*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES

Saturday, January 8, 2000

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Alexander)
2. Approval of October 30, 1999 minutes
3. Election of Council officers for the year 2000
4. Proposal by Oregon Association of Process Servers, Inc. regarding ORCP 7 (Chair)
5. Discussion and decisions regarding 1999-2001 biennial agenda (Chair)
6. Old business
7. New business
8. Adjournment

# # # # #

Corrected to change meeting date in Agenda Item 2

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of October 30, 1999
Oregon State Bar Center
Lake Oswego, Oregon

Present: J. Michael Alexander
Lisa A. Amato
Benjamin M. Bloom
Bruce J. Brothers
Kathryn H. Clarke
Allan H. Coon
Don A. Dickey
Robert D. Durham
William A. Gaylord
Daniel L. Harris
Rodger J. Isaacson
Mark A. Johnson
Virginia L. Linder
Michael H. Marcus
John H. McMillan
Ralph C. Spooner
Nancy S. Tauman

Excused: Richard L. Barron
Lisa C. Brown
Ted Carp
Kathryn S. Chase
Connie Elkins McKelvey
Karsten Hans Rasmussen

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander, presiding as Acting Chair, called the meeting to order at 9:36 a.m.

Agenda Item 2: Approval of minutes. On motion of Mr. Gaylord, seconded by Ms. Tauman, the minutes of the Council's December 12, 1998 meeting were unanimously approved as previously distributed.

Agenda Item 3: Introduction of members. Each member briefly introduced himself or herself, and new members were welcomed by Mr. Alexander to the Council.

Mr. McMillan commented that he thought Bruce Hamlin had done an extraordinarily good job as Chair of the Council, with which there was unanimous agreement. Prof. Holland said that a custom had developed whereby the Council presents outgoing Chairs with a suitably inscribed plaque or similar expression of its esteem and gratitude, and requested the Council to authorize him to arrange for such a presentation to Mr. Hamlin. This authorization was then signified by expression of a unanimous sense of the Council.

Agenda Item 4: Review of 1999 legislative session (Prof. Holland) (See Attachment A to agenda of this meeting). Prof. Holland reported that the 1999 Legislative Assembly had appropriated the requested funding for the Council's 1999-2001 biennial budget. He further reported that the Legislative Assembly had not modified or disallowed any of the ORCP amendments promulgated by the Council at its 12/12/98 meeting, which will therefore become effective on Jan. 1, 2000.

Prof. Holland also noted that the Legislative Assembly had enacted a possibly significant amendment to ORCP 47, but had not consulted with the Legislative Advisory Committee. He also stated that he wanted the Council to be aware of the fact that he had been asked by the sponsor of the bill to testify in support of the Rule 47 amendment, and had done so, but had made it clear on the record that he was testifying as a civil procedure teacher and member of the bar, not as the Council's Executive Director, and did not in any manner purport to speak on the Council's behalf. A sense of the meeting was expressed that Prof. Holland had not acted inappropriately.

Agenda Item 5: Discussion of possible items for Council's 1999-2001 agenda (Mr. Alexander) (See Attachment B to agenda of this meeting). A lengthy discussion was conducted to identify, at least preliminarily, the matters which should comprise the Council's 1999-2001 biennial agenda. Several members stated that the Council could not feasibly undertake consideration of all the items suggested in Attachment B, but would have to limit its focus to whichever among those items, together with possibly others not mentioned in Attachment B, deemed most urgently to warrant attention.

Judge Harris stated that he thought the Council might do well to consider several matters relating to jury reform which have originated in Arizona, including neutral voir dire, juror questions following each witness, and post-trial debriefing of jurors. He added that a subcommittee might be appointed to examine these procedures, and also to recommend any ORCP amendments which might be needed to authorize their implementation. Judge Harris concluded by saying that he would try to get some relevant materials distributed to members prior to the next Council meeting.

Discussion then turned to whether the Council should take up the subject of expert discovery. Mr. Alexander commented that, on one or two past occasions, there had been some very tentative discussion of this subject, but that the result of such discussion had been a decision not to consider seriously amending the existing discovery rules. He cautioned that, given how divisive this subject had been whenever it was raised in the past, the

Council would need to give careful thought before deciding to go down that road during this biennium. Mr. Gaylord added his observation that he did not regard the present ORCP discovery rules as being ambiguous on the subject of expert discovery. However, Judge Marcus said that, while the traditional understanding that expert discovery is not authorized under the present rules is widely understood, there might nonetheless be some value in codifying that tradition by means of a suitable amendment.

Mr. Bloom stated that he thought some doubts exist regarding the territorial scope of availability of DMV service, in particular whether it applies to vehicular accidents on private property, such as parking lots or tractors when operating on farm land. Mr. Alexander suggested that Mr. Bloom summarize whatever problems he saw in a memo for distribution prior to the next Council meeting.

Discussion then turned to ORCP 44 and 55, amendments to which were being worked on by Judge Anna Brown's subcommittee during the 1997-99 biennium. Mr. Gaylord mentioned that the full subcommittee had not met since the fall of 1998, but that he had recently met with Judge Brown to review where matters stood. He added that this subcommittee had identified quite a few problems relating to hospital and medical records subpoenas, perhaps foremost among which is the inconsistent responses they often elicit.

Mr. Gaylord urged that this subcommittee be reappointed, possibly with one or more additional members who might be willing to join this effort. Ms. Amato and Mr. Spooner expressed willingness to serve on this subcommittee, and were thereupon so appointed by Mr. Alexander to serve with continuing members Ms. Brown, Ms. Chase, Mr. Gaylord, and Ms. Tauman.

