

**\*\*\* NOTICE \*\*\***  
**PUBLIC MEETING**  
**COUNCIL ON COURT PROCEDURES**  
**Saturday, February 9, 2002**  
**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. Spooner)
2. Approval of 1-12-02 minutes (attached)
3. Progress reports and discussion regarding current ORCP amendment projects (Mr. Spooner):
  - 3a. Proposal to amend ORCP 34 B(2) (Attachment A) (Mr. Brothers)
  - 3b. Proposal to amend ORCP 47 C (Attachment B) (Judge Barron)
  - 3c. Proposal to amend ORCP to substitute declarations under oath for affidavits (Attachment C) (Prof. Holland)
  - 3d. Report of jury innovation committee (Judge Harris)
  - 3e. Report of ORCP 44/55 amendments committee (Mr. Merritt)
4. Old business (Mr. Spooner)
5. New business (Mr. Spooner) // Prof. Holland (Attachment D)
6. Adjournment (Mr. Spooner)

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COUNCIL ON COURT PROCEDURES  
Minutes of Meeting of January 12, 2002  
5200 Southwest Meadows Road  
Oregon State Bar Center  
Lake Oswego, Oregon

Present: Ted Carp Connie Elkins McKelvey  
Kathryn H. Clarke Jeffrey S. Merrick  
Allan H. Coon Shelley D. Russell  
Don A. Dickey David Schuman  
Daniel L. Harris David F. Sugerman  
Rodger J. Isaacson John L. Svoboda  
Nicolette D. Johnston  
Alexander D. Libmann

Note: Bruce J. Brothers attended by speaker telephone.

Excused: Lisa A. Amato Nely L. Johnson  
Richard L. Barron Karsten Hans Rasmussen  
Benjamin M. Bloom Ralph C. Spooner  
Robert D. Durham

Visitors: Mr. Bob Oleson, Public Affairs Director, Oregon State Bar; Attorney Eugene Buckle, Portland, representing the OADC.

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

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**Agenda Item 1: Call to order.** Ms. Clarke as Acting Chair called the meeting to order at 9:36 a.m. and welcomed Judge David Schuman as a new member of the Council.

**Agenda Item 2: Approval of 10-13-01 minutes (attached to 1-12--02 agenda).** Mr. Sugerman requested that these minutes be corrected to show that at the 10-13-01 meeting he had suggested that the Council revisit some issues surrounding court-ordered medical exams pursuant to ORCP 44, to which request there was unanimous consent. As thus corrected these minutes were approved as distributed.

**Agenda Item 3: Discussion of possible ORCP amendment projects for the current biennium:**

**3a. Proposal to amend ORCP 34 B(2) (see Attachment A to 1-12-02 agenda) (Mr. Brothers).** Mr. Brothers stated that he thought this proposed amendment was quite self-explanatory. He added that it was prompted by the belief that it is unfair to place the burden on a plaintiff to determine that a defendant has died and the amendment would therefore shift the burden of giving notice to the defendant's personal representative. It was agreed that Mr. Brothers would chair a committee to give this proposed amendment whatever additional study seems warranted, that additional members would be appointed to this committee if deemed necessary, and that this matter would be further considered at a future Council meeting.

**3b. Proposal to amend ORCP 47 C (see Attachment B to 1-12-02 agenda).** After some discussion it was agreed that this matter be referred to a committee chaired by Judge Barron, with Mr. Brothers and Ms. Russell as members, and that it be further considered at a future Council meeting.

**3c. Proposal to amend ORCP 44/55.** Mr. Merrick stated that the imminent effective date of the federal HIPPA regulations concerning privacy of health care regulations makes it imperative that the Council promptly consider how Rules 44 and 55 need to be amended, with which statement Ms. McKelvey expressed agreement. Judge Coon also expressed his agreement and added that he thought it is important that every effort be made to involve such organizations as the Oregon Hospital Association and the Oregon Medical Association at an early stage in the process in order to achieve a consensus that would not fall apart at the end.

Mr. Gene Buckle was then recognized and informed the Council that the OADC had recently created a governmental affairs committee. He added that he was prepared to act as liaison between the Council and OADC with regard to any efforts to amend ORCP 44/55.

