

*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, June 8, 1996
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order
2. Approval of 5-11-96 minutes (attached)
3. Proposed amendment of ORCP 68 (see Attachment A) (Mr. Hamlin)
4. Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda) (Ms. Tauman)
5. Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda and Attachment B to 5-11-96 agenda) (Ms. Craine)
6. Conclusion of review of 1995 legislation: S.B. 601, H.B. 3098 (see Attachment B to 12-9-95 agenda) (Mr. Gaylord)
7. Report and recommendation of subcommittee to review ORCP 7 (Attachment B to follow) (Judge Brewer)
8. Old business (Mr. Gaylord)
9. New business (Mr. Gaylord)
10. Adjournment (Mr. Gaylord)

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of May 11, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: Sid Brockley
Patricia Crain
Don A. Dickey
Robert D. Durham
William A. Gaylord
Bruce C. Hamlin
John E. Hart
Rodger J. Isaacson
Rudy R. Lachenmeier
Michael H. Marcus
John H. McMillan
Karsten Hans Rasmussen
Stephen J.R. Shepard

Excused: J. Michael Alexander
David V. Brewer
Mary J. Deits
Stephen L. Gallagher, Jr.
Nely L. Johnson
Nancy S. Tauman

Absent: Diane L. Craine
David B. Paradis
Milo Pope

Karen Garst, Executive Director of the Oregon State Bar, and Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association, were in attendance. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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

Agenda Item 2: Approval of April 13, 1996 minutes (Mr. Gaylord). The minutes of the April 13, 1996 meeting were, without objection or amendment, approved as previously distributed to the members.

Agenda Item 3: Adoption of revised Council Rules of Procedure (Mr. Hamlin). At the Chair's request, Mr. Hamlin gave a brief overview of proposed Council Rules of Procedure, which he had revised in response to comments made at the 4-13-96 meeting and to incorporate the rules relating to the Legislative Advisory Committee (LAC) adopted at that meeting. (See Attachment A to agenda of this meeting.) He mentioned that the specific revisions he had made consisted of neutralizing all gender references, reflecting the practice of vesting greater discretion in the Chair than is the case under the present Rules, amending the provision for election of officers to conform to the statutory requirement that the Chair be elected annually, and

incorporation of the LAC rules as Rule II D. The floor was then opened for comments and discussion.

Mr. McMillan questioned the practice of electing the public member as Treasurer, because he doubted whether the public member should chair a Council meeting in the absence of the Chair and Vice Chair. Justice Durham stated that he found some inconsistency between the second and third sentences of revised Rule II A, in that the former provides, consistently with the statute, that the Chair, along with other officers, be elected annually, while the latter seems to codify an intent that, in effect, they are elected biennially. Justice Durham, seconded by Judge Marcus, then moved that the revised Rules of Procedure be adopted as proposed, with the single exception that the third sentence of Rule II A: "It is the intent of the Council that each of the officers will be elected to two consecutive terms, and that the Vice Chair will succeed the Chair in office," be deleted. This motion was carried by a vote of 12 in favor, 1 opposed, and no abstentions.

Agenda Item 4: Possible problem re ORCP 55 I (see Attachment B to agenda of this meeting) (Prof. Holland). Prof. Holland briefly summarized the phone call he had received from Messrs. Walsh and Wiswall, of Eugene, concerning what they perceived to be some problems created by ORCP 55 I, enacted by the 1995 legislature with no consultation with the Council. He also noted that copies of a letter from Mr. Walsh, dated May 1, 1996, further explaining those problems, had been distributed at the meeting (copy attached to these minutes).

Mr. Gaylord said he thought that Messrs. Walsh and Wiswall were raising two distinct, though somewhat related, problems. The first problem had to do directly with ORCP 55 I and its possible practical effect of overriding the physician-patient privilege, and the second had to do with the asserted overbreadth of medical records subpoenas.

Mr. Gaylord then asked whether anyone wished to comment on these issues. Mr. Hart mentioned that the issue of the scope of medical records subpoenas is now working its way through the appellate courts. Mr. Gaylord noted that there was now a subcommittee charged with studying ORCP 55 I, and asked that Ms. Craine, as its Chair, be made aware of the issue, which Mr. Hart said he would do as a member of the subcommittee. Justice Durham commented that a possible defect in ORCP 55 I is in failing to distinguish between validity of service of a subpoena as opposed to its substantive effectiveness to abrogate a privilege with respect to materials subpoenaed.

Ms. Karen Garst, Executive Director of the Oregon State Bar, was then recognized by the Chair and asked whether sponsors of legislation of this kind would typically involve the Bar in their efforts. Ms. Garst replied that the Bar has several mechanisms through which other organizations can coordinate with it respecting legislative reform, such as the Government Relations Program and Law Improvement Section, but noted that of course this kind of coordination is not legally required. Mr. McMillan observed that coordination with the Bar, or with the Council when an issue involved the ORCP, would seemingly improve the chances of the final product being workable. Mr. Hamlin expressed the view that, had ORCP 55 I been referred to the Council for its input, the problems reportedly being encountered with it almost certainly would have been avoided. This discussion concluded with general agreement that any further consideration of these issues by the Council should await a report from Ms. Craine's subcommittee.

Agenda Item 5: Status report of ORCP 7 subcommittee (see Attachment C to agenda of this meeting) (Mr. Rasmussen). Mr. Rasmussen reported that this subcommittee had recently conducted a telecon, would soon be conducting another one, and was working very hard to draft some well considered proposed amendments to ORCP 7. He asked members to take a look at the various drafts and comments contained in Attachment C, and let the subcommittee know of any comments or suggestions they might have. Mr. Hart commented that he thought there exists greater clarity concerning proper service of summons at the present than at any other time in his experience.

Agenda Item 6: Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12/9/95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Judge Brockley reported that this subcommittee had met once by telecon, was continuing its work, and expected to have a report by the next meeting of the Council.

Agenda Item 7: Continuation of review of 1995 legislation affecting civil practice apart from statutes amending the ORCP (see Attachment B to 12/9/95 agenda) (Mr. Gaylord). Mr. Gaylord stated that he saw no problems from the Council's perspective created by H.B. 2625, but saw some possible problems in connection with the prevailing party fee provisions of S.B. 385. Mr. Lachenmeier commented that, while the Council has no authority to tinker with this or any other legislation, it might be worthwhile for it to give some thought to whether the prevailing party fee provisions of this statute dovetail with existing sanctions provisions of the ORCP. It was agreed that the subcommittee chaired by Ms. Tauman, which has already been asked to study ORCP 17, should also be asked to give some preliminary thought to the issue raised by Mr. Lachenmeier, and

in particular decide whether a thorough study of the matter should be undertaken now or whether it would be better to await the handing down of some appellate decisions, to see whether any problems actually arise. Mr. Gaylord identified ORCP 17, 46 and 68 as those as to which issues of duplication or overlap might arise. Mr. Lachenmeier agreed to serve as an additional member of the subcommittee.

Regarding S.B. 482, one or more members noted that there might be some discordance between the latter's provision for amending complaints to insert claims for punitive damages on the one hand, and the provisions in ORCP 23 about amendment of pleadings generally on the other. Judge Marcus raised a question of whether there might be need for clarifying amendment of the ORCP discovery rules to address the matter of discoverability of defendants' financial assets in the context of punitive damages. Justice Durham mentioned that he saw a potential problem with the provision of S.B. 482 which makes the Oregon Department of Justice a judgment creditor before any judgment exists or is entered.

