***** NOTICE *****

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES

Saturday, October 30, 1999
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. Alexander)
2. Approval of minutes of Dec. 12, 1998 meeting (copy attached)
3. Introduction of new members (Mr. Alexander)
4. Report on 1999 Legislative Assembly (Prof. Holland) (Attachment A)
5. Discussion of possible items for Council's 1999-2001 agenda (Mr. Alexander) (Attachment B)
6. Discussion of Council's meeting schedule (Mr. Alexander)
7. Old business
8. New business
9. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of December 12, 1998
Oregon State Bar Center
Lake Oswego, Oregon

Present:
Lisa A. Amato
J. Michael Alexander
Bruce J. Brothers
Anna J. Brown
Lisa C. Brown
Ted Carp
Kathryn S. Chase
Allan H. Coon
Diana L. Craine
Don A. Dickey
Robert D. Durham
William A. Gaylord
Bruce C. Hamlin
Daniel L. Harris
Rodger J. Isaacson
Virginia L. Linder
Connie Elkins McKelvey
John H. McMillan
Michael H. Marcus
David B. Paradis
Nancy S. Tauman

(Note: Karsten Hans Rasmussen attended a portion of the meeting via speaker telephone.)

The following guests were in attendance: Bob Oleson of the Oregon State Bar; Amanda Williams, of the office of David Barrows, Portland; J.R. (Scotty) Pettigrew of the Oregon Process Servers Association. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Bruce Hamlin). Mr. Hamlin called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of September 12, 1998 minutes (Mr. Hamlin). The minutes of the Council's September 12, 1998 meeting were adopted as distributed with the agenda of this meeting, with the exception that in the list of those members present, Bill Gaylord should be included as being present.

Agenda Item 3: Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Hamlin).

a. ORCP 68 C(4). After brief discussion it was decided that it would not be feasible to vote on the attached tentatively adopted amendments as a package. Mr. Hamlin stated that, since the time during which Mr. Rasmussen could participate in the meeting by telephone was limited, he proposed to begin by consideration of the two alternative versions of the amendments to ORCP 68 C(4).

Mr. Gaylord said that he favored that either alternative be adopted in preference to adoption of neither, but thought that Alternative 1 would be the better choice because he believed it

would result in fewer requests for findings and conclusions being made. Judge Marcus, seconded by Mr. Paradis, moved adoption of Alternative 1. Mr. McMillan asked for clarification of how the two alternative versions differed from one another. Mr. Hamlin responded that Alternative 1 would permit requests to be made at a later time than would Alternative 2. Mr. Alexander commented that, if Alternative 2 were adopted, it would result in findings being requested almost automatically, even in many cases where neither party really wanted or needed them. Judge Dickey said that he preferred Alternative 2 because that was the version preferred by all the judges who had submitted comments.

In response to a suggestion by several members, Mr. Hamlin asked for a straw poll as to preferences between Alternatives 1 and 2. Eleven members then indicated a preference for Alternative 1, and 11 members a preference for Alternative 2. No member indicated a preference that neither version be adopted. Judge Harris then stated that he wished to change his straw vote to support Alternative 1, and Ms. McKelvey stated she wished to change her straw vote to support Alternative 2. Judge Marcus, in response to Mr. McMillan's question as to why he favored Alternative 1, said that in relatively few cases involving attorney fee awards does any party really want findings, and that Alternative 1 would tend to limit requests for findings to those cases where a party really does want them.

Justice Durham noted that, while he was not opposed to Alternative 1, his preference was for Alternative 2, largely out of respect for the view expressed by trial judges, and added that should Alternative 2 prove undesirable in actual practice, he would be willing to see the Council reconsider this issue in the next biennium. Judge Carp expressed agreement with this view. Judge Marcus stated that, as between the two versions under consideration, the clear preference of the Judicial Conference would be for Alternative 1.

Mr. Rasmussen, seconded by Judge Harris, moved that the pending motion be amended to substitute Alternative 2 for Alternative 1. This motion was agreed to by vote of 13 in favor, 7 opposed, with the chair abstaining. Mr. Hamlin then called for a binding vote on the main motion, as amended, to adopt Alternative 2. Mr. Gaylord said that he had been persuaded by the views expressed by Justice Durham, and would therefore vote in favor of the main motion. **The main motion, as amended, was then agreed to by a vote of 23 in favor, none opposed, and no abstentions.**

At this point Mr. Rasmussen said he had to discontinue his telephonic participation in the meeting. Mr. Hamlin, in response to a query from Mr. Gaylord about when consideration would be given to the draft Staff Comments to the amendments just adopted, said he would defer such consideration until later in the meeting so that any member who might have to leave before the conclusion of the meeting would be able to vote on all tentatively adopted

amendments.

b. ORCP 7 D(2)(b) and 7 E. Judge Marcus, seconded by Justice Durham, moved adoption of the proposed amendments to these provisions. **Without discussion this motion was agreed to by vote of 22 in favor, none opposed, and no abstentions.**

c. ORCP 7 D(3)(a) and 69 A. Mr. Hamlin reminded members that the Council's options were to not adopt either proposed new subparagraph 7 D(3)(a)(iv) or proposed new subsection 69 A(3), to adopt the former without the latter, or to adopt both proposed provisions. At the suggestion of Judge Brewer Mr. Hamlin asked for a straw vote on how much support existed for each of the aforementioned options. This straw vote showed that 13 members favored adoption of proposed subparagraph 7 D(3)(a)(iv) without adoption of proposed subsection 69 A(3), and that seven members favored adoption of both proposed provisions. No member expressed support for the option of adopting neither proposed provision.

Mr. Gaylord stated that he did not regard proposed subparagraph 7 D(3)(a)(iv) and subsection 69 A(3) as alternatives as to which a choice should be registered by a single vote, but as separate proposals as to each of which a vote should be taken. He then moved, seconded by Justice Durham, that proposed subparagraph 7 D(3)(a)(iv), the basic provision for mail agent service, be adopted, but that proposed 69 A(3) not be adopted.

Judge Marcus expressed strong opposition to this motion, stating that inclusion of proposed 69 A(3), with its requirement that due diligence be shown by affidavit, would entail very little extra effort on the part of attorneys, but would cause them to be more meticulous in their efforts to effect service in the appropriate, more traditional manner, and therefore might occasionally protect perfectly law-abiding persons against the possibility of being seriously damaged if mail agent service did not result in actual, timely notice. He added that mail agents are presently under no legal obligation to forward summonses and complaints to their customers when served in this manner, and that the mere fact that a given defendant uses mail agent services should not be understood as evidencing an intent to evade service. He concluded by saying that he would vote against adoption of proposed 7 D(3)(a)(iv) without proposed 69 A(3) because he believed that would pose some risk of harm without any justification for it.

Mr. Hamlin then asked Ms. Amanda Williams, representing the Oregon Association of Process Servers, whether she wished to offer any comments on this matter. Ms. Williams responded that the Association would like to see adoption of proposed 7 D(3)(a)(iv), with or without proposed 69 A(3), but that its preference was for adoption of 7 D(3)(a)(iv) without 69 A(3).

Mr. Gaylord stated that he favored adoption of 7 D(3)(a)(iv) without 69 A(3). He pointed out that customers of mail agent

services have made a voluntary designation of their mail agent's establishment as the place at which they wished to be contacted. He added that he did not believe that adding a requirement of a due diligence affidavit would afford defendants served in this manner any greater level of due process, because if a default were entered and subsequently challenged, the party which had used mail agent service would have to show what efforts had been made to locate the defendant, at which point the affidavit would not be controlling. Judge Brewer expressed agreement with this view, and added that he thought it very important that the chair make clear to members that they could vote in favor of proposed 7 D(3)(a)(iv) without thereby binding themselves either way with respect to proposed 69 A(3). In response Mr. Hamlin stated that the ensuing vote on Mr. Gaylord's motion would be understood to relate only to 7 D(3)(a)(iv), and that if the vote were to adopt that proposal, a separate vote would subsequently be taken on whether to adopt 69 A(3). **On the call of the question, Mr. Gaylord's motion, as thus understood, was agreed to by vote of 21 in favor, none opposed, and no abstentions.**

Judge Marcus, seconded by Ms. Chase, moved adoption of proposed subsection 69 A(3). He reiterated his strongly held opinion that failure to accompany adoption of the mail agent service provision by adoption of the due diligence affidavit requirement would gratuitously create some risk of injustice to mail agent customers, and do so for no good reason. He analogized inclusion of 69 A(3) to the greater protection afforded by installing better brakes on new cars. **On the call of the question, Judge Marcus's motion was not agreed to by vote of seven in favor, 13 opposed, and no abstentions.**

d. ORCP 39 D and E. Judge Marcus commented that there appeared to be relatively little support for these proposed amendments, and a belief that, if adopted, they would constitute over-regulation. Ms. Tauman expressed agreement with this opinion. Mr. Hamlin asked Mr. Brothers, chair of the subcommittee which drafted the pending amendments, to recapitulate how they originated and evolved. Mr. Brothers responded that these amendments originated from a request by the OSB Procedure and Practice Committee that the Council consider amending Rule 39 to deal more effectively with what that Committee perceived to be a growing and increasingly state-wide problem of excessive and unfounded obstruction to the taking of oral depositions. Examples of such obstruction provided by the Committee, Mr. Brothers continued, were unjustified instruction by counsel to deponents not to answer questions, argumentative objections to questions, and interruptions of depositions while a question is pending. He noted that, in response to criticisms at a previous meeting, the proposed amendments had been revised to make them less detailed in their proscriptions.

Judge Carp said that he wished to express two concerns on

behalf of Mr. Rasmussen, based on the latter's extensive experience in taking and defending depositions and as a current member of the Procedure and Practice Committee. The first concern was that proposed paragraph 39 D(3) could have the effect of unduly restricting the circumstances in which defending counsel might properly instruct a deponent not to answer a question. Mr. Rasmussen's second concern, as related by Judge Carp, was that the Procedure and Practice Committee clearly believed that there is a problem of obstruction of depositions which requires a state-wide response, presumably in the form of one or more amendments to ORCP 39, and that the Committee continues to favor the amendments presently under consideration. Judge Carp added that proposed paragraph 39 D(3) would regulate what goes on at depositions considerably less stringently than do the Multnomah County Circuit Deposition Guidelines and less stringently than is true in federal court. Mr. Brothers commented that, on the assumption that the Council would do something to deal with this problem on a state-wide basis, he had discouraged adoption of a local rule in Deschutes County. Judge Brown expressed surprise that a proposed amendment as controversial as this appeared to be had elicited only one comment in response to publication of the amendment in the advance sheets.