Ms. Clarke then appointed a committee to review Rules 44 and 55 with a view to their possible amendment with Mr. Merrick as Chair, and Mr. Buckle, Ms. Clarke, Mr. Libmann, Ms. McKelvey, Judge Rasmussen, and Mr. Spooner as members.\*

\*Judge Rasmussen subsequently withdrew from this committee because of the press of other commitments. Mr. Rich Rogers was subsequently added to this committee to provide liaison with OTLA.

**3d. Other proposed amendments.** Mr. Sugerman stated that, partly on the basis of conversations with two Multnomah County circuit court judges, he was of the opinion that certain issues concerning the conditions under which court-ordered medical exams are conducted pursuant to Rule 44 might usefully be addressed by one or more amendments to that rule. Several members expressed opposition to the Council's revisiting these issues which were thoroughly considered during the 1999-2001 biennium. No formal motion was offered, but it was agreed by consensus that this item be tabled without foreclosing the possibility of it being placed on the current biennial agenda by vote to do so at a future Council meeting.

Judge Harris asked that the Council agree to a continuation of the committee which had worked on the topic of jury innovation during the 1999-2001 biennium resulting in some amendments to Rule 58. This request was agreed to by consensus. It was also agreed that this jury innovation committee would consist of Judge Harris as Chair, and Mr. Bloom, Judge Carp, Judge Dickey, Ms. Johnston, Ms McKelvey, and Mr. Sugerman as members.

Mr. Libmann stated that he is a current member of the Oregon State Bar Procedure and Practice Committee and had been asked by that committee to inquire of the Council whether the latter had any objection to the committee's proceeding to consider some possible amendments to ORCP jury trial provisions concerning such matters as juror discussion of a case prior to being charged when all jurors are present, alternate jurors, and possible improvements to the language of ORCP 58 B. Judge Carp stated that he did not think the Council can, or should try to, control or limit the agenda of the Procedure and Practice Committee, with which view there was unanimous agreement. Judge Carp suggested to Mr. Libmann that, because of the early deadline to which it is subject, he impress upon the Procedure and Practice Committee the importance of timely notification of the Council of any ORCP amendments which it proposes to approve and forward for legislative adoption so that the Council has a reasonable opportunity to provide its input.

Discussion then turned to a communication dated 1-10-02 from Mr. Tom Howser to Judge Harris (a copy of which is attached to these minutes) suggesting that, if and to the extent possible, declarations made subject to the penalties of perjury be substituted for affidavits wherever the latter are called for by a provision of the ORCP. Several members expressed interest in pursuing this suggestion because of the greater convenience it seemed to offer, but queried whether amending the ORCP in this fashion might create inconsistencies with provisions of the Oregon Revised Statutes (ORS). Prof. Holland said that, prior to the February meeting, he would prepare a listing of all ORCP provisions which call for the use of affidavits, and also identify any ORS provisions requiring use of affidavits or which might otherwise complicate the substitution of declarations for affidavits throughout the ORCP.

**Agenda Item 4: Election of 2002 Council Officers.** The following members were nominated and unanimously elected to the offices indicated for the year 2002: Mr. Ralph Spooner, Chair; Ms. Kathryn Clarke, Vice Chair; Ms. Nicolette Johnston, Treasurer.

Prof. Holland reported that Mr. Jack Folliard has resigned from the Council incident to his retiring from the practice of law. He said he would contact the Oregon State Bar about the need to appoint a practitioner member in place of Mr. Folliard.

**Agenda Item 5: Old business.** No item of old business was raised.

**Agenda Item 6: New business.** No item of new business was raised.

**Agenda Item 7: Adjournment.** Without objection Ms. Clarke adjourned the meeting at 10:45 a.m.

Respectfully submitted,

Maury Holland  
Executive Director

During the 1999-2001 biennium the following amendment to ORCP 34 B(2) was proposed by Mr. Brothers, but the Council deferred action on the proposal because of lack of time to consider it. [Matter to be added in **bold underlined**; matter to be deleted *italicized* and enclosed in square brackets [ ]:

1 "B(2) Against such party's personal representative or  
2 successors in interest [*at any time within four months after*  
3 *the date of the first publication of notice to interested*  
4 *persons, but not more than one year after such party's death]*  
5 **unless the personal representative or successor in**  
6 **interest serves notice of the death of the party on the**  
7 **claimant and the claimant fails to substitute the**  
8 **personal representative or successor in interest**  
9 **within four months of service of such notice."**

