NOTICE

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, July 13, 1996
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Gaylord)

2. Approval of 6-8-96 minutes (attached)

3. Report and recommendations of subcommittee to review ORCP 7: (Attachment A) (Judge Brewer)

4. Report of subcommittee to review ORCP 17 C and 54 E (see Attachment B to 12-9-95 agenda and Attachment B to this agenda) (Ms. Tauman)

5. Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda, Attachment B to 5-11-96 agenda, and Attachment C to this agenda) (Ms. Craine)

6. Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (see Attachment D) (Mr. Gaylord)

7. Discussion of inquiry by Mr. Jim Nass on behalf of OSB Appellate Practice Section pertaining to proposed bill to amend ORCP 82 (see Attachment E) (Mr. Gaylord)

8. Old business (Mr. Gaylord)

9. New business (Mr. Gaylord)

10. Adjournment (Mr. Gaylord)

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of June 8, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Rodger J. Isaacson
	David V. Brewer	Nely L. Johnson
	Sid Brockley	Stephen Kanter
	Patricia Crain	Rudy Lachenmeier
	Robert D. Durham	Michael H. Marcus
	William A. Gaylord	Milo Pope
	Bruce C. Hamlin	Karsten Hans Rasmussen
Excused:	Diana L. Craine	John H. McMillan
	Mary J. Deits	David B. Paradis
	Don A. Dickey	Stephen J. R. Shepard
	Stephen L. Gallagher, Jr.	Nancy S. Tauman
	John E. Hart	

Also present was Maury Holland, Executive Director.

Agenda Item 1: Call to order. The Chairperson, Mr. Gaylord, called the meeting to order at 9:41 a.m.

Agenda Item 2: Approval of May 11, 1996 minutes (Mr. Gaylord). A motion carried by unanimous consent to approve the minutes of the May 11, 1996 meeting as previously distributed to the members. Before proceeding with the balance of the agenda, Mr. Gaylord welcomed Professor Stephen Kanter as the newest member of the Council.

Agenda Item 3: Proposed amendment of ORCP 68 C(4)(c)(ii) (see Attachments A and D to agenda of this meeting) (Mr. Hamlin). Mr. Hamlin briefly recounted as background the Council's decision during the 1993-95 biennium not to promulgate an amendment to ORCP 68 C(4)(c)(ii) that would have required findings and conclusions in connection with attorney fee awards in every case where they are requested by an interested party. He stated that he would not have raised the issue again, even in the form of the narrower amendment now proposed, except that *Long v. Oceanway Motors, Inc.*, 139 Or App 469, 473, __P2d__ (1996) had recently held that appellate courts will require such findings and conclusions in certain kinds of cases. This decision, along with the previously decided *Mattiza v. Foster*, 311 Or 1, 10, 803 P2d 723 (1990), he added, meant that the present assertion in

68 C(4)(c)(ii), that "[n]o findings of fact or conclusions of law shall be necessary," is in some instances incorrect and misleading. He further added that the amendment he proposed did not undertake to specify the areas of law or kinds of cases where findings and conclusions are required, since these are likely to change over time.

Prof. Kanter asked whether the Council had a view on whether findings and conclusions in this context are desirable, and also suggested that a good solution might be simply to delete the final sentence of C(4)(c)(ii), thus leaving the matter entirely to the courts. Justice Durham explained that appellate courts have become quite frustrated in discharging their obligation to review fee awards when required to do so. He added that, in his view, attorney fee awards often implement important public policies, and hence call for carefully reasoned review exposed to public scrutiny, something that is extremely difficult when the facts relied on by trial judges in ruling on fee petitions are not included in the record. Judge Marcus commented that he personally favored findings and conclusions when requested, but noted that the preference of many trial judges is to say as little as possible. Judge Brewer suggested that ORCP 62 should be taken into account, as that rule might be read to require findings and conclusions when requested in connection with fee awards independently of 68 C(4)(c)(ii). Mr. Alexander then suggested that the discussion might better return to the narrower issue posed by Mr. Hamlin's proposed amendment as to whether the present language of C(4)(c)(ii) is misleading.

Judge Brewer stated that, in his view, the final sentence of C(4)(c)(ii) is misleading and should be corrected. Judge Brockley said that he remained of the same view as when the issue was raised in the 1993-95 biennium, namely, that requiring findings and conclusions in connection with fee awards would divert too much time from other more important things that trial judges must do, and would be a waste of public resources. Mr. Alexander questioned whether, if 68 C(4)(c)(ii) is amended to make its final sentence not misleading, it might be useful also to add words such as "notwithstanding Rule 62."

Mr. Gaylord noted the absence of any motion on the floor, in response to which Mr. Hamlin, seconded by Mr. Alexander, moved adoption of the proposed amendment as shown in Attachment A, but without adopting the suggested Staff Comment, which he stated he did not intend the Council formally to adopt. Justice Durham said that he appreciated the effort by Mr. Hamlin to deal with a genuine problem, but would nonetheless oppose the motion because it would merely tell litigants that they must research pertinent case law. Mr. Lachenmeier stated he would oppose the motion because, in his view, it did not adequately deal with the

possible application of ORCP 62. Upon a call of the question, the motion was agreed to by a vote of 7 in favor, 5 opposed and 2 abstaining.

Mr. Gaylord then asked how many members would favor the Council giving more comprehensive consideration to broader issues that might be posed by ORCP 68 C(4)(c)(ii), and pointed out that anyone can place an item on the agenda. Eleven of the 14 members present indicated that they favored the Council doing this. Judge Brockley requested that, if the broader issues are to be revisited, the topic be scheduled for a single specific time. Mr. Alexander suggested that it might be helpful if the minutes of discussions concerning this topic during the previous biennium were distributed to all members, with which there was general agreement, and Prof. Holland said he would see that this was done.

Agenda Item 4: Report of subcommittee to review 1995 legislative amendments to ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Mr. Alexander reported on behalf of the subcommittee that there had been some discussion among its members concerning ORCP 54 E as amended, and the conclusion reached that this section did not present any problems requiring the Council's attention. He added that the subcommittee had not yet completed its review of ORCP 17 D.

Agenda Item 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). Mr. Gaylord read and placed in the record Ms. Craine's letter of June 7 confirming that, in the subcommittee's view, the insertion of ORCP 55 I by the '95 legislature appears to have created "some serious practical problems." (A copy of this letter is attached to the file copy of these minutes.) Mr. Gaylord stated that the Council's best course of action would be to defer further consideration of this item pending a full report from the subcommittee.

Agenda Item 6: Conclusion of review of 1995 legislation: S.B. 601, H.B. 3098 (see Attachment B to 1209-95 agenda) (Mr. Gaylord). In the interest of reaching the next item on the agenda, Mr. Gaylord decided, without objection, to defer this item to the agenda of a future meeting.

Agenda Item 7: Report of subcommittee to review ORCP 7 (see Attachment B to agenda of this meeting) (Judge Brewer). Judge Brewer began his report by running through and briefly summarizing each of the amendments to ORCP 7 now being considered by the subcommittee. Specifically, he explained that the amendment proposed in lines 11-12, p. 2, was intended to conform

to an identical amendment to ORCP 7 B already tentatively adopted by the Council; that the amendment in lines 4-15, p. 5 was intended to clarify and improve the generic service-by-mail provision of the rule; that the amendment to D(3)(a)(i) in line 26, p. 5 to line 6, p. 6 was intended to codify the holding in *Lake Oswego Review v. Steinkamp,* 298 Or 607, 695 P2d 565 (1985), except that restricted delivery mailing is not required; that the amendment proposed to D(4)(a)(i) in line 25, p. 8 to line 3, p. 11 was intended to jettison the amorphous prerequisite for use of this service method--that defendant could not be served by any other method--in favor of a the more clear-cut prerequisite that plaintiff first at least once attempt service by a primary method, to eliminate service on the DOT as useless, and to eliminate the "moving target" by requiring mailing to another address that might result in actual notice only if known by plaintiff at the time of the other two mailings; that the amendment to D(4)(c)(ii) proposed in line 7, p. 12 was intended to give greater protection to insurers in light of the probable greater use of alternative service under D(4)(a)(i) as proposed to be amended; that the amendment proposed to D(6)(c) in lines 7-15, p. 14 was intended to authorize publication of summons at a location other than where the action is commenced when that provides greater likelihood of giving actual notice; that the amendment proposed to D(7), which would become D(6)(g), was intended to make clear that its requirements apply only to court-ordered service pursuant to D(6); and that the amendment proposed to 7 G in line 17, p. 20 was intended to clarify that service not consistent with the "reasonably calculated" standard of D(1) cannot be excused pursuant to this section.

Judge Brewer then took up each amendment in turn, as shown in Attachment B, and asked for comments and suggestions from members present. Mr. Alexander asked whether he correctly understood the amendment proposed to D(4)(a)(i) on lines 6 - 12, p. 10, as meaning the service would be sufficient even if all mailings were returned to sender unreceipted. Judge Brewer confirmed that this understanding was correct, but emphasized that this method of service would be authorized only in the limited context of motor vehicle cases, that its conformity both with fourteenth amendment due process and the "reasonably calculated" standard of D(1) was premised on the special legal obligation of motorists to provide address information at accident scenes and, on the part of Oregon motorists, to notify the DOT of any changes in record address occurring within three years of accidents, and that it would be an alternative service method available only after plaintiffs had first attempted service by a primary method under D(3). Justice Durham remarked that, in proposing this and other amendments to 7 D, it was no part of the subcommittee's purpose to diminish the utility of personal service.

Mr. Lachenmeier then raised two questions regarding the proposed amendments to D (4)(a)(i). The first was whether it might be better to require three, rather than just one, attempts to effect service by a primary method before authorizing resort to the three certified or registered mails that need not yield a receipt. His second question was whether it made good sense to allow plaintiffs to resort to this alternative method merely on the basis of one prior certified or registered mailing, return receipt requested, returned as undeliverable. The amendment as presently drafted, he pointed out, would allow plaintiffs who first failed with one mailing simply to repeat the same futile effort. Judge Brewer responded that he thought Mr. Lachenmeier's point a good one meriting further serious consideration by the subcommittee.

Mr. Rasmussen pointed out that the draft as distributed prior to this meeting failed to reflect the subcommittee's agreement to add "and by first-class mailings" on line 25, p. 9, following "return receipts requested, ..." He explained that this was proposed to be added because sometimes first-class mail is more likely to reach an addressee than is registered or certified mail. Prof. Holland said he would amend the draft to show this change as having been already agreed upon by the subcommittee.

Judge Marcus suggested that, with reference to the proposed amendments referring to "registered or certified mail," the subcommittee might do well to check with the Postal Service, to find out exactly what the differences between these two kinds of mailing are, whether there is any need for the rule to continue to refer to both in the alternative, and also whether something should be said about including a "Please Forward" endorsement on envelopes in which mailings are made. Judge Brewer agreed that these matters should be checked with the Postal Service.

There followed a lengthy discussion as to why the proposed amendments did not require "restricted delivery," a feature that had been emphasized in the opinion in *Steinkamp*. Judge Brewer explained the subcommittee's thinking on this matter to the effect that it should be left to plaintiffs' attorneys to decide whether to restrict delivery to increase the chances of getting defendants signatures on receipts, and since the amendments required such signatures, there seemed no point in adding a requirement that delivery be restricted. Mr. Alexander observed that signatures on receipts are sometimes illegible, and that unless delivery were restricted, it might sometimes be unclear whether it was the defendant or someone else who had signed. Judge Marcus expressed his opinion that requiring restricted delivery might be useful symbolically, because it would help

impress on defendants that the mailings were both important and specifically directed to them.

Mr. Kanter asked, with reference to the amendment proposed to D(4)(a)(i) on lines 3-6, p. 10, what was contemplated if a plaintiff learned where defendant might actually be found after the mailings required by (1) and (2). Judge Brewer responded that the subcommittee had concluded it would unduly complicate the amendment if plaintiffs were confronted by a "moving target," by which he meant that, unless a time certain were stated for purposes of mailing (3), if sufficiency of service were challenged, the evidentiary determination of what plaintiffs might have learned after making the mailings might become unduly wide ranging. He added that the subcommittee wanted to make all provisions as to timing as clear-cut as possible.