Justice Durham, seconded by Judge Brewer, made a motion to lay this proposal on the table, which he explained would mean that, for the present, the Council would not go on record as either finally adopting or voting down this proposed amendment. He further explained his reason for so moving, which was his sense that not enough information had been gathered concerning the extent and seriousness of the problem to which the proposed amendment would respond to warrant either its adoption or definitive rejection at this point. Judge Isaacson questioned what impact, if any, the Council's deferring decision on this matter would have on adoptions of Supplemental Local Rules intended to address the problem of obstruction of depositions. Mr. Hamlin expressed some concern that if the Council decided to do nothing, even if only temporarily, that might create an impression that the Council is unresponsive to civil practice problems identified by the Bar, specifically the Procedure and Practice Committee, and also might encourage proliferation of Supplemental Local Rules more restrictive of what counsel defending depositions can properly do than anything the Council would seriously consider.

Mr. Gaylord said he was opposed to the motion to table this item. He further stated that the concerns he had expressed at an earlier meeting, that the originally proposed version of 39 D(3) would unduly restrict defending counsel from instructing deponents not to answer questions intruding upon privileged matters and the like, had been satisfactorily met by the subcommittee's revisions as reflected in the currently pending proposal. He added that he believed the Procedure and Practice Committee had acted correctly

in bringing this problem to the Council's attention, and that he had some worry that, if the Council were now to do nothing, the OSB might cause legislation to be introduced which could result in a less desirable solution than what is contained in the current proposal. **On the call of the question, the motion to table this item was not agreed to by vote of four in favor, 16 opposed, and no abstentions.**

Judge Brewer explained that his reason for seconding Justice Durham's motion to table this proposal was not because he disagreed with it, but because he was concerned about the apparent lack of consensus on the subcommittee which prepared it. He further explained that this proposal deals with an area of practice as to which some differences in local rules might be appropriate to reflect differences in experience encountered in various parts of the state. Mr. Brothers reiterated the point that many local bar associations were working on the perceived problem addressed by this proposal, and stated his agreement with Mr. Gaylord's point that if the Council fails to act, other groups might.

Mr. Brothers, seconded by Judge Carp, then moved adoption of the proposed amendments to ORCP 39 D and E. Judge Brown stated that she strongly supported the motion because she believed that the problem of obstruction of depositions is a serious and recurring one which badly needs addressing. Ms. McKelvey stated that she would vote against this motion because she believed the proposal was premature and failed to address some significant issues which she thought required further careful consideration. **On the call of the question, Mr. Brothers' motion was agreed to by vote of 16 in favor, three opposed, and one abstention.**

e. ORCP 55 I(2). Judge Marcus, seconded by Judge Carp, moved adoption of the proposed amendments to subsection 55 I(2). **On the call of the question, this motion was agreed to by vote of 19 in favor, none opposed, and no abstentions.** Judge Brown, chair of the subcommittee tasked with studying problems assertedly being experienced in connection with hospital and medical records subpoenas, reported that this subcommittee had met several times during this biennium, had put in a good deal of hard work, but did not have sufficient time to complete its difficult task. She added that this work would presumably be carried over to the 1999-2001 biennium, when the Council and any subcommittee assigned to this project would have the benefit of the considerable work her subcommittee had accomplished, but was unable to complete.

f. ORCP 70 A(2). Mr. Hamlin reminded members that these proposed amendments were referred to the Council by the OSB Debtor/Creditor Section, not for promulgation, but for any comments and suggestions the Council might have. He also recalled

that, at the Council's September 12 '98 meeting, Mr. Gaylord's motion was agreed to that these proposed amendments be published in the October advance sheets together with the other ORCP amendments tentatively adopted by the Council, so that comments might be obtained from the bench and bar, and so that the Council would retain the option of promulgating these amendments. Mr Hamlin noted that the reason the Debtor/Creditor Section had asked the Council for any comments members might have, rather than that the Council promulgate these amendments, was that the amendments were integral parts of legislation which the OSB would cause to be introduced in the 1999 legislative session.

Mr. Hamlin asked whether there had been any reaction on the part of the Debtor/Creditor Section to the fact that the Council had published these amendments for the purpose of possibly promulgating them independently of anything the OSB might do by way of proposed legislation. Prof. Holland replied that the Debtor/Creditor Section was pleased to have the Council's support for these amendments, but added his own caution that for the Council to independently promulgate these amendments might not be wise, first because the statutory amendments of which these subsection 70 A(2) amendments are a part might not be enacted and, secondly, because if the statutory changes are enacted and these amendments are also promulgated by the Council, the former would have an earlier effective date than the latter, thereby possibly creating confusion.

Judge Marcus moved that these amendments be endorsed, but not promulgated, by the Council, but this motion was not seconded. Mr. Gaylord then moved, seconded by Judge Isaacson, that a formal vote of members be taken on whether to endorse these amendments and, if the amendments were thus endorsed, that the Legislature be informed, both of the fact of the Council's endorsement and of the reason the amendments were not promulgated. **This motion was then agreed to by vote of 19 in favor, none opposed, and no abstentions.**

g. Staff Comments. Several members suggested revisions to Staff Comments to one or more of the amendments adopted for promulgation as prepared by Prof. Holland. He, with accustomed docility, agreed that all suggested revisions would be reflected in the Staff Comments as published.

Agenda Item 4: Election of 1999 Legislative Advisory Committee ("LAC"). Mr. Hamlin declared the floor open for nomination of members to compose the 1999 LAC. The following were unanimously so elected: Mr. Alexander, Judge Dickey, Mr. Gaylord, Judge Linder, and Mr. McMillan.

Agenda Item 5: Election of 1999 Officers. Justice Durham nominated the following members for the offices indicated, to serve during the year 1999: Mr. Hamlin to be Chair, Mr.

Alexander to be Vice Chair, and Mr. McMillan to be Treasurer. Mr. Hamlin asked for any additional nominations. There were no such nominations. Judge Brewer moved, and was duly seconded, that nominations be closed, and this was unanimously agreed to.

Agenda Item 6: Old business. Judge Brown said that it would be useful for the Council to confirm the authority of the Rule 55 subcommittee to continue its work during the interim period before the Council's first meeting in the coming biennium. Mr. Hamlin replied that he was sure that he was expressing the sense of the Council in stating that any work which the Rule 55 subcommittee, its chair, and members could manage to accomplish during the interim period would be most welcome and appreciated. He added that he anticipated that a Rule 55 subcommittee would be reappointed at the Council's first meeting in the 1999-2001 biennium, comprised of continuing members willing to serve, to which other members might be added.

Judge Brown circulated a copy of a recent order and opinion of Multnomah County Circuit Court Judge David Gernant ordering a party to permit the adverse party to depose certain of the former's intended expert witnesses. Several members stated that they would like to have a copy of this order and opinion, and Prof. Holland said he would make and send copies to all members.

Agenda Item 7: New business. Justice Durham mentioned that Chief Justice Carson had recently commented to him about how the "exact language" requirement of ORS 1.735(2) is so rigid that it would prohibit the Council from acting upon suggestions received during the comment period following publication of tentatively adopted amendments in the October advance sheets, regardless of how much they might improve draftsmanship, but without changing the meaning of published amendments. The example used by Chief Justice Carson was that ORS 1.735(2) would prohibit the Council from changing "phone" to "telephone." Justice Durham stated that he was inclined to agree with the Chief Justice's comment, and would like to see the Council give some consideration to how this procedural problem might be addressed, possibly, though not necessarily, by asking the Legislature to amend or repeal ORS 1.735(2). Mr. Hamlin expressed agreement with this thought.

Agenda Item 8: Adjournment. Without objection Mr. Hamlin declared the meeting adjourned at 12:31 p.m.

Respectfully submitted,

Maury Holland
Executive Director

Attachment A

Summary of 1999 Session of the Legislative Assembly

1. None of the ORCP amendments promulgated by the Council at its Dec. 12, 1998 meeting was disapproved or modified.

2. The amendments to ORCP 70 A(2)(a) proposed by the OSB on behalf of the Debtor/Creditor Section, which were endorsed but not promulgated by the Council, were enacted as part of SB 415, which also amended ORS 18.350 and 46.488.

3. ORCP 46 B(1) and 55 C(1) were amended by SB 564 to delete the obsolete references to "district court." (These should have been done by the Council, and I apologize for my failure to catch them in time.)

4. ORCP 47 C was amended by HB 2721 as follows (language deleted in strikeout; language added in bold):

> **C Motion and proceedings thereon.** The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The ~~judgment sought shall be rendered forthwith~~ **court shall enter judgment for the moving party** if the pleadings, depositions, **affidavits** and admissions on file~~, together with the affidavits, if any,~~ show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. **The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit under section E of this rule.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The LAC was not consulted, or invited to testify, about this statutory amendment.

Attachment B

October 20, 1999

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland, Executive Director

Re: Some ORCP and Legislative Issues for Possible Consideration in the 1999-2001 Biennium

The Council's past practice has been to give first priority to possible problems concerning the ORCP about which members have become aware from their own experience, or which are brought to the Council's attention by communications from judges, attorneys, or occasionally such groups as process servers. That is doubtless how it should be and is likely to remain. In fact, dealing with "live" issues of that current and practical sort seems to take up nearly all the Council's available time and effort, at least has done so in recent biennia.

However, early in the last biennium, in the interest of enabling the Council to become a bit more "pro-active," I was asked to write up something inviting its attention to other possible defects in the ORCP, or ways they might be improved, derived primarily from studying appellate opinions in which one or more ORCP provisions are construed or discussed. The items shown below result from that exercise, together with items suggested by others, including, in one instance, the Oregon Supreme Court. Also included are three items which would require legislative action, two of which have to do with the Council itself rather than the ORCP. Naturally, it is entirely up to the informed, collective judgment of the Council to decide which, if any, of the following items to pursue.