## **RULE 47 SUMMARY JUDGMENT**

### **C. MOTION AND PROCEEDINGS THEREON**

The motion and all supporting documents shall be served and filed at least **60 (45)** days before the date set for trial. The adverse party shall have **25 (20)** days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

January 10, 2002

Via e-mail at  
daniel.harris@ojd.stateor.us

The Honorable Daniel L. Harris  
Judge of the Jackson County Circuit Court  
Jackson County Courthouse  
100 South Oakdale Avenue  
Medford, OR 97501

Dear Judge Harris:

Pursuant to our telephone conversation today, I would appreciate it if you would mention to the Council on Court Procedures a matter, which I think would greatly ease practice.

At the present time, nearly everything has to be supported by affidavit. All applications for extraordinary relief, such as injunctions, receivers, TROs, replevin, etc. require that as a foundation. However, many times clients or witnesses are out of the area. The affidavit must be sent, a notary must be found, the client or witness is inconvenienced and to what end, other than a sworn statement.

Both California and Washington seem to have nearly done away with affidavits as part of the judicial process. The usual form that substitutes for an affidavit is a declaration. It states that "The undersigned, under penalties of perjury, does hereby declare:"

This is much simpler and still requires truthfulness in the statement. seem to struggle more and more with finding an affidavit and

convincing my client that they have to go get this witnessed and signed in front of some stranger.

The Honorable Daniel L. Harris

January 10, 2001

Page Two

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I don't see that we lose anything, but gain a lot of practical benefit to practice. Many clients view this as truly archaic and wonder what is going on.

Thank you for considering this and bringing it up with the Council.

Sincerely yours,

Tom Howser

Thomas C. Howser

January 10, 2002

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Tom Howser

Thomas C. Howser

ATTACHMENT C TO 2-9-02 MEETING AGENDA (Corrected)

(Note: Below are shown all ORCP provisions which call for the use of affidavits, with every occurrence of the word **affidavit(s)**, **counter-affidavit(s)** or **affiant** in bold print. Following those ORCP provisions are listed all provisions of the UTCR which call for use of affidavits. Finally, following the listing of UTCR provisions is a listing of all ORS provisions calling for the use of affidavits *in the context of civil litigation*.

Throughout the entirety of the ORS there are, of course, hundreds of mentions of, or requirements for, affidavits, but my listing includes only those which occur in the context of civil litigation and which therefore have the potential for creating difficulty were declarations substituted for affidavits in one or more provisions of the ORCP. However, after having spent considerable time on this question, while not claiming infallibility, my view is that amending any or all ORCP provisions to provide for declarations rather than affidavits would *not* create any contradictions or inconsistencies. Perhaps the Council will decide that the benefits from shifting from affidavits to declarations are substantial enough so that a committee should be appointed to double-check my conclusion. I can assure you that it's fascinating work and don't want to hog it all myself..)

RULE 7. SUMMONS

\* \* \*

D(6)(a) Court Order for Service by Other Method. On motion upon a showing by **affidavit** that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

\* \* \*

D(6)(c) Where Published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in

the **affidavit** required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

\* \* \*

F. Return; Proof of Service.

\* \* \*

F(2)(b) Publication. Service by publication shall be proved by an **affidavit** in substantially the following form:

\* \* \*

F(2)(c) Making and Certifying **Affidavit**. The **affidavit** of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the **affidavit**. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such **affidavit**.

F(2)(d) Form of Certificate or **Affidavit**. A certificate or **affidavit** containing proof of service may be made upon the summons or as a separate document attached to the summons.

\* \* \*

G. Disregard of Error; Actual Notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, or who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or **affidavit** or certificate of service of summons. The court shall disregard any error in the content of summons that does not materially prejudice the substantive rights of the party against whom summons was issued. If service is made in any manner complying with subsection D(1) of this section, the court shall also disregard any error in the service of summons that does not violate the due process rights of the party against whom summons was issued.

