

*****NOTICE***
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 12, 2004
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 (Ms. Clarke)
2. Approval of 5-8-04 minutes (to follow)
3. Reports and recommendations (Ms. Clarke):
 - 3a. ORCP 46 A(1) - Judge Velure's proposed amendment (see Attachment A to this agenda) (Judge Carp)
 - 3b. ORCP 9 F and 10 D - Effective date of fax service (see Attachment B to this agenda) (member of the committee)
 - 3c. ORCP 32 - proposed amendments regarding class actions (see Attachment C to this agenda) (Mr. Sugerman)
 - 3d. ORCP 44 A - proposed amendments regarding court-ordered physical or mental examinations (see Attachment D to this agenda) (Justice Durham for the Committee)
 - 3e. ORCP 44 B and C - proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought (see Attachment E to this agenda) (member of the committee)
4. Old business
5. New business:
 - 5a. Proposals by Ms. Kristen David to amend UTCR 5.030 and 5.080 referred to Council by Mr. Bruce D. Miller (see Attachment F to this agenda) (Prof. Holland)
 - 5b. ORCP 54 E: Proposal to amend (submitted by Procedure and Practice Committee of Oregon State Bar) (see Attachment G to this agenda) (representative of Procedure & Practice Committee)
 - 5c. ORCP 7 (discussion) (Ms. Clarke)

Agenda of 6-12-04 Meeting (cont'd)

6. Adjournment (Ms. Clarke)

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Note

The Council at its 4-10-04 meeting voted to adopt in principle the amendments to ORCP 59 H(1) and H(2).

The Council at its 5-8-04 meeting voted to delete 83 A(9) referring to notice of a bulk transfer and 83 D (Effect of notice of bulk transfer).

Agenda Item 2: Approval of minutes. On motion duly made and seconded, the minutes of the Council's April 10, 2004 meeting were approved as previously distributed.

Agenda Item 3: Reports and recommendations (Ms. Clarke):

3a. ORCP 46 A(2): Judge Velure's proposed amendment (see Judge Carp's draft proposal distributed at this meeting, a copy of which is attached to these minutes) (Judge Carp for the committee). Judge Carp reported that the committee recommended tentative adoption of the bold italicized sentence as shown in his memo. He reminded members that the purpose of this amendment was to ensure that a clear and complete identification of the materials of which production is sought would appear on the first page of the motion, primarily for the convenience of judges ruling upon such motions.

Justice Durham suggested that the word "written" modifying "motion" was redundant, and that the proposed new sentence should be revised to read: "Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover." Mr. Bloom pointed out that no particular sanction seemed to be provided for failure to comply with the first page requirement. Judge Carp responded that he did not believe that any specifically authorized formal sanction was needed or appropriate. Motion judges could simply "chew out" counsel who failed to comply.

In light of the fact that members had not been able to consider this proposal prior to this meeting, it was agreed that its further consideration be deferred to the June meeting.

(Without objection, the following two items were taken up out of the order shown on the meeting agenda.)

Agenda Item 5: New business (Ms. Clarke):

5e. ORCP 54 E: Proposal by Procedure & Practice Committee of Oregon State Bar (see Attachment H to this meeting agenda) (Mr. Steven H. Pratt for the Procedure & Practice Committee). Mr. Pratt stated that the Procedure & Practice Committee believed that ORCP 54 E required clarification in two related respects, the first being whether an offer of settlement does, or does not, include the claimant's costs, disbursements, and attorney fees, and the second being whether the latter are to be included in determining whether a claimant who has rejected an offer subsequently obtained a judgment more favorable than the amount offered. He invited members' attention to the draft amendment he had prepared, copies of which

were distributed at the meeting and one is attached to these minutes, entitled "PROPOSED AMENDMENTS TO ORCP 54 E."