1. Can and should ORCP 54 E be amended in some manner to avoid the conflict of interest possibly created between attorney and client when an offer to allow judgment is made in the form of a single lump sum stated in the offer as including attorney fees, costs and disbursements, and damages? [Suggested by Justice Gillette in footnote 4 of his opinion in *For Counsel, Inc. v. Northwest Web Co*, 329 Or 246, 255, __P2d__ (1999).] Rather than summarizing this opinion or restating the issue which Justice Gillette recommended the Council consider, I've attached the text of this quite short opinion as Attachment B-I to this memo.

2. Possible need to rectify arguably anomalous difference between ORCP 7 D(2)(c) and 7 D(3)(b)(i) [Suggested by Ms. McKelvey based upon a "real life" question which recently arose in her firm]. The question is, when service is made on a corporation pursuant to ORCP 7 D(3)(b)(i) "by personal service upon any clerk on duty in the office of a registered agent," in this instance a secretary in the registered agent's office, does that constitute a form of office service such that the follow-up mailing required for office service is necessary to complete service?

My view is that the answer to this question is "no." The language of

D(2)(b) (substituted service) and D(2)(c) (office service) clearly states that service is complete only on the date of the follow-up mailing required for both those methods of service, whereas D(3)(b)(i) says nothing about follow-up mailing.

If the Council agrees that there is no problem here of lack of clarity, a possible issue for consideration might be reformulated as whether it makes good sense for 7 D(2)(c) to require follow-up mailing in connection with office service, but not to require it in connection with what seems substantially identical to office service, but where the defendant is a corporation. I would guess that the Council would not favor eliminating the follow-up mailing requirements for either substituted or office service, so the issue really comes down to whether that requirement should be added to D(3)(b)(i) and possibly other service methods which resemble substituted or office service.

3. <u>Discovery of expert witnesses; ORCP 36.</u> (See Attachment B-II). It is with some trepidation that I include this item, because it has definitely been a "hot potato" from the time the first Council drafted the original ORCP in 1978. The minutes of those early meetings show that the Council initially decided to depart from the antecedent Oregon discovery statutes by authorizing, for the first time in Oregon practice, limited discovery of expert witnesses more or less along the lines of what is now FRCP 26(b)(4)(A).[1] However, in response to arguments of some members and an outpouring of communications from the bar opposing expert discovery, the Council changed its mind, as it also did with respect to abandonment of fact in favor of notice pleading.

The current problem, if there is one, derives from the fact that the original Council chose not to prohibit expert discovery explicitly, but drafted discovery rules, especially ORCP 36, which at least arguably authorize it. A fair reading of the minutes of meetings where discovery was discussed and debated would, however, I believe leave the reader with the sense that the intent of the original Council, in not saying one thing or the other with the explicitness of FRCP. 26(b)(4)(A), was that expert discovery is not permitted, which was how matters had stood under the statutory predecessors of the ORCP discovery rules.

Since the ORCP became effective Jan. 1, 1980, the Council has revisited the question of expert discovery on at least one, and possibly more, occasions. The most recent one was in 1992, when some members suggested that this issue be reconsidered. At the meeting at which whether even to consider this suggestion was decided, more lawyers appeared to "testify" against it than I've ever seen at any Council meeting. Then-Chief Judge Owen Panner was the principal "witness" in opposition. He told the Council that, based on his long experience in both state and federal courts, he believed that Oregon's discovery rules are, on balance, better than the corresponding federal rules, especially with regard to expert discovery, because, in his view, the federal discovery rules are productive of greater expense, longer delay, and a host of

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[1] FRCP 26(b)(4)(a) provides in relevant part: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." The current FRCP 26(a)(2) also requires "initial disclosure" of the identity of all prospective expert witnesses, the substance of the opinions to which they are expected to testify, and the bases for such opinions. But this provision was not part of Rule 26 in 1978.

complexities which he did not think worth whatever benefits they provide. The Council was persuaded to drop the matter, and no specific amendment was ever produced for its consideration.

Regardless of whether one favors or opposes expert discovery as a matter of policy, there seems to be room for doubt whether expert discovery is permitted under the current rules. This is illustrated by Judge David Gernant's letter opinion dated 12/8/98 (Attachment B-II) ordering, over plaintiff's objection, depositions of one or more of plaintiff's expert witnesses. The reasoning of Judge Gernant's opinion seems to me compelling. That is, ORCP 36-46 do not, as many seem to assume, actually say nothing about expert discovery, but in fact do authorize it, though not as clearly or explicitly as FRCP 26(b)(4) does. I agree with Judge Gernant that opinions of prospective expert witnesses are certainly within the general scope of discovery under ORCP 36 B(1),[2] are not normally protected by any evidentiary privilege recognized by Oregon law, and would not, at least when sought by means of oral deposition, come within ORCP 36 B(3)'s definition of "trial preparation materials," which extends only to "documents and tangible things."

Despite the point just made, my impression, and it is no more than that, is that the majority of Oregon judges and trial lawyers believe, or simply assume, that expert discovery is not permitted in Oregon practice. The basis for this belief must be folklore, buttressed by the strong legislative history against expert discovery. There is also the existence of ORCP 47 E,[3] which would make little or no sense were the identities or opinions of expert witnesses discoverable. But Judge Gernant is one judge who does not share that belief. Council members will know whether enough other circuit court judges share his view, or are merely in doubt about the question, and therefore whether the Council should now decide the issue one way or the other and promulgate one or more amendments accordingly. On one or two past occasions, Judge Marcus has commented that he does not find in ORCP 36-46 any clear answer to the question whether or not expert discovery is permitted in Oregon practice.

Given the contentiousness of this issue, it seems surprising that, after 20 years under the ORCP, no appellate opinion has yet resolved it. As you know, it is very difficult to get most discovery rulings reviewed on appeal to the Court of Appeals from a final trial court judgment. As far as mandamus in the Supreme Court is concerned, it is hard to believe that a writ has never been sought concerning this issue, but I find nothing in the reports indicating that one has ever been granted.

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[2] ORCP 36 B(1) states in part: "[P]arties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . ."

[3] "E. Affidavit of Attorney When Expert Opinion Required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. . . . ."

If that is accurate, I'm prepared to venture a guess as to why this has been, and is likely to remain, so. My guess is that the justices have been waiting for the Council to do its job by amending ORCP 36 to speak clearly to the issue of expert discovery one way or the other. If that is indeed the case, the reason for the justices' reluctance to resolve this issue might be that it is preeminently one of pure policy and rule-drafting, essentially legislative in character, and therefore not particularly apt for judicial resolution in the absence of clear guidance from the text of statutes or rules of court.

Given some background of which new members will be unaware, there is one thing I wish to add that normally wouldn't need saying. There seems to have arisen suspicion on the part of one or more members that I have some kind of personal ax to grind, and harbor a wish to see the Council authorize expert discovery. First, my personal view about the pros and cons of expert discovery, or any other policy issues relating to the ORCP, does not influence anything I do as Executive Director.

Secondly, I happen not to have a personal view on this subject. This is a matter which seems to me entirely practical in nature, and thus I believe that the only people whose views are entitled to be taken seriously concerning it are judges, particularly trial judges, and trial lawyers, especially those who, like many current members of the Council, have considerable experience actually litigating cases under both the federal and the Oregon discovery rules. That is something I have never done, and almost certainly never will. The only consideration of which I am aware possibly arguing in favor of expert discovery is that Oregon is today the only U.S. jurisdiction where most lawyers and judges appear to believe it is not permitted, even though I join Judge Gernant in thinking the discovery rules actually provide that it is.

4. Impleader of third-party defendants under ORCP 22 C(1).

(a) This question came to my attention, not from reading appellate opinions, but from receiving a phone call from a Portland lawyer who actually encountered it. This lawyer represents the sole defendant, an aircraft component manufacturer, in a product liability and negligence case. He timely served a summons and third-party complaint claiming that, pursuant to ORS 18.470(2),[4] the alleged fault of the third-party defendant should be compared with any fault attributed to his client. The third-party defendant responded

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[4] ORS 18.470(2) in relevant part provides: "The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of any third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. . . ."

ORS 18.485 must have been applicable to the case recounted to me by this lawyer, in which event any liability of his client and that of the third-party defendant would be several, but not joint. Thus, this lawyer's purpose in trying to bring in the third-party defendant was not to seek contribution, but so that the client's share of the total damages recovered by the plaintiff might be proportionately reduced in accordance with any comparative fault assigned to the third-party defendant.

with a motion to dismiss the third-party complaint on the ground of misjoinder, arguing that, pursuant to ORCP 22 C(1), impleader is permitted only when the third-party complaint alleges that the third-party defendant "is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff . . ." Recently the lawyer who contacted me informed me that his motion for leave to serve the third-party complaint was denied on the ground that this kind of joinder is not authorized by ORCP 22 C(1)

The problem with 22 C(1) is that, if my understanding of comparative fault and several liability is correct, it appears not to fit with ORS 18.470(2). Subsection 22 C(1) is a traditional impleader provision, and therefore limits third-party joinder to situations where liability is alleged to run from a third-party defendant to a third-party plaintiff by way of contribution or indemnification. However, ORS 18.470(2), as amended in 1995, in combination with ORS 18.485(1),[5] as also amended in 1995, clearly contemplates joinder of third-party defendants merely for the purpose of the trier of fact's comparing their alleged fault with the fault alleged on the part of one or more originally named defendants as third-party plaintiffs. The net effect under these new statutes might be substantially the same as under the traditional doctrine whereby each joint tortfeasor is liable for the whole amount of plaintiff's damages, with apportionment of such damages being accomplished by means of claims for contribution, but the legal theory of the new statutes is different. It is that difference which subsection 22 C(1) appears not to accommodate.

Please have in mind that while ORS 18.470(2), as well as other subsections of this statute, uses the term "third party defendants," the statute is not itself a joinder provision and says nothing about how third-party defendants come into existence. So far as I know, the only provision of Oregon law which speaks to that issue is ORCP 22 C(1). If the Council agrees with this analysis, a fix should be fairly easily accomplished.

(b) There is one other feature of ORCP 22 C(1) which might warrant reconsideration. It is the sentence reading: "Otherwise the third party plaintiff must obtain agreement of the parties who have appeared *and* leave of court." (Emphasis added.) There might be one somewhere, but I've not been able to find any other provision of the ORCP, or of the FRCP for that matter, which requires *both* agreement of all appearing parties *and* leave of court in order for some procedural step to be taken.