Justice Durham asked whether anyone had a problem with the phrase "if the plaintiff first at least once attempts to serve ..." on lines 19-20, p. 9. There was general agreement that the phrase "if the plaintiff makes one attempt ..." would be an improvement. Mr. Hamlin raised the question whether the elimination in the amendment proposed to D(4)(a)(i) of the requirement of service on the DOT might prompt objections on grounds of loss of fee revenue. Judge Brewer replied that he had been in contact with the individual at the DOT in charge of recording service of summons, and learned that the DOT had no objection to its being discontinued.

Judge Marcus suggested that the subcommittee should carefully check the language of the relevant statute to ensure that the language of D(4)(b), as proposed to be amended, tracks that language. Judge Brewer agreed with this suggestion. He similarly agreed with Judge Marcus' suggestion that the language of D(4)(c) concerning preconditions for taking defaults be double-checked for consistency with the amendments proposed to D(4)(a)(i). Also agreed to was Mr. Hamlin's request that the subcommittee reconsider the requirement of D(4)(c)(ii) that, not less than 30 days prior to applying for defaults, plaintiffs must mail a copy of the summons and of the complaint to defendants' insurers. Mr. Hamlin explained that his concern was that any language adopted not lend itself to an interpretation that service on, as opposed merely to notice to, insurers is required.

This discussion concluded with Judge Brewer saying that the subcommittee would soon be conducting another phone conference during which, among other things, all comments and suggestions made during the course of this meeting would be reviewed and carefully considered. Mr. Gaylord, joined by several members, commended the subcommittee for the hard work it was devoting to this difficult and challenging project.

Agenda Item 8: Old business (Mr. Gaylord). There was no response to Mr. Gaylord's query whether any member had an item of old business to propose.

Agenda Item 9: New business (Mr. Gaylord). Mr. Gaylord asked whether all members had received a copy of Mr. Jim Nass's letter of 5-22-96 requesting, on behalf of the OSB Appellate Practice Section, the Council to express its view regarding sections of a proposed bill that would amend ORCP 82 and make reference to other rules. Receiving an affirmative reply, Mr. Gaylord directed that Mr. Nass's inquiry be placed on the agenda of a future meeting.

There was general agreement with Mr. Gaylord's statement that the volume of work presently facing the Council meant that the Council meeting scheduled for July 13 would have to be held. Only one member present indicated that, because of a longstanding commitment to be out of state at the time, he would be unable to attend that meeting. Mr. Gaylord reported that eight members had responded to a questionnaire that they would not be able to make an August meeting rescheduled to August 3 to avoid conflict with the OTLA annual meeting. It was thus agreed that the August meeting would be held on August 10 as scheduled.

Agenda Item 10: Adjournment (Mr. Gaylord). There was unanimous consent for Mr. Gaylord declaring the meeting adjourned at 12:35 p.m.

Respectfully submitted,

Maury Holland
Executive Director

Attachment A to Agenda of 7-13-96 Meeting

Draft of ORCP with amendments proposed by
ORCP 7 Subcommittee

RULE 7. SUMMONS

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

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section E of this rule. A summons is issued when subscribed by plaintiff or ~~a resident attorney of this state~~ **an active member of the Oregon State Bar**.[1]

[1] This amendment has already been tentatively adopted by the Council.

C. Contents; Time for Response; Notice to Party Served.

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

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

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

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

C(2) *Time for Response.* 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

[2] This amendment is required for consistency with the identical amendment to 7 B already tentatively adopted.

the date of the first publication.

C(3) *Notice to Party Served.*

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

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

D. Manner of Service.

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

D(2) *Service Methods.*

D(2)(a) Personal Service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

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

D(2)(c) Office Service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the

circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

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

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

D(3)(a) Individuals.

D(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual

place of abode, then by substituted service or by office service upon such defendant or ~~an~~ agent ~~authorized by appointment or law to receive service of summons~~. **Service may also be made upon an individual defendant to which neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided such defendant signs a receipt for the mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.**

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

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

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

D(3)(b)(i) Primary Service Method. By personal

service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.

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

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

assistant, or clerk.

D(3)(d) Public Bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, or attorney thereof.

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

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

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

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

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

D(4)(a)(i) In any action arising out of any accident,

collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, ~~and~~ **or** streets of this state, ~~any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf who cannot be served with summons by any method specified in subsection D(3) of this rule, may be served with summons by leaving one copy of the summons and complaint with a fee of $12.50 with the Department of Transportation or at any office the department authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the Department of Transportation by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Department of Transportation's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant.~~ **if the plaintiff makes one attempt to serve the defendant by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as evidenced by its return, did not effect service, the**

plaintiff may then serve the defendant by the following certified or registered mailings, return receipts requested, and by first class mailings pursuant to paragraph (2)(d) of this section, to the defendant addressed to: (1) any residence address provided by the defendant at the scene of the accident; (2) any current residence address of the defendant shown in the driver records of the Department of Transportation, and; (3) any other address of the defendant known to the plaintiff at the time of making the mailings required by (1) and (2) which might result in actual notice to the defendant. Sufficient service pursuant to this subparagraph may also be shown if the proof of service includes a true copy of the envelope in which each of the mailings required by (1), (2) and (3) above was made showing that it was returned to sender as undeliverable or that the defendant had not signed its receipt. For the purpose of computing any period of time prescribed or allowed by these rules, service under this subparagraph shall be complete on the latest date on which any of the mailings required by (1), (2) and (3) above are made.

D(4)(a)(ii) ~~The~~ A fee ~~of $12.50~~ paid by the plaintiff to the Department of Transportation to obtain address information concerning a defendant in order to make service pursuant to subparagraph D(4)(a)(i) of this rule shall be taxed as part of the costs if plaintiff prevails in the

action. ~~The Department of Transportation shall keep a record of all such summonses which shall show the day of service.~~

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

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

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

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

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

~~rule~~ **section**.

D(5) *Service in Foreign Country.* When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

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

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

D(6)(b) Contents of Published Summons. In addition to the contents of a summons as described in section C of this rule, a

published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

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

D(6)(d) Mailing Summons and Complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant **by certified or registered mail, return receipt**

requested, and by first class mail. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

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

D(6)(f) Defending Before or After Judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one

year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

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

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

F. Return; Proof of Service.

F(1) *Return of Summons.* The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

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

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

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

circumstances of mailing and the return receipt shall be attached.

F(2)(a)(ii) Certificate of Service by Sheriff or Deputy. If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or describing in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt shall be attached.

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

AFFIDAVIT OF PUBLICATION (Here omitted)

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

F(2)(d) Form of Certificate or Affidavit. A certificate or

affidavit containing proof of service may be made upon the summons or as a separate document attached to the summons.

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

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

G. Disregard of Error; Actual Notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, ~~and~~ **or** ~~the~~ **a** person who may serve summons shall not affect ~~the~~ validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of ~~or service of~~ summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

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

June 28, 1996

To: Chair and Members, Subcommittee to Review ORCP 7

From: Maury Holland M.J.H.

Re: Question Presented Regarding Suggested Amendments of ORCP 7

I. QUESTION PRESENTED

If the phrase: "For the purpose of computing any period of time prescribed or allowed by these rules,[1] service shall be complete upon such mailing." as it appears with minor variations throughout ORCP 7 D (i.e., D(2)(b), (c), (d), and D(4)(a)(i)), were amended to add "or by statute" following "allowed by these rules," would courts give effect to "or by statute" or would they disregard that added language as beyond the Council's authority under ORS 1.735?[2] The intended purpose of these amendments would be to direct courts to give effect to the dates of completion of service specified in ORCP 7 D "[f]or the purpose of computing any period of time prescribed or allowed by these rules, . . ." as also the dates of service for purposes of statutes of limitations

[1] The principal, if not the only, "period of time prescribed or allowed by these rules, . . . [f]or the purpose of computing" which the dates of completion of service control is the 30 days following service of summons within which defendants must "appear and defend," *see* ORCP 7 C(2), or be subject to default. This same 30-day period is also incorporated in ORCP 39 to specify the time within which plaintiffs may not take a deposition without leave of court or special circumstances.

[2] "**1.735 Rules of Procedure; limitation on scope and substance; submission of rules to Legislative Assembly.** The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, *including rules governing form and service of summons* and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules (emphasis added)."

keyed to date of service, especially ORS 12.020.[3]

II. AUTHORITIES

There are, of course, no judicial decisions or other authorities squarely on point regarding the precise question here presented, since neither ORCP 7 D, nor any other provision of the ORCP, has ever included the phrase "or by statute" in a context directly relevant to this question.[4] Thus, in order to answer the question, recourse must be had to authorities having a greater or lesser degree of bearing on it, but not "on all fours."

The authorities summarized below are divided into two tiers. Those in the first tier deal with one or another issue concerning service of summons in the context of statutes of limitations. Those in the second tier deal, in other contexts, with ORCP provisions apart from Rule 7 where some question arises as to whether such provisions might "abridge, enlarge or modify ... substantive rights" in contravention of ORS 1.735.

First Tier Authorities

[3] "**12.020 When action deemed begun.**

"(1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.

"(2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed."

ORS 12.020 is the only section of Chapter 12 keyed to date of service, and also appears from the cases to be the only limitations provision directly determinative in cases involving whether an action has been timely commenced. All other sections of Chapter 12 speak of "commencement" or "commenced," terms that are defined for all purposes of Chapter 12 by ORS 12.020.

[4] The phrase "or by statute," or equivalent, does appear at many places in the ORCP, but not in a context responsive to the question here presented. *See e.g.* ORCP 1 A, 2, 4 B, 10 A, 32 K, 33 B, and 50.

Supreme Court Opinion

Hoyt v. Paulos, 310 Or 196, 796 P2d 355 (1990) (per Fadeley, J. for unanimous court), *affirming* 96 Or App 91, 771 P2d 647 (1989) (per Deits, J.) Motor vehicle case in which circuit court dismissed on ground that service pursuant to ORCP 7 D(4)(a)(i) had not been completed until after expiration of the 60 days allowed by ORS 12.020(2) for relation back to date complaint filed. Plaintiff timely filed her complaint, personally served the MVD and sent copies of papers to defendant by certified mail, return receipt requested, all within 60 days of filing. Also within 60 days plaintiff mailed copies of papers to defendant's insurer by regular mail. It was "agreed," however, that insurer had not received the papers, or any other form of notice of the action, within 60 days of filing. {Note that at this time, D(4)(a)(i) required personal service on the MVD and mailings to defendant and defendant's insurer, but did not specify the kind of mailing. It was agreed, however, that the mailing to defendant must be by registered or certified mail, return receipt requested, because that mailing constituted "service by mail," and D(2)(d) required that such service be by that kind of mailing. Neither D(4)(a)(i) nor D(2)(d) had at that time any provision as to when service was complete "[f]or the purpose of computing any period of time prescribed or allowed by these rules, . . ."}

The Court of Appeals reversed, holding that for purposes of ORS 12.020(2), defendant was served when the papers were mailed to him by certified mail, return receipt requested. In what must be regarded as dicta, the opinion also stated as follows:

> Even if ORCP 7 D(4)(a)(i) is read to impose a requirement that defendant's insurer had to be given notice by certified mail, the requirement may not affect when an action is deemed commenced. The Council on Court Procedures, in promulgating the Rules of Civil Procedure, "shall not abridge, enlarge, or modify the substantive rights of any litigant." ORS 1.735. If ORCP 7 D(4)(a)(i) is construed to require that a defendant's insurer be served by certified mail before an action is deemed to have been commenced, it would abridge plaintiff's substantive rights to maintain the action.[5]

Judge Newman concurred specially. He reasoned that D(4)(a)(i) was at best ambiguous as to whether either certified or registered, as opposed to first class mailing, to defendant's

[5] 96 Or App 91, 94, 771 P2d 647, 648.

insurer was required, and would have resolved this ambiguity by reading the pertinent language to require nothing more than first class mailing of notice to, not service upon, such insurer.