Justice Durham invited attention to the "exact language" requirement imposed by ORS 1.735(2) as referenced on page 8 of the 12/12/98 minutes as an item of new business. He said that he was aware that there had been some previous, inconclusive discussion about whether to seek a relaxation of this requirement, but expressed the view that this question should now be preliminarily considered by more than one member, perhaps by the Executive Committee.

Prof. Holland reminded members that Ms. Henthorne and he are available to provide logistical and other kinds of support to subcommittees between Council meetings, when their meetings and other work must be done. In particular, he said he would be glad to do any legal research desired by a subcommittee, and that Ms. Henthorne is available to arrange telephone conference calls if

given a few days advance notice. Mr. Spooner commented that he thought face-to-face meetings would be preferable to conference calls, and asked whether there are any funds in the Council's budget to defray expenses of such meetings, to which the reply was that there are no such funds in the budget.

Ms. Clarke invited attention to a letter from Michael Brian (copy filed with original of these minutes) calling attention to some problems he believes exist in connection with IME's pursuant to ORCP 44 A. This letter also suggests that the Council consider appropriately amending Rule 44, such as possibly providing, along the lines of the State of Washington's counterpart rule, such protections as a plaintiff having a representative present at an IME, or that there be audio recordings of everything said in the course of the examination. Mr. Bloom commented that he knew of a case where the examining physician refused to conduct the examination with a plaintiff's representative present. Judge Harris noted that, as Rule 44 now stands, different judges take different approaches to dealing with these issues.

Mr. McMillan emphasized the great importance of the Council's finishing the work begun by Judge Brown's subcommittee, with which thought there was unanimous agreement. Mr. Alexander stated that, with what the subcommittee had already accomplished, he was confident that a good final product could be debated and drafted no later than the September, 2000 meeting. Justice Durham commented that he thought that some of the items included in Attachment B could be preliminarily studied by an individual member with greater efficiency and without the need to appoint a subcommittee. Mr. Alexander expressed agreement with this thought .

Mr. Alexander concluded this discussion by asking all members to think carefully about the items suggested in Attachment B, though not to the exclusion of other items, including those mentioned in the course of this meeting, so that at the next meeting, priorities might be agreed upon and assignments accordingly made to subcommittees or individual members on the usual, volunteer basis.

Agenda Item 6: Discussion of Council's meeting schedule (Mr. Alexander). Some members suggested that the Council's 1999-2001 biennial priorities might be agreed upon and settled by means of e-mail and other communications prior to the next meeting. Judge Marcus, however, stated that he believed those priorities should be debated and, if possible, decided upon at that meeting. There appeared to be general agreement to that effect.

The consensus of the members was that it would not be useful for the Council to meet in December. Mr. Alexander therefore

announced that the next meeting would be on January 8, 2000, and that unless subsequently modified by agreement, the Council would plan to meet thereafter on the second Saturday of the month, which is the customary meeting date.

Agenda Item 7: Old business. No item of old business was raised.

Agenda Item 8: New business: Mr. Brothers suggested appointment of a subcommittee, possibly composed of new members, to eliminate any things in the ORCP which do not belong there. There was also a reminder that, at the Jan. 8, 2000 meeting, Council officers, who would also constitute the Executive Committee, will be elected.

Agenda Item 9: Adjournment. On motion duly seconded, Mr. Alexander declared the meeting adjourned at 11:15 a.m.

Respectfully submitted,

Maury Holland
Executive Director

OREGON ASSOCIATION OF PROCESS SERVERS, INC.

O.A.P.S.

December 16, 1999

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

Re: Proposed Changes to ORCP Rule 7

Dear Mr. Holland,

The Oregon Association of Process Servers proposes for the Council's consideration the following changes to ORCP 7:

1. Allowing substitute service upon an individual at his/her place of employment.

2. Eliminating the requirement that service of process be attempted first at an individual's home before attempting service at an individual's place of business.

At this time, we would like to simply present the basic idea of the proposed changes and the problems they are designed to resolve. We look forward to meeting with the Council in January to further discuss the possibility of these amendments.

The first proposed change, allowing sub-service at an individual's place of employment, is an attempt to address the problem of businesses denying access to employees for purposes of service of process. There is an increasing trend among businesses to refuse to cooperate with process servers either for safety reasons or simply because they do not want to get involved. The end result is that many defendants are unreachable at their place of work, and may be completely unreachable if the workplace is their only known place of contact. A form of substitute service at an individual's place of employment could solve this problem by allowing an individual to be served at his/her place of work when other means of service are unavailable or have been exhausted.

The second proposed change is elimination of the requirement that a plaintiff attempt service at an individual's home before the individual may be served at his/her office. This requirement has proved to be cumbersome and inefficient with no

apparent due process benefits to justify the trouble. Statistically, it is easier to find a person at work than at home, so when someone maintains an office it is most efficient to attempt service there first. Trying an individual's office first reduces the time it takes to effect service thus expediting notice. In addition, process servers generally charge per address, so allowing initial service at a person's office can dramatically reduce expenses. For these reasons, the Association proposes, when an individual maintains an office, a plaintiff be allowed to serve there first without having to attempt service at the individual's home.

Thank you for your attention to these proposed changes. Please do not hesitate to contact Amanda Rich of Dave Barrows & Associates at 503-378-7717 if you have any questions or comments prior to January's meeting.