It seems to me worth noting, by way of comparison, that ORCP 23 A provides that, for amendment of a pleading more than 20 days after its being served, leave of court *or* "written consent of the adverse party" is required. An amended complaint could, of course, join one or more additional defendants, which strikes me as not very different from joinder of a third-party

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[5] ORS 18.485(1) provides: "Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint."

defendant.[6]

I assume, maybe incorrectly, that when all parties agree that a third-party complaint may be served more than 90 days after service of plaintiff's summons and complaint, the way this would be done on the record is by filing a consent or stipulated motion and order granting leave. Apart from class actions, do judges ever deny stipulated motions? Can anyone think of a reason why a judge might properly deny a stipulated motion in the context of third-party practice? I can't.

FRCP 14(a),[7] the federal counterpart of ORCP 22 C(1), requires leave of court for a third-party complaint to be served more than 10 days after service of the answer, and says nothing about "agreement of the parties" as an alternative to obtaining leave of court, much less as an added requirement. Almost certainly this provision contemplates that, when the parties have agreed, "leave of court" will take the form of a *pro forma* order attached to the stipulated motion.

Please note that FRCP 14(a) permits service of third-party complaints without leave of court only within 10 days of service of the answer, which would normally be within 30 days of service of plaintiff's complaint. Isn't this 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint? Just asking.

5. <u>Should not ORCP 67 C(2)[8] be amended?</u> What good purpose is served by this provision? Of course this limitation on the amount of damages a judgment may award makes good sense in the context of default judgments, but if C(2) were amended, that would still be provided for by C(1).

C(2) is an exception to the more general rule, stated in 67 C, that "[e]very judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings; . . ." But it is an exception which nearly swallows up the whole

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[6] Incidentally, wouldn't "written consent of the parties who have appeared" be slightly better than "written consent of the adverse party; . . ." which is the language now used in ORCP 23 A? When a litigation is going to be prolonged or complicated as can happen when pleadings are amended after the lapse of more than 20 after it is served, shouldn't all parties other than the one seeking to amend have a chance to object by withholding consent and, if the would-be amender persists by filing a contested motion for leave to amend, argue the reasons for objecting to the judge?

[7] ". . . The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. . . ."

[8] "Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount."

of the, in my opinion clearly sound, general rule.[9] Do not at least 90% of all civil actions involve a demand for money damages? If so, that means the supposedly general rule, that judgments shall award parties the relief to which they are shown to be entitled, applies only in the minority of cases where money damages are not demanded, such as where only injunctive or declaratory relief is sought.

In *Laursen v. Morris*, 103 Or App 538, 799 P2d 1232 (1990), the Court of Appeals approved, properly in my opinion, an end-run around 67 C(2). In this case the jury verdict awarded the plaintiff more than the amount of damages demanded in the complaint. Prior to judgment being entered on this verdict, the trial court granted the plaintiff's motion to amend the complaint so that the ad damnum would equal the amount awarded by the verdict. The Court of Appeals affirmed and ruled that 67 C(2) is not violated as long as the ad damnum is formally amended prior to entry of judgment.

Laursen left open the obvious question whether, if no motion is made to amend the ad damnum, or a motion is made but denied, and judgment is entered on a verdict awarding damages greater than demanded in the complaint, that would violate 67 C(2). If the answer to that question is no, then 67 C(2) becomes a dead letter for all practical purposes. If the answer is yes, then 67 C(2) constitutes a kind of Dickensian trap for the unwary.

6. **Subpoenas for hospital and medical Records; ORCP 44 and 55.** Continuing members will recall that this is the principal item left over from the 1997-99 biennial agenda, where a broad range of apparent problems in this area was studied by a subcommittee chaired by Judge Anna Brown. That subcommittee reported that those problems appear to be so many and so difficult to fix that this effort would have to be carried over to the 1999-2001 biennium, which I assume the Council will decide to do.

I have always found one aspect of Rule 44 puzzling. What puzzles me is, how can the obligation imposed by 44 C on parties claiming damages for personal injuries to provide, on request of a party against whom such claim is made, "a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply. . . ," be reconciled with ORS 40.280, OEC Rule 511,[10] whereby the mere commencement of litigation to recover for personal injuries does not waive the physician-patient privilege?

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[9] There is no comparable limitation on amounts awarded as damages in federal practice. *See* FRCP 54(c): "* * * Except as to a party against whom a judgment is entered by default, every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." While I have not checked the rules of the other fifty states, I strongly suspect the vast majority of them more closely resemble FRCP 54(c) than ORCP 67 C(2).

[10] "Voluntary disclosure [of privileged material] does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence." The material referred to in section 44 C as "written reports and existing notations of any examinations relating to injuries for which recovery is sought" would seem clearly to be protected by the physician-patient privilege under ORS 40.235(2), OEC Rule 504-1(2).

Is the answer to this query simply that the obligation to produce imposed by section 44 C comes into play only if and when the party alleging personal injuries waives the privilege, either expressly or by doing something like taking a discovery deposition inquiring into the nature and causes of those injuries? That explanation seems implausible, however, because why would a claimant ever take a discovery deposition inquiring about his or her own injuries?

Of course, the mere availability of discovery does not override evidentiary privileges, since pursuant to ORCP 36 B(1), no form of discovery may be had of privileged material unless the privilege has been somehow waived. Perhaps I'm failing to see something here, which would not be the first time that has happened, and none of you find section 44 C in the least bit confusing. If so, there would obviously be nothing the Council need concern itself with, and I'll just ask someone to explain that aspect of 44 C to me during a break. But there does seem, at least to me, something about the way 44 C is worded which makes it appear that the production obligation it imposes operates as a matter of course in a manner which simply ignores or somehow overrides the patient-physician privilege.

If this is indeed a problem, it is probably among the least of those which Judge Brown's subcommittee reported to be currently plaguing practice under Rules 44 and 55. The Council will almost certainly want a new subcommittee appointed to continue this work. One or more among the continuing members of the Council were members of Judge Brown's subcommittee.

7. **Deletion of the final sentence of ORCP 60.**[11] This provision, affording trial judges the option of dismissing a claim without prejudice rather than directing a verdict against the claimant, has been in Rule 60 since the ORCP became effective, and can be traced back through the statutory antecedents of the ORCP to Oregon's territorial code of procedure. The trial judge's option, to grant a dismissal without prejudice rather than direct a verdict, is a vestige of nineteenth-century procedure whereunder claimants were permitted to move for a voluntary "non-suit," without prejudice, at any time prior to the jury's retiring to consider its verdict[12] This option is not provided for in the federal counterpart of ORCP 60, FRCP 50(a).[13]

According to the language of ORCP 60, ordering a dismissal without

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[11] The final sentence of ORCP 60 is as follows: "If a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict."

[12] The procedural history of the voluntary non-suit and its relationship to the modern directed verdict is discussed quite extensively in *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077 (1943).

[13] "Rule 50(a) Judgment as a Matter of Law. (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

prejudice is an available alternative to directing a verdict, not, of course, to denying a directed verdict. Can anyone imagine any situation where a trial judge, confronted with a situation where a motion for a directed verdict should be granted, would instead order dismissal without prejudice? I cannot. Why would a judge ever do such a thing? On the basis of what criteria would the choice between directing a verdict and dismissing without prejudice possibly be made? Of course, there might be times when a claimant, or a party defending against a claim, would prefer to avoid the claim preclusive effect which entry of judgment on a directed verdict would have, and thus preserve the possibility of coming back for another bite at the apple. But would it ever be appropriate for a judge to produce that result? If not, it seems to me that the final sentence of ORCP 60 should go out.

I have found no appellate opinions discussing the rationale for the option this sentence provides or criteria for how it should be exercised. One reason the older procedure, dating from the nineteenth, and persisting in some jurisdictions well into the early twentieth century, permitted voluntary non-suits until virtually the conclusion of trials was that the rules governing amendments of pleadings were very strict, and amendments to conform to the evidence were virtually unknown. Thus, there was, by modern standards, remarkable solicitude toward litigants who suffered a failure of proof in the initial trial of a case. But in today's climate of crowded dockets, liberal amendments of pleadings, broadly transactional claim preclusion, and non-mutual issue preclusion, allowing any litigant to try the same case twice, for no better reason than a failure of proof the first time around, seems to me entirely out of bounds.

In what must be the extremely unusual situation where the trial judge finds that a failure of proof would warrant a directed verdict, but that for some extraordinary reason the failure of proof should be excused and the possibility of a second action preserved, the "safety valve" of granting a new trial pursuant to ORCP 64 B is always available, including for "newly discovered evidence" under B(4). Deleting the final sentence of ORCP 60, with its anomalous option for which no guidance is provided and criteria for its exercise are difficult to imagine, would point litigants and judges to ORCP 64 B, which where it seems to me the issue should be focused in those rare instances where it arises.

Another advantage of relying upon ORCP 64 B is that, unlike what would presumably happen if the final sentence of ORCP 60 were ever invoked, service of the summons and complaint would not have to be repeated, the case would not have to be repleaded, and no question would arise about the tolling of applicable periods of limitations.

The final sentence of ORCP 60 is anomalous in another respect. The option it provides is available only as an alternative to directing a verdict *against* a claimant. If this option makes any sense in any context, why isn't it also available as an alternative when a trial judge is on the point of directing a verdict *in favor* of a claimant?[14] Granted that directed verdicts

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[14] The answer to this question is, again, afforded by procedural history having scant relevance to modern practice. It is that "non-suits" happened, voluntarily or involuntarily, only to litigants who sued upon claims, or "causes of action" as they were then called. There was, of course, no procedure by which a party not suing, but being sued, and against which a verdict was about to be either returned or directed, could go away and come back another day better prepared. Obviously, the reason for this lack of

in favor of claimants are few and far between, but they must occasionally occur. Everything considered, the final sentence of ORCP 60 should, with apologies to Karl Marx, be consigned to the dustbin of history.