The Supreme Court opinion affirming the Court of Appeals was equivocal concerning the language quoted above, neither clearly approving nor disapproving it as part of the holding. At one point the Supreme Court opinion stated:

> The Council's rules do not and cannot change statutes concerning limitations on actions. Nor did the Council or the empowering statute contemplate that rules of the Council would do so. A Council staff comment on proposed ORCP 7 D(4)(a) makes the point that "the date of service for limitations purposes is not and could not could not be covered by rules." Merrill, Oregon Rules of Civil Procedure: 1990 Handbook 31 (1990).[6]

This language was probably, like the language quoted earlier from the Court of Appeals opinion, dicta.[7] That is so because the balance of the Supreme Court opinion made reasonably clear its holding was that ORCP 7 D(4)(a)(i) required only personal service on the MVD and service on the defendant by registered or certified

[6] 310 Or 196, 200, 796 P2d 355, 357. Fred was entirely correct in writing: "As with substituted or office service, the date of service for limitations purposes is not . . . covered by rules," but was, I believe, incorrect in unnecessarily adding "and cannot be." Language in some appellate opinions have followed Fred's lead, by following statements about what ORCP 7 has never purported to do with statements about what it supposedly *could never* do.

[7] I'm aware that academic lawyers are more prone to make much of the distinction between holdings and dicta than practitioners and most judges usually are. My perception is that trial judges generally regard nearly all legal propositions asserted in appellate court opinions as equally authoritative and binding, as do judges of intermediate appellate courts such assertions in opinions of the highest court. Dismissing as non-binding dicta statements of law that appeared for all the world like binding holdings when handed down is pretty much the exclusive prerogative of the court uttering them. If this perception is accurate, and if the Council promulgates amendments adding "or by statute," I would guess that judges of trial courts and those of the Court of Appeals would in all likelihood regard themselves bound by language such as that quoted on p. 4 above from Justice Fadeley's *Hoyt* opinion until the Supreme Court itself demotes it to the rank of dicta in the process, hopefully, of repudiating it. However, I do not regard this as a significant consideration arguing against the proposed amendments. Naturally, others might disagree.

mail, with the mailing to defendant's insurer merely being a notice requirement, not a requirement of service or of acquiring jurisdiction.[8] Since D(4)(a)(i) then had no provision purporting to control on when service pursuant to it would be deemed complete for limitations purposes, the statements in the opinion of the Court of Appeals, and even more clearly so in that of the Supreme Court, about the Council lacking power under ORS 1.735 to affect the extension of limitations periods pursuant to ORS 12.020(2) by rules prescribing completion dates of service, were unnecessary given the language of the pertinent ORCP provisions at the time.

However, the *Hoyt* opinion did contain some reasoning which, unless the courts are persuaded by Staff Comment or arguments of counsel to abandon it in this context, presents an serious objection against amendments adding "or by statute." That reasoning was to the effect that since ORS 12.020 had been most recently amended in 1973, a fact remaining true today, the legislature, in employing such language as "when . . . the summons [is] served on the defendant, . . ." or "service of summons in an action . . . ." could not have had in mind the ORCP, since neither they nor the Council then existed.[9]

If the courts are to give effect to the addition of "or by statute," they would have to embrace a different theory of how the judicially determined meaning of a statute, even though not amended, can change over time in light of ongoing changes in adjacent areas of law. In another context, this different theory has been referred to as "dynamic" as opposed to "static conformity."[10] As professorial, in the worst sense, as it probably

[8] It was this decision that prompted what is now ORCP 7 D(4)(c)(ii) promulgated by the Council in 1990.

[9] 310 Or 196, 199, 796 P2d 355, 357.

[10] *See generally* C. A. WRIGHT, LAW OF FEDERAL COURTS § 61 (5th. ed., 1994). The reference is to the "static conformity" of the Conformity Act of 1792, Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276, which required federal trial courts to conform to the rules of common law procedure of the forum state existing on the date of the Act, in contrast with the "dynamic conformity" of the Conformity Act of 1872, Act of June 1, 1872, c. 255, 17 Stat. 197; Rev. Stat. § 914, which required conformity to forum state rules of procedure existing at the time an action was pending. Before the 19th. century was far along it was widely recognized that the 1792 Conformity Act was one of the dumbest things any legislature had ever done to courts over which it had authority. It meant, of course, that a U. S. District Court, when in 1860 adjudicating a common law action in Massacusetts, was required to apply Massachusetts' rules of procedure as they had existed in 1792. This problem related only to common law actions, since from the beginning the federal trial courts had their own equity and admiralty rules, as well as bankruptcy rules

sounds, this theory is nevertheless discussed more pointedly in the Discussion section of this memo because it strikes me as the key to unraveling this little conundrum. It is also more commonsensical than the jurisprudential lingo might suggest.

Court of Appeals Decisions

a. **Mitchell v. Harris,** 127 Or App 424, 859 P2d 1196 (1993). Motor vehicle case. Plaintiff timely filed complaint and, in following week, served papers on both the MVD and defendant's insurer by means unspecified. Plaintiff could not locate defendant, and so failed to serve him by any method within 60 days of filing. The Court of Appeals opinion affirming Judge Gallagher's denial of motion to dismiss action as time-barred implied that he ruled as he did because he believed service on the MVD by itself constituted service for purposes of ORS 12.020(2). The Court of Appeals affirmed Judge Gallagher's ruling on the independent ground that the action had been timely commenced against defendant's personal representative, defendant having died while action was pending and her personal representative being substituted by amendment of the complaint. In dicta, the opinion stated that service on the MVD and defendant's insurer did not constitute service on defendant for purposes of ORS 12.020(2). The opinion reasoned that 12.020(2) requires service sufficient to give the court jurisdiction, ORCP 4, and here the court did not acquire jurisdiction over the decedent, as opposed to the personal representative, because service only on MVD and insurer conformed neither to D(4)(a)(i) nor to the "reasonably calculated" standard of D(1).

b. **Korgan v. Gantenbein,** 74 Or App 154, 702 P2d 427 (1985). Legal malpractice case. Plaintiff timely filed complaint, and within 60 days of filing made substituted service on defendant by delivering papers to resident of his "dwelling place." *See* ORCP 7 D(2)(b). However, plaintiff did not make the follow-up mailing of papers to defendant required by D(2)(b) until more than 60 days after filing. The Court of Appeals reversed the circuit court's dismissal of the action as time-barred. Its opinion merely took at its word the phrase in D(2)(b): "For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing," and held that whatever might be required "[f]or the purpose . . . of these rules, . . . " the only thing required for purposes of ORS 12.020(2) was good service on the defendant, but not any follow-up mailing. The opinion intimated nothing about how the court would have ruled had D(2)(b) expressly provided that "[f]or the purpose of computing any period of time prescribed or

during periods when a federal bankruptcy act was in effect.

allowed by these rules *or by statute,* substituted service shall be complete upon such mailing."

Second Tier Authorities

Supreme Court Decision

Jefferson State Bank v. Welsh, 299 Or 335, 702 P2d 414 (1985) (per Jones, J. for unanimous court). Creditor brought action to collect on note against three jointly liable debtors, D1, D2 and D3. D1 defaulted by failing to appear and defend. Creditor obtained default judgment against D1, upon which it began to execute. D2 and D3 then moved for summary judgment, invoking the case law "all or none" doctrine, under which even partial execution of a judgment against any joint obligor releases other joint obligors. Circuit court granted this motion, and creditor appealed. The Court of Appeals reversed on the ground that ORCP 67 E(2)[11] abrogated the "all or none" rule. 70 Or App 635, 290 P2d 1107 (1984).

In the Supreme Court D2 and D3 argued that the application given ORCP 67 E(2) by the Court of Appeals meant that this subsection exceeded the Council's authority under ORS 1.735 because it abrogated or modified the substantive "all or none" rule of pre-existing case law. The Supreme Court avoided responding to this contention, holding that the default judgment against D1 was somehow still pending as an "intermediate," not a final judgment.[12] The opinion noted that the circuit court had not accompanied entry of the default judgment with the express determination required by ORCP 67 B for immediate appealability of a judgment on less than all claims.[13] The opinion further

[11] "E(2) *Joint Obligations; Effect of Judgment.* In any action aginst parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all such parties and a default, dismissal, or judgment in favor or or against less than all of such parties does not preclude a judgment in the same action in favor of or against the remaining parties."

[12] 299 Or 335, 340, 702 P2d 414, 416.

[13] With all respect due to its eminent author, I simply cannot understand this holding. I do not understand how a judgment on which there was at least partial execution was not "final" for purposes of the "all or nothing rule," even if not accompanied by any express direction pursuant to ORCP 67 B. Also, if the default judgment against D1 was not final, how was it that the summary judgment against creditor on his claims against D2 and D3 was

commented that creditor's recourse was to move under ORCP 69 C and 71 to set aside the default judgment it obtained against D1, upon the granting of which creditor would then be free to proceed against all three debtors.[14]

Court of Appeals Decision

Harp v. Loux, 54 Or App 840, 636 P2d 977 (1981) (Mick Alexander for plaintiff-respondent). Motor vehicle case. Plaintiff attempted personal service on defendant at address given at scene of accident and as shown in MVD records, which was the same, but summons was returned that defendant could not be located there, as he had moved to a California address. Plaintiff then sought personal service at California address, but California sheriff returned the summons "non est." California sheriff's office informed Mick that defendant had moved to "Coalmont, B.C.," but could provide no specific address. Mick then made several phone calls to Coalmont area, but could not obtain a specific address. He then mailed papers to defendant, by registered mail, return receipt requested, at the Oregon address, the California address, and to "Coalmont, B.C." All were returned as "undeliverable."[15] Mick subsequently obtained a default judgment, which insurer then moved to set aside for insufficient service. No issue of limitations was raised. The circuit court denied this motion, and the Court of Appeals affirmed.[16]

The Court of Appeals, per Richardson, P.J. for a unanimous court, held that the method of service used complied literally with the requirements of then D(4)(a) for service and with D(4)(c) for taking a default judgment. It also rejected appellant's arguments that the circuit court judge had abused his discretion in failing to set aside the default judgment, and that the

appealable, there apparently having been no 67 B direction with respect to those claims. Neither of these queries, however, affects the conclusion that *Welsh* does not speak directly to the question here presented.

[14] 299 Or 335, 340, 702 P2d 414, 416.

[15] Note that at this time D(4)(a)(i) required no mailings or other notice to insurers, and did not require any method of service on the MVD.

[16] The method of service Mick finally resorted to so closely resembles the alternative method authorized by D(4)(a)(i) as proposed to be amended that, if the Council promulgates this amendment, this service method might become colloquially known as "Mick service." Or maybe "Mick/Brewer service," since it was Judge Brewer who first focused on *Harp* as providing case law authority for the alterntive method included in the presently considered amendment to D(4)(a)(i).

procedures for service pursuant to D(4)(a), combined with those for taking a default pursuant to D(4)(c), violated defendant's due process rights under the fourteenth amendment.

Since no limitations defense appears to have been raised, the *Harp* opinion had no occasion to say anything about whether the method of service used would have been good service for purposes of ORS 12.020(2). However, the defendant did invoke the restriction on the Council's authority under ORS 1.735, arguing that because the method of service prescibed by ORS D(4)(a) arguably differed in certain details from that prescribed by its statutory predecessor, former ORS 15.190, D(4)(a) in combination with D(4)(c) adversely affected his substantive rights in violation of ORS 1.735. Judge Richardson's opinion made short work of this contention: "We do not agree that the change is 'substantive' within the meaning of ORS 1.735, or that it could have any possible negative bearing on defendant's rights."[17] The opinion of course intimated no view on what the ruling would have been had ORS 12.020(2) been in play.

Attorney General Opinion

41 Op Att'y Gen 527 (1981). This opinion responded to four questions posed by then Sen. Bob Smith concerning certain amendments to ORCP 32 promulgated by the Council in December, 1980, which were subsequently overriden in the 1981 session despite the partial support they received in this opinion. These amendments made merely discretionary the requirement of ORCP 32 F(2) that in class actions involving individual monetary claims the court must solicit "claim forms" from all class members (i.e., opt in); eliminated the limitation on class action judgments to the total of amounts recovered by individual class members who have submitted claim forms (i.e., no "fluid recoveries"); and gave courts discretionary authority to require defendants to pay some or all the costs of pre-certification notice to class members on a finding of defendant's probable liability.