Sincerely,

Pat Bennett for

Pat Bennett
President, OAPS

Jason Crowe for

Jason Crowe
Legislative Chair, OAPS

Attachment
OAPS - 2

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

ATTORNEYS AT LAW

D. KEITH SWANSON
F. LATHEN
HAEL ALEXANDER
ALD W. McCANN

CHARLES D. BURT
1928-1996

388 STATE STREET
SUITE 1000
SALEM, OR 97301-3571

FAX (503) 588-7179
(503) 581-2421

OF COUNSEL
DAVID W. HITTLE

GREG NOBLE
371-3404

November 29, 1999

TO: Members of the Council on Court Procedures

FROM: J. Michael Alexander

Dear Colleagues:

I indicated that following our meeting in October I would try to summarize the various matters on our potential agenda for the upcoming year. As mentioned, I think our January meeting needs to be devoted to prioritizing items and discerning what we can realistically accomplish. Judge Durham also suggested that we might examine the matters raised in Maury's memo to see if some items might be addressed by a single person, as opposed to a committee. Quite frankly, I think individuals or fairly small committees are, generally, fairly efficient. With that in mind, I'll try to go through the items discussed. I am ranking these subjects not in a personal order of preference, but in accordance with what I see as an order of significance in terms of the overall effect of the proposed change, and the effort necessary on the part of the Council.

ORCP 55H(i) Subcommittee. This subcommittee is already up and running, and hopefully will have a report ready for the next meeting. This is obviously a project we will continue to pursue in the upcoming year. I either misplaced my notes, or took very poor ones, but I believe that Ralph Spooner and Lisa Amato agreed to serve on this committee for the upcoming year.

Juror Participation in Trials. Judge Harris brought up the subject of expanding the role of jurors in trials. He said he has information concerning an Arizona jury project, and would be supplying it to members of the committee. This is a very interesting issue and one that represents a fundamental change in trial procedure. It probably should be addressed by a rule change if such new practices are going to take place or, in fact, are taking place in some of our courts. A committee should address this issue if the Council decides to take some action.

Attachment A-1

ORCP 44A. This issue was presented in Mr. Bryan's letter to me that was circulated to the committee. He indicates that there seems to be some confusion and inconsistency over the Oregon procedure surrounding independent medical exams. He circulated a copy of Washington Rule 35 which allows for a representative to be present at the independent medical examination. Once again, if this is a matter the Council is to address, I would suggest a small committee be appointed to study any proposed rule change.

Discovery of Expert Witnesses, ORCP 36 (See 10/20/99 Memo of Maury Holland, Item 3): Maury describes this as a "hot potato", a term which I certainly agree with. Obviously, despite my position as the chair, I do not pretend to try to conceal all of my biases. I am ranking this very high in terms of significance as it would result in a substantial change in Oregon civil procedure. My own feeling is that there is too much division of opinion to justify the Council expending its time to once again address this issue. If it is considered, a committee should address any changes.

Interpleader of Third-Party Defendants Under ORCP 22C(1): (See 10/20/99 Memo of Maury Holland, Item 4). Maury recognizes an interesting procedural problem surrounding the interplay between the new comparative fault statutes and ORCP 22C(1), governing third-party pleading. This is a procedural matter that might potentially arise in a number of settings. A small committee could address this if the Council thought it warranted our attention.

Changes to ORCP 21A(3)(f). (See 10/20/99 Memo of Maury Holland, Items 10 and 11). This is a pleading issue that I believe could be dealt with either by a single individual, or by a committee of two.

Amendment to ORCP 63C. (See 10/20/99 Memo of Maury Holland, Item 9). Maury does a good job setting out the application of the waiver provision of this rule as discussed by the Supreme Court in the Goodyear Tire case. Again, I think a single individual could probably analyze this situation to first see if there is an ongoing problem and then draft language to correct it.

Amendment to ORCP 54E. (See 10/20/99 Memo of Maury Holland, Item 1) The Supreme Court specifically asked us to address this issue in a footnote to its opinion. I believe an individual could draft appropriate language responsive to the question raised.

Changes to ORCP 60, 64B(5), and 67C(2). (See 10/20/99 Memo of Maury Holland, Items 5, 7, and 8). I don't know if the problems addressed here come up often in practice. My experience has certainly been very limited. Once again, if the Council wanted to address these items I believe that one or two individuals could probably look into the three rules discussed by Maury in his memo.

Changes to ORCP 7D(2)(c) and 7D(3)(b)(i). (See 10/20/99 Memo of Maury Holland, Item 2). This is an area where an individual could examine the need for any changes and draft language if necessary.

Inconsistency Between ORCP 13B and 19C. (See 10/20/99 Memo of Maury Holland, Item 12). An individual could deal with this matter if the Council felt it should be addressed and a change was warranted.

Attachment A-2

Changes Requiring Legislation. (See 10/20/99 Memo of Maury Holland, Item 14). The suggested changes are obviously matters we could only recommend to the Legislature. To the extent that a recommendation by the Council would have some significant weight, then I think it would probably be appropriate to address some of these matters, depending upon the feeling within the group. I know that Justice Durham had expressed some particular interest in the potential amendment of ORS 1.735(2) concerning the "exact language" requirement. I believe these potential legislative issues could again be addressed by an individual.

Technical Corrections. (See 10/20/99 Memo of Maury Holland, Item 13). These would seem to be changes that could be easily accomplished.