## RULE 9. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

\* \* \*

C. Filing; Proof of Service. Except as provided by section D of this rule, all papers required to be served upon a party by section A of this rule shall be filed with

the court within a reasonable time after service. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by **affidavit** of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers. Where service is made by telephonic facsimile communication device, proof of service shall be made by **affidavit** of the person making service, or by certificate of an attorney. Attached to such **affidavit** or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine.

\* \* \*

#### RULE 17. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

A. Signing by Party or Attorney; Certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the address of the party. Pleadings need not be verified or accompanied by **affidavit**.

\* \* \*

#### 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) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) 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), 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.

#### RULE 47. SUMMARY JUDGMENT

A. For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting **affidavits**, for a summary judgment in that party's favor upon all or any part thereof.

B. For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting **affidavits**, for a summary judgment in that party's favor as to all or any part thereof.

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

interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. **Form of Affidavits; Defense Required.** Except as provided by section E of this rule, supporting and opposing **affidavits** shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an **affidavit** shall be attached thereto or served therewith. The court may permit **affidavits** to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by **affidavits** or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

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. The **affidavit** shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by **affidavit**, would be a sufficient basis for denying the motion for summary judgment.

F. **When Affidavits Are Unavailable.** Should it appear from the **affidavits** of a party opposing the motion that such party cannot, for reasons stated, present by **affidavit** facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit **affidavits** to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

G. **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the **affidavits** presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the **affidavits** caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be subject to sanctions for contempt.

## RULE 52. POSTPONEMENT OF CASES

\* \* \*

B. **Absence of Evidence.** If a motion is made for postponement on the grounds of absence of evidence, the court may require the moving party to submit an **affidavit** stating the evidence which the moving party expects to obtain. If the adverse party admits that such evidence would be given and that it be considered as actually given at trial, or offered and overruled as improper, the trial shall not be postponed. However, the court may postpone the trial if, after the adverse party makes the admission described in this section, the moving party can show that such **affidavit** does not constitute an adequate substitute for the absent evidence. The court, when it allows the motion, may impose such conditions or terms upon the moving party as may be just.

## RULE 55. SUBPOENA

\* \* \*

H. **Hospital Records.**

\* \* \*

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt

thereof. Delivery shall be accompanied by the **affidavit** described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

\* \* \*

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the **affidavit** of a custodian of the hospital records, stating in substance each of the following: (i) that the **affiant** is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the **affiant** shall so state in the **affidavit**, and shall send only those records of which the **affiant** has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the **affidavit**, more than one **affidavit** may be made.

\* \* \*

#### I. Medical Records.

\* \* \*

I(3) **Affidavit of Attorney.** If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the **affidavit** of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

\* \* \*

## RULE 64. NEW TRIALS

\* \* \*

D. Specification of Grounds of Motion; When Motion Must Be on **Affidavits**. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) through (4) of section B of this rule, it shall be upon **affidavit**, setting forth the facts upon which the motion is based. If the cause is newly discovered evidence, the **affidavits** of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.

E. When **Counteraffidavits** Are Allowed; Former Proceedings Considered. If the motion is supported by **affidavits**, **counteraffidavits** may be offered by the adverse party. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case prior to the verdict or other decision sought to be set aside.

F. Time of Motion; **Counteraffidavits**; Hearing and Determination. A motion to set aside a judgment and for a new trial, with the **affidavits**, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by **counteraffidavits**, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

\* \* \*

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

\* \* \*

C(4)(c) Hearings on Objections.

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

\* \* \*

## RULE 69. DEFAULT ORDERS AND JUDGMENTS

### A. Entry of Order of Default.

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

A(2) Certain Motor Vehicle Cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an **affidavit** showing:

A(2)(a) that the plaintiff has complied with subparagraph D(4)(a)(i) of Rule 7; and

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

### B. Entry of Default Judgment.

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

\* \* \*

B(1)(d) The party seeking judgment submits an **affidavit** stating that the party has no knowledge or belief that a guardian or conservator has been appointed under ORS chapter 125 for the party against whom judgment is sought:

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

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

\* \* \*

B(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or a person who is incapacitated or financially incapable, as defined by ORS 125.005, unless the minor or person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon **affidavits**.

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

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

\* \* \*

#### RULE 70. FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing plainly titled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such **affidavits**, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof.

