*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, September 14, 1996
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

**A G E N D A**

1. Call to order (Mr. Gaylord)

2. Approval of 7-13-96 minutes (attached)

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

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

5. Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda, Attachment B to 5-11-96 agenda, Attachment C to 7-13-96 agenda, and Attachment C to this agenda) (Mr. Hart)

6. Review tentatively adopted amendments to ORCP 39 and ORCP 72 (Attachment D and E, respectively, to this agenda) (Mr. Gaylord)

7. Report of subcommittee to review ORCP 17 C (see Attachment B to 12-9-95 agenda and Attachment B to 7-13-96 agenda (Mr. Alexander)

8. Review of LAC Subcommittee Internal Rules and revised Council Rules of Procedure (Attachment F to this agenda) (Mr. Alexander and Mr. Hamlin)

9. Old business (Mr. Gaylord)

10. New business (Mr. Gaylord)

11. Adjournment (Mr. Gaylord)

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 13, 1996
Oregon State Bar Center
Lake Oswego, Oregon

Present: J. Michael Alexander, David V. Brewer, Sid Brockley, Diane L. Craine, Mary J. Deits, Don A. Dickey, Stephen L. Gallagher, Jr., William A. Gaylord, Bruce C. Hamlin, John E. Hart, Rodger J. Isaacson, Nely L. Johnson, Rudy R. Lachenmeier, Michael H. Marcus, David B. Paradis, Karsten Rasmussen, Nancy S. Tauman

Excused: Patricia Crain, Robert D. Durham, Stephen Kanter, John H. McMillan, Milo Pope, Stephen J.R. Shepard

Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association, was in attendance. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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**Agenda Item No. 1: Call to order (Mr. Gaylord).** Mr. Gaylord called the meeting to order at 9:40 a.m.

**Agenda Item No. 2: Approval of Minutes (Mr. Gaylord).** Without objection or amendment, the minutes of the Council's June 8, 1996 were approved as previously distributed to all members, except that Mr. Gaylord noted that it had not been finally agreed, as stated in the minutes at the end of the second paragraph under New Business, to hold the August 10, 1996 meeting as scheduled. He said that his recollection was that a final decision about the August 10 meeting was deferred to the present meeting, with which there was general agreement.

**Agenda Item 3: Report and recommendations of subcommittee to review ORCP 7 (See Attachment A to 7-13-96 agenda) (Judge Brewer).** Judge Brewer reported that the subcommittee had conducted two teleconferences since the last Council meeting, as a result of which much progress was made toward reporting a finished product for the Council's consideration. He also mentioned that he had been in contact with Mr. Dwight Apple, the individual at the Department of Transportation (DOT) having supervisory responsibility for recording and filing summonses served pursuant to ORCP 7 D(4)(a)(i), to find out whether the amendment to this provision now under consideration, which would eliminate any service on, or notice to, the DOT, would cause any

problems, or raise objections there. Judge Brewer reported that he had been assured by Mr. Apple that the DOT would be pleased to see this function ended, and would probably save some money as a result, which assurance had been confirmed by letter from Mr. Dwight Apple dated July 12, 1996 (copies distributed at this meeting; original filed with these minutes).

Judge Brewer continued by noting that a few issues remained not finally decided by the subcommittee about which it wished to get any guidance or suggestions members might have before it proceeds further. He stated that one such issue was whether to move present paragraph 7 D(4)(c), dealing with defaults when service is pursuant to subparagraph 7 D(4)(a)(i), to Rule 69, which governs defaults generally. A second important issue remaining undecided, he added, was whether to delete the phrase "or service of" in section 7 G as it appears on line 16, p. A-18 of Attachment A. He further stated that another important unresolved question was whether, at each place in 7 D where the phrase: "For the purpose of computing any period of time prescribed or allowed by these rules, ..." appears, there should be an amendment adding the words: "or by statute" following "rules." Judge Brewer explained that the purpose of such amendment would be to make completion dates of various modes of service as prescribed in section 7 D effective for purposes of statutes of limitations as well as for purposes internal to the ORCP. He added that, while there was unanimous agreement within the subcommittee that this amendment would be good policy, some doubt existed about whether this would be within the Council's authority under ORS 1.735 because of statements in several appellate court opinions, including one by the Supreme Court, that the Council may not, by rule, affect the running or tolling of limitations.

Ms. Tauman said that she found paragraph D(2)(d), in lines 7-18, p. A-5, difficult to understand, and thought its clarity might be improved by changing "but not later" to "but in no event later." Judge Brewer responded that the subcommittee would consider this suggestion.

Regarding subparagraph 7 D(4)(a)(i), Prof. Holland mentioned that he had checked ORS 801.305 for the statutory definition of "highway" with a view to possibly substituting that single word for the existing "roads, highways and streets of this state." The question was then considered whether the existing language of the provision should be retained, with a staff comment making reference to ORS 801.305. Judge Brockley said he thought the coverage of D(4)(a)(i) ought to be symmetrical with that of the Motor Vehicle Code. Mr. Rasmussen stated that the subcommittee had not considered whether D(4)(a) should, or validly could, contain a wider scope of coverage than does the Motor Vehicle

Code, such as by extending to premises open to the public, but not necessarily as a matter of right. Judge Gallagher suggested that perhaps the language should not be cast in terms of geography, but instead say something like "operated within this state." Mr. Alexander, seconded by Mr. Hamlin, then moved to table further discussion of this issue, but subsequently withdrew the motion without a vote. Mr. Hamlin then suggested that the language from line 22, p. A-9 to line 21, p. A-10 would be improved in terms of readability if it were pulled apart and reformatted, a suggestion with which there was general agreement. Judge Brewer expressed agreement with this suggestion.

Judge Brewer then asked for some reactions to the proposed deletion of "or service of" from section 7 G as shown on line 16, p. A-18. Justice Durham stated he would be concerned that such deletion might be understood by trial judges to mandate hypertechnicality in dealing with even the most inconsequential, non-prejudicial deviations from prescribed service methods. Judge Brewer commented that the subcommittee was considering breaking down or reformatting section 7 G along the lines Mr. Hamlin suggested in connection with subparagraph D(4)(a)(i). Judge Brockley suggested caution in adding new language to 7 G. Discussion of this point concluded with Judge Brewer asking any member who had a better idea about how best to clarify section 7 G to fax his or her proposed language to the subcommittee.

Discussion then turned to the phrase "certified or registered mail, return receipt requested, ..." as it appears in several places throughout section 7 D. Judge Brewer summarized what he had learned from the U.S. Postal Service about the differences between certified and registered mail, about another form of mailing called "express mail," and about the inadvisability of requiring that envelopes in which mailings are made show "Please Forward," or the like, on the outside. Judge Brockley suggested that adding express mail to certified or registered mail would seem to work best. Judge Isaacson raised the question whether the amended language should authorize use of some or all means of private mailing. Judge Brewer responded that the subcommittee would give some thought to that question.

