***** NOTICE *****
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES

Saturday, February 12, 2000
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Alexander)
2. Approval of January 8, 2000 minutes (copy attached)
3. Reports regarding items of pending business*

    a. ORCP 44/55. Subcommittee

    b. ORCP 7. Subcommittee

    c. Jury reform. Subcommittee

    d. ORCP 44 A (IME). Subcommittee

    e. ORCP 21 A(3) (defense of prior action pending) (Attachment A). Prof. Holland

    f. ORCP 22 C (impleader; comparative fault) (Attachment B). Prof. Holland

    g. ORCP 67 C(2) (limitation of damages) (Attachment C). Prof. Holland

    h. ORCP 34 B(2) (substitution of personal representative). Mr. Brothers

    i. ORCP 54 E (offer of judgment; conflict of interest). Justice Durham

    j. ORS 1.735(2) ("exact language" requirement). Justice Durham, Judge Harris

4. Old business
5. New business
6. Adjournment

*A "report" may consist of as little as that work on the item is just getting under way or as much as submission of draft proposed amendments.

* * * * *

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 8, 2000
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	William A. Gaylord
	Lisa A. Amato	Daniel L. Harris
	Benjamin M. Bloom	Rodger J. Isaacson
	Bruce J. Brothers	Mark A. Johnson
	Ted Carp	Michael H. Marcus
	Kathryn S. Chase	Connie Elkins McKelvey
	Kathryn H. Clarke	John H. McMillan
	Allan H. Coon	Karsten Rasmussen
	Robert D. Durham	Ralph C. Spooner
Excused:	Richard L. Barron	
	Lisa C. Brown	
	Don A. Dickey	
	Virginia L. Linder	
	Nancy S. Tauman	

The following guests were in attendance: Ms. Robin LaMonte, of the Legislative Fiscal Office; Ms. Colleen Kinney, of the Department of Administrative Services (Budget and Management Division); Mr. Jason Crowe, Legislative Chairman of the Oregon Association of Process Servers (OAPS); Ms. Pat Bennett, President of the OAPS; Ms. Amanda Rich, a lobbyist representing the OAPS. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander) Mr. Alexander called the meeting to order at 9:35 a.m. He welcomed the guests in attendance.

Agenda Item 2: Approval of October 30, 1999 minutes. The minutes of the 10/30/99 meeting were unanimously approved as previously distributed, except that the date shown in Agenda Item 2 as the date of the previous meeting was corrected from October 30, 1999 to December 12, 1998.

Agenda Item 3: Election of Council officers and members of the Executive Committee for the year 2000. Mr. Gaylord, seconded by Ms. Chase, moved nomination of the following officers for the year 2000: Mr. Alexander to be Chair, Mr. Spooner to be Vice Chair, and Mr. McMillan to be Treasurer. This motion was agreed to by unanimous voice vote. Judge Marcus, seconded by Judge Coon, then moved that nominations be closed, and this motion was agreed

to by unanimous voice vote.

Agenda Item 4: Proposal of the OAPS regarding ORCP 7 (see Attachment "OAPS" to agenda of this meeting) (Mr. Alexander). Mr. Alexander recognized the guests associated with the OAPS for the purpose of explaining their proposal for amendments to Rule 7. Ms. Rich stated that the OAPS wished the Council to consider two important difficulties she said were being experienced by members of that organization in serving summonses and complaints and, if possible, try to devise solutions. The first of these difficulties, she explained, was the refusal by many large employers to cooperate with private process servers when the latter were attempting to make personal service on employees at the place of employment. This lack of cooperation, she added, usually meant the added time and expense of calling upon deputy sheriffs to effect service.

Ms. Bennett elaborated on this difficulty, adding that several employers were taking the position that private process servers, as opposed to deputy sheriffs, are not welcome on their premises even for the legitimate purpose of serving summonses and complaints. She added that the OAPS was not asking the Council to promulgate an amendment that would necessarily compel employers to do such things take an employee off the production line to accept personal service, but does urge that some provision be added to the ORCP making clear to employers that they have some obligation to cooperate with servers in some manner that would not be unduly disruptive. She suggested as one possibility a provision obligating employers either to accept service on behalf of employees or physically produce employees for personal service.