Mr. Pratt pointed out that, whereas the existing section provided that unless the parties "otherwise agree," an offer of judgment will be deemed not to include costs or fees, which can be sought in addition to the amount offered by filing and serving a statement pursuant to ORCP 68 C(4), the proposed new subsection 54 E(1) would require that every offer must state explicitly whether or not it includes costs and fees. Also, he continued, proposed new subsection 54 E(3) would require the court to include any costs or fees obtained in connection with a contested judgment when an offer had stated that it included costs and fees in determining whether the contested judgment was more favorable to the claimant than the offered judgment. Mr. Pratt concluded by stating that the Committee believed that the language of the existing section 54 E created some potential for malpractice claims.

Justice Durham commented that he believed that some re-writing of section 54 E was called for, basically for the reasons stated by Mr. Pratt, adding that he was not sure the language prepared by Mr. Pratt was precisely what was needed. General agreement with this comment was expressed by the members. Judge West stated that he was in full agreement with Justice Durham's comment. Judge Carp said that any proposed amendment to section 54 E should take account of a Supreme Court decision handed down some years ago, *For Counsel, Inc. v. Northwest Web Co.*, 329 Or 246, 985 P2d 1277 (1999).

Discussion of this item concluded by Judge Carp's offering a motion, duly seconded and unanimously agreed to, suggesting that the Procedure & Practice Committee revisit its proposed amending language, if possible prior to the Council's June 12, 2004 meeting on the agenda of which this item should then be included.

5d. ORCP 55 H: Subpoenas seeking individually identifiable health information (see Attachment G to this meeting agenda) (Ms. Gwen M. Dayton for the Oregon State Bar Health Law Section). Ms. Dayton stated that in 2003, when ORCP 55 H was amended to comply with regulations promulgated under the federal Health Insurance Portability & Accountability Act (HIPAA), employers having individually identifiable health information were included in the amendment by inadvertence. She further stated that the intended coverage of this amendment was, like the HIPAA regulations, limited to hospitals, health care providers, health plans, and health care clearinghouses. She added that compliance with section 55 H as amended was creating some difficulties for some employers.

Ms. Clarke commented that her understanding of the amendment was that its intended coverage was very broad. Ms. Sugerman remarked that, given the amount of time and effort which the Council devoted to this matter so recently, he questioned the appropriateness of returning to it so soon. Ms. Johnston stated that many employers resent having to respond to

subpoenas for health care information, and are discouraged by the amended section from maintaining them even when they might be useful both to them and to employees. Ms. Dayton stated that the Health Law Section wished to bring this matter to the Council's attention, but did not feel strongly in favor of an amendment to exclude employers from section 55 H's coverage.

After further discussion, on motion made and duly seconded, the Council voted not to pursue this matter further at this time, 16 in favor and 1 opposed.

[At this point the meeting returned to the order of items as shown on the agenda.]

3b. ORCP 9 F and 10 D: Effective date of fax service (see memo entitled "Proposed Amendments to ORCP 9F and 10D" (Ms. McKelvey for the committee). Ms. McKelvey invited members' attention to a memo entitled "Proposed Amendments to ORCP 9F and 10D," copies of which were distributed to members and one is attached to these minutes. She recalled that this proposed amendment had been suggested by Mr. Bruce C. Hamlin and noted that, in accordance with his suggestion, it would make fax service equivalent to service by personal delivery if accomplished before 5:00 p.m. on a regular business day, meaning that the effective date of fax service would not be subject to the three-day delay as with service by mail.

Several members expressed concern about how, under this proposed amendment, malfunctioning fax machines or unreadable copies of transmittals would be dealt with. Justice Durham commented that he did not believe that fax transmission had reached the point of reliability that would justify treating service by that method as tantamount to in-hand service. One or more members stated that fax transmissions sent late on Friday afternoons would frequently not actually be received until the following Monday morning. Mr. Bloom said that he favored this amendment, adding that fax transmissions show the date and time of receipt. Ms. Clarke questioned whether proof of service by fax would be made by affidavit or declaration, and whether a confirmation of the date and time of actual receipt would have to be attached thereto. Mr. Svoboda questioned whether when a fax is sent to the fax number shown in the Bar Directory, that number would be deemed presumptively correct.