As I said, this is only my ranking in terms of what I perceive as the impact of the issues proposed. I believe the Council needs to decide which matters to undertake and, perhaps, in which order. Theoretically, all of these matters could be assigned for some initial work, but I don't think the Council itself could address many of these matters in an appropriate fashion. If we decide to undertake changes involving what seem to be significant issues, however that is defined, we might try to focus our entire attention on those matters and hopefully complete them before the end of our term. We could then turn to less complicated issues if we had time at the end of the year. My own feeling is that the work being done on Rule 55H(i) will require a bit of our attention. If we also undertake the issues raised with regard to Rule 44 and to expanded participation of jurors in trials, I believe much of our attention could be focused on those three matters.

I look forward to our next meeting and I also welcome input from any of you prior to that time.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER & MCCANN, PC

J. Michael Alexander

JMA/jb
CC: Maury Holland
Gilma Henthorne

Attachment A-3

Michael Brian
Attorney at Law

1611 E. Barnett Road • Medford, Oregon 97504-8284
Telephone (541) 772-1334 • Fax (541) 770-5560

October 26, 1999

By Fax to (503) 588-7179

J. Michael Alexander, Chair
Council on Court Procedures
Burt, Swanson, Lathen, Alexander
& McCann, P.C.
Attorneys at Law
388 State Street, Suite 1000
Salem, OR 97301

Re: ORCP 44A (amending to allow recording and presence of representative)

Dear Mick:

My practice consists of solely representing individuals who have suffered some type of physical injury as a result of the actions of an individual or corporation. In most claims, where a lawsuit is filed, the defendant requests a medical exam by a doctor chosen by the defendant or the defendant's attorney. Sometimes the other attorney and I can agree on the examining doctor and the ground rules regarding the examination. Often we cannot reach an agreement and ORCP 44A is used by the defense attorney to obtain an order of the court directing the injured individual to submit to a medical exam.

Please note that in the above paragraph I did not use the adjective "independent" in describing the medical exam. Even though that term is often used to describe the medical exam, in my opinion the term is inaccurate. Often the medical exam is adversarial. Even when it is not, disputes can arise about information provided during the exam, or the injured individual may feel uncomfortable being alone with a doctor who works for the other side in the lawsuit. Currently, ORCP 44A is silent as to any procedures to address these issues. Some courts have allowed the exam to be recorded and/or a representative to be present, but it is inefficient and expensive for the courts to establish procedures on a case-by-case basis.

For this reason, I believe that Oregon procedural law would be improved if ORCP 44A was amended to provide that at the medical exam the individual may be accompanied by a representative and may record the exam. This change can be accomplished by adding one or two additional sentences to ORCP 44A, similar to State of Washington Civil Rule 35(a). Under this procedural rule, an individual who is attending a defense medical exam has the right to record the medical exam and have a representative present. A copy of the rule is attached to this letter.

I am willing to appear personally before the Council on Court Procedures concerning the changes I am requesting in ORCP 44A.

Very truly yours,

Michael Brian

Michael Brian

MB/rlo
Enc.
M\W\My Documents\Alexander Ltr Oct. 26

WASHINGTON COURT RULES

STATE

1999

FOR FEDERAL RULES, SEE WASHINGTON COURT RULES, FEDERAL, 1999

FOR LOCAL RULES, SEE WASHINGTON COURT RULES, LOCAL, 1999

WEST GROUP

[redacted]e request shall set forth the items to be [redacted]ected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

Attachment B

October 20, 1999
(Slightly Revised 12/23/99)

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 the Oregon Supreme Court in footnote 4 of its 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 the Court 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

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 the Council would not favor eliminating the follow-up mailing requirement 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 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

---

[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.

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 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, contrary to what 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 likely know whether enough other circuit court judges share his view, or are merely in doubt about the question, and therefore will have a sense of 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

---

[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. . . . ."

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. However, 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.

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

[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

with any fault attributed to his client. The third-party defendant responded 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 the motion to dismiss his third-party complaint for misjoinder was granted 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 fault with any fault attributed to 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.

---

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.

[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."

(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 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

---

[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. . . ."

than as much as 90 days after service of the complaint? Just asking.

5. Should not ORCP 67 C(2)[8] be amended? 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 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,

---

[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."

[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).

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?

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. <u>Deletion of the final sentence of ORCP 60.</u>[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

---

[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).

[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."

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 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 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 century, and persisting in some jurisdictions well into the early twentieth, 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 claimants who suffered a failure of proof in the initial trial of a case. But in today's climate of crowded dockets, liberal amendment 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

---

[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."

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 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]

---

[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 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.

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 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 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

---

"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."}

[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. . . . ."

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 for the Council now is whether that limited meaning would usefully be expressed by language 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 both in the trial court or on appeal.[22]

---

[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).

[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)

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, but 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, 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 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]

---

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

[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

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]

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

---

(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 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.

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 the 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.

So, 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 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

---

[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.

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. Should not ORCP 21 F[27] be amended to provide for waiver of all procedural defenses omitted from a pre-answer motion? 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 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

---

[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 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."

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. Should not ORCP 21 A(3)[31] be amended or deleted? 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 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

---

[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).

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 actions 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 it 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--files and serves 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 the factual allegations included in the answer by way of affirmative defense, which is almost certainly not the intent of these provisions separately or in 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

---

[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."

[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.

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 ORCP 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 that distinction in connection with answers. But there seems no good reason to extend the need to draw that sometimes difficult distinction to replies.

13. <u>Technical Corrections</u>. 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. <u>Changes Requiring Legislation</u>. Following are three items

---

[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).

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 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

---

[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).

[40] U.S. CONST. art. I, §3.

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, 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,

---

[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.

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?