\* \* \*

RULE 79 TEMPORARY RESTRAINING ORDERS AND PRELIMINARY  
INJUNCTIONS

\* \* \*

B. Temporary Restraining Order.

\* \* \*

B(1)(a) It clearly appears from specific facts shown by **affidavit** or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B(1)(b) The applicant or applicant's attorney submits an **affidavit** setting forth the efforts, if any, which have been made to notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The **affidavit** required in this paragraph shall not be required for orders granted by authority of ORS 107.095(1)(c), (d), (e), (f), or (g).

\* \* \*

RULE 82. SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF  
SURETIES

\* \* \*

E. Affidavits of Sureties.

E(1) Individuals. The bond or undertaking must contain an **affidavit** of each surety which shall state that such surety possesses the qualifications prescribed by section D of this rule.

E(2) Corporations. The bond or undertaking of a corporate surety must contain **affidavits** showing the authority of the agent to act for the corporation and stating that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

\* \* \*

## RULE 83. PROVISIONAL PROCESS

A. Requirements for Issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary **affidavits** requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or **affiant**, that the action is one in which provisional process may issue, and:

A(1) The name and residence or place of business of the defendant;

A(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A(3)(a) If the provisional process sought is claim and delivery, a description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

\* \* \*

C. Evidence Admissible; Choice of Remedies Available to Court.

C(1) The court shall consider the **affidavit** or petition filed under section A of this rule and may consider other evidence including, but not limited to, an **affidavit**, deposition, exhibit, or oral testimony.

C(2) If from the **affidavit** or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in section D or E of this rule, or a restraining order, as provided in section F of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

\* \* \*

G. Appearance; Hearing; Service of Show Cause Order; Content; Effect of Service on Person in Possession of Property.

\* \* \*

G(3) The order shall:

G(3)(a) State that the defendant may file **affidavits** with the court and may present testimony at the hearing; and

\* \* \*

**UTCRC Provisions Calling for Use of Affidavits**

- UTCRC 1.120(3)(c) (in support of motion for order to clerk to disburse monies)
- " 1.140(4)(a) (in support of request for judicial extension of periods of records retention)
- " 2.050 (may be required in support of attorney fees when instrument not available)
- " 3.170(2) (information that must be submitted by out-of-state attorney)
- " 7.020(2) (in support of motion to continue case for good cause beyond 28 days from notice of non-return or non-acceptance of service)
- " 7.020(3)(b) (in support of motion to continue case for good cause if defendant does not appear within 91 days of filing of complaint)
- " 8.010(3) (uncontested dissolutions or annulments to entered on basis of affidavit as prescribed in ORS 107.095(4))
- " 8.010(5) (Uniform Support Affidavits in contested child support proceedings)
- " 8.010(7) (affidavits which must be filed before entry of judgment in domestic relations proceedings)
- " 8.040(1) (in support of motion for relief under ORS 107.095(1)--interim relief pending entry of dissolution or annulment decree)
- " 8.040(2) (in support of motion regarding temporary custody)
- " 8.040(3) (form of Uniform Support Affidavit)
- " 8.040(4) (service and filing of Uniform Support Affidavit)
- " 8.050(1) (in support of order modifying support or custody order)
- " 8.050(2) (service of show cause order with supporting affidavit)
- " 8.050(3) (service of affidavit by opposing party)
- " 8.050(4) (contents of affidavit when SED initiates or opposes motion to modify)
- " 8.050(5) (manner of completing Uniform Support Affidavit)
- " 9.020 (in support of request for approval of surety bond)
- " 9.050 (to accompany petition for approval of personal injury claim settlement)
- " 9.090(1) (in support of request for attorney fees in protective proceedings)
- " 9.090(2) (in support of request for attorney fees re decedents' estates cases)
- " 9.090(3) (in support of request for personal representative fees)
- " 13.190(2)(f) (affidavit or declaration under penalty of perjury admissible in arbitration)

**ORS Provisions Calling for Use of Affidavits in Civil Litigation**

- ORS 14.110 (in support of motion for change of venue)
- " 14.260 (in support of motion to disqualify judge)
- " 14.270 ( " " " " " " " )