Discussion of this item concluded with a request that Ms. McKelvey prepare a revised amendment for consideration at the June 12 meeting whereby fax service would be equated with service by mail for the purpose of determining due dates of responses to faxed transmittals.

3c. ORCP 32: Proposed amendments regarding class actions (see Attachment A to this meeting agenda) (Mr. Sugerman for the committee). Mr. Sugerman requested that this item be deferred to the June 12 meeting, which request was agreed to.

3d. ORCP 44 A: Proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to this meeting agenda) (Justice Durham for the committee). Justice Durham reported that two members of this committee had submitted written proposals, but those do not necessarily represent the final product which it wished the Council to consider. He added that a committee meeting was scheduled for May 21, 2004 in Judge Johnson's chambers, and that he expected a proposal in final form would be ready for the Council meeting June 12.

Judge Coon said that the issue of recording exams, or allowing examinees' representatives to be present during exams, was not a problem in southern Oregon, and asked whether a significant problem was existing elsewhere in the state. Some members responded that they believed there was somewhat of a problem in various parts of the state, and that clarification on a uniform state-wide basis was called for. Justice Durham commented that the committee was not undertaking a drastic amendment of this provision, but only some modest fine-tuning.

Discussion of this item concluded with general agreement that this matter would be placed on the agenda of the June 12, 2004 meeting.

3e. ORCP 44: Proposed amendments regarding requests for written reports and existing chart notations of examinations relating to injuries for which recovery is sought (see Attachment C to this meeting agenda) (Mr. Bloom for the committee). Mr. Bloom suggested that further consideration of this item be deferred to the June 12 Council meeting and combined with discussion of item 3d above, with which there was general agreement. Justice Durham said that it would be helpful to members if some advance documentation were provided to be studied prior to that meeting.

Agenda Item 4: Old business (Ms. Clarke): No item of old business was raised.

Agenda Item 5: New business (Ms. Clarke):

5a. ORCP 67: Notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment D to this meeting agenda) (Judge Barron). Judge Barron recalled that the purpose of his proposal was to shorten and simplify this rule. Ms. Clarke stated that discussion of this item made her uncomfortable because of her involvement with a case in which a petition for review was then pending. Ms. McKelvey then offered a motion, duly seconded and unanimously agreed to, that further consideration of this item be deferred until the judgment in this case becomes final.

5b. ORCP 83 A(9) and D: Proposed deletion of references to "notice of bulk transfers" (see Attachment E to this meeting agenda) (Prof. Holland). A motion was offered by Judge Schuman, seconded by Judge Carp, and unanimously agreed, to tentatively

adopt the proposal deleting references to "notice of bulk transfers" in these provisions.

5c. Proposals by Ms. Kristen S. David to amend UTCR 5.030 and 5.080 and referred to Council by Mr. Bruce D. Miller (see Attachment F to this meeting agenda) (Prof. Holland). It was unclear whether any ORCP amendment was being proposed. No draft of an amendment was submitted for consideration. Prof. Holland stated that he would get in touch with Mr. Miller and report back at the June 12 Council meeting whether the UTCR committee wished the Council to consider any specific action regarding Ms. David's proposal.

Ms. Clarke stated that last biennium's amendments providing that declarations under oath could be used in lieu of affidavits needed a specific fix, which she said she would try to distribute to members prior to the June 12 Council meeting.

Mr. Svoboda asked whether any contacts with legislators were being made, to which the response was that such contacts would probably have to await the November elections when the identities of members of the 2005 legislature would become known.

Agenda Item 6: Adjournment. Without objection Ms. Clarke adjourned the meeting at 11:23 a. m.

Respectfully submitted,

Maury Holland
Executive Director

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) Appropriate Court.

A(1)(a) Parties. An application for an order to a party may be made to the court in which the action is pending, and, on matters relating to a deponent's failure to answer questions at a deposition, such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A(1)(b) Non-parties. An application for an order to a deponent who is not a party shall be made to a court of competent jurisdiction in the political subdivision where the non-party deponent is located.