Judge Brewer then asked for guidance on the question of whether "or by statute" should be added following "by these rules" where the former phrase appears in section 7 D. Prof. Holland was asked to summarize a memo he had written for the subcommittee in which he concluded that the addition of "or by statute" probably would be sustained by the Supreme Court as within the Council's power, despite several statements by way of dicta in appellate court opinions that the Council is prohibited by ORS 1.735 from prescribing when service is effective for

purposes of statutes of limitations, ORS 12.020(2) in particular, and did so with characteristic brevity.

Mr. Gaylord and Judge Marcus both raised the question whether, in view of whatever doubt exists about the validity of an amendment adding "or by statute," some way might be found to get the legislature to ratify it. Mr. Hamlin commented that it was a source of some concern to him that doubt about the validity of this amendment might spawn several years of prolonged litigation before the issue was finally settled one way or the other. He also recalled that, on past occasions, when the Council has promulgated a package of related ORCP amendments, it had asked the legislature to enact other related provisions which the Council deemed beyond its authority, and the legislature had never failed to act. Mr. Rasmussen, however, expressed reservations about approaching the legislature on this matter.

Mr. Lachenmeier asked for clarification as to whether any of the reservations being expressed reflected doubt on the part of any members that this amendment would constitute good policy. Mr. Hamlin and others responded that their only concerns were some doubt about whether this amendment would be within the Council's power and the time it would take to settle the matter in litigation unless the legislature ratifies this change. Discussion of this issue then concluded without any decision about the possibility of approaching the legislature.

Judge Marcus stated that he questioned the change from "any" to "the" on line 6, p. A-10 following "(2)." He added that, if a plaintiff knows or learns of multiple current residence addresses, he thought that mailings to all should be required. Mr. Rasmussen explained why he preferred staying with "the."

Mr. Lachenmeier said he had some concern about how people served by mail would learn that service was complete three or seven days after mailing rather than on the date they signed the receipt, assuming the latter happens after the former. He explained that he worried that people served by mail for which they sign a receipt would probably assume that the service was completed on the date they signed the receipt, whereas, if that event occurred more than three or seven days after mailing, the 30 days within which to appear and defend would have begun to run three days after mailing if to an address in Oregon, or seven days after mailing if to an address outside Oregon.

**Agenda Item No. 4: Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda and Attachment B to this agenda) (Ms. Tauman).** Ms. Tauman reported that the subcommittee had found no problems with ORCP 54 E presently requiring action by the Council. Mr. Alexander said that the

subcommittee had identified some issues relating to ORCP 17 warranting further consideration. Two of these, he said, were what the burden of proof is when sanctions under ORCP 17 D(4) are awarded in the form of monetary penalties payable to the court and what procedures should be followed. He stated that the corresponding changes to FRCP 11 in 1993 failed, in his opinion, to provide much guidance. He said that he thought the burden of proof should be the same as for punitive damages, i.e., clear and convincing. He concluding by noting that, especially since the PLF policy has a blanket exclusion for punitive sanctions, a real problem appears to have been created, and offered, as a subcommittee member, to try to draft some language to ameliorate it. There was general agreement with the idea of the subcommittee attempting to draft some apt language that at some point could either be recommended to the legislature or possibly incorporated in an amendment promulgated by the Council.

**Agenda Item No. 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 7-13-96 agenda) (Ms. Craine).** Ms. Craine confirmed that the subcommittee agreed with the point made in Mr. James Walsh's letter that the 24 hours notice-to-patient period provided by 55 I is totally inadequate and is often likely to have the practical effect of violating the patient-physician privilege. She added that Prof. Holland had learned from a conversation with Mr. Tom Cooney, who played an important role on behalf of the Oregon Medical Association (OMA) in getting section 55 I enacted by the 1995 legislature, that the OMA had no intention of narrowing or undermining the patient-physician privilege. Mr. Gaylord added that it was his understanding that the OMA's purpose was to take the burden off doctors and other health care providers, when served with a patient records subpoena, of determining whether the patient had waived, or was then willing to waive, the privilege. Ms. Craine confirmed that that was her understanding as well. She added that perhaps the Council, or the subcommittee, should have some interaction with the Procedure & Practice Committee, and Judge Marcus suggested there might be some consultation with the OMA.

Mr. Hart suggested that a window of 15 days, as opposed to only 24 hours, might best protect everyone's interests. Several members commented that the notice period would have to be different for trial, as opposed to discovery, subpoenas. Mr. Gaylord noted that the issue of what the notice period should be was separate and distinct from the effect of a subpoena on the privilege. This discussion concluded without any action on the Council's part.

**Agenda Item No. 6: Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (see Attachment B to 7-13-96**

**agenda)(Mr. Gaylord).** Mr. Gaylord stated that the floor was open for suggestions from any member about how and when to proceed. Judge Brockley noted that he had prepared a memo restating the basis for his continued opposition to requiring findings of fact and conclusions of law in connection with fee awards. Judge Marcus commented that effective appellate review is precluded in the absence of findings. Judge Brockley responded that his opposition to findings was not motivated by any desire to insulate trial judges from appellate review, but by his sense of priorities in the use of trial judges' time. Mr. Gaylord reiterated that feelings by various members about this issue were strong enough to prompt him to designate it as an agenda item which, it was decided by general agreement, should be continued to the next meeting. Mr. Gaylord also directed that a copy of Judge Brockley's memo be attached to the agenda of the next meeting so that members not present at the present meeting would have it, and because Judge Brockley had a conflict that will prevent him from attending the September 14 Council meeting.

**Agenda Item No. 7: Discussion of inquiry of Mr. Jim Nass on behalf of the OSB Appellate Practice Section pertaining to proposed bill that would amend ORCP 72 (see Attachment E to 7-13-96 agenda) (Mr. Gaylord).** Mr. Gaylord noted that Mr. Nass's letter does not ask the Council to take any action respecting ORCP 72 other than to line up behind the amendment to that rule contained in the Appellate Practice Section's proposed bill. There was general agreement with the substance of the proposed amendment. Judge Marcus, seconded by Mr. Rasmussen, moved that the Council formally inform the Appellate Practice Section that it approved the proposed amendment to ORCP 72. Judge Brockley stated he did not believe the Council should allow itself to be put in the position of endorsing or approving rules amendments prepared by others, with which there was general agreement. He therefore moved, seconded by Judge Brewer, to amend the Marcus motion to the effect that the Council tentatively adopt the ORCP 72 amendment as contained in Mr. Nass's letter. On unanimous voice vote, the Marcus motion, as amended by the Brockley motion, was agreed to. The amendment to ORCP 72 as thus tentatively adopted reads as follows:

**RULE 72**

**A. Immediate Execution; discretionary stay.** Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of 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.**

**Agenda Item No. 8: Old business (Mr. Gaylord).** In response to Mr. Gaylord's inquiry whether anyone wished to raise an item of old business, none was raised.