Mr. Hart stated that, in his view, if S.B. 482 or other legislation has created problems or misalignments with existing procedures, solutions of such problems should be left to the variety of Oregon State Bar committees that exist in order to work on such matters. Mr. Gaylord said that, if the Council so approved, he would try his hand at drafting a letter to Sen. Neil Bryant that would at least apprise him of problems the Council sees, if not proposing possible solutions to them, and would then submit his draft to the Council for its formal or informal approval. Mr. Hart, seconded by Judge Brockley, moved that Mr. Gaylord be authorized to draft a letter of the kind suggested to Sen. Bryant, as the latter had invited the Council to do. This motion was carried by a vote of 11 in favor, 1 opposed, and no abstentions. Mr. Lachenmeier explained his "no" vote on the motion by saying that he believed that, before the Council starts writing letters to legislators with a view to proposing legislation, ground rules should be agreed upon similar to those that now exist for the LAC. At the conclusion of this discussion, it was agreed that review of S.B. 601 and H.B. 3098 should be placed on the agenda of a future meeting.

Agenda Item 8: Election of members of the Legislative Advisory Committee (LAC) (Mr. Gaylord). Mr. Gaylord nominated the following Council members to be members of the LAC: Judges Brockley and Dickey, and Messrs. Alexander, Hamlin and McMillan. These nominations were seconded by Mr. Lachenmeier. All the foregoing nominees were then elected by unanimous voice vote. As its first act, the LAC, on the motion of Mr. Hamlin, elected Mr.

Alexander to be its Chair. (General approbation was then expressed by all members.)

Agenda Item 9: Old business (Mr. Gaylord) In response to Mr. Gaylord's query whether there were any items of old business, Mr. Hamlin responded by referring to Attachment D to the agenda of this meeting, explaining that he thought the amendment to ORCP 68 C(4)(c)(ii) therein proposed might be useful to put attorneys on notice that, in certain instances, special findings of fact and conclusions of law in connection with attorney fee awards are required by appellate decisions when requested by a party. He added that the amendment he proposed seemed to him all the more helpful in light of the fact that the present subparagraph states flatly: "No findings of fact or conclusions of law shall be necessary," which recent appellate decisions have determined is not a correct statement of the law in all instances. Mr. Gaylord stated that he thought it would be unwise to take up this proposal as an item of old business, and directed that it be placed as a scheduled item on the agenda of a future meeting of the Council.

Agenda Item 10: New business (Mr. Gaylord). In response to Mr. Gaylord's query whether there were any items of new business, Judge Marcus referred to Prof. Holland's memo to Susan Evans Grabe dated 4-17-96 (copy enclosed with agenda of this meeting), and to his letter of 5-13-96 to Judges LaMar and Pratt (copy attached to original of these minutes), both dealing with the abolition of district court judgeships effective Jan. 15, 1998. Judge Marcus noted that some doubt exists about what entity will replace the present District and Circuit Judges Associations, and that how this is resolved might have some at least impact on the process by which trial judges are appointed to membership on the Council. He added that he did not propose any sort of action by the Council at this time, but simply wanted the Council to know that he had alerted the Circuit and District Judges Associations to some potential technical issues that might arise by his letter to the Presidents of both Associations.

Agenda Item 11: Adjournment (Mr. Gaylord). On motion unanimously agreed to, Mr. Gaylord adjourned the meeting at 11:52 a.m.

Respectfully submitted,

Maury Holland
Executive Director

MEMORANDUM

April 29, 1996

TO: Chair and Members, Council on Court Procedures
FROM: Bruce C. Hamlin 
RE: Special Findings to Support Attorney Fee Awards
FILE: 12685.88

I propose that ORCP 68C(4)(c)(ii) be amended as follows:

"The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary **except as otherwise required by law.**"

I also suggest the following Staff Comment:

"Several recent cases have required findings for purposes of appellate review. See, e.g., Mattiza v. Foster, 311 Or 1, 10, 803 P2d 723 (1990); Long v. Oceanway Motors Inc., 139 Or App 469, 473, ___ P2d ___ (1996). Such findings should be in the form and have the content required by that other law. See, e.g., ORCP 17D (5)."

This proposal more narrowly accomplishes the purpose of codifying existing case law addressed in my memo of April 3, 1996 (copy attached).

MEMORANDUM

April 3, 1996

TO: Maury Holland, Executive Director
Council on Court Procedures

FROM: Bruce C. Hamlin

RE: Special Findings to Support Attorney Fee Awards

FILE: 12685.88

During the last bienium, the Council voted 8 to 8¹ not to amend ORCP 68C(4)(c)(ii) so as to require findings of fact supporting an award of attorney fees. The specific language proposed at that time read:

“The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [~~No findings of fact or conclusions of law shall be necessary.~~] The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.”

Recently, in Long v. Oceanway Motors, Inc., 139 Or App 469, ___ P2d ___ (1996), the Court of Appeals reversed an award of attorney fees and remanded for findings as to frivolousness under ORS 646.638(3) (Unlawful Trade Practices Act). In doing so, the Court noted that such findings had previously been required by the Supreme Court for a claim for attorney fees based upon ORS 20.105(1), and by the Court of Appeals for a claim for attorney fees under former ORCP 17C. 139 Or App at 473.

In light of those rulings, it may be prudent to amend ORCP 68 to read:

“The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [~~No findings of fact or conclusions of law~~”

¹ Some members of the Council may have voted against the proposal on the ground that it may not have been properly tentatively adopted. See Minutes of December 10, 1994, p 2.

~~shall be necessary.]~~ The trial court shall make findings of fact and conclusions of law on awards of attorney fees made pursuant to ORCP 17D or ORS 20.105(1)."²

In that way, judges and practitioners reading ORCP 68 would have the requirement of special findings called to their attention. This proposal would do no more than to codify existing case law.

² ORS 646.638(3) is not listed because an award of attorney fees in favor of a defendant is no longer conditioned on a finding of frivolousness. There are other statutes, including some amended by 1995 Or Laws, Chap 618, which condition an award on some determination by the court. It is unclear which of those statutes may be interpreted so as to require a finding of fact or conclusion of law.

May 31, 1996

To: Chair and Members, Council on Court Procedures
From: Maury Holland, Executive Director *M.H.*
Re: Attachment B to 6-8-96 Agenda; Report of Subcommittee to Review ORCP 7

Please attach the enclosed material as Attachment B to the agenda for the June 8 '96 Council meeting. This consists of the complete text of ORCP 7 with several amendments now being considered by the subcommittee. The amendments shown are not at this point being formally recommended to the Council for tentative adoption, as there remain some points of doubt or disagreement as yet unresolved among subcommittee members. Included in the attached draft are some footnotes I've prepared highlighting those points, as well as explaining some of the proposed changes. The purpose of distributing this material now is so that the subcommittee might get the benefit of any comments or suggestions members care to make at the June 8 meeting. I realize this won't be reaching you until a day or so before that meeting.

Language proposed to be added is shown in **bold underlined**; language proposed to be deleted in ~~strikeover~~.

{P.S. to Chair and Members of the ORCP 7 Subcommittee: I've tried my best to pick up and incorporate all the stylistic changes agreed upon in the course of the May 30 telecon. Please let me know if I've missed anything or gotten anything wrong in that regard.}

2
3 **DRAFT**

4
5 **RULE 7. SUMMONS**

6
7 **A. Definitions.** For purposes of this rule, "plaintiff"
8 shall include any party issuing summons and "defendant" shall
9 include any party upon whom service of summons is sought. For
10 purposes of this rule, a "true copy" of a summons and complaint
11 means an exact and complete copy of the original summons and
12 complaint with a certificate upon the copy signed by an attorney
13 of record, or if there is no attorney, by a party, which indicates
14 that the copy is exact and complete.

15
16 **B. Issuance.** Any time after the action is commenced,
17 plaintiff or plaintiff's attorney may issue as many original
18 summonses as either may elect and deliver such summonses to a
19 person authorized to serve summons under section E of this rule.
20 A summons is issued when subscribed by plaintiff or a resident
21 attorney of this state.¹

22
23 **C. Contents; Time for Response; Notice to Party**
24 **Served.**

¹ The Council has tentatively adopted an amendment that would amend: "a resident attorney of this state" to read: "an active member of the Oregon State Bar."

1 C(1) *Contents.* The summons shall contain:

2 C(1)(a) *Title.* The title of the cause, specifying the name
3 of the court in which the complaint is filed and the names of the
4 parties to the action.