{Distributed at 1-8-00 meeting as added p. B-23 of **Attachment B** to Agenda of that meeting} January 8, 2000

To: Chair and Members, Council on Court Procedures
Fm: Maury Holland
Re: Additional Suggested Item Regarding ORCP 7 D(3)(a)(i) and 7 D D(3)(b)(i).

Dan Reitman, a Portland trial lawyer and a former student of mine, recently phoned me to make a suggestion regarding service of summonses and complaints. Specifically, Dan's suggestion is that service by certified, registered, or express mailing, which is presently authorized by 7 D(3)(a)(i) only for use with individual defendants who are neither minors nor incapacitated persons, might also be authorized for service on corporations by similar mailing of papers to registered agents pursuant to 7 D(3)(b)(i).

For what it is worth, I think Dan's suggestion an excellent one which could be acted on by the Council without too much time and effort. Since the Council authorized service by mail on individuals two biennia ago, the information I pick up suggests that few plaintiffs' lawyers seem to be using it, probably because of the unavoidable risk that mail service can always be defeated by the individual's simply refusing to sign for receipt of the mailing. As you know, defendants cannot defeat service by refusing to accept delivery of papers by a server, at least not if the latter speaks the magic words.

Dan contends that registered agents of corporations would be extremely unlikely to refuse to sign for, and thereby acknowledge receipt of, papers served by the proper form of mailing IF SUCH SERVICE WERE AUTHORIZED BY ORCP 7 D. That is because, unlike most individuals, registered agents, who are in the business of accepting service, would know that the most likely consequence of their refusing to sign for, and thereby accept, service by mail would be to trigger alias service by personal delivery, the additional costs of which would be added as taxable costs in the event the plaintiff prevails.

When the Council first authorized this form of mail service about four years ago, it wished to be extremely cautious by sticking closely to the basic facts of *Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 306, 695 P2d 565 (1985), where the Supreme Court first approved mail service on an individual defendant under the "reasonably calculated" standard of 7 D(1). As sensible as that caution might then have been, there is now reason to believe that the Council authorized mail service limited to the situation where it is least likely actually to be used, precisely because individuals are much more likely than institutional defendants to think they can evade service.

Perhaps the time has now come for the Council to consider expanding the availability of *Steinkamp*-type service for use with corporate defendants, and possibly such other institutional defendants as partnerships, the State of Oregon, other public bodies, and unincorporated associations. Obviously, the more widely available *Steinkamp*-type service becomes, the greater the saving of expenses it would presumably achieve.

In addition to the intrinsic merits of this proposal, there is nothing that makes a more positive impression on the Legislature than when the Council promulgates an ORCP amendment offering the promise of likely reducing litigation costs. Legislators understandably just love that kind of thing.

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

Mr. James S. Crane
Copeland, Landye, Bennett and Wolf
1300 S.W. Fifth Avenue, Suite 3500
Portland, Oregon 97201

Mr. Everett W. Jack
Davis Wright Tremaine LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

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

Michael Brian
Attorney at Law

1611 E. Barnett Road • Medford, Oregon 97504-8284
Telephone (541) 772-1334 • Fax (541) 770-5560

October 26, 1999

By Fax to (503) 588-7179

J. Michael Alexander, Chair
Council on Court Procedures
Burt, Swanson, Lathen, Alexander
& McCann, P.C.
Attorneys at Law
388 State Street, Suite 1000
Salem, OR 97301

Re: ORCP 44A (amending to allow recording and presence of representative)

Dear Mick:

My practice consists of solely representing individuals who have suffered some type of physical injury as a result of the actions of an individual or corporation. In most claims, where a lawsuit is filed, the defendant requests a medical exam by a doctor chosen by the defendant or the defendant's attorney. Sometimes the other attorney and I can agree on the examining doctor and the ground rules regarding the examination. Often we cannot reach an agreement and ORCP 44A is used by the defense attorney to obtain an order of the court directing the injured individual to submit to a medical exam.

Please note that in the above paragraph I did not use the adjective "independent" in describing the medical exam. Even though that term is often used to describe the medical exam, in my opinion the term is inaccurate. Often the medical exam is adversarial. Even when it is not, disputes can arise about information provided during the exam, or the injured individual may feel uncomfortable being alone with a doctor who works for the other side in the lawsuit. Currently, ORCP 44A is silent as to any procedures to address these issues. Some courts have allowed the exam to be recorded and/or a representative to be present, but it is inefficient and expensive for the courts to establish procedures on a case-by-case basis.

For this reason, I believe that Oregon procedural law would be improved if ORCP 44A was amended to provide that at the medical exam the individual may be accompanied by a representative and may record the exam. This change can be accomplished by adding one or two additional sentences to ORCP 44A, similar to State of Washington Civil Rule 35(a). Under this procedural rule, an individual who is attending a defense medical exam has the right to record the medical exam and have a representative present. A copy of the rule is attached to this letter.

I am willing to appear personally before the Council on Court Procedures concerning the changes I am requesting in ORCP 44A.

Very truly yours,

Michael Brian

Michael Brian

MB/rlo
Enc.
M\W\My Documents\Alexander Ltr. Oct. 26

Attachment C-2

WASHINGTON COURT RULES

STATE

1999

FOR FEDERAL RULES, SEE WASHINGTON COURT RULES, FEDERAL, 1999

FOR LOCAL RULES, SEE WASHINGTON COURT RULES, LOCAL, 1999

WEST GROUP

Attachment C-3

[redacted]e request shall set forth the items to be [redacted]ected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

Attachment C-4

TROUTDALE LAW FIRM

Richard A. Weill, P.C.
102 W. Historic Columbia River Hwy.
Troutdale, Oregon 97060-2033
(503) 492-8911
Fax 492-8705

December 15, 1999

Maury Holland, Esq.
Executive Director
COUNCIL ON COURT PROCEDURES
1221 University of Oregon School of Law
Eugene OR 97403

Dear Mr. Holland:

In response to an article in the OSB Bulletin, I would like to suggest a change to ORCP rules, although I am sure a complementary statute change would also be necessary to fully implement my suggestion.