Sen. Smith asked whether the effect of these amendments would be to authorize fluid recoveries, and if so, whether that would exceed the Council's authority under ORS 1.735. The answer was that the amendments would not affirmatively authorize fluid recoveries, but would merely remove "procedural obstacles" to such recoveries, leaving to other bodies of law the question whether they are authorized or not,[18] though those other bodies of law were not identified. Thus construed, the opinion concluded that the amendments did not in this respect exceed the Council's authority

[17] 54 Or App 840, 851, 636 P2d 977, 982.

[18] 41 Op Att'y Gen 527, 537.

under ORS 1.735.[19]

In the only holding to date, judicial or otherwise, that the Council had exceeded the limits of ORS 1.735, the opinion answered Sen. Smith's question about whether the amendment relating to shifting notice costs exceeded those limits by stating unequivocally: "We believe it probably does."[20] Its reasoning was that the normal rule, that each party must bear its own litigation costs until some are shifted following a final adjudication of liability, probably gives rise to rights at least quasi-substantive in character.

Sen. Smith's final question was whether, if the Council promulgates an amendment exceeding its authority under ORS 1.735, it would nonetheless become effective as law unless the legislature overrode it by statute. The answer, of some limited interest here, was that, unless the legislature acts to override an ORCP amendment as *ultra vires* under ORS 1.735, there would ensue a period of confusion before the courts got around to striking it down. For present purposes, the most pertinent thing the opinion stated was the following about the weight courts should give to legislative failure to override an ORCP amendment promulgated by the Council:

> We conclude it would be proper [for a court] to give only minimal attention to legislative inaction, even if it can be shown that the rule was in fact given careful and basically approving attention, as it is proper to accord respect to the original determination by the Council on Court Procedures that the rule was proper for it to adopt.[21]

This seems to say that courts should give greater weight to the Council's decision tp promulgate an amendment than to the legislature's failure to override it. Given the realities of legislative functioning, that is probably sound and underscores

[19] In thus concluding, this opinion took a more expansive view of what constitutes merely "procedural barriers" than did the Council four or five years ago when it revisited the issue and came close to again deleting the claim form requirement of ORCP 32 F(2), but held back at the last minute. As I recall, the holding back was based upon some combination of a concern that removing the claim form requirement might well affect substantive rights and worry about possibly aggravating the legislature by undoing something it went out of its way to do in the 1981 session.

[20] 41 Op Att'y Gen 527, 539.

[21] Id. at 543.

the importance of the subcommittee and Council taking the question here presented seriously.

III. CONCLUSION AND RECOMMENDATION

My recommendation is that at each point in ORCP 7 D where "[f]or the purpose of computing any period of time prescribed or allowed by these rules" occurs (i.e., D(2)(b), D(2)(c), D(2)(d), D(4)(a)(i)), the words "or by statute" be added following the first quoted phrase.

IV. DISCUSSION AND REASONING

1. Would these amendments be good policy? My answer is yes, and I believe that most, if not all, subcommittee members agree. The principal reason these amendments would constitute sensible policy is really nothing more sophisticated than that, whenever possible, the law should avoid complexities serving no useful purpose.

If one puts aside the different roles of the legislature and the Council in the area of procedural lawmaking, and the different scopes of their respective authority, no one would think it a good idea to have different effective dates of service for limitations purposes as opposed to purposes internal to the ORCP. No good reason appears for this divergence beyond honoring a fetishistic reading of ORS 1.735 that the Council must not affect substantive rights.[22]

[22] At least one additional reason occurs to me why the Council should take a reasonably expansive view of the domain of "pleading, practice and procedure, . . ." Consider ORCP 23 C, a rule of procedure which runs in the teeth of ORS 12.020(1). The latter provides that, for the purpose of limitations periods, an action is commenced by filing of the complaint plus service of summons. If this statutory provision were all the law existing on this topic, that would probably mean that if a timely filed complaint were for any reason dimissed after the limitations period had expired, an amended complaint would not be effective to commence the action "within the time limited." Such an amended complaint would have to be dismissed on motion as time-barred, just as would a new complaint in a separate action on the same claim. ORCP 23 C, however, changes that outcome by providing that, when certain requirements stated in that section are met, an amended pleading "relates back" to the date of the original pleading. This provision does not state the significance or consequence of relation back, nor does ORS 12.020(1) say anything along the lines of: "for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant when the **original** complaint, **or any subsequently amended complaint arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in said original complaint, . . .**" The connecting link between ORCP 23

C and ORS 12.020(1) has been forged by the courts on the basis of *presumed*, not necessarily actual, legislative intent. *See generally* Caplener v. U.S. National Bank, 317 Or 506, 858 P2d 1308 (1993).

Applying ORCP 23 C to ORS 12.020(1) will usually have a much larger effect on "substantive rights" as defined by the latter than would adding "or by statute" to ORCP 7 D. That is because an amended complaint filed weeks or months after expiration of the "time limited" can escape being time-barred if it meets the requirements, not of ORS 12.020(1), where none appear, but of 23 C for relating back, whereas adding "or by statute" to ORCP 7 D might cause a very slight postponement of the date service would be effective for purposes of ORS 12.020(2). Even that slight postponement could be avoided by the plaintiff taking the extra one or more steps now required by ORCP 7 D for completion of service at the same time as service on defendant by a primary method.

Why, then, have the courts, which in dicta have expressed near horror at the very thought of ORCP 7 affecting the effective date of service for purposes of ORS 12.020(2), never expressed the slightest scruple about applying ORCP 23 C to determine the meaning of "when the complaint is filed, . . ." for purposes of ORS 12.020(1)? I'll give you five seconds to guess the answer, and then tell you that the reason for this discrepancy is that ORCP 23 C was part of the original draft ORCP enacted by the 1979 legislature and never thereafter amended either by that body or by the Council. Of course, ORCP 7 D was also part of the original draft ORCP 7 D enacted by the 1979 legislature. The difference is that ORCP 7, especially 7 D(4)(a)(i), has been amended at least seven or eight times since the ORCP first became effective, sometimes by the legislature, sometimes by the Council. It would now take more patience than I have to disentangle the various provisions of ORCP 7 D to determine which emanated from the legislature and which from the Council. And what a foolish exercise that would be. I will double-check, but I believe the language in 7 D about the day on which various methods of service shall be deemed complete "[f]for the purpose . . . of these rules, ..." originated in each instance from the Council, not the legislature. If I can confirm this, it would mean that no one could attribute to the legislature any specifically expressed intent to limit those completion dates to purposes internal to the ORCP.

You probably see now where this argument is going. Even had the legislature alienated all authority over the ORCP, thus violating the Oregon Constitution, it would be a terrible thing to say about Oregon law that all rules of law are divided into the substantive and the procedural, and never the twain shall meet. That would mean that if Oregon law were an engine, it would always sputter and cough, never purr. But since the legislature has retained direct legislative authority over the ORCP, as well as authority to review the Council, it would be madness to dissect all provisions of the ORCP, trying to determine which emanated from the legislature and which from the Council, and then ask whether any of the latter have so much indirect impact on "the substantive rights of any litigant" as to rise to the level of modifying those rights. The legislature might put nearly anything, including a general sales tax, into the ORCP. But nothing the Council is likely to consider putting into the ORCP should be withheld by it on account of some

Rulemakers can always say that competent lawyers should not depend solely on reading the ORCP, while ignoring related statutes and case law. But a certain number of mistakes by lawyers are inevitable in any legal system. Rulemakers should try to minimize the obvious opportunities for lawyers' mistakes, for no better reason than that the primary losers from them will be litigants who might forfeit their day in court, or at least pay higher than necessary legal fees. Few things can be more damaging to our legal system than when lawyers have to explain to clients why the merits of their claims or defenses will not be heard because of some procedural miscue clients will usually have great difficulty understanding or accepting. Malpractice actions and bar discipline are far from being the best deterrents or remedies for this sort of thing. Even when all unnecessary complexities have been pruned out of the law, plenty of challenging work will remain for lawyers and judges in coping with the many surviving complexities that do serve necessary or useful purposes.

2. Would the courts give effect to "or by statute" when applying ORS 12.020? This is the issue about which there is some understandable doubt within the subcommittee. There is always a danger, in predicting what courts will do, of being unduly influenced by what the predictor thinks they should do. That said, my best judgment is that it is very probable, though by no means absolutely certain, that the courts would ultimately[23] give effect to "or by statute" in this context. A well constructed Staff Comment should help to assure that result.

Even if this prediction turns out to be wrong, the downside risk of promulgating the proposed amendments seems to me negligible, if not non-existant. The Council should not hesitate to use its own best collective judgment merely out of fear that the courts might just possibly disagree. This applies no less to judgments about where the limitation in ORS 1.735 on the Council's authority comes into play than to judgments about the soundness of ORCP amendments as a matter of procedural policy, with which the legislature has often disagreed. The Council has its quasi-legislative role, and the courts have their judicial role, so what else is new? Again, this is nothing more than my best guess, but I doubt whether the legislature would override amendents adding "or by statute," or even that they would raise a ruckus in that body. The courts would then perhaps give some deference to the combined weight of the Council's action together with the legislature's inaction.

Another reason the risk of the Council acting positively on

childlike terror about substantive rights being abridged or, more frighteningly still, ENLARGED, somewhere behind the woodpile in the cellar.

23 "Ultimately" is here used advisedly. The sense in which it is used is discussed in note 7 above.

this matter seems to me negligible is that it is hard to see how any lawyer could be "trapped" or misled by additions of "or by statute," even if that phrase were to be invalidated by the courts on ORS 1.735 grounds. Note that in every instance where courts have diffentiated between completion of service "[f]or the purpose . . . of these rules, . . ." and date of effective service for purposes of ORS 12.020(2), the latter has been held to have occurred earlier than the former. In other words, the completion of service dates specified by ORCP 7 D tend to be just a bit later than what courts have determined to be the effective date of service for purposes of ORS 12.020(2). Plaintiffs' lawyers will not be induced fatally to delay doing anything because "or by statute" is added; in fact, they will be prodded to proceed a bit faster, to ensure that their service is "complete" for purposes of limitations as well as for purposes of the rules. Plaintiffs might occasionally lose a case because they had not completed service for purposes of ORS 12.020(2) as applied in light of ORCP 7 D, but that would not be because of lack of clear notice of the deadline that would be imposed by the conjunction of the rule and the statute.

Similarly, it is hard to see how defendants would be trapped or misled, as opposed to being disappointed by losing a motion they expected to win, should the courts refuse to give effect to a service completion date as also the date of service for purposes of determing whether the action is time-barred. In this connection, the pertinence of ORS 12.220[24] should be considered once someone succeeds in understanding what it means.

Although the Council should not be scared off from acting on

[24] "**12.220 Commencement of new action within one year after dismissal or reversal.** Except as otherwise provided in ORS 72.7250, if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies and any cause of action in favor of the plaintiff survives, the heirs or personal representatives of the plaintiff, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section." This is my favorite candidate for Oregon's most opaquely drafted statute. Among other things, it appears to mean that if a prior action were dismissed as time-barred, the relief afforded by this "saving" provision would not be available. However, if the prior action were dismissed for something like insufficiency of summons or service, a new action could be brought within one year of the dismissal. Judging from what the appellate reports suggest are the significant number of cases where defendants fight hammer and tongs for a ruling that service was insufficient, where the larger stakes clearly are assumed to relate to limitations, it seems this statute is not widely known or understood among Oregon lawyers.

its best judgment by the bare possibility that the courts might conceivably disagree, at the same time the Council would not want to promulgate any amendment that would, so to speak, be laughed out of court in the sense of being clearly *ultra vires* under case law or other authority. However, I think that is far from being the case here.