**Agenda Item No. 9: New business (see attached 7-11-96 memo from Prof. Holland re possible amendment to ORS 1.735(2)) (Mr. Gaylord).** Prof. Holland gave some background on the 1993 amendment to ORS 1.735(2) requiring that the exact text of any ORCP amendment promulgated by the Council be published to the bench and bar no less than 30 days prior to the meeting at which the vote to promulgate was taken. He added that the unintended, but unfortunate, effect of that amendment has been to make the October and November Council meetings prior to legislative sessions so useless that they are generally not held. He therefore suggested to the Council that it might want to vote to authorize Mr. Gaylord, as Chair, to seek an amendment to ORS 1.735(2) in the 1997 legislative session that would substitute "substance and intended effect" for "exact language." He added that the legislature might be approached either through the OSB if time permitted, or through the good offices of Senator Neil Bryant.

Mr. Hamlin suggested instead that there might be arranged a change in publication dates. Mr. Chuck Tauman was recognized by the Chair, and he suggested that publication of tentatively adopted amendments might be accomplished more quickly by use of inserts in the *OSB Bulletin* as opposed to the Judicial Advance Sheets. Messrs. Hamlin and Lachenmeier suggested a possible solution by way of breaking up tentatively adopted amendments, in the form published, into separate proposals in the manner that was done with the ORCP 22 amendments in the 1993-95 biennium. This discussion concluded with no motion or any other definite action taken respecting Prof. Holland's suggestion.

There followed brief discussion about the advisability of holding the scheduled August 10 meeting of the Council, at the conclusion of which it was generally agreed not to hold that meeting. Prof. Holland mentioned that, in light of the large number of items the Council would likely have to complete at the September 14 meeting, members should be prepared for the

possibility that that meeting might have to extend into the afternoon, in which event box lunches would be ordered.

**Agenda Item No. 10: Adjournment (Mr. Gaylord).** Without objection, Mr. Gaylord declared the meeting adjourned at 1:00 p.m.

Respectfully submitted,

Maury Holland
Executive Director

Oregon

DEPARTMENT OF
TRANSPORTATION
DMV Services
HEARINGS PROGRAM
(503) 945-7960
FAX (503) 945-5304
FILE CODE:

July 12, 1996

The Honorable Judge Dave Brewer
Lane Circuit Court
125 East 8th Avenue
Eugene OR 97401

Dear Judge Brewer:

Pursuant to our conversation of July 11, 1996, and in response to your letter, the Department of Transportation (ODOT) would welcome the change to ORCP 7 D(4) which would remove ODOT from being served or being the repository of summons and complaints.

ODOT supports the Council on Court Procedures' proposal for removal of this requirement. This change would reduce our administrative and systems cost.

Yours Truly,

Dwight D. Apple
Manager

DDA:lfl

John A. Kitzhaber
Governor

1905 Lana Avenue NE
Salem, OR 97314

**Attachment A to 9-14-96 Agenda**

***Draft of ORCP 7 with amendments proposed by ORCP 7 Subcommittee as of 9-14-96***

## 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**

**State Bar.**[1]

**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

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

[2] Language shown is added needed to conform to amendment of 7 B, p. 1 ln. 18 - p. 2 ln. 1 above, already tentatively adopted by the Council.

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

**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 **or by statute**,[3] substituted service shall be complete upon such

[3] The following is a proposed Staff Comment explaining the Council's intention in making this amendment and identical ones to 7 D(2)(c), (d) and D(4)(a)(i):

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, by first-class mail,** 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 **or by statute,** 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

7 D(2)(b), (c), (d) and (4)(a)(i) are amended by adding "or by statute" following: "For the purpose of computing any period of time prescribed or allowed by these rules, . . ." The purpose of these amendments is to provide the same date on which service of summons is deemed completed for purposes of any statutes referring to service of summons as the date of completion "[f]or the purpose . . . of these rules, . . ." The premise of these amendments is that service of summons is part of the law of procedure and is one of the matters included within the Council's mandate under ORS 1.735. These amendments are prompted by the view that multiple dates on which service of summons is deemed complete--one for purposes internal to the ORCP, and one or more others for purposes of various statutes--constitute an unnecessary complication in the law.

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, by first-class mail, 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 **or by statute**,[4] 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**, or by express mail, and by first-class mail**. For the purpose of computing any period of time prescribed or allowed by these rules **or by statute**,[5] 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 in no event later than the date on which the defendant signs a receipt for the registered, certified or express mailing**.[6]

**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

[4] *See* note 3 above.

[5] *See* note 3 above.

[6] Some people have said that the language added here is difficult to understand. The subcommittee believes a brief explanatory Staff Comment might help.

prescribed or allowed by these rules or by statute, 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 shall, except as otherwise expressly permitted, 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, or by express mail, and by first-class mail. Except as otherwise expressly provided, ~~F~~for the purpose of computing any period of time prescribed or allowed by these rules or by statute, 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 in no event later than the date on which the defendant signs a receipt for the registered, certified or express 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



9-13-96

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 the defendant signs a receipt for the registered, certified or express 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~~ **ORCP** 27 A(2).[7]

[7] The subcommittee suggests that, when there are references to provisions of other rules, the form of reference be simplified to "ORCP 27 A(2)," or whatever. This would replace the extremely wordy and cumberson traditional form of reference, which tends to read something like: "paragraph (a) of subsection A of Rule 27." The subcommittee does not suggest that all cross-references between rules be thus simplified at this time, but that the occasion of amending Rule 7 be used to start the process now. That will mean there will be some period of time during which there will be inconsistency in

**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~~ **ORCP** 27 B(2).[8]

**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,

usage within the ORCP, but the subcommittee does not think that will produce confusion. Perhaps early in the coming biennium, the Executive Director could prepare and propose all the amendments necessary to make this simpler form of cross-reference uniform throughout the ORCP. This simpler reference form could also be used for internal references within Rule 7, such as occurs in the new language proposed to be added in 7 D(3)(i), if the Council agrees with this suggestion. For now, however, cross-references internal to Rule 7 remain in the traditional form. If the Council disagrees with this suggestion, the existing forms can naturally be retained. There is a possibility that this simpler form of cross-reference might not be acceptable to the Legislative Counsel, who, of course, has final word on all matters of format. Speaking of the Legislative Counsel, this version of Rule 7 has been reformatted to conform to the official, ORS style.

[8] *See* note 7 above.

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~~ **other event giving rise to**[9] 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~~

[9] The subcommittee proposes adding these words because the phrase "accident, collision, or liability" does not make good sense. It debated whether simply to delete "liability," but decided against doing so because this tripartite phrase has a long history which the subcommittee did not want to risk disturbing.