My older brother, who has been a litigator with the US Attorney's Office for over 25 years, simply cannot understand why lawyers in this state must use "affidavits" versus "declarations", which is the federal way of doing things. As a sole practitioner who does not regularly use a secretary, I must travel to the title company every week to have my signature notarized on an ORCP 68 petition or some other court affidavit. It is really a meaningless ritual since in my 17 years of practicing, neither I (as a notary) or anyone else has actually raised their right hand and "sworn" an affidavit to be true. The writer of the current Bulletin article is quite correct when he says: *"I prefer declarations because they are more convenient for the witness, who can simply sign without having to hunt down a notary"*. (See "Attention to Detail, OSB December 1999 Bulletin, p. 34). Moreover, I think a declaration is more meaningful of a solemn ritual since the signer must sign a document in which he or she states affirmatively that it is signed under penalties of perjury/false swearing. An affidavit provides no such language. It is the Notary who provides the "subscribed and sworn" jurat.

A change to "declaration" from affidavits would also save paper, and I don't think this should be minimized. Frankly, it almost is insulting to me as a lawyer to have to get my own signature notarized on any court document. Anything a lawyer signs is subject to the strictures of ORCP 17 and applicable DR's. The notarization is just a waste of paper in my opinion.

I would ask the Council on Court Procedures to make the necessary changes to the Rules, and to also suggest to the appropriate committee, a legislative change that would simply say that any court filed document may be subscribed using a declaration

or an affidavit. That type of statute might be preferable to amending a myriad of statutes that call for affidavits to be filed in court proceedings (e.g., probate dom. rel).

Please contact me if you have any questions. I certainly appreciate your committee's good work.

Very truly yours,

Richard Weill

STOEL RIVES LLP
ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2600
PORTLAND, OREGON 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet: www.stoel.com

December 16, 1999

GREGORY R. MOWE
Direct Dial
(503) 294-9458
email grmowe@stoel.com

J. Michael Alexander
Chair, Council on Court Procedures
Burt Swanson Lathan Alexander
& McCann, P.C.
388 State Street, Suite 1000
Salem, OR 97301

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

Re: Proposed Changes to ORCP

Gentlemen:

On behalf of the OSB Procedure and Practice Committee, I submit the enclosed proposed changes to ORCP for such consideration and action as the Council may deem appropriate. The proposed changes are unanimously supported by the Procedure & Practice Committee, with the exception of the "brief opening statements" proposal. Our Committee may have further comment or suggested revisions relating to opening statements, which we will communicate promptly after our next meeting in January. Judge Carp is familiar with our rationale and process in arriving at these proposals. Feel free to call me as well with any questions. Thank you for your consideration.

Very truly yours,

Gregory R. Mowe
Chair, OSB Practice & Procedure Committee

GRM/dlc
Enclosures
cc w/enc.: Honorable Ted Carp
Ms. Susan Grabe

ATTACHMENT E - 1

PROPOSED CHANGES TO ORCP

Brief Opening Statements

[amending ORCP 58B] The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire.

Alternate Jurors

[amending ORCP 57F] If alternate jurors are impaneled, their identity shall not be determined until the end of trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternates will be determined by lot in a drawing held in open court.

Questions by Jurors to Witnesses or the Court

[amending ORCP 58B] Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

Written Jury Instructions

[amending ORCP 59] The court's preliminary and final instructions on the law may be in written form, in which case a copy of the instructions may be furnished to each juror before being read by the court. Upon retiring for deliberations the jurors shall take with them all jurors' copies of any final written instructions given by the court.

Jury Discussions

[amending ORCP 58C] If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court upon its motion, or upon motion by a party, for good cause.

Attachment F

December 26, 1999

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: Expert Discovery: Why the Council Should Step Up to the Plate

If you have the patience to read this, or even if you don't, I promise I won't pester you again about this subject. The following are the reasons why I think the Council has an institutional obligation to resolve the issue of expert discovery, clearly and once and for all, subject of course to the possibility that a later Council or the Legislature could always change whatever might be decided upon by this Council.

1. My impression is that the majority of Oregon judges and trial lawyers have long believed, and continue to believe, that the present discovery rules, ORCP 36-46, do not authorize expert discovery. However, Judge Gernant's letter opinion is some evidence that at least one judge does not so believe, and I doubt he is the only circuit court judge who thinks that expert discovery is authorized. In addition to any other judges who believe that expert discovery is authorized, there are probably a larger number who believe that ORCP 36-46 do not provide a clear answer either way. Based on comments he has made on past occasions, my guess is that Judge Marcus belongs in that latter category.

Bill Gaylord recently told me that, at least twice in his experience, an opposing party unsuccessfully sought discovery of his expert(s), and then petitioned for mandamus in the Supreme Court, also unsuccessfully in the sense that the petitions were dismissed. The fact that those efforts were unsuccessful is not my point. Rather, my point is that competent lawyers do not ordinarily move for something which the pertinent statutes or rules clearly state cannot be granted. Other experienced litigators among the Council's current members will know how often they, or their opponents, have raised the question of expert discovery. No appellate opinion resolves the issue and, for reasons stated in my earlier memo, the prospect that one ever will seems unlikely.