I cannot find any square holdings that the rights conferred by ORS 12.020 are substantive, but the opinions are chock full of assumptions that they are, and those assumptions are correct.[25] This statute gives claimants a substantive right to proceed provided their complaints are filed within the limitations period, and further provided that service of summons is effected within 60 days of filing. The Council cannot, consistently with ORS 1.735, "abridge, enlarge or modify" that right by, for example, an ORCP amendment providing that service must occur within 50 days of filing, may occur within 100 days of filing, or that limitations are tolled by mere filing of a complaint.[26]

[25] Until about forty or so years ago, statutes of limitations were generally classified as procedural law for purposes of choice of law and therefore controlled by forum law. However, in recent decades, there has been a growing recognition that limitations law is both procedural and substantive in character. *See generally* E. SCOLES ET AL., CONFLICT OF LAWS § 3.9 (2nd. ed., 1994). *See also* UNIFORM CONFLICT OF LAWS LIMITATIONS ACT, 12 ULA POCKET PART 56 (1988), adopted in Oregon as ORS 12.410 - 12.480. In effect this statute directs Oregon courts, when adjudicating a claim substantively created by the law of another jurisdiction, to apply either the pertinent limitations period of the other jurisdiction or the Oregon limitations period pertinent if the claim were created by domestic law, whichever is shorter. This provision recognizes that, when a claim is litigated in its courts, Oregon has the same procedural interest in barring "stale" claims regardless of whether substantively created by domestic or foreign law. It also recognizes that if the action would be timely under Oregon limitations law, but time-barred under the *lex causae,* the law creating the claim, then the latter should normally apply.

[26] This was the meaning of Fred Merrills' Staff Comment, quoted by Justice Fadeley in *Hoyt,* to the effect that the ORCP, at least to the extent promulgated by the Council, cannot affect statutes of limitations. I'm sure Fred had in mind the identical issue that arose in connection with federal courts' implementation of the *Erie* doctrine under which, as you will recall, federal courts must in diversity cases apply federal procedural law, including the FRCP, but state substantive law. The issue arose in federal courts because FRCP 3 has always stated: "A civil action is commenced by filing a complaint with the court," but unlike ORCP 3, has never included the words: "Other than for purposes of statutes of limitations, . . ." The question was whether FRCP 3 overrides, in diversity cases, the limitations law of a forum state which, like Oregon, defines "commencement" of an action by reference to service of summons or process. In *Walker v. Armco Steel Corporation*, 446 US

Conceding, as one must, that ORS 12.020 confers substantive rights on litigants does not establish that those rights must not in any manner, or to the slightest degree, be indirectly affected by the ORCP without thereby "abridging, enlarging or modifying" them. The division of the law between the domains of substance and procedure is a useful one, but it should not cause the Council or the courts to lose sight of the reality that the law "is a seamless web," that substantive and procedural rules constantly and dynamically interact with each other, such that some degree of impact of rules in one category on those in the other is unavoidable. Thus, a compulsory counterclaim rule can have the effect of barring a meritous substantive claim, but is no less procedural for that. Similarly, a plaintiff having a meritorious substantive claim might nevertheless suffer an involuntary dismissal, with prejudice, for obstinate refusal to comply with a discovery rule or order. Examples of this interaction between procedure and substance in the law could be multiplied nearly without end.[27]

740, 100 S Ct 1978, 64 L Ed2d 659 (1980), the court reaffirmed the early *Erie* decision in *Ragan v. Merchants Transfer Co.*, 337 US 530, 69 S Ct 1233, 93 L Ed 1520 (1949) to the effect that, in diversity cases, FRCP 3 could not be applied to supplant forum state law that an action is commenced for limitations purposes by service of summons or process. FRCP 3 could be applied in diversity cases, but only for purposes internal to the FRCP. As Fred certainly well understood, questions about the relationships between the ORCP and statutes implicate issues of separation of powers or delegation of legislative power, not federalism as with the *Erie* cases.

At the risk of further trying your patience, I should mention the relevance here of the great case of *Hanna v. Plumer*, 380 US 460, 85 S Ct 1136, 14 L Ed2d 8 (1965). The issue presented there was whether effective service of process on the personal representative of decedent's estate had occurred within the one year of death required by Massachusetts limitations law. Without disturbing the holding of *Ragan* that in this diversity case the U.S. District Court must apply Massachusetts law as to when the action was deemed commenced for limitations purposes, the court nevertheless held that what constituted sufficient service of process is governed by FRCP 4, not the somewhat different Massachusetts rule on how process is served on personal representatives, even though the difference between the two rules might result in a slight difference in the time a personal representative would get service. *Hanna* has some pertinence here, because it recognizes that a rule of procedure, such as FRCP 4, does not cease to be procedural merely because it can have some indirect, incidental affect on substantive rights. That is the beginning of wisdom in this area of the law.

[27] In deciding whether a rule remains procedural despite its having substantive overtones or incidental effects, no one has really improved on Justice Roberts' tautological "test" in *Sibbach v. Wilson & Co.*, where he announced: "The test must be whether a rule really regulates procedure, . . ." 312 US 1, 14, 61 S Ct 422, 426, 85 L Ed 479, 485 (1941). 312 US 1, 14, 61

To resolve this puzzle in the affirmative, first the Council, then the courts, would have to reach the following understanding. Additions of "or by statute" at the appropriate points in ORCP 7 D would in no way contradict any language in ORS 12.020. They would, however, slightly change one aspect of the meaning the courts have attached to the terms "and the summons served on the defendant, . . ." ORS 12.020(1), or "by such service has acquired jurisdiction. . . ." ORS 12.020(2). The changed meaning would become that a summons is served for purposes of this statute when its service is complete as provided by whatever rule of procedure then governs details of service, including dates of completion.

Would this be legitimate as a matter of judicial construction? Obviously, only the courts can say authoritatively. My own predictive view is that this would not only be legitimate, but also far more sensible than the "static conformity" espoused in the *Hoyt* opinion.[28] All that would be necessary is to hold that, when the legislature originally enacted the archetype of ORS 12.020 in 1862 and most recently amended this statute in 1973, it meant by "the summons served," etc., a summons served as currently prescribed where one would logically expect to find such prescriptions, namely, in the currently applicable rules of procedure, now specifically in ORCP 7.

This is not a matter of what actual legislators actually thought, because few of them are likely to have thought much about this sort of issue. Rather, it is a matter of the kind of intent courts regularly attribute to legislatures because it makes

S Ct 422, 426, 85 L Ed 479, 485 (1941). *Sibbach* was the first and last time one of the FRCP was sought to be invalidated in the U.S. Supreme Court on the ground that a provision had been promulgated by the Court in excess of its rule-making power under 28 U.S.C. § 2072, a power which, like that of the Council, is subject to the limitation that: "Such rules shall not abridge, enlarge or modify any substantive right."

It seems to me that the point illustrated by *Sibbach* comes down to the following. For the Council to decide whether an ORCP amendment being considered for promulgation is within the limitation imposed by ORS 1.735, it need ask only whether "the rule really regulates procedure." ORCP 7 is a rule which comprehensively defines and regulates what is no doubt part of the law of procedure, service of summons. When service under ORCP involves a series of discrete steps taken over time, it is only natural to find among its detailed provisions some dealing with when service is complete. ORS 12.020 uses the term "service of summons" or equivalent at two or three places, but since it is a statute of limitations, not a rule of procedure, it contains no provision specifying when service is effective for determining whether an action is timely or time-barred. Because of the wording of ORCP 7 D, to the effect that completion dates are "[f]or the purpose of . . . these rules, . . ." the courts have in effect been directed develop their own concept of when service is effective for ORS 12.020 purposes.

[28] *See* text accompanying note 8 above.

eminent good sense to do so. Courts, in other words, pay legislators the often unmerited compliment of assuming that, had they really thought about whatever issue is in question, they would have thought sensibly about it. Of course, in doing this, courts cannot go so far as to contradict the express words of a statute, or even its evident intent as disclosed by legislative history or otherwise. But nothing like that would be involved here.

To test this, just suppose that ORS 12.020 had not been revisited by the legislature since its original enactment in 1862. And suppose further that the rules of procedure in effect in 1862 contained all sorts of archaic or unduly complicated provisions regarding service of summons long since abandoned. Would anyone seriously argue that the legislators in 1862 intended that, until ORS 12.020 was amended, the meaning of "the summons served" for limitations purposes should perpetually remain whatever the rules of procedure governing summons were on that date? Whatever those legislators actually thought, or more likely did not think, no court would attribute such an intent to them.

Whatever the legislators who most recently amended ORS 12.020 might have thought, the subsequent legislature which in 1977 created the Council to draft the ORCP and amend them on an ongoing basis, subject to legislative disapproval, must have understood that part of what the Council and the ORCP would do is prescribe rules regulating service of summons and, from time to time, change them. In fact, "rules governing form and service of summons" are specifically mentioned in the statute as among the "rules governing pleading, practice and procedure" the Council was to promulgate. The language of this statute clearly contemplated "amendments . . . from time to time, . . ." Would it be sensible to attribute to the 1973 legislature an intent that there might over time develop two divergent dates of effective service, one for purposes internal to the ORCP and another for purposes of "service" within the meaning of ORS 12.0202? Surely not, unless there is some necessary, or at least useful, purpose to be served by such divergence. None occurs to me.

In analyzing a legal question such as the present one, it is often useful to draw back a bit and view it from a larger perspective, lest one lose sight of the forest for the trees. Thus viewed, ORS 12.020(2) is obviously about limitations of actions, not about service of summons. It refers to "service of summons," but does not purport to define service or deal with its specifics and details. For the latter, one naturally looks to the ORCP, ORCP 7 specifically, since as ORS 1.735 explicitly recognized, service of summons, including such details as when it is complete, is part of the law of procedure. The courts have engrafted onto ORS 12.020(2) its own meaning, by way of statutory construction, as to when service of summons occurs, but have done so because the provisions in ORCP 7 D specifying when various methods of service are complete are expressly limited to "complete for the purpose . . . of these rules." There seems to me no good

reason for this self-imposed limitation.

Another way of putting the question presented in larger perspective is by recognizing that, while rules of law are conveniently divisible into rules of substance and rules of procedure, there is no impermeable barrier between the two divisions prohibiting rules in one category from being referred to by, and incorporated into, rules in the other. Thus ORS 12.020, with its rules of substantive law, refers at several points to "service of summons," or the like, clearly part of the law of procedure. In construing that term of reference, the courts have not looked to ORCP 7 D to determine the effective date of service, at least in part because the language in 7 D, "[f]or the purpose . . . of these rules, . . ." has always repelled reference to its completion date provisions. There is, however, no sound reason to impute to the legislature, in employing such terms as "service of summons" in ORS 12.020, an intent not to refer to service as prescribed in the part of the law where one would expect details of service to be prescribed, namely, ORCP 7. Similarly, there is no sound reason why ORCP 7, if amended to add "or by statute," could not be understood to embody the Council's intent to provide for details of service, including completion dates, both for purposes internal to the ORCP and for purposes of any statutes using the term "service of summons," or the like, unless that is excluded by the language or policy of the statute.

Unless cross-references of this sort, across the artificial division between substantive and procedural rules, are not only permitted, but encouraged, the law of any jurisdiction, its *corpus juris* as an integrated whole, will over time became less compactly integrated. It will unwittingly engender all manner of anomalous quirks, quiddities and loose ends, spawning an unnecessary, untidy and unhelpful morass of different special meanings attached to what, like service of summons, should be one and the same thing for all purposes, not one thing for this purpose, and another for that purpose. A kind of perverse affinity for attaching differing meanings to the same words or things is one of the unflattering traits stereotypically associated in the lay mind with the law and lawyers.

cc: Chair and Members, Council on Court Procedures (for distribution 7-1-96)

Attachment B to 7-13-96 agenda

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U'REN AND SCHUEBEL

June 7, 1996

COPY

VIA FACSIMILE

Mr. Maury Holland
Executive Director
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid Street, Room 331
Eugene, OR 97403

RE: ORCP 54E

Dear Maury:

Mick Alexander, Judge Brockley and I met by telephone to discuss ORCP 54E. Our conclusion was that the intent of the revision was to state that if the party asserting a claim fails to better the amount offered in an Offer of Compromise under ORCP 54E, they will not recover a prevailing party fee, but that the party making the offer of compromise will not recover a prevailing party fee either.

We believe that this section is clear and needs no revision.