5 C(1)(b) *Direction to Defendant.* A direction to the
6 defendant requiring defendant to appear and defend within the time
7 required by subsection (2) of this section and a notification to
8 defendant that in case of failure to do so, the plaintiff will
9 apply to the court for the relief demanded in the complaint.

10 C(1)(c) *Subscription; Post Office Address.* A subscription
11 by the plaintiff or by ~~a resident attorney of this state~~ **an**
12 **active member of the Oregon State Bar**,² with the addition of
13 the post office address at which papers in the action may be
14 served by mail.

15
16 C(2) *Time for Response.* If the summons is served by any
17 manner other than publication, the defendant shall appear and
18 defend within 30 days from the date of service. If the summons is
19 served by publication pursuant to subsection D(6) of this rule,
20 the defendant shall appear and defend within 30 days from the date
21 stated in the summons. The date so stated in the summons shall be
22 the date of the first publication.

23
24 C(3) *Notice to Party Served.*

² This amendment is required for consistency with the identical amendment to ORCP 7 B. I erred in not picking this up at the time. See note 1 above.

1 C(3)(a) In General. All summonses, other than a summons
2 referred to in paragraph (b) or (c) of this subsection, shall
3 contain a notice printed in type size equal to at least 8-point
4 type which may be substantially in the following form:

5
6 {Three forms of NOTICE TO DEFENDANT here omitted from this draft}

7
8 **D. Manner of Service.**

9 D(1) *Notice Required.* Summons shall be served, either within
10 or without this state, in any manner reasonably calculated, under
11 all the circumstances, to apprise the defendant of the existence
12 and pendency of the action and to afford a reasonable opportunity
13 to appear and defend. Summons may be served in a manner specified
14 in this rule or by any other rule or statute on the defendant or
15 upon an agent authorized by appointment or law to accept service
16 of summons for the defendant. Service may be made, subject to the
17 restrictions and requirements of this rule, by the following
18 methods: personal service of summons upon defendant or an agent
19 of defendant authorized to receive process; substituted service by
20 leaving a copy of summons and complaint at a person's dwelling
21 house or usual place of abode; office service by leaving with a
22 person who is apparently in charge of an office; service by mail;
23 or, service by publication.

24
25 D(2) *Service Methods.*

26 D(2)(a) *Personal Service.* Personal service may be made by

1 delivery of a true copy of the summons and a true copy of the
2 complaint to the person to be served.

3 D(2)(b) Substituted Service. Substituted service may be
4 made by delivering a true copy of the summons and complaint at the
5 dwelling house or usual place of abode of the person to be served,
6 to any person over 14 years of age residing in the dwelling house
7 or usual place of abode of the person to be served. Where
8 substituted service is used, the plaintiff, as soon as reasonably
9 possible, shall cause to be mailed a true copy of the summons and
10 complaint to the defendant at defendant's dwelling house or usual
11 place of abode, together with a statement of the date, time, and
12 place at which substituted service was made. For the purpose of
13 computing any period of time prescribed or allowed by these rules,
14 substituted service shall be complete upon such mailing.

15 D(2)(c) Office Service. If the person to be served
16 maintains an office for the conduct of business, office service
17 may be made by leaving a true copy of the summons and complaint at
18 such office during normal working hours with the person who is
19 apparently in charge. Where office service is used, the
20 plaintiff, as soon as reasonably possible, shall cause to be
21 mailed a true copy of the summons and complaint to the defendant
22 at the defendant's dwelling house or usual place of abode or
23 defendant's place of business or such other place under the
24 circumstances that is most reasonably calculated to apprise the
25 defendant of the existence and pendency of the action, together
26 with a statement of the date, time, and place at which office

1 service was made. For the purpose of computing any period of time
2 prescribed or allowed by these rules, office service shall be
3 complete upon such mailing.

4 D(2)(d) Service by Mail. When required or allowed by
5 this rule or by statute, ~~Service by mail, when required or~~
6 ~~allowed by this rule,~~ shall be made by mailing a true copy of the
7 summons and ~~a true copy~~ of the complaint to the defendant by
8 certified or registered mail, return receipt requested, and by
9 regular first class mail. For the purpose of computing any
10 period of time prescribed or allowed by these rules, service by
11 mail shall be complete three days after such mailing if ~~the~~ to an
12 ~~address to which it is mailed is~~ within this state and seven days
13 after mailing if ~~the~~ to an address ~~to which it is mailed is~~
14 outside this state, but not later than the date on which
15 the defendant signs a receipt for the mailing.

16
17 D(3) *Particular Defendants.* Service may be made upon
18 specified defendants as follows:

19 D(3)(a) Individuals.

20 D(3)(a)(i) Generally. Upon an individual defendant,
21 by personal service upon such defendant or an agent authorized by
22 appointment or law to receive service of summons or, if defendant
23 personally cannot be found at defendant's dwelling house or usual
24 place of abode, then by substituted service or by office service
25 upon such defendant or ~~an agent authorized by appointment or law~~
26 ~~to receive service of summons.~~ Service may also be made upon

1 an individual defendant to which neither subparagraph (ii)
2 nor (iii) of this paragraph applies by mailing made in
3 accordance with paragraph (2)(d) of this section provided
4 such defendant signs a receipt for the mailing, in which
5 case service shall be complete on the date on which the
6 defendant signs a receipt for the mailing.

7 D(3)(a)(ii) Minors. Upon a minor under the age of 14
8 years, by service in the manner specified in subparagraph (i) of
9 this paragraph upon such minor, and also upon such minor's father,
10 mother, conservator of the minor's estate, or guardian, or, if
11 there be none, then upon any person having the care or control of
12 the minor or with whom such minor resides, or in whose service
13 such minor is employed, or upon a guardian ad litem appointed
14 pursuant to Rule 27 A(2).

15 D(3)(a)(iii) Incapacitated Persons. Upon a person
16 who is incapacitated or financially incapable, as defined by ORS
17 125.005, by service in the manner specified in subparagraph (i) of
18 this paragraph upon such person, and also upon the conservator of
19 such person's estate or guardian, or, if there be none, upon a
20 guardian ad litem appointed pursuant to Rule 27 B(2).

21 D(3)(b) Corporations and Limited Partnerships. Upon a
22 domestic or foreign corporation or limited partnership:

23 D(3)(b)(i) Primary Service Method. By personal
24 service or office service upon a registered agent, officer,
25 director, general partner, or managing agent of the corporation or
26 limited partnership, or by personal service upon any clerk on duty

1 in the office of a registered agent.

2 D(3)(b)(ii) Alternatives. If a registered agent,
3 officer, director, general partner, or managing agent cannot be
4 found in the county where the action is filed, the summons may be
5 served: by substituted service upon such registered agent,
6 officer, director, general partner, or managing agent; or by
7 personal service on any clerk or agent of the corporation or
8 limited partnership who may be found in the county where the
9 action is filed; or by mailing a copy of the summons and
10 complaint to the office of the registered agent or to the last
11 registered office of the corporation or limited partnership, if
12 any, as shown by the records on file in the office of the
13 Secretary of State or, if the corporation or limited partnership
14 is not authorized to transact business in this state at the time
15 of the transaction, event, or occurrence upon which the action is
16 based occurred, to the principal office or place of business of
17 the corporation or limited partnership, and in any case to any
18 address the use of which the plaintiff knows or, on the basis of
19 reasonable inquiry, has reason to believe is most likely to result
20 in actual notice.

21 D(3)(c) State. Upon the state, by personal service upon
22 the Attorney General or by leaving a copy of the summons and
23 complaint at the Attorney General's office with a deputy,
24 assistant, or clerk.

25 D(3)(d) Public Bodies. Upon any county, incorporated
26 city, school district, or other public corporation, commission,

1 board or agency, by personal service or office service upon an
2 officer, director, managing agent, or attorney thereof.