8. **Delete ORCP 64 B(5).**[15] One component of this subsection is superfluous and the other component is misleading. No one doubts that a judgment that is "against law" should be set aside. The problem is that it is impossible to imagine a judgment that would be "against law" in any sense not fully addressed by B(1), (2), (3), (4) or (6).[16]

I have not thoroughly researched all the reported decisions in which B(5) was discussed, but my preliminary check shows that the most recent opinion was in *Hightower v. Paulsen Truck Lines, Inc.*, 277 Or 65, 599 P2d 872 (1977), which dealt with ORS 17.610(6), the statutory predecessor of ORCP 64 B(5). There the court reversed the trial court's grant of defendant's new trial motion, the basis for which was the supposed failure of the jury to follow the instruction on contributory negligence. Although the opinion spoke in terms of whether the judgment was "against law," the analysis was actually focused upon whether the conflicting evidence supported a finding that plaintiff was not contributorily negligent.

If the superfluousness of "against law" were the only problem with 64

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symmetry was that plaintiffs normally have every incentive to avoid delay, whereas defendants might be tempted to encourage it, such as by being poorly prepared for trial the first time around.

[15] "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

* * *

B(5) Insufficiency of the evidence to justify the verdict or other decisions, or that it is against law."

[16] "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

"B(1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

"B(2) Misconduct of the jury or prevailing party.

"B(3) Accident or surprise which ordinary prudence could not have guarded against.

"B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

* * *

"B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application."

{Note: It might, or might not, be worthwhile changing to references to "application" to "motion."}

B(5), it might not be worth bothering about. However, its other component, "[i]nsufficiency of the evidence to justify the verdict or other decision, . . ." seems to me to have the potential of being confusing or misleading. The reason I find it misleading is because it implies that an Oregon trial court can grant a new trial on the ground of insufficiency of the evidence to support a verdict under circumstances where it could not grant a motion for jnov.

But that is not true. By virtue of Art. 7 (amended), Sec. 3 of the Oregon Constitution,[17] neither a trial nor an appellate court may grant a new trial if a jury verdict is supported by any evidence whatsoever or, as the standard is sometimes phrased, by even a "scintilla" of evidence. But if a verdict is not supported by any evidence, should not the trial court grant the verdict-loser jnov, assuming a motion therefor was timely made and that a proper motion for directed verdict had also been made?

"Insufficiency of the evidence to justify the verdict" makes perfectly good sense in federal practice and in most other states, where the evidentiary standard for granting a new trial is clearly distinguishable from the standard for granting jnov, or judgment as a matter of law as it now called in federal court. In federal practice, for example, the standard for granting judgment as a matter of law is that the verdict is not supported by "substantial evidence," the precise meaning of which has always been somewhat in doubt, but has been generally understood to mean something a bit more than a mere scintilla. However, the federal standard for granting a new trial on an evidentiary basis asks whether the verdict is contrary to the "manifest weight of the evidence." In other words, U.S. district judges are permitted to weigh evidence when ruling on new trial motions, whereas the Oregon Constitution prohibits Oregon trial judges from doing anything even approaching that.

Should the Council decide this matter is worth pursuing, at least one note of caution is in order. As you probably know, the Oregon Legislative Assembly has seen fit to borrow ORCP 64 as the rule governing new trials in criminal cases. If the Council decides to consider repealing 64 B(5) or otherwise tinkering with ORCP 64, care should be taken to avoid thereby inadvertently causing problems in the area of criminal procedure.

9. Should ORCP 63 C[18] be amended in light of *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*[19] In this opinion, the Supreme Court, sensibly in my opinion, read into the language of 63 C a limited meaning not expressed, or even hinted at, in that language. The issue is whether that limited meaning would usefully be expressed by language

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[17] "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. . . . ."

[18] "A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. . . . ."

[19] 325 Or 46, 932 P2d 1141 (1997), *modifying* 322 Or 406, 908 P2d 300 (1995).

amending this section.

To summarize this case, Tualatin recovered damages of $260,000 against Goodyear on a claim of common law fraud. Goodyear timely moved in the circuit court for jnov based on its contention that the fraud damages were not supported by the evidence. The trial judge denied this motion in a ruling that did not directly figure in the subsequent appeal. Goodyear filed no motion for new trial. In the Court of Appeals Goodyear successfully invoked the "we can't tell" or *Whinston* rule[20] to obtain a reversal and remand for new trial on the ground that some of the fraud allegations which had been submitted to the jury, over Goodyear's request that they not be submitted, were not supported by the evidence.[21]

In its initial opinion in this case, the Supreme Court reversed the Court of Appeals' grant of a new trial on the ground that, by failing to join a new trial motion with its jnov motion in the trial court, Goodyear had waived the right to seek a new trial in the trial court or on appeal.[22] In other words, the Court read 63 C to mean literally what it says.

The Supreme Court subsequently granted Goodyear's petition for reconsideration and, after reargument and re-briefing, modified its opinion and the portion of its original judgment which had reversed the Court of Appeals' grant of a new trial.[23] In contrast to the original holding to the effect that 63 C means precisely what it says, the Court held, in its opinion upon reconsideration, that a judgment-loser's failure to join a new trial motion with a jnov motion waives, both in the trial court and on appeal, only the right to seek a grant of a new trial on the same ground as that asserted in the jnov motion. Since the ground asserted in Goodyear's jnov motion had been different from the ground on the basis of which it sought and was granted a new trial by the Court of Appeals, the latter ruling was affirmed rather than reversed.

My suggestion is that the Council might consider two possibilities with respect to the waiver provision of 63 C. The easier, more obvious, and perhaps wiser possibility would be simply to add language to this section to express clearly the limited scope of the waiver to conform to the second *Goodyear* opinion. Admittedly, competent lawyers must understand the meaning of any ORCP provision, or statute for that matter, in light of appellate opinions construing it, when the apparent textual meaning of a provision is as significantly modified as happened in the second *Goodyear* opinion respecting 63 C, and when the modified meaning can be clearly stated by the addition of a few words, there might be some value in doing so.

The second, more venturesome possibility, of course, is that the Council might amend 63 C to entirely delete its waiver provision. I have traced back this provision to the statutes which pre-existed the ORCP, and found that it entered the statute books in the 1920's. I have not located any legislative

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[20] So called from *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990).

[21] 129 Or App 206, 879 P2d 193 (1994).

[22] 322 Or 406, 412, 908 P2d 300, 304 (1995)

[23] 325 Or 46, 932 P2d 1141 (1997).

history or other kind of explanation of why it was adopted, whose idea is was, or what it was intended to accomplish. The minutes of the original Council show that 63 C was simply taken over verbatim from its statutory predecessor, with no indication that its advisability was considered by the Council at that time. A cursory inspection of Council minutes since then disclosed no occasion when the Council has given any thought to the pros and cons of this waiver provision. The FRCP counterpart of ORCP 63 C contains no comparable provision.[24]

I don't see that any good purpose is served by this waiver provision, as either literally construed in the Supreme Court's original *Goodyear* opinion, or given the limiting construction in the opinion upon reconsideration. Reading between the lines of the original opinion, one gets the sense that the Supreme Court did not really discern any particular purpose for the waiver provision, but felt constrained to rule as it did because of the clarity with which waiver is mandated in 63 C.[25]

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[24] FRCP 50(b) If, for any reason, the court does not grant a motion for a judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury to the court's later deciding the legal questions raised by the motion. The movant may renew it request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

[25] Justice Gillette made a valiant effort to conjure up a rationale for the waiver provision, but, with respect, did not come up with anything very convincing. He speculated that, when a party against whom judgment has been entered moves for jnov but not for new trial, that might be because, unless the moving party can convert defeat into victory, it might prefer accepting defeat to the trouble and expense of a new trial even if the Court of Appeals would grant one. 322 Or at 412, 908 P2d at 303.

I contacted one of Goodyear's lawyers to ask why they failed to join a new trial motion with their jnov motion. The reason he gave had nothing to do with Goodyear's preferring defeat to the trouble and expense of a new trial, which is what it proceeded to seek and obtain in the Court of Appeals. The reason he gave was that Goodyear's lawyers thought their contention that some of the fraud allegations submitted to the jury were not supported by the evidence had been sufficiently argued to the trial judge such that renewing that argument by way of a new trial motion would be a waste of time. He also told me that Goodyear's principal argument the first time the case reached the Supreme Court was that 63 C's waiver provision applies only to waiver of new trial in the trial court, but not as a consequence of reversal on appeal. That argument the Supreme Court properly rejected. Of course, 63 C is a rule which governs proceedings in trial, not appellate, courts, but that is beside

One of Goodyear's lawyers told me that they were "totally shocked" by the Supreme Court's original holding in this case. This caused me to wonder why presumably competent lawyers would be shocked by the Supreme Court's simply applying the law as clearly expressed in 63 C--their shock threshold must be pretty low. The answer must be that at least these lawyers, and perhaps many others, never even considered the possibility that 63 C meant what it said. The only explanation I can imagine for that odd situation is that the waiver provision as it literally appears in 63 C makes so little sense that lawyers have difficulty believing it means what it says.

In its opinion on reconsideration, the Supreme Court was obviously persuaded that 63 C does not, or at least should not, mean what it says. The limiting construction formulated in the opinion on reconsideration will avoid the harm which the continued literal construction of the provision could do.

It certainly would have been helpful to the Supreme Court and to the *Goodyear* litigants if, prior to that case, the Council had done either one of two things.[26] First, if the Council had been able to anticipate the Supreme Court's conclusion upon reconsideration in *Goodyear* that 63 C understood literally makes no sense, and had added appropriate language anticipating the very limited scope of its waiver provision in accordance with that holding, that would have spared the Court and the parties the need for two arguments and briefings in this case.

The second thing the Council might have done would have been simply to delete the waiver provision altogether. Even though the Supreme Court has now established what 63 C means, and that meaning might be just fine, there is still the issue of whether that meaning should now be clearly expressed in the language of the rule. But, why go further, by even considering the possibility of deleting the waiver provision entirely?

Careful thought would have to be given to the matter, but I believe I'm correct in thinking that, given the narrowing construction of this waiver provision, there are no situations to which the provision could apply. That is, I cannot imagine any situation where a new trial could be sought on the same grounds as jnov. That, of course, would not be true if, as in federal practice, the evidentiary standard for granting a new trial were different from the standard for granting jnov, but, as you know, that is not the case in Oregon practice. That being so, would it not be better simply to delete the waiver provision altogether?

Some might be inclined to favor retention of this waiver provision in

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the point. If accepted, Goodyear's argument would mean that some contention could be waived in the trial court, but then retrieved on appeal. If appellate courts failed to enforce waiver rules governing proceedings in trial courts, the whole purpose of having such rules would be defeated.