Very truly yours,

Nancy S. Tauman

NST/dg

Enclosure:
Copy, letter to Brockley
& Alexander

cc: Mr. William A. Gaylord
The Honorable Sid Brockley
Mr. J. Michael Alexander

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B-1

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June 7, 1996

COPY

VIA FACSIMILE

The Honorable Sid Brockley
Circuit Court Judge
206 Clackamas County Courthouse
807 Main Street
Oregon City, OR 97045

Mr. J. Michael Alexander
Burt, Swanson, Lathen,
Alexander, McCann & Smith, PC
Suite 1000
388 State Street
Salem, OR 97301

RE: Council on Court Procedures

Gentlemen:

Enclosed is a copy of my letter to Maury Holland regarding our conclusions on ORCP 54E.

Also, after our discussion of ORCP 17, I believe we identified the following for further review and discussion:

> Since ORCP 17D(4) has language which allows for the imposition of monetary penalties payable to the court, what is the burden of proof necessary for the imposition of such a penalty? Is the burden of proof the clear and convincing standard as it presently is for punitive damages?

I will set up another meeting after I have had a chance to review the federal Rule 11 sanctions regarding the burden of proof and penalties. If you have any information, send it over.

I will not be at the meeting tomorrow, so I'll leave it up to you to report, if necessary.

Very truly yours,

Nancy S. Tauman

NST/dg

Enclosure:
Copy, letter to Holland

cc: Mr. Maury Holland

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Attachment C to 7-13-96 agenda

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LEGAL ASSISTANTS
SHEILA BUCHANAN
DANNEE L. DAMERELL

June 7, 1996

Bill Gaylord
Attorney at Law
1400 SW Montgomery St.
Portland, OR 97201

Re: ORCP 55(I)

Dear Bill:

John Hart and I met to discuss the new legislative changes to ORCP 55(I).

In his May 1, 1996 letter James Walsh raises some legislative concerns.

If this bill was designed to lessen the confusion of doctors about whether or when to provide copies of their charts to third parties, it probably does not accomplish that.

The changes to 55(I) create some serious practical problems. Of main concern is the 24 hour notice. It is clearly inadequate. Minimally, a 15 day notice should be required to make this workable.

I will be out of State at the time of the council meeting on Saturday. I will try to be available by telephone for any discussion on Rule 55(I).

Sincerely yours,

Diana Craine

Diana Craine

DC:kms

cc: John Hart
Maurice Holland

Attachment B to 7-13-96 Agenda

MEMO

TO: William A. Gaylord, Chair
Council on Court Procedures

FROM: Durham, J. RD

SUBJECT: Findings to Support Attorney Fee Award, ORCP 68 C(4)(c)(ii)

DATE: June 10, 1996

This memo follows the Council's discussion of this subject at the meeting on June 8, 1996, during which the group in attendance tentatively approved the following underlined change to ORCP 68C (4)(c)(ii):

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

The rationale for that change is that the current rule is misleading and incorrect because Oregon's appellate courts, in several cases, have required the trial courts to make findings to support attorney fee awards under several statutes or rules. That criticism of the current rule is correct. See, e.g., Mattiza v. Foster, 311 Or 1, 10, 803 P2d 723 (1990) (requiring findings on prevailing party status, meritlessness of claim or defense and improper purpose to support a fee award under ORS

20.105(1)); Long v. Oceanway Motors, Inc., 139 Or App 469, 473, ___ P2d ___ (1996) (requiring findings on issue of frivolousness of the action to support a fee award under the Uniform Trade Practices Act, ORS 646.638(3) (1993)); Plere Publishers, Inc. v. Capital Cities/ABC, Inc., 120 Or App 36, 38, 852 P2d 261, rev den 317 Or 583 (1993) (meaningful appellate review requires the trial court to make special findings to support the imposition of a sanction against a lawyer under ORCP 17). In imposing the requirement of findings, each of those cases relies on the necessity of findings to permit adequate appellate review of the fee award.

I propose the following change to the rule to supplant the change considered on June 8, 1996:

> "The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. The trial court shall make findings of fact and conclusions of law regarding a denial or award of attorney fees if requested by any party before the court determines the issue. [No findings of fact or conclusions of law shall be necessary except as otherwise required by law.]" (Proposed change underscored; deleted material in brackets.)

I set forth below a brief statement of my reasons for this proposal.

1. The June 8, 1996, change, which requires supporting findings of fact and conclusions of law where "otherwise required by law," is not misleading but also is not very helpful. Under

that rule, trial judges and parties will have to sift through appellate opinions and attempt to discover whether a court has imposed a requirement of findings and conclusions in the particular type of case before the court. Whether Oregon law imposes that requirement should not depend on the vagaries of past appellate court decisions. Instead, the Council should make a policy decision, applicable in attorney fee litigation generally, on the basis of the usefulness and necessity of findings and conclusions to support an award.

In addition, the rule considered on June 8 imposes a requirement of findings and conclusions, in cases where that is "otherwise required by law," regardless of any request for findings and conclusions by any party. That seems wrong. First, council should not impose that requirement on trial judges even if no party requests findings and conclusions regarding fees. Second, the requirement of a prior request for findings and conclusions is necessary to protect the appellate system from an appeal by a party who failed to make that request. The June 8 rule incorrectly permits a party to complain on appeal about the lack or inadequacy of trial court findings and conclusions about a fee award even though that party never requested findings and conclusions.

2. My proposal follows the model of ORCP 62 A,[1] which now requires a trial court, if requested by a party, to make findings and conclusions in a civil action tried to a court. It only makes sense to me that the rules also should entitle a party to request findings and conclusions on an attorney fee award dispute that may decide, in many cases, larger questions of monetary liability and social policy than the underlying civil action will resolve.

Recall also that, in Mattiza v. Foster, 311 Or at 10, the Supreme Court took note of the discretionary character of both ORS 20.105(1) and ORCP 62 A, but still imposed a requirement of findings on specific issues to support an attorney fee award, because "special findings are a prerequisite to meaningful review by an appellate court."[2]

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[1] ORCP 62 A provides:

> "Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein."

[2] Mattiza, 311 Or at 10, provides:

> "The Need for Findings
>
> "Although, in the absence of a request for special

The court in Mattiza did not consider ORCP 68 C(4)(c)(ii), and did not explain why. It is my speculation that the reason is that, in Mattiza, the trial court did make extensive findings in support of its fee award, but addressed the wrong issues. Moreover, the Supreme Court could determine, as a matter of law, that no fee award was appropriate. For that reason, ORCP 68 C(4)(c)(ii) was inapplicable.

3. Findings and conclusions on an attorney fee award are essential to meaningful appellate review of the award in virtually all cases, not simply in those fee cases, cited above, in which the appellate courts have imposed a requirement of findings and conclusions under a particular statute or rule.

---

findings by one of the parties, the court 'may' make special or general findings, ORCP 62 A, the award of attorney fees under ORS 20.105(1) is a situation in which special findings are a prerequisite to meaningful review by an appellate court. See Tyler v. Hartford Insurance Group, 307 Or 603, 771 P2d 274 (1989) (requiring findings by Court of Appeals in cases under ORS 20.105(1)); see also Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F2d 1486, 1508 (11th Cir 1985), cert den 475 US 1107 (1986) (under Florida law, the trial court 'must make a specific finding of "complete absence of justiciable issue of either law or fact" or face reversal or remand on the award of attorney's fees'). Not only should the trial court make findings regarding the merit of the party's claim, defense, or ground for appeal or review, and which of the three grounds under ORS 20.105(1) the court is considering, but it should also specify which actions of the party are violative of the statute."

Because that rationale (i.e., the necessity of findings and conclusions to permit meaningful appellate review) applies across the spectrum of cases involving potential fee awards, so should the rule requiring findings and conclusions.

4. Requiring findings and conclusions, when requested, on attorney fee awards should not impose an inordinate burden on trial courts. For example, as I read the current rules, a trial judge may resolve all pending objections and deny or grant a fee award, in whole or in part, through an oral ruling on the record that states the court's findings and conclusions on the issues raised. If the court desires to make separate written findings and conclusions, the court can either prepare them or direct counsel for the successful party to prepare them from the court's oral statements on the record, as is common in other contexts.

State and federal administrative agencies and the federal courts routinely support attorney fee awards, or denials of fees, with findings and conclusions on the record. I am not aware of any complaint from those sources that preparing findings and conclusions, or directing lawyers to do so, unduly increases workloads. Moreover, I am unaware of any complaint from a state court judge that the existing Oregon cases, that require trial court findings and conclusions on fee awards under certain statutes and rules, have increased materially the work of the trial courts.

~~D-6~~
D-6

5. Requiring findings and conclusions on fee awards is good public policy. The underlying decision is important judicial work that should be conducted openly, and on valid, reasonable grounds that the parties and the public can understand. The current rule seems to foster a policy of silence that permits the court to say nothing about the reason for an award, modification, or denial of fees, and thereby induces the court to sidestep or overlook critical statutory issues and critical objections regarding fee awards, at least in some cases. In my view, if a fee request or an objection to one is well taken, the court can and should say so and explain why, briefly, so that the parties and the public will know the basis for the underlying policy decision.

Thank you for considering this suggestion.

c: Prof. Maury Holland

also to prohibit even disclosure of their existence or that some are being withheld.

Agenda Item 8: Amendment to ORCP 15 A as Proposed by the Practice & Procedure Committee of the Oregon State Bar (see Attachment D to the Agenda of this meeting). This proposed amendment was reported by the Chair as being recommended by the OSB Practice & Procedure Committee for tentative adoption by the Council (see p. D-1 of Attachments to meeting agenda). Mr. Hamlin moved the tentative adoption of the proposed amendment and Judge Pope seconded the motion. Some members questioned whether the ambiguity to which this proposed amendment seems addressed is one that causes problems with any frequency. Judge Marcus stated that extending filing times inevitably slows the pace of litigation to some extent, and pointed out that the problem of ambiguity could be just as well resolved by providing that all replies to counterclaims and answers to cross-claims must be filed within ten days as by providing, as this proposed amendment would do, that all must be filed within thirty days. In other words, he said, any possible doubt could be just as effectively dispelled in favor of ten rather than thirty days. Some members replied to this point that they didn't believe that the difference between ten and thirty days would have significant impact on the overall speed with which litigation is conducted. Mr. Lachenmeier asked Ms. Chase how broadly support for this amendment was shared among members of the Practice & Procedure Committee. The latter responded that only a few such members regarded the amendment was especially important, but that no members appeared to think it was a bad idea. Judge Billings stated that, from a District Court perspective, the difference between ten and thirty days would have no significant impact. Judge Brockley and others noted that, in federal practice, the uniform period for filing responsive pleadings is twenty days. On the call of the question, this motion was adopted by a vote of 13 in favor, 3 opposed and no abstentions.

Agenda Item 9: Report regarding trial court findings in connection with fee awards; ORCP 68 C(4)(c)(ii): Mick Alexander. Mr. Alexander was recognized to report on any early conclusions reached by the subcommittee appointed at the Council's Jan. 15, 1994 meeting to consider whether subparagraph 68 C(4)(c)(ii) should be amended to require findings of fact in connection with trial court rulings on attorney fee petitions and objections. This matter was raised at that meeting by Justice Durham. Mr. Alexander reported that this subcommittee had had one lengthy discussion of this question, from which it became apparent that the issues involved are quite difficult ones, that no consensus had yet formed within the subcommittee, but that there was a

general sense that the problem raised by Justice Durham seemed important enough to warrant more thought and attention. Ms. Crain and Judge Deits both commented that any requirement of findings would necessarily increase the judicial workload, at both the trial and appellate court levels. Messrs. Alexander and Gaylord responded that the increased workload was fully understood to be involved, and therefore the question is whether such increase would be worth that cost in terms of greater clarity and more principled decisionmaking. Judge Marcus noted that the considerable number of AWOP decisions in the Court of Appeals is suggestive of that Court's limited existing capacity to publish articulated reasoning in the process of resolving all the issues that come before it. Judge Sams stated that his practice is always to provide findings and conclusions even in the absence of any mandate in the rules. Ms. Tauman said that her experience suggests that there might be some value to practitioners in being able to request formal findings. She also volunteered to serve as a member of this subcommittee, to which the meeting agreed on behalf of Mr. Hart. This discussion ended without any formal action by the Council, but with general agreement that the subcommittee should continue its deliberations on the premise that this issue should not at this point be summarily dismissed from the current biennial agenda.