~~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 shown by its return, did not effect service, the plaintiff may then serve the defendant by mailings made in accordance with paragraph (2)(d) of this subsection addressed to the defendant at:**

(A) any residence address provided by the defendant at the scene of the accident;

(B) the current residence address, if any, of the defendant shown in the driver records of the Department of Transportation; and

(C) any other address of the defendant known to the plaintiff at the time of making the mailings required by (A) and (B) which might result in actual notice to the defendant.

Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the registered, certified or express mailings required by (A), (B) and (C) above was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by (A), (B) and (C) above is made. If the mailing required by (C) is omitted because the plaintiff did not know of any address other than those specified in (A) and (B), the proof of service shall so certify.

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 (i) of this paragraph 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.~~ **Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph (i) of this paragraph may be recovered as provided in ORCP 68.**[10]

**D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph (i) of this paragraph are as provided in ORCP 68 A(2).**[11]

**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 **other event giving rise to**[12] liability, shall forthwith notify the Department of Transportation of any change of such defendant's address **occurring** within three years after such

[10] *See* note 7 above. The provision in Rule 68 is at p. 24, ln. 12-14.

[11] *See* notes 7 above and 14 above. The provision referred to as ORCP 69 A(2) is at p. 31, ln. 20 to p. 32, ln. 21.

[12] *See* note 9 above.

accident ~~or,~~ collision **or event**.[13]

~~D(4)(c) 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 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 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~~

[13] The subcommittee believes that, at an appropriate time, the Council suggest to the legislature that D(4)(b), which was added by the legislature some years ago at the Council's request, be deleted from the ORCP and added to the Oregon Vehicle Code, where it would seem to belong. This paragraph obviously imposes a substantive legal obligation quite remote from rules of civil procedure. However, the Council does not recommend deleting this provision at this time, since it was inserted by the legislature and has no exact counterpart in the Vehicle Code or anywhere else that we can locate.

~~method specified in subsection D(3) of this rule.~~[14]

**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~~ **by certified or registered mail, return receipt requested, or by express mail, and by**

[14] D(4)(c) in its entirely is transferred Rule 69 to become subsection 69 A(2), the text of which follows at p 31, ln. 20 to p. 32 ln. 21 .

first-class mail,[15] 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 than 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

[15] Amended for consistency in wording with amendment to D(2)(d).

**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 **the** defendant's ~~post office~~ **current** address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and **the** complaint to the defendant **at such address by certified or registered mail, return receipt requested, or by express mail, and by first-class mail.** ~~When~~ **If** the **current** address of any defendant is not known ~~or~~ **and** cannot be ascertained upon diligent inquiry, a copy of the summons and **the** complaint shall be mailed **by the methods specified above** to the defendant at **the** defendant's last known address. If **the** plaintiff does not know, and cannot ascertain upon diligent inquiry, the ~~present~~ **current** ~~or~~ **and the** last known address of the defendant, mailing **of** a copy of the summons and **the** complaint is not required.

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, or by express mail, and by first-class mail.[16] 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.[17]

[16] Amended for consistency in wording with D(2)(d).

[17] Query by MJH, whether D(6)(d) shouldn't be amended as follows:

> **D(6)(d) Mailing summons and complaint.** If service by publication is ordered and defendant's ~~post office~~ current 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, or by express mail, and by first-class mail. ~~When~~ If the current address of any defendant is not known ~~or~~ and cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain~~,~~ upon diligent inquiry, the ~~present~~ current or last known address of the defendant, mailing a copy of

**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,~~ **ORCP 20 I and J,**[18] 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

the summons and complaint is not required.

[18] *See* note 7 above.

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, a defendant cannot** be served with summons by any method ~~specified~~ **authorized** in ~~subsection D(3) of this~~ **these** rule**s or other rule or statute** if **service pursuant to subparagraph (4)(a)(i) of this section is not authorized and** the plaintiff attempted service of summons by all ~~of~~ the methods ~~specified~~ **authorized** in subsection ~~D~~(3) **of this section for service on 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~~ **ORCP** 68.

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, a defendant cannot** be served with summons by any method ~~specified~~ **authorized** 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)**, and in subsection D(4) if applicable, of this rule 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 6~~ **ORCP** 68.[19]

[19] *See* note 7 above.

**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 first-class**[20] 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

[20] Added at last minute by Holland and without consulting subcommittee, but seems obviously helpful, if not essential.

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,

**subsection D(1) of this rule, the court shall also disregard any error in the service of summons that does not violate the due process rights of the party against whom summons was issued.**[21]

**H. Telegraphic Transmission.** A summons and complaint may be transmitted by telegraph as provided in ~~Rule~~ **ORCP** 8 D.[22]

[21] The subcommittee strongly suggests that a Staff Comment be prepared, pertinent to this amendment, explaining the Council's intent.

[22] See note 7 above.

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

**A. Definitions.** As used in this rule:

**A(1) *Attorney fees.*** "Attorney fees" are the reasonable value of legal services related to the prosecution or defense of an action.

**A(2) *Costs and disbursements.*** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; **any fee charged by the Department of Transportation for providing address information concerning a party served with summons pursuant to ORCP 7 D(4)(a)(i);**[23] the compensation of referees; the expense of copying of any public record, book, or document admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The

[23] *See* note 7 above.

expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

**B. Allowance of costs and disbursements.** In any action, costs and disbursements shall be allowed to the prevailing party, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs. If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements.

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

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

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

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

C(2)(a) Alleging Right to Attorney Fees. A party seeking attorney fees shall allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in this subsection.

C(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be alleged in such motion, in similar form to the allegations required in a pleading.

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

C(2)(d) Any allegation of a right to attorney fees in a pleading or motion shall be deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing.

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

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

**C(4)(a) Filing and serving statement of attorney fees and costs and disbursements.** A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to ~~Rule~~ ORCP 67,[24]

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with ~~Rule~~ ORCP 9 C;[25] and

C(4)(a)(ii) Serve, in accordance with ~~Rule~~ ORCP 9 B,[26] a copy of the statement on all parties who are not in default for failure to appear.

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

[24] *See* note 7 above.

[25] *See* note 7 above.

[26] *See* note 7 above.

may be amended in accordance with ~~Rule~~ ORCP 23.[27]

**C(4)(c) Hearing on objections.**

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

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

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

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

**C(5)(a) As part of judgment.** When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to ~~Rule~~ ORCP 67[28] is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

**C(5)(b) By supplemental judgment; notice.** When any issue regarding attorney fees or costs and disbursements has not

[27] *See* note 7 above.

[28] *See* note 7 above.

been determined before a judgment pursuant to ~~Rule~~ ORCP 67[29] is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in ~~Rule~~ ORCP 70 B(1).[30]

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

**C(6)(a) Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims pursuant to ~~Rule~~ ORCP 67 B,[31] the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

**C(6)(b) Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where

[29] *See* note 7 above.

