

May 24, 1996

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

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

Re: Item of New Business

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

SUPREME COURT



COURT of APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97310

RECORDS SECTION
503-986-3555
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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,

Jim Nass
James W. Nass

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

g:corr.mlx

Post-it* Fax Note	7671	Date	5-22	# of pages	9
To	Prof. Maury Holland	From	Jim Nass		
Co./Dept.	U of O Law School	Co.	Or. Court of Appeals		
Phone #	541 346-3834	Phone #	503 986-3563		
Fax #		Fax #			

Senate Bill _____

SUMMARY

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

5 A BILL FOR AN ACT

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

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

9 SECTION 1. ORS 19.033 is amended to read:

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

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

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

26 (2) * * * *

27 (3) * * * *

28 (4) * * * *

29 (5) * * * *

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

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

10 SECTION 2. ORS 19.038 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

1 SECTION 5. ORS 19.040 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 SECTION 8. ORCP 72 is amended to read:

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