Agenda Item 10: Report regarding ORCP 22 (Rudy Lachenmeier). Mr. Lachenmeier stated that he had no formal report or recommendations to present at this meeting, but expects to recommend some clarifying amendments to this rule at the May meeting or subsequently. He reiterated the concern expressed at the January meeting that there appear to be some confusingly inconsistent word usages in the present text of subsection 22 C(1), in particular the use of "shall" in contrast to "may" elsewhere in the subsection, which might lead to the inference that third-party counterclaims against third-party plaintiffs are compulsory, as opposed to the general rule in Oregon practice that all counterclaims are permissive only. Mr. Lachenmeier added that he had had some conversations with authors of relevant CLE materials, which left him more persuaded that the possibilities of confusion are real. He said that, in drafting his proposed amendments, he would obtain more information respecting pertinent legislative history.

Mr. Lachenmeier went on to say that, in the course of his examination of subsection 22 C(1), he discovered something else that might constitute a problem worth addressing. That is the wording that requires both leave of court and agreement of existing parties in order for a third-party complaint and summons to be served on a prospective third-party defendant more than 90

third-party joinder as of right and require discretionary leave of court in all instances. Mr. Hart stated he thought it useful to give defendants 90 days in which to bring in third-party defendants for contribution and the like, and said that the real issue is what should be required after the 90 days have elapsed. He continued by asking whether this question should be put over until the next meeting when a supermajority hopefully will be present. Mr. McMillan remarked that, after such extended discussion, he thought there should be a vote. He then moved the question and Mr. Gaylord seconded. The motion failed to carry on a vote of 6 in favor, 6 opposed and 0 abstentions. Mr. Hart directed that the minutes reflect that this remains an open issue for possible further consideration. Judge Johnson said that possibly a compromise, whereby 120 days would be substituted for 90 days, might be worth consideration.

Agenda Item 6: Report from Subcommittee on Findings in Connection with attorney fee awards--ORCP 68 C(4)(c)(ii). (Mick Alexander.) Mr. Alexander reported that there was general agreement within the subcommittee that there should be some provision for findings in connection with rulings on attorney fees, and that the preferred proposed amendment was alternative 3 at the bottom of Attachment D p. 1 to the agenda of this meeting, which reads: "The trial court shall make findings of fact and conclusions of law on awards of attorney's fees if requested by any interested party." This sentence would replace the present second sentence of 68 C(4)(c)(ii), which reads: "No findings of fact or conclusions of law shall be necessary."

Prof. Holland asked whether there was any point in requiring "conclusions of law" in addition to "findings of fact," and Judge Marcus responded that there are situations where conclusions of law would be useful. Mr. Hart asked the members whether there was a consensus that there be some form of amendment to require finding and conclusions. Only three members expressed opposition to any change to the present language of this subparagraph. Mr. Gaylord moved that alternative 3, as set forth above, be adopted, which was seconded by Judge Marcus. However, no vote was taken on this motion, thus continuing this proposal on the Council's agenda.

Mr. Hart asked Prof. Holland to prepare and circulate prior to the July meeting a summary of amendments tentatively adopted to date. He noted that, at that meeting, there will probably be tentative adoption of amendments respecting hospital records and class actions. This work product, together with amendments previously adopted, should then probably be disseminated to the bench and bar, and perhaps to legislators as well, so that

comments might be received and considered at the October meeting or earlier. As a courtesy to the trial judges, he directed Prof. Holland to circulate copies of alternative 3, the pending amendment to 68 C(4)(c)(ii), to all presiding trial court judges in the state with an indication that this is under consideration by the Council and inviting any reactions they might have.

Agenda Item 7: Other matters for consideration. Brief discussion was had concerning the April 22, 1994 letter to Ms. Crain from Mr. Ronald K. Cue (Attachment E to the agenda of this meeting). It was generally agreed that this relates to an apparent inconsistency between the Juvenile and the Evidence Codes, and hence is beyond the Council's jurisdiction. It was suggested that this matter be referred to the Family Law Committee of the OSB.

Agenda Item 8: Old business. In response to a query from Mr. Hart, no member raised any item of old business. However, Prof. Holland reminded the members of the suggestion of Senator Springer that the best chance of obtaining an appropriation for the Council's 1995-97 budget would be to have it incorporated as an item in the biennial budget of the Judicial Department if that could be done.

Agenda Item 9. New business. In response to a query from Mr. Hart whether any member had any item of new business to propose, Mr. McMillan made pointed reference to the just issued *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* prepared under the chairmanship of former Chief Justice Ed Peterson. Mr. McMillan also noted that all present members of this Council are white. Some members commented that the membership of the Council is determined by the Bar Board of Governors and other appointing authorities, not by the Council itself, and Mr. McMillan said he was aware of this fact.

Agenda Item 10: Adjournment. The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

~~Attachment D-2~~
~~(See Agenda Item 6)~~

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

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April 27, 1994

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Re: Council on Court Procedures

Dear Steve and Nancy:

At the last meeting the Council on Court Procedures discussed the issue of findings of fact concerning awards of attorney's fees under ORCP 68. Particularly, we discussed the provisions of ORCP 68(C)(4)(c)ii. That rule reads as follows:

> **"The court shall deny or award in whole or in part the amount sought as attorney's fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary."**

We engaged in quite a bit of discussion concerning the need to address awards of attorney's fees, particularly in areas of social importance, such as civil rights cases. In addition, I think that one could argue that almost any statute allowing for attorney's fees represents a public policy encouraging attorneys to undertake cases for clients who would not otherwise be in a position to retain their services. There were also comments by a number of judges on the council indicating that they routinely do make findings in attorney fee cases when objections are filed.

It would seem that an amendment to the rule could take a number of forms, including the following:

> **1. "The court shall make findings of fact and conclusions of law with regard to the award of attorney's fees."**
>
> **2. "The trial court may make findings of fact and conclusions of law on awards of attorney's fees."**
>
> **3. "The trial court shall make findings of fact and conclusions of law on awards of attorney's fees if requested by any interested party."**

Attachment D-2

4. "The trial court shall make findings of fact and conclusions of law on the issue of attorney's fees when requested by all interested parties."

5. "The trial court is encouraged to make findings of fact and conclusions of law on the issue of attorney's fees when requested by any interested party to the action, and when the decision involves an issue that is not only important to the parties, but also important to the general policy supporting the award of attorney's fees."

These are obviously only some of my suggestions on possible changes to Rule 68(C). However, I think that the threshold question would be whether the Council feels that any change to the rule is appropriate. Therefore, I would propose that a motion be presented to the council with essentially the following language:

"Should the Council on Court Procedures consider amendments to ORCP Rule 68(C)(4)(c)ii regarding findings of fact and conclusions of law relating to an award of attorney's fees."

If this motion is passed, then we should discuss an appropriate form for any amendment. If the motion fails, then the rule should obviously retain its current form. I do feel that the question of whether any change is necessary is always the first one that should be addressed.

I would appreciate your thoughts on this issue not only at the next meeting, but beforehand if appropriate.

Sincerely,

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

J. Michael Alexander

JMA/jb
CC: Maury Holland, University of Oregon ✓
School of Law, Rm. 311
1101 Kincaid St.
Eugene OR 97401

John Hart
Attorney at Law
Suite 2000
1000 SW Broadway
Portland OR 97205

discussion had lasted as long as was useful, and that he expected the amendment proposed by the Marcus subcommittee would be voted on at the September meeting unless different language is proposed before then. He also expressed his own support for the language of the Marcus subcommittee and asked all members present to say informally whether they supported or opposed it. All members present indicated that they either support that language or are leaning in that direction, with three members indicating that they do not wish to foreclose the possibility of further thought on the matter. Mr. Hart concluded this discussion by expressing the hope that absent members would give due consideration to this matter and come to the September meeting prepared to cast their votes.

Agenda Item 4: Report of Subcommittee on Findings in Connection with Fee Awards -- ORCP 68 C(4)(c)(ii) (Mick Alexander) (see Attachment B to Agenda of this meeting for text of proposed amendment and letters from judges in opposition). Mr. Alexander stated that the subcommittee needed more guidance on this difficult issue. The letters from the judges, he said, suggest that the trial bench is unanimously opposed to this amendment, yet some of what they write suggests why findings might be useful. Mr. Phillips recalled the concerns that had been expressed by Justice Durham, and Justice Graber mentioned that appellate courts generally tend to regard findings and conclusions as being helpful from their perspective. Judge Gallagher asked whether anyone had detected a groundswell of support for this amendment, to which there was no affirmative reply. Mr. Hamlin remarked that the relevant language of Rule 68 seems to have been derived from the prior statute, which means that this amendment would change long-standing practice. He expressed doubt whether such a change would be warranted in the absence of a strong showing of a broad demand for it or that it would solve some pressing problem. Justice Graber stated that she didn't believe the additional time required in the trial courts would be very substantial and noted that there can be no meaningful appellate review in the absence of findings. Mr. McMillan said that his reading of Judge Maury Merten's letter suggested to him that requiring findings might well serve the public interest by bringing out in the open things that should be brought out. Justice Graber questioned the use of the word "interested" modifying "party" in the proposed amendment. Mr. Alexander responded that the intent was to limit the right to request findings to a party who was either requesting or resisting a fee award, rather than allowing any party to the litigation to do so. Mr. Gaylord suggested that: "if requested by any party affected by the award or denial" might be better. Justice Graber suggested that some clarification might usefully be made, although no motion to amend was offered.

There followed discussion of what groups should be asked for their input in the same fashion that trial judges had been solicited. It was agreed that Maury Holland would give notice of this proposed amendment and solicit comments from the following organizations: OADC, OTLA, Oregon Legal Services, and the Litigation and Family Law Sections of the OSB.

Agenda Item 5: Report of Subcommittee on Hospital Records -- ORCP 55 H (Mick Alexander). Mr. Alexander noted that the subcommittee's recommended amendments to section 55 H are set forth in his 7/5/94 letter to John Hart and Maury Holland (attached to these minutes). He also stated that these recommended amendments are substantially the same as those set forth in his May 13, 1994 letter and preliminarily discussed at the Council meeting on May 14, 1994 (attached to these minutes). He said that the subcommittee had concluded it would be impossible to devise language that would require hospitals to disclose the identity of records withheld pursuant to federal or state privacy regulations, since the regulations appear to prohibit even that much disclosure. Mr. Gaylord raised the question of whether it might be less awkward for hospitals if language such as: "unless the subpoena is accompanied by proof of compliance," but no motion to thus amend was offered. Mr. Hart then asked for a general expression of opinion from the members present. A consensus was expressed to the effect that the amendments proposed by this subcommittee appear to be well devised to resolve the problem to which they are addressed to the maximum extent possible. Note was taken of the July 11, 1994 letter of Ms. Karen Creason, who participated as an "outside" member of the subcommittee, to Maury Holland in which she endorsed the currently proposed amendments and recommended their promulgation (attached to these minutes).

Attention then turned to a discussion of the amendments to Rule 55 proposed as legislation by the OSB Procedure and Practice Committee ("PPC") set forth in the July 1, 1994 letter of Mr. Dennis James Hubel, Chair of the PPC, and attachment, distributed to Council members under Maury Holland's covering memo of July 6, 1994 (attached to these minutes). Note was taken of the July 7, 1994 letter of Mr. Laurence E. Thorp, who participated as an "outside" member of this subcommittee, to Maury Holland commenting upon the PPC's proposed amendments (attached to these minutes). Mr. Hart asked whether the members present believed the Council should take the PPC proposed amendments under consideration or not. Mr. Gaylord stated that he believed that these proposals should have come through the Council. Mr. McMillan was strongly of the opinion that the Council should take the PPC proposals under consideration and give the Legislature the benefit of its judgment by approving them as formulated, by amending them, or by disapproving them. He added that, by taking these proposals under consideration, the Council would provide

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

* * * * *

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

* * * * *

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [~~No findings of fact or conclusions of law shall be necessary.~~] The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

* * * * *

COUNCIL ACTION

At the Council's May 14, 1994 meeting, the Council discussed the above amendment proposed by Mick Alexander's subcommittee. The consensus was that the proposed amendment should be disseminated to all presiding trial court judges for comment prior to the Council's July 16, 1994 meeting.