3 D(3)(e) General Partnerships. Upon any general
4 partnerships by personal service upon a partner or any agent
5 authorized by appointment or law to receive service of summons for
6 the partnership.

7 D(3)(f) Other Unincorporated Association Subject to Suit
8 Under a Common Name. Upon any other unincorporated association
9 subject to suit under a common name by personal service upon an
10 officer, managing agent, or agent authorized by appointment or law
11 to receive service of summons for the unincorporated association.

12 D(3)(g) Vessel Owners and Charterers. Upon any foreign
13 steamship owner or steamship charterer by personal service upon a
14 vessel master in such owner's or charterer's employment or any
15 agent authorized by such owner or charterer to provide services to
16 a vessel calling at a port in the State of Oregon, or a port in
17 the State of Washington on that portion of the Columbia River
18 forming a common boundary with Oregon.

19
20 D(4) *Particular Actions Involving Motor Vehicles.*

21 D(4)(a) Actions Arising Out of Use of Roads, Highways,
22 and Streets; Service by Mail.

23 D(4)(a)(i) In any action arising out of any accident,
24 collision, or liability in which a motor vehicle may be involved
25 while being operated upon the roads, highways, ~~and~~ or streets of
26 this state, ~~any defendant who operated such motor vehicle, or~~

1 ~~caused such motor vehicle to be operated on the defendant's behalf~~
2 ~~who cannot be served with summons by any method specified in~~
3 ~~subsection D(3) of this rule, may be served with summons by~~
4 ~~leaving one copy of the summons and complaint with a fee of \$12.50~~
5 ~~with the Department of Transportation or at any office the~~
6 ~~department authorizes to accept summons or by mailing such summons~~
7 ~~and complaint with a fee of \$12.50 to the Department of~~
8 ~~Transportation by registered or certified mail, return receipt~~
9 ~~requested. The plaintiff shall cause to be mailed by registered~~
10 ~~or certified mail, return receipt requested, a true copy of the~~
11 ~~summons and complaint to the defendant at the address given by the~~
12 ~~defendant at the time of the accident or collision that is the~~
13 ~~subject of the action, and at the most recent address as shown by~~
14 ~~the Department of Transportation's driver records, and at any~~
15 ~~other address of the defendant known to the plaintiff, which might~~
16 ~~result in actual notice to the defendant. For purposes of~~
17 ~~computing any period of time prescribed or allowed by these rules,~~
18 ~~service under this paragraph shall be complete upon the date of~~
19 ~~the first mailing to the defendant. if the plaintiff first at~~
20 ~~least once attempts to serve the defendant by a method~~
21 ~~authorized by subsection D(3) of this section and, as~~
22 ~~evidenced by its return, did not effect service, the~~
23 ~~plaintiff may then serve the defendant by the following~~
24 ~~certified or registered mailings, return receipts~~
25 ~~requested, to the defendant addressed to: (1) any~~
26 ~~residence address provided by the defendant at the scene~~

1 of the accident; (2) any current residence address of the
2 defendant shown in the driver records of the Department of
3 Transportation, and; (3) any other address of the
4 defendant known to the plaintiff at the time of making the
5 mailings required by (1) and (2) which might result in
6 actual notice to the defendant. Sufficient service
7 pursuant to this subparagraph may also be shown if the
8 proof of service includes a true copy of the envelope in
9 which each of the mailings required by (1), (2) and (3)
10 above was made showing that it was returned to sender as
11 undeliverable or that the defendant had not signed its
12 receipt. For the purpose of computing any period of time
13 prescribed or allowed by these rules,³ service under this

3 This is one of the points about which there is some difference of opinion among subcommittee members. I believe all members would favor adding "or by statute" following "prescribed or allowed by these rules." but some are not sure that such an addition is within the statutory authority of the Council to "promulgate rules governing pleading, practice and procedure, . . . which shall not abridge, enlarge or modify the substantive rights of any litigant." ORS 1.735(1). There are two or three appellate opinions, I believe all by the Court of Appeals, interpreting this limitation, plus an Attorney General opinion. At least one Court of Appeals opinion held that any provision in the ORCP prescribing the date of completion of service does not necessarily establish the effective date of service for purposes of statutes of limitation, ORS 12.020(2) in particular, reasoning that the latter is either a matter of statutory interpretation or affects substantive rights, or both, and therefore in either event is beyond the Council's statutory authority. I have been asked to prepare a brief memo summarizing the pertinent authority on this point, and will have something to distribute at the June 8 meeting. All subcommittee members of course understand that, if there is any substantial doubt about whether the courts would give effect to "or by statute," it would be a serious mistake to insert it because it might well trap or mislead lawyers who read only the rule and are not well versed in the surrounding case law. On the other hand, at least one or two subcommittee members strongly feel that the existing language, "any period of time prescribed or allowed by these rules," which recurs at several points in ORCP 7, tends to be misleading, because some lawyers might assume that that effective date must also be the effective date for limitations and perhaps other statutory purposes. These members believe that, provided the courts would give it effect, the best way to remove this potential trap is for the Council to make

1 subparagraph shall be complete on the latest date on which
2 any of the mailings required by (1), (2) and (3) above are
3 made.

4 D(4)(a)(ii) ~~The~~ A fee of ~~\$12.50~~ paid by the plaintiff
5 to the Department of Transportation to obtain address
6 information concerning a defendant in order to make
7 service pursuant to subparagraph D(4)(a)(i) of this rule
8 shall be taxed as part of the costs if plaintiff prevails in the
9 action. ~~The Department of Transportation shall keep a record of~~
10 ~~all such summonses which shall show the day of service.~~

11 D(4)(b) Notification of Change of Address. Every motorist
12 or user of the roads, highways, ~~and~~ or streets of this state who,
13 while operating a motor vehicle upon the roads, highways, or
14 streets of this state, is involved in any accident, collision, or
15 liability, shall forthwith notify the Department of Transportation
16 of any change of such defendant's address occurring within three
17 years after such accident or collision.

18 D(4)(c) Default. No default shall be entered against any
19 defendant served under this subsection unless the plaintiff
20 submits an affidavit showing:

21 · D(4)(c)(i) that summons was served as provided in

explicit its intention that whatever dates are prescribed in ORCP 7 for completing service are effective, not only for purposes "of these rules," but also for purposes of ORS 12.020 and other statutory limitations provisions. There is no question but that ORCP amendments as promulgated by the Council have as much force as statutory law as ORCP amendments enacted by the legislature. The difference is that, in amending the ORCP or doing anything else, the legislature is not limited to matters of "pleading, practice and procedure," whereas the Council is. This is an issue that should take everyone back to what I'm sure was their fondly recalled first day in Civil Procedure.

1 subparagraph D(4)(a)(i) of this rule and all mailings to defendant
2 required by subparagraph D(4)(a)(i) of this rule have been made;
3 and

4 D(4)(c)(ii) either, if the identity of defendant's
5 insurance carrier is known to the plaintiff or could be determined
6 from any records of the Department of Transportation accessible to
7 plaintiff, that the plaintiff not less than ~~14~~ 30 days prior to
8 the application for default caused a copy of the summons and
9 complaint to be mailed to such insurance carrier by registered or
10 certified mail, return receipt requested, or that the defendant's
11 insurance carrier is unknown; and

12 D(4)(c)(iii) that service of summons could not be had
13 by any method ~~specified~~ authorized in subsection D(3) of this
14 rule.

15
16 D(5) *Service in Foreign Country.* When service is to be
17 effected upon a party in a foreign country, it is also sufficient
18 if service of summons is made in the manner prescribed by the law
19 of the foreign country for service in that country in its courts

⁴ If 7 D(4)(a)(i) is to be amended as shown above, this would allow for effective service even when a defendant had not signed a receipt for any of the three required mailings. Some subcommittee members believe that, particularly if this amendment is adopted, insurance carriers need greater protection than is afforded by the present 14-day notice prior to taking a default. 30 days seems sensible to those members. On the other hand, other subcommittee members would prefer incorporating some sort of notice-to-insurers requirement into D(4)(a)(i) itself, as proposed to be amended, so that insurers would get notice at about the same time as insured are served. The difficulty is how to incorporate a notice-to-insurers provision into D(4)(a)(i), as proposed to be amended, without making an already complex provision even more so, and without raising questions about whether the insurer's receipt of notice would be essential to complete service on the insured.