Mr. Crowe introduced himself as currently President of Nationwide Process Severs in Portland. He suggested the present requirement, that prior to effecting office service an effort must be made to serve defendants at the residence, led to inefficiency, delay, and additional costs. He therefore asked that this requirement be dropped. Ms. Bennett added that there are occasionally situations when office service is safer than trying to make service at a residence.

Mr. Gaylord said that he thought both of the OAPS proposals distributed at the meeting should be placed on the agenda for further consideration. He noted that providing for service at places of employment might prove more difficult than the other proposal about eliminating the requirement of attempted residence service. Mr. McMillan asked whether the proposal about service at places of employment had been run by the Association of Oregon Industries, to which the response was that it had not been. Judge Marcus noted that authorizing service at places of employment might involve placing legal obligations on non-litigant, third parties, and therefore might be near or beyond the limits of the Council's statutory authority.

Discussion of this item concluded with general agreement that the OAPS proposals should be included on the 1999-2001 agenda, along with any other proposed amendments to Rule 7, including Mr. Bloom's suggestion that ORCP 7 D(4)(a) be clarified with regard to its application to private premises open to the public, such as parking lots. (See Mr. Bloom's 1-5-00 memo, copies of which were distributed at this meeting, and a copy filed with the original of these minutes.). It was further agreed that the OAPS and other proposals regarding Rule 7 would be studied by a subcommittee consisting of Mr. Bloom, Ms. Clarke, Mr. Johnson, and Judge Rasmussen.

Agenda Item 5: Discussion and decisions regarding 1999-2001 biennial agenda (see Attachments A - F of agenda of this meeting) (Mr. Alexander)

a. ORCP 44 and 55. Mr. Alexander asked Mr. Gaylord to bring the Council up to date on the issues regarding Rules 44 and 55, especially Sections 55 H and I, on which the subcommittee[1] formerly chaired by Judge Anna Brown was resuming work.

Mr. Gaylord referred to a letter dated 1-7-00 which he had faxed to the other members of this subcommittee, and to Judge Brown, summarizing where he thought matters stood. (A copy of this letter is filed with the original of these minutes.) He said that there existed eight drafts of proposed amendments, but that no amending language was then quite ready for submission to the Council. He proceeded to summarize the goals of the subcommittee as follows: i. to restore to the rules a clear opportunity for a person whose records to object to their production before they are produced by the hospital or health care provider on the ground of their being categorically privileged or outside the scope of discovery, ii. to give a person whose records are sought a clear opportunity to make objection to specific information contained in the records, on grounds of privilege or as being outside the scope of discovery, after the records have been copied by the hospital or health care provider, but before being sent to the requesting party, iii. to facilitate reliable and complete disclosure of discoverable health care records to parties entitled to receive them without requesting parties having to rely on disclosures by adverse parties, iv. to eliminate or minimize the need for repetitious subpoenas or requests, and repeated handling and disputing of the same records, v. to preserve the option of a simple request for production when that is workable, vi. to give clear guidance to health care providers about what is required on their part, vii. to eliminate arbitrary distinctions between

[1]Ms. Amato, Ms. L. Brown, Ms. Chase, Mr. Spooner, and Ms. Tauman.

"hospital" and "health care" records while being consistent with definitions and procedures found in ORS Chapter 192, viii. to take advantage of existing sanctions for non-compliance with requests or subpoenas, and ix. to retain the convenience of the present rules whereby subpoenaed records may be provided without attendance at a deposition or trial.

Mr. Gaylord further commented that a somewhat novel procedure was then under consideration whereby the party seeking records would serve two documents on the party whose records are sought, with the latter in turn serving the documents on the health care provider. These documents would be a subpoena duces tecum describing the requested records and a consent form signed by the patient or other person authorized to consent to their release. An instruction sheet would also be provided to the records custodian which would indicate that the requested records should be placed in separate sealed envelopes and forwarded in a single package to the patient or patient's attorney, who would then have an opportunity to inspect them before forwarding them to the requesting party assuming there were no objections of privilege or scope.