- " 18.335(1)(a) (among papers to be retained in trial court file)
- " 18.410(2)(a) (in support of motion to determine whether judgment satisfied)
- " 18.410(3) (affidavit responding to motion described above)
- " 18.410(4)(a) (evidence on any issue in dispute on basis of affidavits described above)
- " 18.535(2) (in support of motion to amend complaint to allege punitive damages)
- " 18.535(3) (denial of motion described above)
- " 18.580(2) (showing of collateral benefits submitted after verdict)
- " 23.050(5) (information to be submitted by judgment creditor)
- " 23.050(6) (certifying that judgment debtor no longer lives in county where transcript of judgment is filed)
- " 23.320 (determination of adverse claims to property seized on execution)
- " 23.445(4) (in support of petition for sale of residential property on execution of judgment)
- " 23.445(5) (hearing upon filing of petition and affidavit)
- " 23.445(6) (service of petition and supporting affidavit)
- " 23.570(2)(c) (in support of assignment of claim to redeem property sold)
- " 24.125(1) (execution of foreign judgment--to show name of judgment debtor, etc.)
- " 24.290(2) (foreign money judgment--rate of currency exchange)
- " 24.290(10) ( " " " " " " " )
- " 24.310(4) (market quotation used in calculating U.S. currency value of foreign judgment)
- " 25.200(1) (in support of application for warrant to arrest of child or spousal support obligor who fails to appear for examination)
- " 30.230 (in support of motion for leave to commence action against obligor on officer's performance bond)
- " 33.055(4) (in support of motion to initiate contempt proceeding)
- " 33.055(5)(a) (court may order arrest of contemnor based on information in affidavit)
- " 34.365(1) (in proof of petitioner's inability to pay filing fee for writ of habeas corpus)
- " 34.695 (at hearing on habeas corpus court may receive proof by affidavits)
- " 36.415(2) (in support of defendant's motion to refer claim to mandatory arbitration)
- " 41.930 (affidavit of custodian of hospital records admissible as evidence of matters stated therein--see ORCP 55 H(3))
- " 44.090(2) (by person subpoenaed as witness to hold officer liable for wrongful arrest)
- " 45.020 (definition of "affidavit")
- " 45.130 (production of affiant who furnishes affidavit in support of provisional remedies)
- " 52.170 (in support of plaintiff's request to waive furnishing undertaking or letter of credit to secure payment of disbursements in justice courts)
- " 52.210 (affidavits required in justice court for provisional remedies)

- " 52.530 (in support of motion to change place of trial in justice court)
- " 55.030 (plaintiff's affidavit in small claims department of justice court that he made a good faith effort to collect the claim)
- " 105.147 (plaintiff's affidavit of defendant's noncompliance with judgment terminating tenancy)
- " 107.065(2)(a) (in support of motion to grant dissolution of marriage prior to 90 days following service of petition and summons)
- " 107.065(2)(b) (stating that stipulated judgment has been signed by the parties)
- " 107.095(4) (setting forth prima facie case for dissolution or annulment)
- " 107.097 (in support of application for temporary protective order)
- " 107.138(1)(b) (in support of motion for temporary status quo order)
- " 107.434(1)(c) (with motion and order waiving mediation requirement for good cause)
- " 107.437(2) (in support of application for order of assistance to regain custody)
- " 107.490 (in support of petition for summary dissolution of marriage)
- " 107.560(2) (in support of motion to waive 45 day period following filing of petition for conciliation jurisdiction within which trial or hearing can be held)
- " 107.720(1)(a) (affidavit of service of restraining order)
- " 109.767(1) (to set forth information required in child custody proceeding)
- " 109.096(2) (affidavit of person other than petitioner of relevant facts in filiation proceeding)
- " 109.145 (evidence presented by affidavit in filiation proceeding)
- " 109.155(5) (certifying authenticity of documents substantiating expenses)
- " 109.245(3) (documenting chain of custody of blood tests)
- " 109.326(2) (of husband or mother in making determination of nonpaternity in adoption proceeding)
- " 109.767 (for submission of information in child custody proceeding)
- " 110.384(2) (admissible in evidence in family support proceeding)
- " 111.215(3) (as proof of notice in probate proceedings)
- " 112.820(1)(c) (as proof of publication in connection with destruction of a will)
- " 113.055(1) (of attesting witness in ex parte hearing for probate of will)
- " 113.145(4) (filed by personal representative to show giving of required notices or waivers)
- " 113.155(4) (filed by personal representative to show publication of notice)
- " 114.515 (affidavit in support of request for appointment of personal representative for small estates)
- " 114.525 (content of above affidavit)
- " 124.030(1) (as proof of service of restraining order)

**Final Note:** My reference to "declarations under oath" in Item 3c of the 2-9-02 agenda was mistaken. "Declaration under penalty of perjury" is the term used in UTCR 13.190(2)(f)..