1 of general jurisdiction, or as directed by the foreign authority
2 in response to letters rogatory, or as directed by order of the
3 court. However, in all cases such service shall be reasonably
4 calculated to give actual notice.

5

6 *D(6) Court Order for Service; Service by Publication.*

7 D(6)(a) Court Order for Service by Other Method. On motion
8 upon a showing by affidavit that service cannot be made by any
9 method otherwise specified in these rules or other rule or
10 statute, the court, at its discretion, may order service by any
11 method or combination of methods which under the circumstances is
12 most reasonably calculated to apprise the defendant of the
13 existence and pendency of the action, including but not limited
14 to: publication of summons; mailing without publication to a
15 specified post office address of defendant, return receipt
16 requested, deliver to addressee only; or posting at specified
17 locations. If service is ordered by any manner other than
18 publication, the court may order a time for response.

19 D(6)(b) Contents of Published Summons. In addition to the
20 contents of a summons as described in section C of this rule, a
21 published summons shall also contain a summary statement of the
22 object of the complaint and the demand for relief, and the notice
23 required in subsection C(3) shall state: "The 'motion' or 'answer'
24 (or 'reply') must be given to the court clerk or administrator
25 within 30 days of the date of first publication specified herein
26 along with the required filing fee." The published summons shall

1 also contain the date of the first publication of the summons.

2 D(6)(c) Where Published. An order for publication shall
3 direct publication to be made in a newspaper of general
4 circulation in the county where the action is commenced or, if
5 there is no such newspaper, then in a newspaper to be designated
6 as most likely to give notice to the person to be served. Such
7 publication shall be four times in successive calendar weeks. If
8 the plaintiff knows of a specific location other the
9 county where the action is commenced where publication
10 might result in actual notice to the defendant, the
11 plaintiff shall so state in the affidavit required by
12 paragraph D(6)(a) of this subsection, and the court may
13 order publication in a comparable manner at such location
14 in addition to, or in lieu of, publication in the county
15 where the action is commenced.

16 D(6)(d) Mailing Summons and Complaint. If service by
17 publication is ordered and defendant's post office address is
18 known or can with reasonable diligence be ascertained, the
19 plaintiff shall mail a copy of the summons and complaint to the
20 defendant by certified or registered mail, return receipt
21 requested, and by first-class mail.⁵ When the address of any
22 defendant is not known or cannot be ascertained upon diligent
23 inquiry, a copy of the summons and complaint shall be mailed to

⁵ This added language might be redundant in light of D(2)(d). On the other hand, omitting it might raise questions whether the greater specificity of D(6)(d) overrides the generality of D(2)(d).

1 the defendant at defendant's last known address. If plaintiff
2 does not know and cannot ascertain, upon diligent inquiry, the
3 present or last known address of the defendant, mailing a copy of
4 the summons and complaint is not required.

5 D(6)(e) Unknown Heirs or Persons. If service cannot be made
6 by another method described in this section because defendants are
7 unknown heirs or persons as described in sections I and J of Rule
8 20, the action shall proceed against the unknown heirs or persons
9 in the same manner as against named defendants served by
10 publication and with like effect; and any such unknown heirs or
11 persons who have or claim any right, estate, lien, or interest in
12 the property in controversy, at the time of the commencement of
13 the action, and served by publication, shall be bound and
14 concluded by the judgment in the action, if the same is in favor
15 of the plaintiff, as effectively as if the action was brought
16 against such defendants by name.

17 D(6)(f) Defending Before or After Judgment. A defendant
18 against whom publication is ordered or such defendant's
19 representatives, on application and sufficient cause shown, at any
20 time before judgment, shall be allowed to defend the action. A
21 defendant against whom publication is ordered or such defendant's
22 representatives may, upon good cause shown and upon such terms as
23 may be proper, be allowed to defend after judgment and within one
24 year after entry of judgment. If the defense is successful, and
25 the judgment or any part thereof has been collected or otherwise
26 enforced, restitution may be ordered by the court, but the title

1 to property sold upon execution issued on such judgment, to a
2 purchaser in good faith, shall not be affected thereby.

3 ~~D(7) Defendant Who Cannot Be Served.~~ **D(6)(g) Defendant**
4 **Who Cannot Be Served.** A defendant cannot **within the meaning**
5 **of this subsection** be served with summons by any method
6 **otherwise** specified in ~~subsection D(3) of this~~ **these rules or**
7 **other rule or statute** if the plaintiff attempted service of
8 summons by all ~~of~~ the methods specified in subsection D(3)
9 **authorized for service upon such defendant** and was unable to
10 complete service, or if the plaintiff knew that service by such
11 methods could not be accomplished.

12
13 **E. By Whom Served; Compensation.** A summons may be
14 served by any competent person 18 years of age or older who is a
15 resident of the state where service is made or of this state and
16 is not a party to the action nor, except as provided in ORS
17 180.260, an officer, director, or employee of, nor attorney for,
18 any party, corporate or otherwise. Compensation to a sheriff or a
19 sheriff's deputy in this state who serves a summons shall be
20 prescribed by statute or rule. If any other person serves the
21 summons, a reasonable fee may be paid for service. This
22 compensation shall be part of disbursements and shall be recovered
23 as provided in Rule 68.

24
25 **F. Return; Proof of Service.**

26 **F(1) Return of Summons.** The summons shall be promptly

1 returned to the clerk with whom the complaint is filed with proof
2 of service or mailing, or that defendant cannot be found. The
3 summons may be returned by mail.

4

5 F(2) *Proof of Service.* Proof of service of summons or
6 mailing may be made as follows:

7 F(2)(a) *Service Other Than Publication.* Service other than
8 publication shall be proved by:

9 F(2)(a)(i) *Certificate of Service When Summons Not Served*
10 *by Sheriff or Deputy.* If the summons is not served by a sheriff
11 or a sheriff's deputy, the certificate of the server indicating:
12 the time, place, and manner of service; that the server is a
13 competent person 18 years of age or older and a resident of the
14 state of service or this state and is not a party to nor an
15 officer, director, or employee of, nor attorney for any party,
16 corporate or otherwise; and that the server knew that the person,
17 firm, or corporation served is the identical one named in the
18 action. If the defendant is not personally served, the server
19 shall state in the certificate when, where, and with whom a copy
20 of the summons and complaint was left or describe in detail the
21 manner and circumstances of service. If the summons and complaint
22 were mailed, the certificate may be made by the person completing
23 the mailing or the attorney for any party and shall state the
24 circumstances of mailing and the return receipt shall be attached.

25 F(2)(a)(ii) *Certificate of Service by Sheriff or Deputy.*
26 If the summons is served by a sheriff or a sheriff's deputy, the

1 sheriff's or deputy's certificate of service indicating the time,
2 place, and manner of service, and if defendant is not personally
3 served, when, where, and with whom the copy of the summons and
4 complaint was left or describing in detail the manner and
5 circumstances of service. If the summons and complaint were
6 mailed, the certificate shall state the circumstances of mailing
7 and the return receipt shall be attached.

8 F(2)(b) Publication. Service by publication shall be
9 proved by an affidavit in substantially the following form:

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12
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26

AFFIDAVIT OF PUBLICATION

State of Oregon)
) ss.
County of)

I, _____, being first duly sworn, depose and say that I
am the
_____ (here set forth the title or job description of the
person
making the affidavit), of the _____, a newspaper of general
circulation published at _____ in the aforesaid county and
state; that
I know from my personal knowledge that the _____, a
printed copy of
which is hereto annexed, was published in the entire issue of said

1 newspaper
2 four times in the following issues: (here set forth dates of
3 issues in which
4 the same was published).