2. The question of whether or not to permit expert discovery is obviously a fundamental one, and is one as to which litigants are entitled to expect that *all* trial judges, not just *most* of them, will rule uniformly one way or the other, in which event they would almost never have to rule at all. It is not one which should be left to judicial, case-by-case discretion. Also, being purely a matter of policy, it should be clearly resolved by clear statement and direction in the rules. That is the responsibility of the Council, at least in the first instance, and not of the judges.

It is unfair to the judiciary on the Council's part to leave it to the judges to tease an answer out of the existing rules, because the methods and

techniques of judicial reasoning cannot reasonably be relied upon to answer the question whether expert discovery is authorized. Although the analogy is not perfect, relying on judges and judicial reasoning to decide whether or not expert discovery is authorized is not wholly unlike a situation where a legislature enacts an income tax statute, but leaves it to judges to determine the tax rate on a case-by-case basis. There never has been, and never could be, such a thing as a common law of income taxation. It seems to me almost as unlikely that there could ever be such a thing as a common law of discovery.

At least the fundamental policy questions respecting discovery should be resolved by clear statement in discovery rules. Naturally, no matter how clear and comprehensive a set of discovery rules might be, a boat load of interstitial questions will remain for judicial resolution by application of the ordinary techniques of statutory interpretation. But whether or not to authorize expert discovery is emphatically not an interstitial question. Even the most talented judges cannot perform their distinctive function well unless the law-making authority, here the Council, properly performs the functions belonging to it, foremost among which is to decide *all* fundamental questions of procedural policy, not just 95% of them.

3. The issue of expert discovery is invariably described as a "hot potato." Having reflected a bit on why this should be so, I've concluded that the reason is the unspoken assumption that, if the Council were to do anything regarding expert discovery, that anything would be to authorize it. But that assumption rests on the widely held belief that the present ORCP discovery rules cannot possibly be interpreted to authorize expert discovery. If that belief were held, not just widely, but universally, particularly by judges, there would be no good reason for a Council which opposes expert discovery on policy grounds to do anything with the existing rules. But "widely" does not seem to me to be a satisfactory state of affairs.

I agree that it would be a hot potato if the Council were to amend ORCP 36 to expressly authorize expert discovery for the first time in Oregon practice. The reason authorizing it would be a hot potato is that the vast majority of Oregon trial judges and trial lawyers oppose expert discovery as a matter of policy for the reasons stated by then-Chief Judge Panner back in 1992--its monetary and other costs are thought to far outweigh its benefits.

In fact, it would be worse than grasping a hot potato--it would be a serious mistake--for the Council to do something clearly at odds with the procedural policy preference of a significant majority of Oregon litigators and judges. While the Council is not, strictly speaking, a representative body obligated precisely to reflect the procedural views of a majority of Oregon judges and trial lawyers,[1] it would be surprising if the preponderant views among Council members did not usually more or less coincide with those held by large majorities of judges and lawyers.

4. If my impression, and is concededly no more than that, is accurate that

---

[1]I speak of "trial lawyers" rather than the bar or lawyers generally, because I think the matters with which the Council deals are of real concern only to lawyers who litigate civil cases in Oregon courts quite regularly, together, of course, with judges.

a large majority of Oregon trial judges and lawyers disfavor expert discovery, why then would it be a hot potato, much less a mistake, if the Council were to amend ORCP 36 to provide clear statement and direction in accordance with that view?

Incidentally, I'm not suggesting that the Council undertake an opinion survey to find out how the bench and trial bar feel about this subject. The present membership of the Council strikes me as broadly representative enough to furnish a sufficiently reliable sense of this.

It would be very easy to take a straw vote to find out whether 15 or more members of the present Council do in fact oppose expert discovery as a matter of policy. Unless 15 members, or some number pretty close to it, indicate a provisional, non-binding willingness to vote to promulgate an amendment to ORCP 36 making clear that expert discovery is not authorized, the matter should be dropped, because I cannot imagine 15 or more votes being mustered to go the other way.

Even if there are 15, or something like that number of, members who indicate an initial, provisional inclination to resolve the issue against authorizing expert discovery, the Council should, of course, allow ample time for discussion and debate, in particular for any members who might favor expert discovery to make their best case and try to persuade opponents to change their minds. In addition, notice of the pertinent agenda item would naturally be publicized in advance, so that anyone having an informed opinion either way would have a full and fair opportunity to address arguments to the Council before any final vote is taken. In other words, even if a straw vote were to show that 15 or more members oppose expert discovery and would support an amendment clearly reflecting that opposition, I'm not suggesting that the Council act summarily, or fail to take time for careful discussion and deliberation, including hearing the views of interested non-members who wish to be heard.

5. If the Council so decided, amending Rule 36 to make absolutely clear that expert discovery is not authorized would not entail difficult or complex drafting. For example, one possibility might be to add the following sentence, or something like it, at the end of the first paragraph of ORCP 36 B(3): "Discovery shall not be had of the identity, qualifications, opinions or bases therefor, of any person specially retained by a party as an expert to testify at, or assist in preparation for, trial." That's surely not the best that could be done, but it's a start.