A(2) Motion. If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. *Any written motion made pursuant to ORCP 46A shall begin with a concise statement of those items the moving party seeks to compel.* When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) Evasive or Incomplete Answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

NOTE:

At the Council's May 8 meeting Justice Durham proposed that the following sentence be substituted for the bold italicized sentence:

Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover.

Proposed Amendments to ORCP 9F and 10D

Purpose

To clarify how time is computed when a document is served by both mail and telephonic facsimile.

Proposed Amendments

ORCP 9F:

"Service by Telephonic Facsimile Communication Device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by hand delivery if transmission is confirmed as complete before 5:00 p.m. on a regular business day. When the proof of service states that service was completed both by facsimile and mail, the provisions of Rule 10D shall govern the computation of time.

ORCP 10D:

Service by Telephonic Facsimile. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party, and service is completed under Rule 9F (telephonic facsimile), three days shall not be added to the prescribed period.

*Attachment B to
6-12-04 agenda*

B-1

Alternative Proposed Amendments to ORCP 9F

Purpose

To clarify how time is computed when a document is served by both mail and telephonic facsimile.

Proposed Amendments

ORCP 9F:

"Service by Telephonic Facsimile Communication Device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by mail for purposes of Rule 10C.

B-2

ORCP 32F PROPOSED REVISIONS 2004

Deletions in [brackets]

Additions at ***bold***

CORRECTED 5-24-04

F Notice and exclusion.

F(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

F(2) Prior to the entry of a final judgment against a defendant the court [shall request] ***may require*** members of the class who may be entitled to individual monetary recovery to submit a ***claim form*** [statement in a form] prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. ***When required,*** [t]he ***claim form*** [statement] shall be designed to meet the ends of justice. In determining ***whether to require a claim form and what form it shall take*** [the form of the statement], the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, ***the probable cost of administering claim forms, the possible prejudice to the parties and class members of omitting the claim form, the probable size of the class, the probable size of individual class members' claims,** and the availability of relevant information from sources other than the individual class members. ***When the court requires a claim form, the *** [The] amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F(3) ***When a claim form is required,** failure [Failure] of a class member to file a statement required by the court will be grounds for entry of judgment dismissing such class member's claim for individual monetary recovery without prejudice to the right to maintain an individual, but not a class, action for such claim.

F(4) Plaintiffs shall bear costs of any notice ordered prior to a determination of liability. The court may, however, order that defendant bear all or a specified part of the costs of any notice included with a regular mailing by defendant to its current customers or employees. The court may hold a hearing to determine how the costs of such notice shall be apportioned.

F(5) No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to current customers or employees of the defendant under this section.

F(6) As used in this section, "customer" includes a person, including but not limited to a student, who has purchased services or goods from a defendant.

Compelled Medical Examinations

(ORCP 44 A)

1 Add highlighted material to existing text of ORCP 44A:

2 A. Order for Examination. When the mental or physical
3 condition or the blood relationship of a party, or of an agent,
4 employee, or person in the custody or under the legal control of
5 a party (including the spouse of a party in an action to recover
6 for injury to the spouse), is in controversy, the court may order
7 the party to submit to a physical or mental examination by a
8 physician or a mental examination by a psychologist or to produce
9 for examination the person in such party's custody or legal
10 control. The order may be made only on motion for good cause
11 shown and upon notice to the person to be examined and to all
12 parties and shall specify the time, place, manner, conditions,
13 and scope of the examination and the person or persons by whom it

1 is to be made. Unless the trial court requires other or
2 different conditions for good cause supported by the record, the
3 following conditions shall apply to a compelled medical
4 examination under this rule:

5 A(1) *Compliance With Agreed Conditions.* The parties, the
6 examinee, and their representatives shall comply with any
7 conditions for the examination to which they agree in writing.

8 A(2) *Representation; Reservation of Objections; Assertion of*
9 *Privileges.* The examinee may have counsel or another
10 representative present during the examination. All objections to
11 questions asked and the procedures followed during the
12 examination are reserved for trial or other disposition by the
13 court. The examinee may assert, either personally or through
14 counsel, a right protected by the law of privileges.