[30] *See* note 7 above.

[31] *See* note 7 above.

pursuant to ~~Rule~~ **ORCP** 67 B[32] separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

[32] *See* note 7 above.

## RULE 69. DEFAULT ORDERS AND JUDGMENTS

### A. Entry of Order of Default.

**A(1) *In General.*** When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to ~~Rule~~ **ORCP** 7[33] or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

**A(2) *Certain motor vehicle cases.*** Notwithstanding

[33] ***See note 7 above.***

subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to ORCP 7 D(4)(a)(i)[34] unless the plaintiff submits an affidavit showing:

A(2)(a) that summons was served as provided in ORCP 7 D(4)(a)(i)[35] and that all mailings to the defendant required thereby have been made; and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and complaint, together with notice of intent to apply for an order of default, to the insurance carrier by certified or registered mail, return receipt requested, or by express mail; or that the identity of the defendant's insurance carrier is unknown to the plaintiff; and

A(2)(c) that service of summons could not be had by any method authorized for service on the defendant by ORCP 7 D(3).

**B. Entry of Default Judgment.**

[34] *See* note 7 above.

[35] *See* note 7 above.

**B(1)** ***By the court or the clerk.*** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or a person who is incapacitated or financially incapable, as defined by ORS 125.005, and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to ~~Rule~~ **ORCP** 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).[36]

**B(2)** ***By the court.*** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or a person

[36] *See* note 7 above.

who is incapacitated or financially incapable, as defined by ORS 125.005, unless the minor or person has a general guardian or is represented in the action by another representative as provided in ~~Rule~~ **ORCP**[37] 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

**B(3)** ***Amount of judgment.*** The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to ~~Rule~~ **ORCP** 68.[38]

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

[37] *See* note 7 above.

[38] *See* note 7 above.

**C. Setting Aside Default.** For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with ~~Rule~~ **ORCP** 71 B and C.[39]

**D. Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of ~~Rule~~ **ORCP** 67 B.[40]

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

[39] *See* note 7 above.

[40] *See* note 7 above.

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

* * * * *

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

* * * * *

C(4)(c) **Hearing on objections.**

* * * * *

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 except as otherwise required by law.

* * * * *

**COUNCIL ACTION**

The Council at its 6/8/96 meeting tentatively voted to adopt the above amendment proposed by Bruce Hamlin (7 in favor, 5 opposed and 2 abstaining). Eleven of the 14 members indicated they favored the Council giving more comprehensive consideration to broader issues that might be posed.

The Council at its 7/13/96 meeting postponed discussion of Justice Durham's June 10, 1996 memo (Attachment B to 7-13-96 agenda). Please see attached page D-2 of that memo. Justice Durham has indicated that he will have another proposed amendment addressing Judge Brockley's concerns (see attached memo from Judge Brockley dated 7/8/96).

See also attached pages reflecting Council actions during the 1993-95 biennium.

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

Excerpt from Justice Durham's 6-10-96 memo

**COUNCIL ON COURT PROCEDURES**
**1221 University of Oregon**
**School of Law**
**Eugene, OR 97403**

**Telephone: (541) 346-3990**

September 3, 1996

TO: **CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Maury Holland, Executive Director M.J.H.

Re: **Added Pages to Attachment B of 9-14-96 Agenda**

Per Justice Durham's request, please insert the pages attached as pages B-2-a - B-2-f of Attachment B to the agenda of the 9-14-96 Council meeting previously distributed.

# MEMO

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

**FROM:** Hon. Robert D. Durham RD

**SUBJECT:** Supplemental Memorandum Re Finding to Support Attorney Fee Award, ORCP 68 C(4)(c)(ii)

**DATE:** September 3, 1996

In my memorandum to you dated June 10, 1996, I proposed an amendment to ORCP 64C(4)(c)(ii) that would require findings, if requested, regarding an award of attorney fees.

Judge Sid Brockley stated a valid criticism of my proposal in his memorandum to you (circulated to the council) dated July 8, 1996. He pointed out, correctly, that my proposed phrase "determines the issue" could lead to unnecessary procedural arguments about the rule's operation.

I wish to amend my proposal regarding ORCP 68C(4)(c)(ii) as follows:

"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 any necessary findings of fact and conclusions of law regarding an award or denial of attorney fees if requested by a party. A party waives the right to request that the trial court make findings of fact and conclusions of law if the party fails to incorporate the request into the statement or objection filed under ORCP 68C(4)(a) or (b). [No findings of fact or conclusions of law shall be necessary except as otherwise required by law.]" (Proposed change underscored; deleted material in brackets.)

Here are the reasons for my proposed changes.

1. "Any necessary" findings and conclusions.

I added the phrase "any necessary" as a modifier for "findings of fact" and "conclusions of law." I did so to stress that the trial court should resolve only the disputes of fact or law that are material to the award or denial of fees. For example, if a party objects to a statement of attorney fees on the ground that the statement contains a mathematical error, the court should make a necessary finding that resolves that claimed error. The rule should not obligate the judge to make other findings about other potential factual disputes that neither the

court nor the parties consider to be material issues.

Some Council members may believe that the phrase "any necessary" states an implicit requirement and that it is, for that reason, unneeded. I include it simply to make it crystal clear that my proposed rule applies only to those disputes that make a genuine difference in the award or denial of attorney fees.

2. Waiver.

Responding to Judge Brockley's comments, I have advanced the point in time by which the moving or responding party must request findings or conclusions from the court. Following the model of ORCP 62A (regarding findings of fact for a trial) and UTCR 4.050 (regarding a request for oral argument on a motion in a civil case), I have provided that a party waives the right to request findings and conclusions unless the party incorporates the request into the statement of fees or the objection. Thus, a party is under a burden to request findings and conclusions in the party's first post-judgment filing regarding attorney fees. In the absence of a request in that first filing, the right to make the request is waived, the trial court would have no obligation to make findings or conclusions, and the issue of lack of findings is foreclosed on appeal.

With due respect to Judge Brockley, I declined to impose an obligation to request findings regarding attorney fees prior to the commencement of trial, as he had suggested. I had several reasons. First, parties frequently have no reason to request findings until the statement of attorney fees is filed after judgment. We should not obligate a party to request findings before they are aware of the facts that give rise to a need for findings in the first place.

Second, ORCP 62A obligates the trial court to make findings about issues that arise during the trial. However, under ORCP 68, attorney fee issues arise not from the evidence at trial, but rather from the statement of attorney fees, objections thereto, and any evidence concerning those documents. ORCP 68C(4)(c)(i) provides:

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

In view of that rule, it seems procedurally odd to require parties to request findings before trial. The attorney fee issues that the trial judge must resolve all arise after

judgment.