5
6 Subscribed and sworn to before me this _____ day of
7 _____, 19__.

8
9 _____

10 Notary Public for Oregon

11 My commission expires _____ day
12 of _____, 19__.

13
14 F(2)(c) Making and Certifying Affidavit. The affidavit of
15 service may be made and certified before a notary public, or other
16 official authorized to administer oaths and acting as such by
17 authority of the United States, or any state or territory of the
18 United States, or the District of Columbia, and the official seal,
19 if any, of such person shall be affixed to the affidavit. The
20 signature of such notary or other official, when so attested by
21 the affixing of the official seal, if any, of such person, shall
22 be prima facie evidence of authority to make and certify such
23 affidavit.

24 F(2)(d) Form of Certificate or Affidavit. A certificate or
25 affidavit containing proof of service may be made upon the summons
26 or as a separate document attached to the summons.

1
2 F(3) *Written Admission*. In any case proof may be made by
3 written admission of the defendant.

4
5 F(4) *Failure to Make Proof; Validity of Service*. If summons
6 has been properly served, failure to make or file a proper proof
7 of service shall not affect the validity of the service.

8
9 **G. Disregard of Error; Actual Notice.** Failure to
10 comply with provisions of this rule relating to the form of
11 summons, issuance of summons, ~~and~~ or ~~the~~ a person who may serve
12 summons shall not affect ~~the~~ validity of service of summons or the
13 existence of jurisdiction over the person, if the court determines
14 that the defendant received actual notice of the substance and
15 pendency of the action. The court may allow amendment to a
16 summons, or affidavit or certificate of service of summons, and
17 shall disregard any error in the content of ~~or service of~~⁶ summons

⁶ There is a significant difference of opinion within the subcommittee as to whether the phrase "or service of" should be deleted. Those supporting deletion make the following argument. Under D(1), any method of service actually used must meet the basic standard of "being reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action" The legislative history shows that the drafters of D(1) borrowed this phraseology from Justice Jackson's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 70 S Ct 652 (1950), which reaffirmed that the "reasonably calculated" standard is binding upon the states as a matter of 14th amendment due process and, more importantly, fleshed out the content of that standard. This legislative history does not bind Oregon courts to give the "reasonably calculated" standard of D(1) the identical construction as that given to 14th. amendment due process in the context of notice. Oregon courts are entirely free to give D(1) a more demanding interpretation as a matter of state law, though there would be no point in giving it a less demanding interpretation, because then the 14th amendment due process standard would be independently controlling. As far as I'm aware, however, the Oregon appellate courts have invariably held that D(1)'s "reasonably calculated" standard means, as a

1 that does not materially prejudice the substantive rights of the matter of state law, precisely the same thing the *Mullane* standard does as a matter of federal constitutional law.

Proponents of deleting "or service of" argue that it invites confusion and distraction. By this is meant that either the "reasonably calculated" standard has been met, or it has not. If it has been, then service was valid, at least as far as method of service is concerned, and there was no "error" that requires being disregarded or excused. If that standard was not met, then service would be invalid as a matter of 14th. amendment due process, and no authority granted by 7 G can alter that conclusion. Since service not meeting the "reasonably calculated" standard of D(1) as a matter of state law must necessarily also violate federal constitutional law, the phrase "or service of" invites confusion, since it is backward looking and requires courts to consider deficiencies in service only in light of what, in retrospect, actually happened, in particular whether the defendant would suffer "any prejudice to substantive rights" were the validity of service sustained despite such deficiencies.

The opponents of deleting "or service of" among subcommittee members argue that taking those words out of this section, especially if such other words as "content of" are left in, risks sending the message to judges that they must be hypertechnical and nitpicking about any errors in the method of service, however inconsequential and devoid of material prejudice to defendants. The opponents believe that that would be the likely practical effect of deleting "or service of," whatever the theory might be. (What about a Staff Comment to avoid this?)

For what it might be worth, FRCP 4 had until a few years ago a provision very much like our present ORCP 7. It was jettisoned as being either useless or confusing, and was replaced by FRCP 4(h) as follows: "**Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom process issued." This strikes me as a highly useful provision, and whatever happens to ORCP 7, I recommend that its amendment of summons, etc., provision be retained. In this connection--and here I'm speaking only for myself since the question has not arisen in the subcommittee--should not the language of ORCP 7 that authorizes court to allow amendments be made explicit that any such amendments as are allowed relate back in time, similar to the relation-back language in ORCP 23 C? In the context of 7 G, I suppose the only context where relation-back would have any application would be where a summons was properly and timely served, but had some error in its contents, though not one which misled the defendant. An example would be if someone personally served a summons on me with my name spelled "Morris Holland" instead of "Maurice J. Holland." If the court allowed this misnomer in the summons to be corrected by amendment on the ground that I knew perfectly well I was the person intended to be served, it could be important to make clear that the amendment related back to the date of service and was not effective only on the subsequent date of the order allowing the amendment. My impression is that it is widely assumed among lawyers and judges that, as with amendments of pleadings under 23 C, any amendment of a litigation document that is allowed by order of the court relates back, nunc pro tunc, to some earlier date, such as the date the original pleading was served, at least if the court so orders. Relation-back would not seem to have any application in the context of what 7 G refers to as "amendment to a[n] . . . affidavit or certificate of service of summons, . . ." But it certainly might when it comes to amendments correcting the contents of a summons such as when, for example, the 60-days-from filing period allowed by ORS 12.020 had expired after service of a summons having a non-prejudicial misnomer, but before the date of the order allowing the corrective amendment.

1 party against whom summons was issued.

2

3 **H. Telegraphic Transmission.** A summons and complaint may
4 be transmitted by telegraph as provided in Rule 8 D.

5

1 party against whom summons was issued.

2

3 **H. Telegraphic Transmission.** A summons and complaint may
4 be transmitted by telegraph as provided in Rule 8 D.

5

May 24, 1996

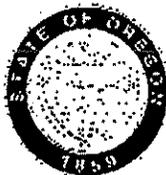
To: **Chair and Members, Council on Court Procedures**

From: Maury Holland, Executive Director *M. J. H.*

Re: Item of New Business

The attached query from Jim Nass, on behalf of the OSB Appellate Practice Section, just arrived. Please place it in your Council file. At the discretion of the Chair, this will be discussed as an item of new business at the June 8 or subsequent meeting.

SUPREME COURT



COURT of APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97310

RECORDS SECTION
503-986-5555
Fax 503-986-5560
TDD 503-986-3561

May 22, 1996

Council on Court Procedures
c/o Professor Maury Holland
University of Oregon School of Law
Room 331
1101 Kincaid St.
Eugene, OR 97403

Re: Oregon Rules of Civil Procedure; especially ORCP 72

Professor Holland,

I am writing on behalf of the Appellate Practice Section of the Oregon State Bar.

The Section is proposing legislation for the 1997 legislative session affecting the practice of appellate law. One of our proposed bills deal with stays on appeal in civil cases. A copy of the proposed bill is enclosed. Section 8 of the bill would amend ORCP 72 to clarify that trial courts retain the authority to stay execution on a judgment notwithstanding the filing of an appeal. We believe that this is the current state of the law, but, because of the existing provisions of ORCP 72, some trial court judges decline to act on motions for stays of enforcement of judgments if a notice of appeal has been filed. If the Legislature adopts the proposed amendments to ORCP 72 and adopts Section 7 of this bill, we hope to remove all doubt on that subject.

Note also that Section 1(1)(a) of the proposed bill refers to ORCP 68, Section 2(2) refers to ORCP 82 D and E, and Section 2(4) refers to ORCP 82 F and G.

The Appellate Practice Section is very interested in the Council's position regarding the proposed amendment to ORCP 72 and whether the references in the proposed bill to other provisions of the Rules of Civil Procedure are appropriate.