Mr. Gaylord concluded this summary by referring to proposed new regulations prepared by a private organization called the Health Privacy Project, which could have an impact on the subcommittee's work. (A copy of those regulations is filed with the original of these minutes.)

b. Jury reform. Ms. Alexander referred members to Attachment E to the agenda of this meeting and to a packet of materials regarding jury reform (copy filed with original of these minutes) previously mailed to members by Judge Harris, and called upon Judge Harris to present this item.

Judge Harris noted that Arizona has not yet done a great deal by way of adopting new rules beyond adopting a rule permitting jurors to take notes which is already a part of Oregon's legal culture. Mr. Johnson commented that these proposals could get the Council involved in how the public perceives trial by jury. Mr. McMillan suggested that he felt some uneasiness about the Council involving itself in something as fundamental as jury trial, to which Mr. Alexander responded that the present ORCP already address several aspects of that institution. Judge Marcus commented that it is an interesting question whether the issues relating to jury reform, as alluded to in Attachment E, are better dealt with by legislators, whose authority derives from having been elected by the people, or by the Council, whose authority derives from its expertise. Judge Carp, speaking as a member of the Practice & Procedure Committee, emphasized that that Committee was very anxious for the Council to take a good look at the matters mentioned in Attachment E. Mr. Brothers observed that the matters broached in Attachment E mostly relate to things that some judges are already doing as a matter of their own discretion, and

therefore the issue confronting the Council is whether it would be useful for the ORCP to provide express authority for them that would be uniform throughout the state.

Judge Marcus mentioned that Judge R. P. Jones had suggested that the Council should promulgate a new ORCP provision regarding whether a plaintiff may have a representative attend an independent medical examination (IME).

Following a short break, Judge Harris offered a motion, duly seconded, that a subcommittee be appointed and authorized to prepare specific proposals for the Council's consideration. This motion was agreed to by unanimous voice vote. Judge Carp, Mr. Johnson, Ms. McKelvey, and Mr. McMillan were appointed to serve with Judge Harris as members of this subcommittee.

c. ORCP 44 A (IME's). General agreement was expressed that the issues broached in Mr. Michael Brian's letter dated 10-26-99 (copy filed with original of these minutes) should be placed on the 1999-2001 agenda. A subcommittee was appointed for this purpose consisting of Ms. Clarke, Justice Durham, and Mr. Spooner.

d. ORCP 36 (expert discovery). There was general agreement that this item would not be included on the 1999-2001 agenda.

e. **ORCP 22 C(1) (impleader).** Mr. Spooner offered a motion, duly seconded, that Prof. Holland be directed to draft a proposed amendment for the Council's consideration that would solve this problem. The motion was agreed to by unanimous voice vote.

f. ORCP 21 A(3) (defense of prior action pending). Mr. Johnson said that he was aware of a case which implicated the present rule and it caused a problem. There was general agreement expressed that Prof. Holland draft a proposed amendment responsive to any problem caused by this subsection.

g. ORCP 63 C (waiver of new trial). General agreement was expressed that this item would not be included on the 1999-2001 agenda.

h. ORCP 60 (dismissal without prejudice as alternative to direction of verdict). General agreement was expressed that this item would not be included on the 1999-2001 agenda.

i. ORCP 13 B and 19 C (whether denials of allegations of affirmative defenses need be included in a response). There was general agreement that, if there is an inconsistency between these sections, the problem does not arise often enough to warrant the Council's attention as an item included on its 1999-2001 agenda.

j. ORCP 54 E (offer of judgment; possible conflict of

interest). Justice Durham agreed to report back to the Council as to whether an amendment to this section would be advisable and, if so, to submit a draft amendment for its consideration.

k. ORS 1.735(2) ("exact language" requirement). It was agreed that Justice Durham and Judge Harris would consider whether to address this issue and, if so, how.

l. ORCP 32 N(1)(e)(v), 62 F, 82 B (technical corrections). It was agreed that these corrections of references to the Disciplinary Rules and the Oregon Revised Statutes could be voted on as tentatively adopted amendments at the September 2000 meeting.

m. ORCP 34 B(2) (elimination of need to substitute a personal representative for deceased insured defendant). It was agreed that Mr. Brothers would prepare a draft amendment for the Council's consideration.

Agenda Item 6. Old business. No item was raised.