[26] There might be others, but I am not aware of any case apart from the *Goodyear* litigation, at least not in the last 20 or so years, where the Oregon Supreme Court has announced a holding, granted a petition for reconsideration and reargument, and then announced that it had simply changed its mind on a particular point of law. In fact, the Court did not really do that in its second *Goodyear* opinion. This opinion stated that, in its initial decision, the Court had mistakenly understood that the ground on which Goodyear sought and was granted a new trial in the Court of Appeals was the same as the ground on which it unsuccessfully sought jnov in the trial court. 325 Or at 48 n. 2, 932 P2d at 1142 n. 2.

order to ensure that parties against whom judgment has been entered in the trial court cannot delay things by first filing a jnov motion and then, if that is denied, filing a new trial motion, in the false hope that would postpone the time when a judgment becomes truly final in the sense of the time within which to appeal having expired. In fact, Goodyear's principal argument in the first Supreme Court case was that the effect of the 63 C waiver is limited to the trial court, such that a failure to join a new trial motion with a jnov motion should not foreclose the opportunity of obtaining a reversal and remand for new trial on appeal.

In fact, however, this waiver provision is not needed for this purpose. Pursuant to ORCP 63 D and 64 F respectively, no motion for either jnov or new trial is timely unless filed within 10 days after entry of judgment. The filing of either motion extends the time within which to appeal, but does not extend the time within which the other motion must be filed. Even in the unlikely event a losing party files one motion on day 5 and the other on day 10, surely the court would consolidate them for hearing. In other words, I see no possibility that repeal of the waiver provision would create any kind of opportunity for losing parties to employ "salami tactics" in the trial court. Also, if precluding salami tactics were really the concern of 63 C, why is there no ORCP provision to the effect that filing a new trial motion without joining a jnov motion results in waiver of the latter?

10. <u>Should not ORCP 21 F[27] be amended to provide for waiver of all procedural defenses omitted from a pre-answer motion?</u> Speaking of salami tactics, this provision unaccountably permits them. The filing of a pre-answer motion stops the running of the time within which an answer must be filed.[28] If a defendant files a pre-answer motion raising any one of the defenses enumerated in 21 A, but omits from such motion any other defense except those specified in 21 G(3) and (4),[29] why should not any

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[27] "F. Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, *except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process,* but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided as provided in subsection G(3) of this rule on any of the grounds there stated. *A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section."* (Emphasis added.)

[28] ORCP 7 B.

[29] "G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made

omitted defenses be deemed waived?

ORCP 21 F, as presently worded, would permit a defendant to file one pre-answer motion raising the defenses of lack of jurisdiction over the person, insufficiency of service, or insufficiency of summons and, if the motion were denied, then file a second pre-answer motion raising any of the other defenses, including those which I believe should be deemed waived by omission from the first motion--prior action pending, that plaintiff is not the real party in interest, that plaintiff lacks the capacity to sue, or that the complaint shows the action is time-barred. The federal counterpart of 21 F[30] seems to be better in that it provides that, if a pre-answer motion is filed, any defense omitted therefrom which Rule 12 permits to be raised by motion and then available to the defendant is waived except the defenses of failure to state a claim, failure to join an indispensable party, and lack of subject matter jurisdiction. One pre-answer motion should suffice.

11. <u>Should not ORCP 21 A(3)[31] be amended or deleted?</u> In most, if not all, other American jurisdictions, the fact of a prior action pending between the same parties concerning essentially the same thing will result in the subsequent action being stayed, but not dismissed. Even a stay is usually not ordered unless the prior action is pending within the same jurisdiction or court system. Thus, federal courts will normally not even stay, much less dismiss, an action on the ground that there is a prior action pending in a state court. Read literally, 21 A(3) would require dismissal of an action on the basis of a prior action pending anywhere in the world. The Court of Appeals has held that A(3) applies when the prior action is pending in federal court,[32] and it would be difficult to distinguish that situation from a prior action pending in a court of another state.

Given the breadth of its application, 21 A(3) contains the admittedly remote, yet real, potential for causing serious injustice. Suppose, for

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at trial, shall be disposed of as provided in Rule 23 B in light of any evidence that may have been received.

"G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."

[30] "12(g) A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

[31] "21 A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (3) *that there is another action pending between the same parties for the same cause, . . .*" (Emphasis added).

[32] *Beethan v. Georgia-Pacific Corp.*, 87 Or App 592 (1987).

example, that A sues B in an Oregon circuit court. B then moves for dismissal of the action on the ground that A is a member of the plaintiff class in a class action pending in some other court in the United States. The judge, pursuant to A(3), grants B's motion to dismiss. Some time later the class in the other action is decertified, or the other action is disposed on some procedural ground not going to the merits. A then re-commences his action against B. While the previous dismissal in the Oregon court pursuant to A(3) would have been without prejudice, the pertinent statute of limitations might well have run and A's claim against B thus become time-barred.

At the very least it seems to me that 21 A(3) should be amended to provide for a stay rather than dismissal as a matter of right. The difficulty with amending A(3) in that manner, however, is that if it were to provide for a stay rather than a dismissal, it would no longer belong in a provision dealing solely with motions to dismiss.

If the Council agrees that 21 A(3) needs fixing, one possibility would be to take it out of Section 21 A and find some other place for it where it could be recast as calling for a stay rather than dismissal. Another possibility would be to delete 21 A(3) and not relocate it anywhere in the ORCP. There is nothing in the FRCP or in the U.S. Judicial Code authorizing or requiring stays of actions, yet the federal courts regularly order stays of action which duplicate or overlap with other actions already pending in the federal court system. Discretionary authority to stay actions is regarded as being derived from the inherent judicial power of the federal courts, and thus not dependent upon a rule or statute. On the other hand, since 21 A(3) has been part of Oregon practice since long before adoption of the ORCP, simply deleting it might mislead lawyers and judges into thinking that Oregon trial courts should attach no significance to the fact of a prior action pending, even if the latter is pending in another Oregon court.

ORCP 21 A(3) was taken over from the statute which preceded and, to the best of my knowledge, has never been considered by the Council.

12. <u>Deal with the inconsistency between ORCP 13 B and 19 C.</u> There seems to me to be something of an inconsistency between the fifth sentence of ORCP 13 B[33] and the first sentence of ORCP 19 C.[34] If a plaintiff wishes to avoid an affirmative defense contained in an answer, the latter then becomes "a pleading as to which a responsive pleading is required, . . ." If a plaintiff does as 13 B requires--file and serve a reply limited to "affirmative allegations in avoidance of any defenses asserted in an answer," it is at least arguable that, pursuant to the first sentence of 19 C, the plaintiff would be taken to have admitted such "affirmative allegations," which is almost certainly not the intent of these provisions separately or in

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[33] "There shall be a reply to a counterclaim denominated as such and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer."

[34] "Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading."

combination.[35]

If the Council agrees that there is an inconsistency here, my recommended solution would be to amend 13 B to conform to its federal counterpart, FRCP 7(a).[36] Obviously, the requirement that a reply be filed in response to a counterclaim denominated as such should be retained. However, the requirement of 13 B that a reply be filed in order for the plaintiff to introduce evidence in avoidance of an affirmative defense, in lieu of, or in addition to, evidence rebutting facts alleged by way of affirmative defense, is archaic and seems to me to serve no useful purpose in modern practice. It dates from an era when pleadings played a much more significant role in civil practice than they do today.

Replies are not required or permitted for this purpose in federal practice, unless so ordered, which happens extremely rarely, or in the practice of any other state I'm aware of. This provision was carried over by the original Council from the predecessor provision of the ORS with no particular thought being given to the matter as far as the minutes and other materials disclose. Perhaps surprisingly, it has caused a fair amount of difficulty, at least judging by the number of appellate opinions in which it has been construed and applied.[37]

One recurring reason for this difficulty, which unavoidably arises with respect to affirmative defenses as opposed to denials in answers, is that it can sometimes be a matter of metaphysical subtlety whether a given showing at trial can be made pursuant to a denial or only if "matter in avoidance" has been pleaded. There is no good way to get rid of the need to draw the distinction in connection with answers between what may be shown pursuant to denials in contrast with affirmative defenses. But there seems no good reason

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[35] *See, e.g., Soldo v. Follis,* 83 Or App 470, 732 P2d 72 (1987), wherein it was correctly held that a plaintiff who filed no reply did not thereby admit the allegations included in the answer by way of affirmative defenses. However, there is no appellate decision squarely on point concerning the effect of filing a reply to avoid an affirmative defense which contains the required "affirmative allegations," but no denials of the defendant's affirmative allegations, as ORCP 19 C seems to require.

[36] "(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

[37] In addition to *Soldo, supra n. 13, see Beckett v. Olsen,* 75 Or App 610, 707 P2d 635 (1985) (absence of a reply denies allegations by way of affirmative defense); *Bourrie v. United States Fidelity and Guaranty Insurance Co.,* 75 Or App 241, 707 P2d 60 (1985) (failure of insured to allege waiver of condition of coverage as raised by insurer as an affirmative defense meant that insured could not show waiver at trial); *Skinner v. Michaels,* 58 Or App 59, (1982) (sufficiency of allegations in reply to avoid defense of release); *and Lang v. Oregon Nurses Ass'n.,* 53 Or App 422, 632 P2d 472, *rev. denied* 291 Or 771, 642 P2d 308 (1981).

to extend the need to draw that sometimes difficult distinction to replies.

13. **Technical Corrections.** The following references are incorrect and should be corrected:

ORCP 32 N(1)(e)(v):		Change "OR 2-106" to "DR 2-106."
" 62 F	:	Change "ORS 19.125" to "ORS 19.415."
" 82 B	:	Add "ORS" before "706.008."

14. **Changes Requiring Legislation.** Following are three items which, if the Council accepts the suggestions, would certainly, or in one case probably, require legislation. Any of them approved by the Council should, I assume, be forwarded through the OSB, in particular what I believe is called the Public Policy Committee of the Board of Governors:

a. Recodification of ORCP 7 D(4)(b).[38] Obviously, this is not a rule of civil procedure at all, but a reporting requirement which belongs in the Vehicle Code of the ORS. That Code contains several similar kinds of reporting requirements, along with a modest penalty provision for failure to comply with them. With this particular reporting requirement misplaced in, of all places, the ORCP, I wonder whether, as a matter of due process, the penalty for non-compliance with it could constitutionally be imposed. Perhaps the thought was that the penalty should be imposed by the Council itself, by summoning violators to a meeting and, upon a finding of guilt by vote of no less than 15 members, pronouncing some appropriate sentence, such as having to attend all Council meetings for one year wearing a dunce cap. However, the only people who could be proceeded against in that fashion might be trial judges and trial lawyers, who are expected to be familiar with the ORCP.