If the Board of Governors approves the proposed bill, it will be pre-session filed and a draft bill produced by Legislative Counsel. We understand that we will have the opportunity in the Fall of this year to make changes to the bill. We invite the Council's comments on the proposed bill at any time between now and then, and thereafter as the bill (we hope) proceeds through the legislature.

Sincerely,

James W. Nass
James W. Nass

c: Jas Adams, Chair, Executive Committee, Appellate Practice Section
Gini Linder, Chair, Legislation Committee

gicorr.mls

Post-it* Fax Note	7671	Date	5-22	# of pages	9
To	Prof. Maury Holland	From	Jim Nass		
Co./Dept.	U of O Law School	Co.	Or. Court of Appeals		
Phone #	541 346-3874	Phone #	503 986-5563		
Fax #	541 346-1514	Fax #	503 986-5560		

Senate Bill _____

SUMMARY

3 Amends procedure for obtaining stays of enforcement of judgments in
4 civil cases.

5 A BILL FOR AN ACT

6 Relating to appeals; amending ORS 19.033, 19.038 and 19.040 and ORCP 72;
7 repealing 19.045 and 19.050, and creating new provisions.

8 Be It Enacted by the People of the State of Oregon:

9 SECTION 1. ORS 19.033 is amended to read:

10 19.033. (1) When the notice of appeal has been served and filed
11 as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or
12 the Court of Appeals shall have jurisdiction of the cause, [pursuant
13 to rules of the court,] but the trial court shall have such powers
14 in connection with the appeal as are conferred upon it by law and
15 shall retain jurisdiction:

16 (a) [for the purpose of allowance and taxation of] To
17 decide requests for attorney fees, costs and disbursements or
18 expenses pursuant to [rule or statute] ORCP 68 or other provision of
19 law: [If the trial court allows and taxes attorney fees after the
20 notice of appeal has been served and filed, any necessary
21 modification of the appeal shall be pursuant to rules of the
22 appellate court.];

23 (b) To enforce the judgment, subject to the judgment or
24 portion thereof being stayed under ORS 19.040, Section 7 of this Act
25 or other provision of law;

26 (2) * * * *

27 (3) * * * *

28 (4) * * * *

29 (5) * * * *

30 (6) Jurisdiction of the appellate court over a cause ends when

1 a copy of the appellate judgment is mailed by the State Court
2 Administrator to the court from which the appeal was taken pursuant
3 to ORS 19.190, except that the appellate court may recall the
4 appellate judgment as justice may require and may stay enforcement
5 of the appellate judgment for the filing of a petition for writ of
6 certiorari to the Supreme Court of the United States and pending
7 disposition of the matter by the Supreme Court of the United States
8 or such other time as the Oregon appellate court may deem
9 appropriate.

10 SECTION 2. ORS 19.038 is amended to read:

11 19.038. Undertakings on appeal generally. (1) Undertakings on
12 appeal are of two kinds:

13 (a) An undertaking for costs secures payment of damages,
14 costs and disbursements that may be awarded against the appellant on
15 appeal.

16 (b) A supersedeas undertaking secures performance of the
17 judgment being appealed and operates to stay enforcement of the
18 judgment pending appeal.

19 (2) An undertaking on appeal shall be secured by one or more
20 sureties, qualified as provided in ORCP 82 D and E, or by an
21 irrevocable letter of credit from a qualifying bank or a deposit of
22 money, checks or federal or municipal obligations as provided in ORS
23 Chapter 22. The liability of the surety or letter of credit issuer
24 shall be limited to the amount specified in the undertaking and such
25 amount shall be stated in all appeal bonds and letters of credit.

26 [(1) Except as provided in ORS 19.045, within 14 days after the
27 filing of the notice of appeal, the appellant shall serve on the
28 adverse party or the attorney of the adverse party an undertaking as
29 provided in ORS 19.040, and within such 14 days shall file with the
30 clerk of the trial court the original undertaking, with proof of
31 service indorsed thereon.] (3) The original of an undertaking on
32 appeal, with proof of service, shall be filed with the trial court
33 clerk and a copy thereof shall be served on each adverse party on
34 appeal. An undertaking for costs on appeal shall be filed within
35 the time provided in Section 4 of this Act. A supersedeas
36 undertaking may be filed at any time while the case is pending on
37 appeal.

38 [(2)] (4) [Within 14 days after the service of the undertaking,
39 the adverse party or the attorney of the adverse party may except to

1 the sufficiency of the sureties or letter of credit issuers or the
2 amount specified in the undertaking, or the adverse party shall be
3 deemed to have waived the right thereto.] Objections to the
4 sufficiency of the undertaking, including the amount thereof, or to
5 the sufficiency of the security for the undertaking shall be filed
6 in and determined by the trial court as provided in ORCP 82 F and G,
7 except that objections shall be filed within 14 days of the date of
8 service of the undertaking.

9 (3) The qualifications of sureties or letter of credit issuers
10 in the undertaking on appeal shall be as provided in ORCP 82D
11 through G.] (5) By written stipulation of the parties, any
12 undertaking on appeal may be dispensed with. The stipulation shall
13 be filed with the trial court clerk within 14 days after the filing
14 of the notice of appeal. Unless disapproved by the trial court, the
15 stipulation shall have such effect as is provided for in the
16 stipulation.

17 (6) The trial court may waive, reduce or limit an undertaking
18 on appeal upon a showing of good cause, including indigence, and on
19 such terms as shall be just and equitable.

20 (7) (a) If the appellate judgment terminating an appeal contains
21 a judgment for costs against the party obtaining the undertaking,
22 the trial court clerk shall enter judgment against the surety or
23 letter of credit issuer as provided in ORS 19.190(4).

24 (b) A party entitled to enforce a supersedeas undertaking for a
25 money judgment may obtain judgment against the surety by serving and
26 filing a request to that effect with the State Court Administrator.
27 The request shall identify the surety against whom judgment is to be
28 entered and the amount of the judgment. Upon such request, the
29 State Court Administrator shall include in the appellate judgment a
30 money judgment against the surety in the amount identified, unless
31 otherwise directed by the appellate court.

32 SECTION 3. Section 4 of this Act is added to and made a part of
33 ORS Chapter 19.

34 SECTION 4. Within 14 days after the filing of the notice of
35 appeal, the appellant shall serve and file an undertaking for costs
36 to the effect that the appellant will pay all damages, costs and
37 disbursements that may be awarded against the appellant on the
38 appeal. The undertaking shall be in the amount of \$500, except as
39 otherwise stipulated by the parties or ordered by the trial court as
40 provided in ORS 19.038(5) and (6).

1 **SECTION 5.** ORS 19.040 is amended to read:

2 (1) *[The undertaking of the appellant shall be given in the*
3 *minimum amount of \$500 unless otherwise fixed by the trial court*
4 *with one or more sureties or in the form of one or more irrevocable*
5 *letters of credit issued by one or more commercial banks, as defined*
6 *in ORS 706.005, to the effect that the appellant will pay all*
7 *damages, costs and disbursements which may be awarded against the*
8 *appellant on the appeal not exceeding the sum therein specified; but*
9 *such undertaking does not stay the proceedings, unless the*
10 *undertaking further provides to the effect following] A supersedeas*
11 *undertaking shall stay the judgment being appealed if:*

12 (a) *[If] The judgment appealed from is for the recovery of*
13 *money, or of personal property or the value thereof[,] and the*
14 *undertaking provides that [if the same or any part thereof is*
15 *affirmed, the appellant will satisfy it so far as affirmed] the*
16 *appellant will satisfy the judgment or any part thereof, to the*
17 *extent that the judgment is affirmed on appeal.*

18 (b) *[If] The judgment appealed from is for the recovery of*
19 *the possession of real property, for a partition thereof, or the*
20 *foreclosure of a lien thereon, and the undertaking provides that, to*
21 *the extent the judgment is affirmed on appeal:*

22 (i) *During the possession of such property by the*
23 *appellant, the appellant will not commit waste or allow waste to be*
24 *committed on the real property[, or suffer to be committed, any*
25 *waste thereon,] and*

26 (ii) *[that if such judgment or any part thereof is*
27 *affirmed,] The appellant will pay the value of the use and*
28 *occupation of such property[, so far as affirmed,] from the time of*
29 *the appeal until the delivery of the possession thereof[, not*
30 *exceeding the sum therein specified, to be ascertained and tried by*
31 *the trial court or judge thereof], with the value of the use and*
32 *occupation to be determined by the trial court and stated in the*
33 *undertaking.*

34 (c) *[If] The judgment appealed from requires the transfer*
35 *or delivery of any personal property[,] and the undertaking provides*
36 *that the appellant will obey the judgment of the appellate court,*
37 *with the amount of the undertaking to be determined by the trial*
38 *court and stated in the undertaking. No supersedeas undertaking is*
39 *necessary if [unless] the things required to be transferred or*

1 delivered are brought into court[,] or placed in the custody of such
2 officer or receiver as the trial court may appoint[, that the
3 appellant will obey the judgment of the appellate court]. [The
4 amount of such undertaking shall be specified therein, and be fixed
5 by the trial court or judge thereof.]