Subject: ORCP changes  
 Date: 01/14 12:31 PM  
 Received: 01/15 8:55 PM  
 From: Roger Harris, roger@hbclawyers.com  
 To: Maury Holland, mholland@law.uoregon.edu

*(Response sent by e-mail 1/21/02)*

We really need to revisit ORCP 31. The present provisions do not address the following situations:

- Where the interpleading party has a "stake" in the "res", or some portion thereof, and nevertheless makes a claim for attorney fees at the conclusion of the action (notwithstanding the fact that the interpleading party's actions, at least in part, caused or contributed to the dispute and the costs incurred). I would make it very clear that in order to be eligible for attorney fees the interpleading party must disclaim any interest or stake in the disputed sums. Further, the if interpleading party had at one time been claiming an interest or stake in the disputed sums, but later disclaims such an interest, they should not be eligible for attorney fees except at the point at which the party became truly neutral. In those situations where the factual issues are somewhat clouded (as I have described here, and which are actual situations) I would allow the judge to act in equity have the award of fees discretionary.
- Where the interpleading party is an OSB member and has acted as an escrow agent in a transaction while still representing one of the parties to the transaction (and the deal goes "sour" and there is a dispute over who gets the earnest or "down" money), the attorney must resign because of a conflict of interest and the PLF steps in to represent him; we should not allow any attorney fees recovery where the attorney has brought the situation on by his own misconduct. Bottom line: Whenever the PLF is involved, the attorney is usually not without some culpability, although s/he may disclaim any stake in the disputed sums. The PLF should not recover its attorney fees, to the financial detriment of at least one of the parties, when trying to "rescue" a bar member from his/her own incompetence.
- Where disputes over escrowed sums or other property/assets held by true third parties invokes the interpleader remedy, often the proceedings are acrimonious and personal (family members, former business partners, etc.). Sometimes a "scorched earth" approach is invoked by one of the parties attempting to inflict the greatest inconvenience and cost on the other. The result is that the party ultimately entitled the asset in dispute must pay the attorney fees of the interpleading party plus its own fees and costs, rendering the net value of any recovery steeply discounted. That threat is often used as a "hammer" to extract steep concessions by parties that believe they have nothing to lose (their own internal analysis shows high risks or little likelihood of recovery). Like federal holdings in some cases, I would give judges the discretion to award attorney fees and costs to the prevailing party in an interpleader action, especially where a party is not acting in good faith or the claims to the disputed asset are frivolous. The federal cases allow the court to consider the conduct of the offending or breaching party in any award. Such an approach, from both a policy and practical standpoint, would encourage earlier resolution of disputed claims and protect against using the system abusively.

While this section of the code is not used frequently, it is a valuable tool in the event of legitimate disputes. Please feel free to contact me if you have any questions. Thank you for your consideration.

D-1

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Attachment D to 2-9-02 Meeting Agenda

Note re ORCP 31 and Mr. Harris' Suggestions for its Amendment

Roger Harris' criticisms of Rule 31 would requirement amendment of Section 31 C, the attorney fee provision of the rule. While the points he makes might well have considerable merit, I doubt whether amending Section 31 C in the manner his criticisms imply would be within the Council's statutory authority pursuant to ORS 1.735(1).

Sections A and B of Rule 31 were both promulgated by the original Council in 1978 (effective 1-1-80) and have not been amended by either the Council or the Legislature since then. Section 31 A modified its statutory predecessor, *former* ORS 13.120. Section 31 B also modified former ORS 13.120 along the lines of Michigan Court Rule 210.2 in order to make clearer than it had been under the statute the procedure whereby an interpleading stakeholder which claims no interest in the fund or other *res* could be dismissed from the proceeding prior to the "second stage" of the interpleader wherein the rival claimants duke it out between or among themselves.