Third, requiring a pretrial request for findings on attorney fees probably would lead to unnecessary precautionary requests for findings, which in turn would compel trial courts to make findings on attorney fees even though, after judgment, the parties may no longer care about such findings. No one would benefit from a rule that may lead to unnecessary trial court work.

In summary, I presently am persuaded that the correct rule is one that obligates the parties to make their request for findings regarding attorney fees in their first post-judgment filing about that subject, and imposes a waiver if they fail to make a timely request.

On separate but related matter, I would have no objection to adding a requirement that the request for findings be set forth in the caption or the first paragraph of the statement of fees or objection. In general, that is the procedure now followed for requesting oral argument on a motion under UTCR 5.050. That procedure may help trial judges by preventing a party from burying a request for findings in the body of a lengthy statement of fees or an objection.

If the Council desires to adopt that procedure, I

suggest that last sentence of my proposal be modified, as follows:

> "A party waives the right to request that the trial court make findings of fact and conclusions of law if the part fails to incorporate the request into the [caption of/the first paragraph of] the statement or objection filed under ORCP 68 C(4)(a) or (b)."
> (Alternative wording underlined and bracketed.)

Thank you for considering these proposed modifications.

cc: Professor Maury Holland

**COUNCIL ON COURT PROCEDURES**
**1221 University of Oregon**
**School of Law**
**Eugene, OR 97403**

**Telephone: (541) 346-3990**

September 3, 1996

TO: **CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Maury Holland, Executive Director M.J.H.

Re: **Added Pages to Attachment B of 9-14-96 Agenda**

Per Justice Durham's request, please insert the pages attached as pages B-2-a - B-2-f of Attachment B to the agenda of the 9-14-96 Council meeting previously distributed.

# MEMO

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

**FROM:** Hon. Robert D. Durham RD

**SUBJECT:** Supplemental Memorandum Re Finding to Support Attorney Fee Award, ORCP 68 C(4)(c)(ii)

**DATE:** September 3, 1996

In my memorandum to you dated June 10, 1996, I proposed an amendment to ORCP 64C(4)(c)(ii) that would require findings, if requested, regarding an award of attorney fees.

Judge Sid Brockley stated a valid criticism of my proposal in his memorandum to you (circulated to the council) dated July 8, 1996. He pointed out, correctly, that my proposed phrase "determines the issue" could lead to unnecessary procedural arguments about the rule's operation.

I wish to amend my proposal regarding ORCP 68C(4)(c)(ii) as follows:

"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 any necessary findings of fact and conclusions of law regarding an award or denial of attorney fees if requested by a party. A party waives the right to request that the trial court make findings of fact and conclusions of law if the party fails to incorporate the request into the statement or objection filed under ORCP 68C(4)(a) or (b). [No findings of fact or conclusions of law shall be necessary except as otherwise required by law.]" (Proposed change underscored; deleted material in brackets.)

Here are the reasons for my proposed changes.

1. "Any necessary" findings and conclusions.

I added the phrase "any necessary" as a modifier for "findings of fact" and "conclusions of law." I did so to stress that the trial court should resolve only the disputes of fact or law that are material to the award or denial of fees. For example, if a party objects to a statement of attorney fees on the ground that the statement contains a mathematical error, the court should make a necessary finding that resolves that claimed error. The rule should not obligate the judge to make other findings about other potential factual disputes that neither the

court nor the parties consider to be material issues.

Some Council members may believe that the phrase "any necessary" states an implicit requirement and that it is, for that reason, unneeded. I include it simply to make it crystal clear that my proposed rule applies only to those disputes that make a genuine difference in the award or denial of attorney fees.

2. Waiver.

Responding to Judge Brockley's comments, I have advanced the point in time by which the moving or responding party must request findings or conclusions from the court. Following the model of ORCP 62A (regarding findings of fact for a trial) and UTCR 4.050 (regarding a request for oral argument on a motion in a civil case), I have provided that a party waives the right to request findings and conclusions unless the party incorporates the request into the statement of fees or the objection. Thus, a party is under a burden to request findings and conclusions in the party's first post-judgment filing regarding attorney fees. In the absence of a request in that first filing, the right to make the request is waived, the trial court would have no obligation to make findings or conclusions, and the issue of lack of findings is foreclosed on appeal.

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

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judgment.

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In summary, I presently am persuaded that the correct rule is one that obligates the parties to make their request for findings regarding attorney fees in their first post-judgment filing about that subject, and imposes a waiver if they fail to make a timely request.

On separate but related matter, I would have no objection to adding a requirement that the request for findings be set forth in the caption or the first paragraph of the statement of fees or objection. In general, that is the procedure now followed for requesting oral argument on a motion under UTCR 5.050. That procedure may help trial judges by preventing a party from burying a request for findings in the body of a lengthy statement of fees or an objection.

If the Council desires to adopt that procedure, I

suggest that last sentence of my proposal be modified, as follows:

> "A party waives the right to request that the trial court make findings of fact and conclusions of law if the part fails to incorporate the request into the [caption of/the first paragraph of] the statement or objection filed under ORCP 68 C(4)(a) or (b)."
> (Alternative wording underlined and bracketed.)

Thank you for considering these proposed modifications.

cc: Professor Maury Holland

M E M O

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

FROM: Sid Brockley

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

DATE: July 8, 1996

I write in response to Justice Durham's thoughtful memo of June 10, 1996.

I do not support the proposal for reasons often expressed.

I suggest that, if the Council were to adopt the proposal, the Rule should require that findings be requested prior to commencement of trial, as is the case with findings requested under ORCP 62A.

This requirement would:

1) allow the trial judge to consider the issues during trial;

2) establish a uniform procedure for requests for findings, and

3) avoid procedural arguments as to the meaning of the words "determines the issue". (Does the court determine the issue by pronouncing an oral decision, writing a letter, signing an order or entering an order?) (Is the issue the net award or each individual sub-issue?)

cc: R.D. Durham

**RULE 68**

**(Council actions during 1993-95 biennium)**

ATTACHMENT B-4

MINUTES OF COUNCIL MEETING 4/16/94

* * *

**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.

* * *

~~Attachment B-6~~
~~(See Agenda Item 6)~~

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

## ATTORNEYS AT LAW

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OF COUNSEL
GEORGE N. GROSS
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April 27, 1994

Steve Shepard
Attorney at Law
Suite 302
767 Willamette St.
Eugene OR 97401

Nancy Tauman
Attorney at Law
P.O. Box 667
Oregon City OR 97045

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 B-6

~~Attachment B-7~~



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

ATTACHMENT B-7

MINUTES OF COUNCIL MEETING 5/14/94

* * *

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.

* * *

MINUTES OF COUNCIL MEETING 7/16/94

* * *

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.

* * *

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).

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

**MINUTES OF COUNCIL MEETING 9/10/94**

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.

***

**MINUTES OF COUNCIL MEETING 12/10/94**

***

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.