6 (d) [If] The judgment appealed from is for the foreclosure
7 of a lien, and also against the person for the amount of the debt
8 secured thereby, and the undertaking provides [shall also be to the
9 effect] that the appellant will pay any portion of the judgment
10 remaining unsatisfied after the sale of the property upon which the
11 lien is foreclosed, [not exceeding the sum therein specified, to be
12 fixed by the trial court or judge thereof] with the amount of the
13 undertaking to be determined by the trial court and stated in the
14 undertaking.

15 (2) The trial court, in its discretion, may dispense with or
16 limit the undertaking required by subsections (1) (a) to (d) of this
17 section when the appellant is an executor, administrator, trustee,
18 or other person acting in another's right.

19 [(2) When] (3) If the judgment appealed from requires the
20 execution of a conveyance or other instrument, [execution]
21 enforcement of the judgment is [not] stayed by [the appeal, unless]
22 executing the instrument [is executed] and [deposited] depositing
23 the instrument with the trial court clerk [within the time allowed
24 to file an undertaking], to abide the judgment of the appellate
25 court.

26 [(3) If the appeal is dismissed, the judgment, so far as it is
27 for the recovery of money, may, by the appellate court, be enforced
28 in the amount specified against the sureties or letter of credit
29 issuers in the undertaking for a stay of proceedings, as if they
30 were parties to the judgment.]

31 [(4) The liability of the surety or letter of credit issuer
32 shall be limited to the amount specified in the undertaking and such
33 amount shall be stated in all appeal bonds and irrevocable letters
34 of credit and shall be fixed by the trial court or judge thereof
35 unless it is in the minimum amount as provided in subsection (1) of
36 this section.]

37 (4) When the judgment is stayed, if perishable property has
38 been seized to satisfy or secure the judgment or has been directed
39 to be sold thereby, the trial court may order the property to be

1 sold as if the judgment were not stayed and the proceeds of the sale
2 to be deposited or invested, to abide the judgment of the appellate
3 court.

4 SECTION 5. Section 7 of this Act is added to and made a part of
5 ORS Chapter 19.

6 SECTION 7. (1) The filing of a notice of appeal does not
7 automatically stay the judgment being appealed, but:

8 (a) A judgment or portion thereof described in ORS
9 19.040(1) or (2) is stayed by operation of law on compliance with
10 the appropriate provisions of ORS 19.040(1) or (3); and

11 (b) A judgment not subject to ORS 19.040(1) or (3) may be
12 stayed by the trial court on motion of party as provided in this
13 section.

14 (2) A party who seeks a stay pending appeal must first request
15 a stay from the trial court. The trial court shall have the
16 authority to act on a request for a stay, regardless of whether a
17 notice of appeal has been filed. Neither the request for a stay
18 made to the trial court nor the trial court's action on the request
19 shall toll the period for filing a notice of appeal.

20 (3) In deciding whether to grant a stay, the trial court shall
21 consider, but is not limited to, the following factors:

22 (a) The likelihood of the appellant prevailing on appeal;

23 (b) Whether the appeal is taken in good faith and not
24 solely for the purpose of delay or patently without any support in
25 fact or in law; and

26 (c) The nature of the harm to the appellant, to other
27 parties, to other persons and to the public that will flow or will
28 likely flow from the grant or denial of a stay.

29 (4) The trial court shall have discretion to impose such
30 reasonable conditions on the grant of a stay as it deems
31 appropriate, including the filing of a supersedeas undertaking in a
32 specified amount.

33 (5) At the request of a party aggrieved by the trial court's
34 denial of a stay or the terms and conditions imposed on the granting
35 of a stay, the trial court shall afford the aggrieved party 14 days
36 in which to seek review by the appellate court of the trial court's

1 decision, during which period the judgment being appealed shall be
 2 stayed on such terms and conditions as the trial court determines
 3 are sufficient to avoid prejudice to the other party or parties
 4 during that 14 day period.

5 (6) After notice of appeal from the judgment has been filed,
 6 the appellate court on motion of an aggrieved party shall have
 7 authority to review the decision of a trial court on a party's
 8 request for a stay pending appeal. When the appellate court reviews
 9 the trial court's decision, the review shall be for abuse of
 10 discretion, except that when the appellate court has de novo review
 11 authority of the appeal on the merits, the appellate court shall
 12 have de novo review authority of the trial court's decision on the
 13 request for a stay pending appeal.

14 (7) A party may request a stay pending appeal from the
 15 appellate court in the first instance and the appellate court may
 16 act on that request without requiring the party to seek a stay from
 17 the trial court if the party establishes that the filing of a
 18 request for a stay with the trial court would be futile or the trial
 19 court is unable or unwilling to act on the request within a
 20 reasonable time. In considering a request for a stay, the appellate
 21 court shall be guided by the factors set out in subsection (3) of
 22 this section.

23 (8) On review of a trial court's decision on a request for a
 24 stay pending appeal or on a request for a stay pending appeal made
 25 to the appellate court in the first instance, the appellate court
 26 shall have the authority to remand the matter to the trial court for
 27 reconsideration or for consideration in the first instance, or to
 28 grant or deny a stay, to impose or modify terms and conditions on a
 29 stay, or to vacate a stay granted by the trial court.

30 SECTION 8. ORCP 72 is amended to read:

31 72 A. Execution or other proceeding to enforce a judgment may
 32 issue immediately upon the entry of the judgment, unless the court
 33 directing entry of the judgment, in its discretion and on such
 34 conditions for the security of the adverse party as are proper,
 35 otherwise directs. *[No stay of proceedings to enforce judgment may*
 36 *be entered by the trial court under this section after the notice of*
 37 *appeal has been served and filed as provided in ORS 19.023 through*
 38 *19.029 and during the pendency of such appeal.]* The court shall
 39 have authority to stay execution of a judgment temporarily until the
 40 filing of a notice of appeal and to stay execution of a judgment
 41 pending disposition of an appeal, as provided in ORS 19.040 and
 42 Section 7 of this Act or other provision of law.

1 B This rule does not limit the right of a party to a stay
2 otherwise provided for by these rules or other statute or rule.

3 C The federal government, any of its public corporations or
4 commissions, the state, any of its public corporations or
5 commissions, a county, a municipal corporation, or other similar
6 public body shall not be required to furnish any bond or other
7 security when a stay is granted by authority of section A of this
8 rule in any action to which it is party or is responsible for
9 payment or performance of the judgment.

10 D When a court has ordered a final judgment under the
11 conditions state in Rule 67 B, the court may stay enforcement of
12 that judgment or judgments and may prescribe such conditions as are
13 necessary to secure the benefit thereof to the party in whose favor
14 the judgment is entered.

15 SECTION 9. ORS 19.045 and 19.050 are repealed.

16 SECTION 10. The provisions of this Act shall apply to appeals
17 initiated by the filing of a notice of appeal on or after the
18 effective date of this Act.

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