Agenda Item 7. New business. No item was raised.

Agenda Item 8: Adjournment. After reminding members that the next meeting of the Council would be on February 12, Mr. Alexander, without objection, declared the meeting adjourned at 12:07 p.m.

Respectfully submitted,

Maury Holland
Executive Director

Attachment A: 2-12-00 Agenda

February 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: Amendments to ORCP 21

As directed at the Jan. 8 meeting I have drafted, for the Council's consideration, proposed amendments to Rule 21 as shown below. The purpose of these amendments is to change what is now the "defense" specified in Subsection 21 A(3)--prior action pending between the same parties for the same cause--on the basis of which a defendant can move for dismissal of the action, to an "objection," on the basis of which a party can move for, or the court on its own motion can order, a discretionary stay of proceedings pending disposition of the prior action. Of course it would be extremely unlikely that a court would become aware of a prior action pending except by motion of a party, but it nonetheless seems to me wise to give trial judges broad discretionary authority to order that proceedings be stayed on their own motion whenever and however that fact comes to their notice.

My draft amendments leave some issues open which the Council might, or might not, wish to have resolved by amending language. Foremost among these open issues is whether what would become Section 21 H should be limited in application to prior actions pending in an Oregon state court. That limitation would correspond to practice in the federal courts, wherein civil actions are, with very few exceptions arising from one or more of the so-called "abstention" doctrines, neither dismissed nor stayed except on the basis of a prior action pending in another federal court.

The amending language might say nothing about the court in which the prior action is pending, or might expressly limit operation of proposed Section 21 H to prior actions pending in Oregon state courts, in any federal court in Oregon or any federal court anywhere, or in any court, state or federal, in the United States. The present Subsection 21 A(3) specifies no limitation in the intended scope of its application, and there has never been an appellate decision clarifying whether it would apply to a prior action pending in a court outside the United States, which, though unlikely, is not impossible, and is apt to become less unlikely as civil litigation becomes more "globalized."

Please bear in mind that one good reason for staying a subsequent action to await disposition of a prior pending action is to avoid an unseemly "race to judgment." That consideration most obviously comes into play whenever the prior action is pending in any federal court or court of another state, because that is the scope of application of the full faith and credit clause and its implementing statute, 28 U.S.C. §1738, pursuant to which the first proceeding to reach judgment effectively preempts all others in the United States. The other good reason for staying subsequent actions is to avoid wastefully duplicative consumption of judicial resources.

A second issue which the Council might wish to consider is whether, when a prior action is shown to be pending, the stay of proceedings should be

discretionary, as my draft amendments has it, or mandatory. Yet another variant would be to provide for mandatory stays if the prior action is pending in an Oregon state court, but discretionary if pending in another jurisdiction. My recommendation is that any stays be discretionary regardless of where the prior action is pending, because there are likely to be so many difficult-to-anticipate, fact-specific variables, especially if operation of proposed new Section 21 H is not confined to prior actions pending in an Oregon state court. To illustrate just one such variable, no sensible trial judge would stay proceedings in a subsequent action on the basis of a prior action pending if those proceedings were far more advanced than those in the prior action, even though the latter was, by definition, prior in the sense of having been commenced earlier. Thus a party to the subsequent action against whom judgment on a verdict is about to be entered could not avoid that result by a belated motion to stay proceedings.

In other words, this seems to be a context where it would be very unwise to tie the judges' hands. A principal defect of the present Subsection 21 A(3) is that it makes dismissal mandatory, and compounds this defect by not saying anything about its scope of application.

These proposed amendments unavoidably also leave open several highly technical issues, *although no more so than does the present Subsection 21 A(3)*. Among these are: When is another action "prior," (this is usually determined mechanically by the respective dates of filing), what constitutes the same "cause," what happens when the subsequent action includes one or more parties in addition to those joined in the prior action or a different alignment of parties, and, conversely, what happens when the prior action involves additional parties not joined in the subsequent action, plus perhaps other issues that have not occurred to me. However, I strongly advise that the Council not attempt to deal with these more technical problems by ORCP language, but leave them to judicial resolution on a case-by-case basis in the rare instances where they arise. This is a context in which judicial technique is perhaps at its strongest, and micro-management by rules language at its most problematic.