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401-2926

JACK L. MATTISON
JUDGE
(503) 687-4257

June 9, 1994

Maurice J. Holland
Executive Director
Council on Court Procedure
University of Oregon
School of Law
Eugene, OR 97403-1221

Re: ORCP 68 C(4)(c)(ii)

Dear Mr. Holland:

My reaction to the proposed changes to ORCP 68 C(4)(c)(ii) set out in your letter of May 26, 1994 is, please don't do this to us.

The rather summary procedure for settling attorney fee issues has been in place for a long time, and we have not experienced any problems or complaints about the procedure itself. If these changes are made, requests for findings and conclusions will become commonplace, resulting in longer hearings and a more involved and longer decision-making process. One has to wonder what benefit these changes are expected to bring about, and as a practical matter just what kind of findings are expected. I suspect that in many cases, they will be embarrassing to counsel on both sides.

I don't know the genesis of this proposal, but would guess that it comes from an unexplained "bad" result that someone received. The worse reason to change something as established as this procedure is to try and "fix" the occasional aberration, and I would encourage the Council not to journey down that road.

Thank you for the opportunity to comment.

Very truly yours,

Jack Mattison
Presiding Judge

JM/rl

P.S. I just had the two judges here who have done most of this work for the past few years review both your letter and mine. They are both rather adamantly opposed to the changes, their initial responses being "just what kind of findings do they expect to get?" From there it deteriorated to putting a "cc: PLF" on the opinion letter, etc.

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

MAURICE K. MERTEN
CIRCUIT JUDGE
687-4258

June 9, 1994

Maurice J. Holland
Executive Director
Council on Court Procedure
University of Oregon
School of Law
Eugene, OR 97403-1221

Re: ORCP 68 C(4)(c)(ii)

Dear Mr. Holland:

Let me echo Judge Mattison's letter on this subject. Let me list the findings of facts and conclusions of law that will result.

Plaintiff is not awarded the attorney fees requested because:

- The hourly rate is too high for this community.
- The hourly rate requested is charged in this community but not by one so inexperienced.
- The hourly rate is reasonable but the bill is padded with unnecessary hours that no reasonably efficient attorney would have required to achieve the result.
- The four days of trial actually occurred, but counsel was so inexperienced/unprepared/unprofessional that only two days should have been required.
- This case should have been handled in small claims where it began but once Plaintiff's counsel took over the file it became so over-pled with exaggerated claims that it took two weeks of a 12 person jury trial to result in the equitable small claims verdict that was received. The court sees no reason to award attorney fees in such a case. P.S. I've tried lots of these.

- Plaintiff and/or Plaintiff's counsel were so unreasonable in their unproven demands and absolute refusal to negotiate that the court finds it not reasonable to award attorney fees on the basis of the small but equitable verdict.

- While the court found for the Plaintiff on the underlying claim, his testimony about the resulting damages were patently untrue and this equity court will not reward the lying litigant.

Need I go on? I sat on most of the cost bill hearings in this court for the last ten years. If required I would have said the above and more hundreds of times. Why in the world would anyone want to make me say that in writing or in front of their client. This provision doesn't let me say these things, it makes me say them so an appellant court will understand the reasoning. Appellate courts do not reverse trial courts on the amount of attorney fees.

If this passes the bar will put a gun to its head - and all the cylinders are loaded.

Sincerely,

Maurice K. Merten
Circuit Judge

MKM:cr

cc: Hon. Jack Mattison

For 7/12 Agenda

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

STEPHEN B. HERRELL
JUDGE

COURTROOM 508
(503) 248-3060

June 20, 1994

Mr. Maury Holland
University of Oregon
School of Law
Eugene, OR 97403-1221

RE: Proposed changes to ORCP 68 C(4)(c)(ii)

Dear Mr. Holland:

This in reference to your letter of May 26, 1994 directed to presiding trial court judges, copies of which were circulated to all the trial judges in Multnomah County.

I oppose the proposed amendment. I see no reason for it, and it appears to me to be just one more unnecessary process that will further run up the cost of litigation.

I sit in family court in which requests for attorney fees are extremely common. Yet these are people who can least afford these kinds of procedures.

Thank you for your consideration.

Very truly yours,

Stephen B. Herrell

SBH:jdm
L-Holland

ATTACHMENT B-6

D-21

seconded by Mr. Shepard, moved adoption of the amendment proposed to section A of Rule 15 (see C-2 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Brockley, move adoption of the amendment proposed to subsection C(1) of Rule 22 (see C-3 - C-4 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Sams, moved adoption of the amendments proposed to transfer existing section C of Rule 69 to become new section B of Rule 58 and renumbering of both rules accordingly (see pp. C-6 - C-9 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Mr. Hamlin, moved adoption of the amendment additionally proposed to subsection C(1) of Rule 22 (see p. C-11 of Attachment C). After some discussion, this motion carried by a vote of 10 in favor, 6 opposed.

Judge Marcus, seconded by Mr. Jolles, moved adoption of the amendment proposed to subsection F(2) of Rule 32 (see p. C-14 of Attachment C), together with an amendment to subsection F(3) of Rule 32 proposed by letter from Mr. Phil Goldsmith to Judge Marcus dated 9/9/94 (see Attachment D to these minutes), but with the words "for individual monetary recovery" substituted for the words "for monetary relief." This motion carried by vote of 15 in favor, 0 opposed, 2 abstaining.

With reference to the amendment proposed to section C of Rule 57 (see p. C-16 of Attachment C), Mr. Phillips stated he was not persuaded the existing rule needed changing, but that if it were to be changed, he preferred a change in the direction of the statute governing juries in criminal cases (see p. C-21 of Attachment C). Mr. Hamlin moved, seconded by Judge Marcus, that the only change to be made in section 57 C should be to substitute "the jurors" for "each juror." Mr. Hart noted that the P&PC had taken great efforts to document existence of what they perceive to be a problem. The immediately aforementioned motion carried by a vote of 14 in favor, 1 opposed, and 1 abstaining, but was subsequently withdrawn in favor of a motion by Judge Pope, seconded by Mr. Phillips, that section 57 C be amended as proposed by Mr. Phillips (see p. C-20 of Attachment C). This motion carried by a vote of 16 in favor, 1 opposed.

Judge Marcus, seconded by Mr. Gaylord, moved adoption of the amendment proposed to subparagraph C(4)(c)(ii) of Rule 68 (see p. C-17 of Attachment C). Justice Graber questioned what was intended by "interested party," as opposed to "party to the litigation." Ms. Tauman stated she thought the amendment should provide for findings and conclusion at the request of "any party

to the litigation." Several members noted the opposition to this proposed amendment by a number of trial judges who had expressed their belief that it would mandate an unwise use of their time. Judge Brockley reiterated his strong opposition to this proposal.

Mr. Chuck Tauman, Executive Director of OTLA, was then recognized and spoke in support of a requirement that, if requested, findings of fact and conclusions of law be provided on the record in connection with rulings on fee petitions. He added that he and his organization believe that the Legislature has provided for attorney fee awards in many circumstances as a matter of sound public policy, and that findings and conclusions would assist in the implementation of that policy. Mr. Hart then called the question, and the motion carried by a vote of 9 in favor, 8 opposed.

Agenda Item 5: Appointment of final review committee. Mr. Hart appointed Judge Marcus, Mr. Hamlin and himself to constitute a final review committee to double-check the accuracy of the texts of tentatively adopted amendments in the form they would be forwarded for required publication in the Judicial Advance Sheets. Maury Holland reminded the Council that, pursuant to the statutory amendment by the 1993 Legislature, tentatively adopted amendments could not be further revised following their publication in the Judicial Advance Sheets, so that the only choices the Council could make at the Dec. 10 meeting would be to either promulgate or not promulgate them.

Agenda Item 6: New Matters. No new matters were raised.

Agenda Item 7: Old business. No items of old business were raised.

Agenda Item 8: New business. No items of new business were raised. Mr. Hart noted that there was no reason for the Council to meet in October or November, but once again stressed the vital importance of full attendance at the Dec. 10 '94 meeting, since a minimum of 15 votes are required for final promulgation of ORCP amendments.

Agenda Item 9: Adjournment. The meeting adjourned at 2:00 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

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

* * * * *

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

* * * * *

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [~~No findings of fact or conclusions of law shall be necessary.~~] The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

* * * * *

COUNCIL ACTION

The Council discussed the above amendment (5/14/94 Minutes, p. 5) proposed by Mick Alexander's subcommittee. The consensus was that the proposed amendment should be disseminated to all presiding trial court judges for comment prior to the Council's July 16, 1994 meeting. Comments letters were received in response to the letter sent to the judges; see Council's further discussion (7/16/94 Minutes, pp. 4). **It was agreed that Maury Holland would give further notice of this proposed amendment and solicit comments from the following organizations: OADC, OTLA, Oregon Legal Services, and the Litigation and Family Law Sections of the OSB** (7/16/94 Minutes, p. 5). NOTE: the notice was sent and no word has been received from those organizations (as of August 22, 1994).

motion the amendments respectively shown as items 3(c) and (h). This motion carried unanimously by vote of 16 in favor, none opposed, and no abstentions.

Mr. Hart then asked whether members had had an opportunity to read and consider the suggestion of Mr. Lawrence D. Gorin in his letter to Maury Holland dated December 5, 1994 (Attachment B to these minutes) that former section 69 C be transferred to Rule 58 as section 58 E rather than 58 B. Mr. Gorin has offered this suggestion in the interest of avoiding unnecessary recodification of the existing sections of Rule 58. Mr. Gaylord, seconded by Judge Gallagher, moved that existing section 69 C be transferred to Rule 58 as new section 58 E. This motion carried unanimously by vote of 16 in favor, none opposed, and no abstentions.

Judge Marcus, seconded by Mr. Gaylord, then moved approval and promulgation of the proposed amendment to Rule 68 shown as item 3(h) on the agenda of this meeting. Mr. Phillips stated that be believed that this item was improperly included on this agenda as a tentatively adopted amendment because it had not been tentatively adopted by affirmative votes of at least a majority (i.e., twelve) Council members, as required by ORS 1.730(2)(a). Mr. Hamlin expressed his agreement with this position. Mr. Hart called for a vote on this motion. The motion failed by vote of 8 in favor, 8 opposed, and no abstentions.

Mr. Hart, seconded by Mr. Hamlin, then moved approval and promulgation of the tentatively adopted amendment to Rule 22 shown as item 3(c) on the agenda of this meeting. This motion failed by vote of 7 in favor, 8 opposed, and 1 abstention. Mr. Gaylord stated that his negative vote was based on his opposition on the merits of this proposed amendment.

Mr. Hart then asked whether there were any suggested changes in the draft of Staff Comments as prepared by Maury Holland and attached to the agenda of this meeting. He reminded members that the Council's past practice has been for the Executive Director to incorporate suggested changes from members as to which there seemed to be an informal consensus, rather than voting formally to adopt or reject Staff Comments. Referring to the draft comments to the amendment of subsection 55 H(2), Mr. Alexander suggested that the final sentence of the first full paragraph on p. 24 be revised to state: "[t]hat there are no records responsive to the subpoena" instead of: "[t]hat production will not be forthcoming." There was a clear consensus of the members in favor of this change.

Judge Marcus stated that he thought that the draft comments to the amendment to subsection 32 F(2) risk saying too much, by obliquely inviting speculation about what the Council

Attachment E to 7-13-96 Agenda

SUPREME COURT

COURT of APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97310

RECORDS SECTION
503-986-5555
Fax 503-986-5560
TDD 503-986-5361

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

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

gicorr.mls

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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 # 541 346-3834	Phone # 503 986-5563	
Fax # 541 346-1564	Fax # 503 [illegible]	

Senate Bill ___

SUMMARY

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

A BILL FOR AN ACT

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

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

SECTION 1. ORS 19.033 is amended to read:

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

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

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

(2) * * * *

(3) * * * *

(4) * * * *

(5) * * * *

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

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

SECTION 2. ORS 19.038 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 5. ORS 19.040 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 6. Section 7 of this Act is added to and made a part of ORS Chapter 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 8. ORCP 72 is amended to read:

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

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

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

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

SECTION 9. ORS 19.045 and 19.050 are repealed.

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