***

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August 27, 1996

**Via Facsimile**

Ms. Gilma Henthorne
University of Oregon
School of Law
1101 Kincaid Street
Eugene, OR 97403-1221

Dear Gilma:

In answer to Maury's call to action, I have spoken with Tom Cooney and crafted two alternative proposals for the Council's consideration at its September 14 meeting relating to ORCP 55 I. Subsection (2) of this rule contains a somewhat controversial 24-hour notice requirement that most Council members believe should be 15 days. Rudy Lachenmeier made the noteworthy suggestion that, sometimes, less than 15 days is required. Consequently, and with the concurrence of Tom Cooney who originally drafted 55 I on behalf of the Oregon Medical Association, I inserted language permitting the court to enlarge or shorten the 15-day period. At our next meeting, therefore, Council members can approve a 15-day modification or, preferably, the 15-day - unless the court orders otherwise - proposal. I enclose copies of both proposals.

Finally, in accordance with the express wishes of several Council members, I have inserted a short comment to the effect that ORCP 55 I does not change the various health care provider-patient privileges set forth in Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

Maury might want to alter the format of the comment.

I hope this proposal reaches you in adequate time to distribute it to other members of the Council.

Best personal regards,

John E. Hart

JEH:clh
enclosures
cc: Diana Craine
William Gaylord
Rudy Lachenmeier

# Council on Court Procedures

# Amendments to ORCP 55 I(2)

# Relating to Subpoenaing Medical Records

Proposed Language A:

I(2) *Manner of Service.* If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

Proposed Language B:

I(2) *Manner of Service.* If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient ~~at least 24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. This 15-day period may be shortened or lengthened as the court may direct. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient ~~at least 24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. This 15-day period may be shortened or lengthened as the court may direct. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

Proposed Comment: ORCP 55 I does not change the various doctor-patient privileges set forth in Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

**DEPOSITIONS UPON ORAL EXAMINATION**
**RULE 39**

* * * * *

**I Perpetuation of testimony after commencement of action.**

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

* * * * *

I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice~~, unless~~**. However,** the court in which the action is pending ~~allows~~ **may allow** a shorter period **for a perpetuation deposition before or during trial** upon a showing of good cause.

* * * * *

**COUNCIL ACTION**

The Council at its 3/9/96 meeting voted unanimously to tentatively adopt the above amendment. Please see attached page 2 of the minutes of that meeting. Note that the proposed amendment did not coincide with the actual wording of the Oregon Revised Statutes; the above version reflects the correct additions and deletions.

was as modified by the second indented paragraph, shown in bold face type, as appears on page 3 of said minutes.

Mr. Rasmussen asked whether the proposed language is sufficiently clear as to whether the term "a shorter period" is intended to refer to the time when a perpetuation deposition is taken, the time by which notice of such deposition is given, or to both. Justice Durham responded that he thought the phrase "before or during trial" removes any ambiguity on that score. Mr. Hamlin noted that the modification contained in the second indented paragraph drops the final clause, "upon a showing of good cause," and questioned whether that was intended. Justice Durham suggested that the concept of "upon a showing of good cause" might be implicit in the phrase "the court may." Judge Marcus, however, noted that, to him, the words "upon a showing of good cause" convey a sense that something a bit stronger must be shown than when courts are asked to exercise their discretion regarding matters that are routinely granted. It was agreed that "upon a showing of good cause" had not been intended to be omitted, and therefore should be restored. Judge Marcus, seconded by Justice Durham, then moved tentative adoption of ORCP 39 I(4) in the following language {language added highlighted; language deleted shown in strikeover}:

> I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice ~~unless the court in which the action is pending allows a shorter period~~. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause.

Mr. Lachenmeier expressed some concern about whether adoption of this amendment might have some negative impact on whatever future efforts might be made to authorize admission of "live" video testimony in jury trials by means of satellite link-ups or the like. No other members expressed a similar concern. On the call of the question, the Council thereupon unanimously voted tentatively to adopt the amendment to ORCP 39 I(4) as set forth above.

**Agenda Item 4: Preliminary report of committee to study and review ORCP 7 (Judge Brewer).** Judge Brewer reported on a phone conference conducted with all committee members, in addition to Prof. Holland, and summarized a "First Committee Report--March 9, 1996," copies of which were distributed at the meeting to the members. (Copy attached to these minutes.) Among the aspects of ORCP 7 practice he stated his committee is examining are whether the prerequisites for "DOT service" pursuant to 7 D(4)(a) and court-ordered service pursuant to 7 D(6), as mandated by ORCP 7

STAY OF PROCEEDINGS
TO ENFORCE JUDGMENT
RULE 72

**A Immediate execution; discretionary stay.** Execution or other proceedings 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.**

* * * * *

**COUNCIL ACTION**

At its 7/13/96 meeting, the Council voted unanimously to adopt the above amendment proposed by the Appellate Practice Section of the Oregon State Bar (see attached letter from James W. Nass).

Attachment E to 7-13-96 Agen

# SUPREME COURT COURT of APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97310

RECORDS SECTION
503-986-5555
Fax 503-986-5560
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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
Glnl Linder, Chair, Legislation Committee

g:corr.mls

ATTACHMENT E-2

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

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July 12, 1996

MEMO TO: COUNCIL ON COURT PROCEDURES

FROM: ORCP 17 COMMITTEE

RE: SANCTIONS

This committee initially undertook to review ORCP 54(E) and 17. We previously concluded that 54(E) properly reflected the legislative intent and turned our attention to ORCP 17. Particularly, we have focused on ORCP 17(D)(4) which allows sanctions which "...may include monetary penalties payable to the court."

One of the specific questions was whether there should be some higher burden of proof to impose such a "penalty", as opposed to the showing necessary to impose other sanctions, such as attorney's fees payable to a party opposing a motion.

ORCP 17 was modeled after FRCP 11, and we thought that the Federal authorities might shed some light on the nature of the proof required for the assessment of a monetary penalty.

Unfortunately, the Federal cases are not of much assistance. The addition of a provision for penalties was added by a 1993 amendment to the Federal rules. The committee notes to such amendment discuss in some detail the fact that the test for imposition of sanctions is an objective one, thus eliminating any "empty-head pure-heart" justification for patently frivolous arguments. However, the history of the rule does not really address any higher burden of proof for the imposition of monetary sanctions on an attorney or a party.

The committee notes to the rule do point out a number of factors to be considered in determining whether to impose a sanction, and the amount of such sanction. The following is a non-exclusive list:

> Whether the improper conduct was wilful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other

> **litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should ont be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.**

The notes go on to point out that Rule 7 sanctions are principally to deter rather than to compensate, and feel that any monetary sanction should ordinarily be paid into court as a penalty, unless it would be appropriate to reimburse the opposing party for the costs associated with the defense of a frivolous claim.