[Language to be added in **bold**; to be deleted in ~~strikeover~~]

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS.

A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, 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: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, ~~(3) that there is another action pending between the same parties for the same cause,~~ (~~4~~ **3**) that plaintiff has not the legal capacity to sue, (~~5~~ **4**) insufficiency of summons or process or insufficiency of service of summons or process, (~~6~~ **5**) that the party asserting the claim is

not the real party in interest, (~~7~~ 6) failure to join a party under Rule 29, (~~8~~ 7) failure to state ultimate facts sufficient to constitute a claim, and (~~9~~ 8) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (~~7~~ 6), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

* * *

C. Preliminary Hearings. The defenses specifically denominated (1) through (~~9~~ 8) in section A of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings. mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * *

G. Waiver or Preservation of Certain Defenses.

G(1) A defense of lack of jurisdiction over the person, ~~that there is another action pending between the same parties for the same cause,~~ insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this

subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

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.

H.[1] [2]Notwithstanding any other provision of this rule,[2] should it appear to the court at any point in the proceedings, by motion or otherwise, that a prior action is pending between the same parties for the same cause, the court may in its discretion order that proceedings be stayed pending disposition of the prior action.

[1]This seemed to me a matter so different and distinct from Section 21 A motions to dismiss that it would be unwise to try to deal with it in the same section. Resort to an entirely new section thus appeared to be the better part of valor.

[2]---[2]Query whether this language is necessary or at least helpful?

February 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: Draft of Suggested Amendments to ORCP 22 C

As directed at the Jan. 8 meeting, I have drafted, for the Council's consideration, proposed amendments to section 22 C as shown below. Their purposes are to accomodate third-party practice to statutory comparative fault, to shorten from 90 to 40 days after service of the plaintiff's summons and complaint the period during which third-party summonses and complaints can be served as of right, and to provide that, after expiration of this period, third-party summonses and complaints may be served only by agreement of the parties *or* leave of court, rather than both. Please note that when "third party" is used as a compound adjective, which requires a connective dash, I have corrected it to "third-party." *See, e.g.*, S. GREENBAUM, THE OXFORD ENGLISH GRAMMAR §9.28 (Oxford Univ. Press, 1996).

[Language to be added in **bold**; to be deleted in ~~strikeover~~.]

RULE 22. COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD-PARTY CLAIMS

* * *

C. Third-Party Practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff, **or upon any person not a party to the action for the purpose of comparing such person's fault with that of the third-party plaintiff in causing the harm alleged by the plaintiff,** as a matter of right not later than ~~90~~ **40** days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared ~~and~~ **or** leave of court. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this rule. The third-party defendant may assert

against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert the third-party defendant's defenses as provided in Rule 21 and may assert the third-party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party **defendant** may proceed under this section against any person not a party to the action ~~who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.~~ **as provided in this section in the case of a third-party plaintiff.**

* * *

E. Separate Trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third-party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

Attachment C: 2-12-00 Agenda

February 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland

Re: Proposed Amendment to ORCP 67 C

This is item 5 of my Oct. 20, 1999 (slightly revised 12/23/99) memo. At the Jan. 8 meeting the Council did not, according to Gilma's and my notes, decide whether or not to place this proposal on its 1999-2001 agenda for consideration. In case the Council might want to take a look at this, I've prepared draft amendments as shown below. As stated in my memo, except for default judgments, limiting the amount of damages which may be awarded in a judgment to the amount in the prayer seems to me to be totally inconsistent with the fundamental premises of modern pleading as well as with the counterpart rules of most, if not all, other American jurisdictions.[1]

I realize the agenda is already pretty crowded, and hence that the Council won't want to deal with this unless it can be handled easily and quickly. I believe it can be, but of course . . . .

[Language to be added in **bold**; to be deleted in ~~overstrike.~~]

RULE 67. JUDGMENTS

* * * *

C. Demand for Judgment. Every 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, except~~:~~

~~C(1) Default. A~~ **that a** judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

~~C(2) Demand for Money Damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.~~

* * * *

[1]The counterpart federal rule provides: "Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final 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." F. R. Civ. P. 54(c).

Attachment C