15 A(3) *Obstruction.* No person may obstruct the examination.

D-2

1 If the examinee, counsel, or the examining physician or
2 psychologist suspends the examination based on a good faith claim
3 that a person has obstructed the examination, the court may order
4 a resumption of the examination under any conditions that the
5 court deems necessary to prevent obstruction. The parties may
6 agree to resume an incomplete examination without an order by the
7 court.

8 A(4) *Record of Examination.* Any party, the examinee, or the
9 examining physician or psychologist may record the examination
10 stenographically or by audiotape in an unobtrusive manner. A
11 person who records an examination by audiotape shall retain the
12 original recording without alteration until final disposition of
13 the action unless the court orders otherwise.

14 A(5) *Transcription of Record.* Upon request, and upon
15 payment of the reasonable charges for transcription and copying,

1 the stenographic reporter shall make a transcription of the
2 examination and furnish a copy of the transcript, or in the case
3 of an audiotape record, the person who records the examination
4 shall make and furnish a copy of the original recording, to any
5 party and the examinee.

D-4

1 Add highlighted material to ORCP 46B(2) (e):

2 B(2) (e) Such orders as are listed in paragraphs (a), (b),
3 and (c) of this subsection, where a party has failed to comply
4 with an order under Rule 44 A requiring the party to produce
5 another for examination, unless the party failing to comply shows
6 inability to produce such person for examination, or where a
7 party, the examinee, or a representative has violated an agreed
8 condition or has obstructed an examination under Rule 44 A.

1 RULE 44 proposed amendment (delete bracketed language, add underlined language):

2 **B. Report of examining physician or psychologist.** If requested by the party against whom
3 an order is made under section A of this rule or the person examined, the party causing the
4 examination to be made shall deliver to the requesting person or party a copy of a detailed report of
5 the examining physician or psychologist setting out such physician's or psychologist's findings,
6 including results of all tests made, diagnoses and conclusions, together with like reports of all
7 earlier examinations of the same condition. [After delivery the party causing the examination shall
8 be entitled upon request to receive from the party against whom the order is made a like report of
9 any examination, previously or thereafter made, of the same condition, unless, in the case of a report
10 of examination of a person not a party, the party shows inability to obtain it.] This section applies
11 to examinations made by agreement of the parties, unless the agreement expressly provides
12 otherwise.

13
14 **C. Reports of examinations; claims for damages for injuries.** In a civil action where a
15 claim is made for damages for injuries to the party or to a person in the custody or under the legal
16 control of a party, upon the request of the party against whom the claim is pending, the claimant
17 shall deliver to the requesting party a copy of all written reports and existing notations of any
18 examinations relating to injuries for which recovery is sought, unless the claimant shows inability
19 to comply. The obligation to produce written reports and existing notations of any
20 examinations includes the production of written reports and existing notations prepared
21 by medical or psychological experts who have personally examined a party or a person in
22 the custody or under the legal control of a party. Nothing in this rule shall require,
23 however, the party to reveal the identity of a retained expert.

24
25 (April 19, 2004)

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October 13, 2003

UTCRC Reporter
Office of the State Court Administrator
1163 State Street
Salem, OR 97301-2563

Re: Suggestions for 2004 UTCRC changes.

To Whom It May Concern:

My practice involves medical and legal malpractice defense in complex cases. Given the nature of the complaints we receive, motion practice and discovery tools are extremely important as are the controlling ORCP and UTCRC authority. Unfortunately, the rules are often ambiguous and unclear on their intent. As the committee discussed this last spring there are real and apparent differences between the UTCRCs and the ORCPs. The following are issues which I have noted for the last six months which are problematic in reality and could be made more practical for daily usage.

UTCRC Chapter 2: Standards for Pleadings and Documents.