However, what is now Section 31 C was added to Rule 31 by the 1991 Legislature. OR LAWS 1991, c. 733 §1. While political prudence might sometimes dictate otherwise, there is no *legal* reason why the Council may not amend an ORCP provision merely because it was enacted by the legislature. In fact, the Council has occasionally done so. However, in addition to having been enacted by the legislature, Section 31 C is clearly an attorney fee-shifting provision, the only one within the confines of the ORCP.

While it might be debatable, in my view fee-shifting provisions do not come within the Council's authority to promulgate "rules governing pleading, practice and procedure, . . ." ORS 1.735(1). A provision that would authorize fee shifting or, as Mr. Harris's proposal would do, introduce new limitations, conditions, or restrictions on fee shifting as authorized by the legislature in Section 31 C, would, in my opinion, be beyond the scope of the Council's statutory authority. It seems to me that a provision that would either authorize fee shifting, or narrow that authorization, is clearly distinguishable from such ORCP provisions as Rule 68, which concerns the procedures by which fee shifting is litigated, but does not itself provide any authority for fee shifting. But, obviously, this is an issue for the Council finally to decide.



# Oregon

John A. Kitzhaber, M.D., Governor

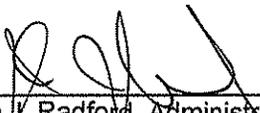
Department of Administrative Services

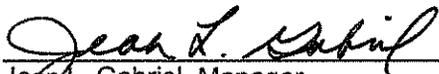
State Controller's Division  
155 Cottage Street NE U60  
Salem, OR 97301-3970  
(503) 373-1044  
FAX (503) 378-8940

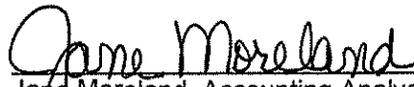
## CAFR ★ Gold Star 2001

Date: January 16, 2002

To: MAURICE J HOLLAND,  
COUNCIL ON COURT PROCEDURES - AGY 167

From:   
John V. Radford, Administrator  
State Controller's Division

  
Jean L. Gabriel, Manager  
Statewide Accounting and Reporting Services

  
Jane Moreland, Accounting Analyst  
Statewide Accounting and Reporting Services

Subject: **FY 2001 GOLD STAR CERTIFICATE**

It is a great pleasure to inform you that your agency has earned the State Controller's Gold Star Certificate for fiscal year 2001. Congratulations to you and your fiscal staff for this outstanding work.

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The State Controller's Gold Star Certificate is awarded to state agencies that provide accurate and complete fiscal year end information in a timely manner. Clearly, the Gold Star is a challenge to earn, and its achievement is due primarily to your agency's diligent efforts to maintain accurate and complete accounting records throughout the fiscal year.

We particularly want to commend your agency's lead CAFR accountant, **TRESSA PERLICHEK**, who worked directly with us to ensure accurate and timely year end reporting. The Gold Star Certificate was presented to your agency's CAFR accountant earlier this month.

Your agency's participation in the Gold Star Certificate program is important to Oregon in meeting statewide fiscal performance goals and key to the timely preparation of Oregon's Comprehensive Annual Financial Report and the statewide Schedule of Expenditures of Federal Awards. Your agency's success in accounting and financial reporting is also critical to Oregon's success in receiving a favorable audit opinion on both statewide documents.

The State Controller's Gold Star Certificate is Oregon's equivalent to the internationally recognized GFOA Certificate of Achievement for Excellence in Financial Reporting. Through the collaborative team effort of state agencies and the State Controller's Division, Oregon has earned the GFOA Certificate every year since 1992. *Gold Star agencies* are key to making this possible! We appreciate your agency's commitment to teamwork and excellence in financial reporting.

We are very happy to recognize your agency with this award. The diligent efforts of your fiscal staff truly make a difference in maintaining the State's accountability and credibility in financial reporting.

cc: VALERIE WICKLUND  
TRESSA PERLICHEK

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*I trust that Ralph will follow past Chairs in allowing me to use the new Lexus 400 that comes with this certificate, provided I chauffeur him to all Council meetings in it. M.*