The Council has talked about this tiny problem for years, but has never gotten around to having it fixed. Since all that would be involved is a recodification, could this be done by the Legislative Counsel without bothering the Legislative Assembly? By the time of our first meeting, I'll try to have an answer to that question.

b. Amendment of ORS 1.730(4).[39] I suggest that the Legislature be asked to delete the "staggered terms" language of this subsection shown in italics in footnote 39. Like the similar staggering of

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[38] "Notification of Change of Address. Every motorist of user of the roads, highways, 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 liability, shall forthwith notify the Department of Transportation of any change of such defendant's address occurring within three years after such accident, collision or event."

[39] "(4) Members of the Council on Court Procedures shall serve for terms of four years and shall be eligible for reappointment to one additional term, *provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of terms to be filled.* . . ." (Emphasis added).

terms provision of the U.S. Constitution regarding the first Senate,[40] ORS 1.730(4) made good sense, but only as applied to the original Council to avoid a total change of membership after the first four years. Once staggering is accomplished, it doesn't have to be repeated. In fact, continuation of staggering terms could only inadvertently defeat the purpose for which this device was originally intended.

While it is true that this provision does no great amount of harm, it does do some. For one thing, it must be a bit awkward when an appointing authority has to decide which new members to appoint to four-year terms and which to two-year terms. (Incidentally, I was originally appointed to a two-year term as a member before becoming Executive Director, and assumed that was because the Board of Governors wanted to limit the damage I might do to the ORCP. But then, why appoint me at all?)

For a second thing, appointing authorities quite often simply ignore this statutory requirement. For example, the four practitioners just appointed to membership were all appointed to four-year terms. Also, the four circuit court judges just appointed or reappointed by the Executive Committee of the Circuit Judges Association were all given four-year terms.

c Amendment of ORS 1.735(2)[41] to eliminate its "exact language" requirement. This item might be a tad more controversial than a. and b. above. The Council has discussed this topic on a couple of past occasions, and decided not to do anything. It seemed to me that the primary reason for not doing anything was a certain anxiety about calling the Legislature's attention to the Council, particularly by asking it to repeal language enacted as recently as 1993.

Perhaps that cautious view will, and should, prevail again.[42] But, purely on the merits, I cannot understand how any member could regard the "exact language" requirement as anything other than an unfortunate, and mildly insulting, provision. It makes the comment period, between publication of tentatively adopted amendments in the October issue of the advance sheets prior to legislative sessions and the December meeting at which voting on final promulgation occurs, nearly useless. While it hasn't happened recently,

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[40] U.S. CONST. art. I, §3.

[41] "(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the *exact language* of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the promulgation, modification or repeal." (Emphasis added).

[42] I don't understand this apparent reluctance on the part of the Council to call the Legislature's attention to its existence. Every legislative session must appropriate and authorize funding for the Council's biennial budget. Additionally, all promulgated ORCP amendments are formally reported to the President of the Senate and the Speaker of the House.

If there is agreement with my suggestion that the "exact language" requirement be repealed, I would further suggest that the appropriate bill be sponsored by the OSB as part of the package of proposed legislation which it sponsors in every session.

as a result of the October publication there is always the possibility that some very useful comments for improvements in drafting of proposed ORCP amendments will be received. But the "exact language" requirement effectively prohibits the Council from taking any advantage of suggested improvements, however little they might change the basic meaning of a proposed amendment, while enhancing the quality of its drafting. The only responses the Council can make, if it finds comments to be sufficiently serious, is to decide not to promulgate a proposed amendment at all or to defer promulgation a full two years until the next biennium.

The other, related unfortunate effect of the "exact language" requirement is that, because the Council cannot do anything in response to comments except decide not to promulgate a particular amendment, since this requirement became effective in 1993 the Council has canceled the meetings it might otherwise have usefully held in October and November. Given the lead time required for publication of proposed amendments in the October advance sheets, the last meeting at which tinkering, redrafting, and polishing of amendments can occur is the one in September, which is then followed by two "dead" months. My recollection is that, prior to 1993, the Council usually did meet in Octobers and Novembers leading up to the decisions whether or not to promulgate at the December meeting, and that substantial improvements in drafting occasionally occurred, sometimes in response to comments, sometimes otherwise.

The message implied by the "exact language" requirement strikes me as a trifle insulting. The implication is that, absent this requirement, the Council would either deliberately try to play games by publishing amendments in one form and then promulgating them in a form having a substantially different meaning, as though members would like to "sneak stuff" into the ORCP when no one is looking, or that the Council is too dumb to know the difference between modifications which merely improve clarity and draftsmanship, but do not significantly change meaning, and those which do. If either of these implications were true, how could the Council be trusted to do anything at all?

Perhaps the Legislature needn't be bothered about this after all. Might it be possible for a judicial member of the Council to render what the Indiana Supreme Court once described as a "sui sponte" declaratory judgment that the "exact language" requirement of ORS 1.735(2) is void for impertinence?

For Counsel, Inc. v. Northwest Web Co., 329 Or 246, __P2d__ (1999)

GILLETTE, J.

This case concerns the proper interpretation of ORCP 54 E, the rule of civil procedure that deals with pretrial offers of compromise. Under that rule, a party that declines a pretrial offer must obtain a judgment more favorable than the pretrial offer, or that party loses any right it otherwise might have had to be awarded costs or attorney fees incurred after the date of the offer. The issue presented is whether the rule permits pretrial offers to be made inclusive of costs, disbursements, and attorney fees without the opposing party's prior agreement. The trial court concluded that such inclusive offers are permissible under the rule. Because plaintiff rejected defendant's offer of compromise (which had included costs and attorney fees) and chose instead to proceed to trial, but failed to recover more than the sum offered, the court limited plaintiff's recovery to the damages awarded plaintiff at trial together with that part of plaintiff's attorney fees, costs, and disbursements adjudged to have accrued as of the date of the offer. The Court of Appeals affirmed the judgment of the trial court. For Counsel, Inc. v. Northwest Web Co., 154 Or.App. 492, 962 P.2d 707 (1998). We allowed review and now affirm the decision of the Court of Appeals.

We take the following undisputed facts from the opinion of the Court of Appeals and from the record. Plaintiff filed a complaint against defendant Northwest Web Co. for breach of contract and fraud.[1] Plaintiff sought $240,000 in damages on the contract claim, $30,000 in damages on the fraud claim, and also sought $100,000 in punitive damages. In addition, the complaint included a claim for attorney fees under a term of plaintiff's contract with defendant. Before trial, defendant made an offer of compromise of $150,000, which expressly purported to be "inclusive of all claims for attorney's fees to the date of the Offer and all costs, pursuant to the provisions of ORCP 54(E)."

Plaintiff rejected defendant's offer. The case went to trial. Plaintiff prevailed on the contract claim but lost on the fraud and punitive damages claims. The trial court awarded plaintiff $107,829, not including costs, disbursements, and attorney fees, and directed that amounts for those items be determined after a hearing under ORCP 68 (establishing procedures for determining and awarding costs, disbursements, and attorney fees).

Plaintiff submitted a statement of attorney fees, costs, and disbursements, seeking a total of $163,156.97 for those items, which, plaintiff claimed, represented the amount incurred through trial on the

[1]Northwest Web Co. filed a third-party complaint against Eugene Direct Mail Service (EDMS), and EDMS joined in the offer of compromise. EDMS joined Northwest Web Co. on the briefs before the Court of Appeals and joins Northwest Web Co. in the proceedings before this court. Accordingly, when we refer to "defendant" in this opinion, we refer both to Northwest Web Co. and to EDMS.

contract claim alone. Defendant objected to the amounts claimed for costs and attorney fees on various grounds, but its principal objections were two. First, defendant contended that, although plaintiff arrived at its allocation of fees and costs for the contract claim by discounting its total outlay by 15 percent to account for the time spent pursuing the fraud claim, in reality, the time and effort expended in pursuit of the fraud claim was at least 50 percent. Second, because defendant's pretrial offer of compromise included claims for attorney fees up to the date of the offer, together with costs, and because plaintiff's total recovery did not exceed that amount, under ORCP 54 E plaintiff was not entitled to recover attorney fees and costs incurred after the date of the offer.

In response, plaintiff argued that the attorney fees and costs need not be apportioned at all, because they were incurred for representation on issues common to both the fraud claim and the contract claim. In any event, plaintiff continued, defendant's offer of compromise was invalid from the outset, because the wording of ORCP 54 E permits offers of compromise to include attorney fees only if both parties had agreed to such an arrangement. Plaintiff argued that the rule contemplates that there will be a stipulated judgment for damages on the underlying claim and then the court will determine the appropriate amount of attorney fees and costs.

The trial court concluded that a substantial part (between 40 and 50 percent) of plaintiff's legal effort was expended in pursuit of the fraud claim, exclusive of issues common to both claims, and that plaintiff's total reasonable attorney fees on the contract claim amounted to $50,000. In addition, the court rejected plaintiff's interpretation of ORCP 54 E and held that nothing in the text of that rule prevents a party from offering to allow judgment to be had against it in an amount that includes attorney fees and costs. The court found that $25,000 of plaintiff's attorney fees, and recoverable costs and disbursements in the amount of $6,564.73, were incurred as of the date of defendant's offer of compromise. Those sums, together with the amount awarded plaintiff in damages on the contract claim, totaled $139,393.73. Because that amount was less than the $150,000 offered in compromise, the court held that plaintiff could not recover additional attorney fees and costs incurred after the offer was made. Additionally, the court held that, under the last sentence of ORCP 54 E, defendant was entitled to recover $3,147.31 from plaintiff for costs and disbursements incurred after the date of the offer.