I believe we need one uniform certificate of service. A rule is needed to set forth with particularity the requirements of what constitutes mailing. Service of Orders, Motions and other documents are raised in dozens of the rules. The problem is that every person does it differently. Is it enough to "place the pleading in a sealed envelope with postage prepaid" and place in a dead mailbox or is there a requirement to certify that the item was "mailed (i.e. postmarked) that day." What about offices which can postmark that day but the letter does not go to the postal service until a day or two later? There are many different types of mailing practices and it becomes problematic with ORCP 9 and 10 and UTCRC 5.030 and 5.100. When seven day and three day deadlines are at issue, the method of mailing becomes important. Especially in light of the "service by mail is complete upon mailing" (ORCP 9). So again - what is the proper uniform way to mail an item?

In addition, a uniform certificate of service would also eliminate the confusion over a once recognized need for a true copy stamp. The top of many certificates of service identify that the item being served is a true copy thereof. This language would satisfy the requirement that an exact copy be served on all parties as established in ORCP 9.

Attachment F to 6-12-04
Agenda

F-1

UTCRC Reporter
 October 13, 2003
 Page 2 of 2.

UTCRC 5.030 and ORCP 10 C: Time for Response.

While many of the courts, such as Clackamas County, specifically reenforce UTCRC 5.030⁵ by stating on the Notice of Hearing "any response not received within 14 days will not be considered," it is contrary to the language of ORCP 10C. ORCP 10C allows for an additional 3 days to be added to any prescribed time to act when service has been by mail. Therefore, in cross-referencing UTCRC 5.030 for consistency a simple third section could affirm this requirement and clarify that 3 additional days are allowed when service was by mail. Another option could be to change the language of 5.030 (1) & (2) to state "not later than 14 days from the date of service of the motion, unless service was by mail, and then 3 additional days shall be added."

Again, in reality these issues do come up and the Courts are faced with these decisions as to whether to consider late (by 3 days) filings.

UTCRC 5.080 and ORCP 68: Statement of Attorney Fees or Affidavit of Attorney Fees.

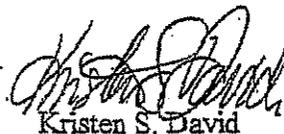
Each time I face an award of attorney fees, the requirements of this rule are re-argued. While UTCRC 5.080 and ORCP 68 require the filing of a "statement for attorney fees" there is the question as to whether an additional affidavit is required to evidence the "reasonableness" and "factors" checked on the UTCRC form. It has been my position that both the Statement (while notarized and in form similar to an affidavit) and a Supplemental Affidavit need to be filed. Unfortunately ORCP 68 is silent on whether a separate affidavit is required and UTCRC 5.080/ UTCRC form simply states "as explained more fully in Exhibit(s) _____ attached."

I believe the clarification of this problem is to add either to the ORCP or the UTCRC rule language that requires an Affidavit supporting the "reasonableness of the fees" and the "factors" checked.

While some attorneys may feel that these are unnecessary change, it is the parties and the judges in highly complex cases where strict adherence can be crucial who are faced with these ambiguities. Slight changes in the UTCRCs can benefit all attorneys and would lessen the need for judicial interpretation.

I thank you for your consideration of these issues. If you have any questions, please feel free to give me a call.

Very truly yours,



Kristen S. David

Attachment F-2 to 6-12-04
 Agenda

PROPOSED AMENDMENTS TO ORCP 54E

Key

Italicized = deleted

Underlined = addition

ORCP 54E Compromise; effect of acceptance or rejection.

E(1) 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. The offer shall state whether the offer is inclusive of costs and disbursements or attorney fees.

E(2) 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 does not state that it is inclusive of costs and disbursements or attorney fees, the party asserting the claim shall submit the claim for costs and disbursements and attorney fees to the court as provided in ORCP 68.

E(3) 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. In determining whether the party asserting the claim obtained a more favorable judgment, the offer shall be compared against the judgment plus recoverable costs, disbursements and attorney fees incurred up to the time of service of the offer.

REVISED SINCE MAY 8, 2004 MEETING

Attachment G to 6-12-04 Agenda