1990 Handbook 217." (Emphasis in original.)

[4] Federal Rules of Civil Procedure 55(a) says:

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

[5] In McCumber and McCumber, 72 Or App 529, 532, 695 P2d 992 (1985), we held that the trial court erred in entering a judgment by default under ORS 107.095(4), against a party that had "appeared" by filing a general appearance but had failed to appear for trial. The party was not afforded the 10-day notice required by ORCP 69A. We adhere to that ruling if the court purports to enter judgment by default. However, as this opinion indicates, the court is not required by ORCP 69A to treat a party's non-appearance for trial after due notice as a default.

DRAFT

May 13, 1993

Honorable Dick Springer
Chair, Senate Judiciary Committee
S-223 Capitol Building
Salem, Or 97310

Honorable Del Parks
Chair, House Judiciary Committee
H-292, Capitol Building
Salem, OR 97310

Re: Council on Court Procedures
Amendment to ORCP 69 A

Dear Senator Springer and Representative Parks:

I am the Chair of the Council on Court Procedures. In December, 1992, I transmitted on behalf of the Council to the President of the Senate and the Speaker of the House amendments to the Oregon Rules of Civil Procedure as promulgated by the Council pursuant to ORS 1.735.

Among those amendments was an amendment to ORCP 69 A concerning default judgments. The amendment to ORCP 69 A was promulgated to avoid the ruling by the Oregon Court of Appeals in Van Dyke v. Varsity Club, Inc., 103 Or App 99, 796 P2d 382, rev denied, 310 Or 476 (1990).

In Weaver and Weaver, 119 Or App 478 (April 21, 1993), the Oregon Court of Appeals overruled Van Dyke and reinstated the interpretation of ORCP 69 A which was the rule prior to Van Dyke. As a result of Weaver, the Council's amendment to ORCP 69 A is no longer necessary.

Amendments to the Oregon Rules of Civil Procedure promulgated by the Council between legislative sessions are submitted to the legislature at the beginning of the next regular session and go into effect on January 1 following the close of that legislative session, unless the legislature takes action to amend, repeal or supplement any of the rules. ORS 1.735. It is unclear whether the Council has any continuing jurisdiction or power over the amendments once they are submitted to the legislature.

Under the circumstances, the legislature should take appropriate action to amend or repeal the Council's amendment to ORCP 69 A. Perhaps legislature counsel could address this.

I am aware that this letter may cause some confusion. Please feel free to contact me or the Council's Executive Director, Professor Maury Holland of the University of Oregon Law School, if you have any questions.

Respectfully submitted,

Henry Kantor

HK:lb
cc:
Hon. Bill Bradbury, Senate President
Hon. Larry Campbell, House Speaker
Hon. Wallace P. Carson, Chief Justice, Supreme Court
Hon. Susan P. Graber, Associate Justice, Supreme Court
Hon. William L. Richardson, Chief Judge, Court of Appeals
Hon. Robert D. Durham, Associate Judge, Court of Appeals
Hon. Winfrid K. Liepe, Lane County District Judge
Mr. John E. Hart, Vice-Chair, Council on Court Procedures
Prof. Maurice J. Holland, Executive Director,
Council on Court Procedures

requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B(2) is a modified form of Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See *State ex rel Nilsen v. Cushing*, 253 Or. 262, 266, 267, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. *Deane v. Willamette Bridge Co.*, 22 Or. 167, 175, 29 P. 440 (1892).

Under section 69 C, the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 B. [NOTE: 69 C referred to above has been renumbered as 69 F.]

### Council on Court Procedures, Staff Comment, 1986

It is the custom among Oregon attorneys to provide notice of an intent to take an order of default to an opposing party when they are aware that the opposing party is represented by counsel. This notice is an outgrowth of professional courtesies among members of the Bar. It is not uncommon for one attorney to grant an extension of time for making an appearance to another attorney and to then notify that attorney when extensions of time will no longer be granted. It is believed that the extension of these professional courtesies assists in the efficient handling of disputes and fosters the professionalism of the Bar.

ORCP 69 has long been read to require the provision of notice prior to seeking an order of default. The Oregon Supreme Court in *Denkers v. Durham Leasing*, 299 Or. 544 (1985), analyzed ORCP 69 and concluded that notice prior to taking an order of default is not required. Notice is required only when making application for a default judgment when the party in default has either appeared or is represented by counsel. It was suggested to the Council on Court Procedures that ORCP 69 should require notice of intent to take a default order when a party has either appeared or is represented by counsel. The Council was concerned that disparate treatment of represented and non-represented litigants in the ORCP presented problems of constitutional dimension.





This amendment requires that notice be given to all parties who have appeared but against whom a default order has been taken prior to application for judgment only in the event that it is necessary to receive evidence prior to entering judgment.

Litigants receive notice of the time within which they must appear to avoid default in the summons, ORCP 7. The extensions of courtesies among members of the Bar are not subject to regulation by the ORCP, and such attempts could make the procedural right of litigants rise or fall, depending on whether they are represented by counsel.

The Council supports these extensions of courtesy among members of the Bar and recognizes the responsibility of all lawyers to abide by established custom and practice, Code of Professional Responsibility, DR 7-106(C)(5), and *Ainsworth v. Dunham*, 235 Or. 225 (1963). The Council does not believe, however, that such courtesies can or should be the subject of procedural requirement.

### Council on Court Procedures, Staff Comment, 1988

Upon the recommendation of the Oregon State Procedure and Practice Committee, the Council amended ORCP 69 A to require notice in some circumstances before application for an order of default and amended ORCP 69 B to eliminate any requirement of notice before application for judgment by default. The amended provision requires written notice of intent to seek an order of default only to a party who has appeared or who has provided written notice to the party seeking default of intent to file an appearance.

The first sentence of ORCP 69 B(2) was amended also by the Council to cure grammatical defects.

### Council on Court Procedures, Staff Comment, 1990

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 it clear that the definition applies to the ORCP as well as ORS sections.

### Legislative History

This rule was promulgated by the Council in 1980.

69 A. In 1988 the Council removed the words "and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that

party," at the end of the first sentence of section 69 A and substituted the words "the party seeking affirmative relief may apply for an order of default." The Council also added the second and third sentences to section 69 A.

**69 B.** In 1986 the Council on Court Procedures added the words "court or the" to the first sentence of section 69 B(1). It also changed the last sentence of the then existing subsection 69 B(1) to a new subsection 69 B(3), removing from the sentence a reference to entry of the judgment "by the clerk." The then existing subsection 69 B(3) was renumbered as subsection 69 B(4).

In 1990 the Council added the words "as defined by ORS 126.003(4)" to paragraph 69 B(1)(b) and section 69 B(2).

The 1981 Legislature added a requirement in the last sentence of subsection 69 B(2) that notice of application for judgment be provided if the party against whom the judgment was sought was known to be represented by an attorney in the pending proceeding. 1981 Oregon Laws, ch. 898, § 8. In 1986 the Council on Court Procedures changed this to require notice of application for judgment only when judgment by default was sought against a party who had appeared in the action. In 1988 the Council removed the last sentence of subsection 69 B(2) and eliminated any requirement of notice of application for judgment by default. In 1988 the Council also changed the words "they have" in the first sentence of subsection 69 B(2) to "the minor or incapacitated person has."

**69 C.** This section was added to the rule by the Council on Court Procedures in 1986.

**69 D and E.** These sections were originally sections 69 C and D and were renumbered by the Council on Court Procedures in 1986 when a new section 69 C was inserted.