Moore's Federal Practice Treatise also discusses sanctions under Rule 11. The only portion which seemed relevant to the issue before the subcommittee is found at pages 11-70 - 11-70.1:

> **"When the sanction to be imposed includes a fine, instead of simple reimbursement for the opposing party's costs and attorney's fees, the sanctioned individuals may be entitled to the protections of Fed.R.Crim.P.42(b), since a fine imposed under Rule 11 is analogous to one imposed for criminal contempt."**

Therefore, there is little guidance that we have found in terms of Federal authorities interpreting the penalty provisions of FRCP 11. It perhaps might be helpful to discuss with the Council at large whether it would nevertheless be appropriate, and within our statutory authority, to propose substantive requirements for the imposition of the penalties now included within the scope of ORCP 17.

In discussing sanctions, there is another matter which the Council may want to address in general. This is beyond the direct scope of the our duties, but has been brought to the attention of this committee. It involves sanctions as they relate to the exclusions in the Professional Liability Fund's policy of insurance.

Exclusion 3(d) to our plan reads as follows:

**"This plan does not apply to that part of any claim: 1) asserted directly against a covered party for punitive or exemplary damages, fines, sanctions, or penalties, or 2) asserted directly or indirectly against the covered party, arising out of the imposition on the covered party or others of any attorney's fees, costs, fines, penalties, sanctions, or other amounts imposed under any Federal or State statute, administrative rule, court rule, or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses."**

To my knowledge, this exclusion has been present in the PLF policy for some period of time. It certainly predated the recent changes to Rule 17. It probably also predated our own Supreme Court's opinion in the case of Seeley v. Hanson, 317 Or 476, 857 P2d 121 (1993).

The Seeley case, and FRCP 11, clearly point out that sanctions may be imposed due to an "improper purpose", but this is an alternative justification. An objective lack of merit in a claim will also give rise to a potential sanction.

Therefore, an attorney and/or his client may be subject to sanctions for conduct which is neither wilful nor taken in bad faith, but is instead only negligent, or perhaps grossly negligent. Even though there is no deliberate wrongdoing, this sanction is not going to be covered. In other words, the attorney is not protected against innocent wrongdoing. This seems contrary to the purpose for which we purchase insurance.

These sanctions can also create a significant conflict of interest, since they can be imposed against a party or an attorney. There are circumstances where sanctions might be appropriate against an attorney for pursuing a non-meritorious claim, or there may be situations where a sanction may be more appropriately imposed against a party who has supplied inaccurate or false information to an attorney, who relied upon some information in pursuing a claim which then turns out to be without merit. At any rate, when a sanction is imposed against either an attorney or the party, there is an immediate potential for conflict concerning who should bear the sanction. This conflict in and of itself is difficult enough, but it creates even more problems when there is no insurance to potentially cover such loss.

Obviously, neither attorneys nor their clients should be insured for deliberate wrongdoing or other intentional misconduct. However, it might be prudent for the PLF to re-examine its exclusion in light of the development of the current rules and case

law concerning the mental element necessary for sanctions to be imposed. A suggestion from the Council, or another Bar group, might trigger such an inquiry.

JMA/jb

**LAC Subcommittee**
**Internal Rules**

At the Council's 4/13/96 meeting, the Council voted to adopt the FIRST RULE on page 2 of the attached letter from Mick Alexander.

The FIRST RULE was incorporated into the Council's Rules of Procedure rewritten by Bruce Hamlin (also attached).

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

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March 18, 1996

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Honorable Michael H. Marcus
Circuit Judge
Multnomah County Courthouse
1021 SW 4th Ave.
Portland OR 97204

RE: LAC Subcommittee
Internal Rules

Dear Subcommittee Members:

I reviewed my letter of January 23rd, John's letter of January 1st, Marianne's letter of January 16th, and Judge Marcus' letter of March 4th. I am enclosing all of this correspondence for your convenience. I have tried to integrate some of the proposed editorial changes to the internal rules that I initially drafted. I am also taking into account John's preference for the shortened version of the proposed rule which I characterized as the "Brockley" rule in my prior letter. I am going to set forth both the longer proposed rules, and the Brockley rule. My office will then call yours to set up a conference call so that we can hopefully reach an agreement as members of the subcommittee for an approved proposal to submit to the entire council.

Here are what I consider the alternative internal rules governing the LAC. The first tracks my prior three proposed

internal rules, and the last is the Brockley Rule:

FIRST RULE:

When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the council unless one of the following has occurred:

1. The council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

2. The LAC, after a request by a legislative committee, has presented any proposal to the council, and the council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the council on court procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has not obtained the approval of the council concerning the content of his testimony, shall not represent to the legislative committee that such member speaks for the council, but shall only identify himself as a member of the council, a member of the LAC, and expressly indicate that he is not authorized to speak on behalf of the council.

The alternative Rule is as follows:

**The LAC shall not exercise its statutory discretion to take a position on behalf of the council, nor shall any member of the LAC indicate that he is taking a position on behalf of the council, unless the position to be taken has been previously approved by a super majority of the council.**

Sincerely,

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

J. Michael Alexander

JMA/jb
Encls.

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at such time and place fixed by the Chair after any appropriate consultation with the Executive Committee. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place and purpose of such meeting shall be given personally by telephone or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of the meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, SUBCOMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a period of one year at the first meeting of the Council following October 1 of each year. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to them by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Subcommittees. The Chair may appoint such subcommittees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. Such subcommittee shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee selected pursuant to ORCP 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a) (last sentence).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

1. The Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

2. The LAC, after a request by a legislative committee, has presented any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the Council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has not obtained the approval of the Council concerning the content of his testimony, shall not represent to the Legislative Committee that such member speaks for the Council, but shall only identify him or herself as a member of the Council, a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

## III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff, maintenance of records of the council, presentation and submission of minutes of the meetings of the Council, provision of required notice of meetings of the Council, preparation and disbursement of Council agenda and receipt and preparation of suggestions for modification of rules of pleading, practice and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the State Court Administrator's office and shall be paid out only by the State Court Administrator as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept in such office under the supervision of the Executive Director.

## IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice and procedure as it deems appropriate at its meetings. Thirty days before the meeting at which final action is to be taken on the promulgation, modification or repeal, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the rules and amendments which have been proposed, and notice that copies of any specific rules and amendments proposed may be secured upon request from the Administrative Office of the Council. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed amendments and rules of procedure.

Thereafter, the Executive Director shall distribute to the members of the Council a draft of the tentative final action to be taken to amend or adopt rules of pleading, practice and procedure as directed by the Council, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct, and the Council shall take final action to modify, repeal or adopt rules of pleading, practice and procedure and direct submission of such amendments and rules and any list of statutory sections affected thereby, together with explanatory comment, to the legislature before the beginning of the regular session of the legislature.