HANDOUTS AT COUNCIL'S 1-8-00 MEETING

1. Memo from Ben Bloom regarding service of process pursuant to ORCP 7 D(4)

2. Proposals from Oregon Association of Process Servers (OAPS) (two pages)

3. Memo from Maury Holland dated January 6, 2000 re additional suggested item regarding ORCP 7 D(3)(a)(i) and 7 D(3)(b)(i)

MEMORANDUM

TO: MEMBERS OF COUNCIL ON COURT PROCEDURES

FR: BEN BLOOM

Date: January 5, 2000

At the last meeting, I mentioned an area of concern involving service of process pursuant to ORCP 7D(4). The issue is whether 7D(4) authorizes service by mail in actions involving use of a motor vehicle on private property, such as a residential driveway or a parking lot.

I am currently aware of a case where this might be an issue because of an accident occurring at a fast food restaurant. Is this an action arising out of operation of a motor vehicle "upon the roads, highways, or streets of this state"? Under the maxim expressio unius est exclusio aterius the answer would appear to be no.

We should consider modifications to the rule to eliminate the ambiguity.

OREGON ASSOCIATION OF PROCESS SERVERS, INC.

O.A.P.S.

Oregon Association of Process Servers
Testimony before the Council on Court Procedures
Saturday, January 8, 2000

Issue #1 - Employers' Refusal to Accommodate Service of Process

A significant number of Oregon employers refuse to cooperate with private service of process. Their refusal considerably increases the amount of time and money it takes to serve a paper. Further, employers' insistence on the use of law enforcement to serve process creates an unnecessary burden on the scarce resources of Oregon's Sheriff's offices.

Attached to this testimony is a draft rule for "employee service". The purpose of the rule is to expedite service of process at a place of employment when other means of service have failed. The rule attempts to lessen the impact of service of process on employers by giving them a choice between allowing the process server to personally serve the employee or accepting service of process on behalf of the employee.

Issue #2 - Requirement that service be attempted at an individual's home before performing office service

The Oregon Association of Process Servers proposes to remove the ORCP 7 D(3)(a)(i) requirement that service be attempted at a person's home before office service may be performed. It is unclear what benefit is derived from maintaining the requirement, however the benefits of removing it are evident. Experience shows that it is easier to reach a person at work than at home, so the likelihood of achieving actual notice increases if service is made at the office. In addition, eliminating a failed service attempt at home decreases both the costs of service and the time necessary to complete service.

Lee Bennett, OAPS President
Jason Crowe, OAPS Legislative Chair
Amanda Rich, Dave Barrows & Associates

Draft of "Employee Service" Rule:

If a person cannot with reasonable diligence be served by other means, service may be made at the person's place of employment.

Employers, when contacted by an individual attempting to make service of process on an employee, shall:

(a) permit the individual to make personal service of process on the employee, or

(b) accept service of process on behalf of the employee.

If service is made under subsection (b), the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of employment or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time and place at which employee service was made. For the purposes of computing any period of time prescribed or allowed by these rules or by statute, employee service shall be complete upon such mailing.

Submitted to the Council on Court Procedures
by the Oregon Association of Process Servers
Saturday, January 8, 2000

{Distributed at 1-8-00 meeting as added p. B-23 of **Attachment B** to Agenda of that meeting} January 8, 2000

To: Chair and Members, Council on Court Procedures
Fm: Maury Holland
Re: Additional Suggested Item Regarding ORCP 7 D(3)(a)(i) and 7 D D(3)(b)(i).

Dan Reitman, a Portland trial lawyer and a former student of mine, recently phoned me to make a suggestion regarding service of summonses and complaints. Specifically, Dan's suggestion is that service by certified, registered, or express mailing, which is presently authorized by 7 D(3)(a)(i) only for use with individual defendants who are neither minors nor incapacitated persons, might also be authorized for service on corporations by similar mailing of papers to registered agents pursuant to 7 D(3)(b)(i).

For what it is worth, I think Dan's suggestion an excellent one which could be acted on by the Council without too much time and effort. Since the Council authorized service by mail on individuals two biennia ago, the information I pick up suggests that few plaintiffs' lawyers seem to be using it, probably because of the unavoidable risk that mail service can always be defeated by the individual's simply refusing to sign for receipt of the mailing. As you know, defendants cannot defeat service by refusing to accept delivery of papers by a server, at least not if the latter speaks the magic words.

Dan contends that registered agents of corporations would be extremely unlikely to refuse to sign for, and thereby acknowledge receipt of, papers served by the proper form of mailing IF SUCH SERVICE WERE AUTHORIZED BY ORCP 7 D. That is because, unlike most individuals, registered agents, who are in the business of accepting service, would know that the most likely consequence of their refusing to sign for, and thereby accept, service by mail would be to trigger alias service by personal delivery, the additional costs of which would be added as taxable costs in the event the plaintiff prevails.

When the Council first authorized this form of mail service about four years ago, it wished to be extremely cautious by sticking closely to the basic facts of *Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 306, 695 P2d 565 (1985), where the Supreme Court first approved mail service on an individual defendant under the "reasonably calculated" standard of 7 D(1). As sensible as that caution might then have been, there is now reason to believe that the Council authorized mail service limited to the situation where it is least likely actually to be used, precisely because individuals are much more likely than institutional defendants to think they can evade service.

Perhaps the time has now come for the Council to consider expanding the availability of *Steinkamp*-type service for use with corporate defendants, and possibly such other institutional defendants as partnerships, the State of Oregon, other public bodies, and unincorporated associations. Obviously, the more widely available *Steinkamp*-type service becomes, the greater the saving of expenses it would presumably achieve.

In addition to the intrinsic merits of this proposal, there is nothing that makes a more positive impression on the Legislature than when the Council promulgates an ORCP amendment offering the promise of likely reducing litigation costs. Legislators understandably just love that kind of thing.