On appeal, plaintiff assigned error to the trial court's conclusion that defendant's offer of compromise was valid, despite the fact, that it purported to be inclusive of attorney fees and costs notwithstanding that plaintiff had not agreed to such an inclusive offer.[2] Plaintiff contented that ORCP 54 E did not apply to such an all-inclusive pretrial offer of compromise, unless the opposing party had agreed that the offer could have that scope. The Court of Appeals performed a statutory analysis under the procedure outlined in PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-12, 859 P.2d 1143 (1993), and concluded that the text of ORCP 54 E permits inclusive offers and does not

[2]Before the Court of Appeals, plaintiff did not challenge the trial court's findings regarding the amount of fees and costs incurred before the offer of compromise was made.

require the opposing party's prior agreement. For Counsel, 154 Or.App. at 496-98, 962 P.2d 707. It therefore affirmed the judgment of the trial court. Id. at 499, 962 P.2d 707. For the reasons that follow, we agree.

We attempt to discern the intent of the legislature with respect to the permissible components of pretrial offers of compromise by using the statutory interpretation methodology set out in PGE. Under that methodology, we first examine the text of the statute, ORCP 54 E, in context. Id. at 610-11. At that first level of analysis, we consider rules of construction that bear on how to read the text, such as the enjoinder found in ORS 174.010 not to omit what has been inserted or insert what has been omitted. Id. at 611. We also consider rules of construction that bear on the interpretation of the statutory provision in context, such as the directive, also found in ORS 174.010, to interpret statutes with multiple particulars or provisions, to the extent possible, so as to give effect to all. Ibid. If, at the conclusion of our examination of the text and context, the intent of the legislature is clear, then we proceed no further. Ibid.

ORCP 54 E provides as follows: "Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer."

The first sentence of ORCP 54 E permits the party against whom a claim is asserted to make "an offer to allow judgment to be given against [it] for the sum, or the property, or to the effect therein specified." Nothing in that wording suggests that a defendant is precluded from making an offer that includes attorney fees or costs. Indeed, under the plain wording of that sentence, the nature and content of offers of compromise are unrestricted. The words "for the sum * * * or to the effect therein specified" are broad and contain no hint that the opposing party's agreement to a particular form of offer is required before it will be considered valid. Unless a contrary intent is manifested elsewhere in ORCP 54 E, then, the first sentence of ORCP 54 E permits offers that include all manner of elements, including attorney fees, costs, and disbursements, with or without the opposing party's prior agreement.

The second sentence of ORCP 54 E sets out the timing and procedures to be followed in the event that the party asserting the claim accepts an offer

of compromise, including the filing of the accepted offer with the clerk of the court and the entry of the terms of the accepted offer as a stipulated judgment. It does not give any indication as to the permissible contours of an offer of compromise.

We bypass, for the moment, the third sentence. The fourth and final sentence of ORCP 54 E provides, in part, that, in the event that an offer is not accepted, it is deemed withdrawn and, if the party asserting the claim fails to recover a more favorable judgment, that party is not entitled to recover costs or fees incurred after the date of the offer. Again, nothing in that recitation of the consequences flowing from a rejection of an offer of compromise suggests that a party against whom a claim is asserted is precluded from making an offer that includes attorney fees and costs, unless the other party agrees. Moreover, and perhaps more importantly, there is no suggestion that those consequences do not apply if the offer happened to include attorney fees and costs.

The remaining sentence, the third, is the one on which plaintiff relies to support its argument that defendant's offer of compromise was invalid because plaintiff had not agreed to a form of offer that included attorney fees and costs. We set that sentence out here for convenience: "Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68." In support of its construction of that sentence, plaintiff focuses on the word "agreed" in the phrase, "unless agreed upon otherwise by the parties," and derives from that usage the conclusion that both parties' agreement is required to effect an all-inclusive offer of compromise. According to plaintiff, implicit in the phrase "unless agreed upon otherwise by the parties" is the assumption that, unless the parties had agreed to an all-inclusive offer, an offer made under ORCP 54 E does not include attorney fees and such fees then shall be determined by a court in accordance with ORCP 68. In addition, plaintiff views the use of the word "shall," in the phrase "costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68," as establishing conclusively that, in the absence of such agreement regarding the nature of the offer, it is for the court to determine attorney fees.

In our view, plaintiff's interpretation of the disputed sentence might make sense if that sentence were read in isolation, outside the context of ORCP 54 E as a whole. As noted, however, our methodology requires us to consider the meaning of the terms used in that sentence in the context of the whole of ORCP 54 E in order to discern the intent of the legislature. When read in that light, the third sentence is a continuation of the discussion in the preceding sentence of what is to happen if a pretrial offer of compromise is accepted. Taking the third sentence together with the second, it is plain that the agreement referred to in the phrase "unless agreed upon otherwise by the parties" is the one formed by one party's acceptance of the other party's

offer.[3] That is, if defendant's offer does not include an amount for attorney fees and costs, but the offer is accepted and filed in court as a stipulated judgment, then the trial court determines the amount of such fees and costs in accordance with ORCP 68 and enters that amount "in addition as part of such judgment."

Moreover, that last quoted phrase has meaning only by reference to the preceding sentence. The word "such" in the phrase "such judgment" refers to the stipulated judgment of the previous sentence, and that stipulated judgment, in turn, consists of the terms of the accepted offer of compromise. Thus, the phrase "in addition as part of such judgment" means in addition to whatever was agreed by the parties in the accepted offer, as part of the stipulated judgment. By contrast, plaintiff's interpretation, which focuses only on the first part of the disputed sentence, would require the court to ignore the phrase "in addition as part of such judgment." That is contrary to our mandate not to "omit what has been included."

Finally, it is true that the directive to the trial court to determine the amount of fees and costs under ORCP 68 uses the mandatory "shall." However, no limitation on the content of the offer reasonably can be inferred from that wording. Because no such limitation can be found elsewhere in that statute, we hold that, for purposes of ORCP 54 E, an offer of compromise that specifies that it includes attorney fees and costs to the date of the offer is valid. No agreement to such a form of offer by the opposing party is required for the offer to be valid under ORCP 54 E.[4]

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

[3]Plaintiff's insistence on reading the disputed sentence in isolation is apparent in its argument that the Court of Appeals "in essence added additional language to ORCP 54 E when it stated that the 'context' of the Rule referred to an 'attorney fee agreement that is either a part of, or connected to, an accepted offer that is being entered as a stipulated judgment.' " (Quoting For Counsel, 154 Or.App. at 498, 962 P.2d 707.) To the contrary, in interpreting disputed wording of a statute by reference to its context, as the Court of Appeals did, a court is not adding additional wording to that statute; rather, it simply accords the meaning to particular words and phrases that the context dictates.

[4]We recognize that our interpretation of ORCP 54 E may exacerbate potential conflicts between lawyer and client concerning whether to accept a pretrial offer of compromise or proceed to trial. Whether the working of the rule is either fair or prudent in that respect cannot, however, alter what it is clear that the rule now provides. At the same time, we recommend that the Council on Court Procedures review the rule, to determine whether some other formulation of the rule would be better.

Attachment B-II

98-15

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
526 MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204-1123
(503) 248-3835

DAVID GERNANT
JUDGE

REC

DEC - 9 1998

ANNA J. BROWN
CIRCUIT COURT
DEPT. 7

December 8, 1998

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Re: Reynolds Metals v. Aetna Casualty & Surety
Case No. 9505-03520

Gentlemen:

After the status conference in court yesterday, two matters were left unresolved: (1) whether expert witness discovery would be allowed; and (2) whether plaintiff's motion for partial summary judgment on the duty to defend, filed July 14, 1995, will be considered prior to the time contemplated for the filing of other summary judgment motions on October 15, 2000.

I. EXPERT DISCOVERY

Over the objection of plaintiff Reynolds Metals, and pursuant to the plain language of ORCP 36, discovery of experts will be directed to occur as provided in defendant's proposed Case Management Order No. 1, at Part VII(A)(3).

I would like the order amended to include the following footnote which should be attached to the headline of subpart 3:

Expert witness discovery is being permitted (and, because it is over the objection of plaintiff, ordered) pursuant to the

plain language of ORCP 36. Because Oregon rules do not permit interrogatories, such discovery shall be done exclusively by deposition, pursuant to ORCP 39.

The court relies for this order on the policy arguments, which seem to the undersigned judge unanswerable, advanced in J.D. Droddy, "The Case for Discovery of Expert Witnesses under Existing Oregon Law," 27 Will.L.Rev. 1, 1-19 (1991). See also the oft-cited case of PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P.2d 1143 (1993), where the court pointed out that if the text of a statute is clear one does not inquire into history or legislative intent. It is the undersigned judge's view, agreeing with the author of the Willamette Law Review article, that only perceived (not to say received) history and continuing practice militate against the conclusion that deposition discovery of experts is permissible in Oregon in any case at the option of any party.

Nonetheless, even if the received history and longstanding practice are normally to be deferred to, this court concludes at least that it possesses discretion to order expert witness discovery in appropriate cases. For similar reasons as those that led to the designation of this case as a complex case, pursuant to UTCR 7.030--e.g., the complexity of the legal issues, the number of parties involved, the expected extent and difficulty of discovery, the anticipated length of trial, together with the greater likelihood of settlement if experts are deposed prior to trial, and the greater value both to the parties and to the court of a settlement prior to trial of such a complex case--this court finds that the interests of justice will best be served by permitting and ordering expert witness discovery in this particular case.

II. SUMMARY JUDGMENT

On page 13 of the defendant's proposed Case Management Order No. 1, please add the following footnote after the sentence ending in the word "abeyance", on line 20:

However, the court is willing to receive briefs on the

subject of whether the plaintiff's "Motion for Partial Summary Judgment on the Duty to Defend" filed July 14, 1995, should be heard and determined at an early date during the discovery process. Plaintiff's brief should be filed on or before December 22, 1998. Defendant's answering brief should be filed on or before January 5, 1999. Any reply brief should be filed on or before January 12, 1999.

If consideration of the motion for partial summary judgment already filed is allowed, a further briefing and argument schedule on the merits of the motion will be established.

III. PROTECTIVE ORDER

I have today signed the "Protective Order" submitted on Davis Wright Tremaine pleading paper and as to which there was no discussion in court yesterday. According to Mr. Everett Jack's cover letter of December 2, 1998, this form of protective order was reached by agreement of all parties.

Very truly yours,

David Gernant

cc: trial court file

DG:bmc