

*****NOTICE***
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 11, 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 9-11-04 minutes (attached)
3. New report for consideration (Ms. Clarke):
 - 3a. RULE 67 (comment letter and proposed revision received from Attorney Lance A. LeFever -- attached)
4. Proposed amendments to Oregon Rules of Civil Procedure (attached) (as published in Issue No. 22 of the Oregon Appellate Courts Advance Sheets) (Ms. Clarke):
 - a) RULE 9 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS
 - b) RULE 32 CLASS ACTIONS
 - c) RULE 44 PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATION
 - d) RULE 46 FAILURE TO MAKE DISCOVERY; SANCTIONS
 - e) RULE 54 DISMISSAL OF ACTIONS; COMPROMISE
 - f) RULE 59 INSTRUCTIONS TO JURY AND DELIBERATION
 - g) RULE 67 JUDGMENTS
 - h) RULE 83 PROVISIONAL PROCESS

Agenda of 12-11-04 Meeting (cont'd)

5. Suggestions regarding staff comments
6. Election of year 2005 officers
7. Election of Legislative Advisory Committee (LAC) for the 2005 Legislative Assembly
8. Old business
9. New business
10. Adjournment

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of September 11, 2004

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present:	Lisa A. Amato	Robert D. Durham
	Eric J. Bloch	Daniel L. Harris
	Benjamin M. Bloom	Nicolette D. Johnston
	Eugene H. Buckle	Connie Elkins McKelvey
	Ted Carp	Shelley D. Russell
	Kathryn H. Clarke	David Schuman
	Allan H. Coon	David F. Sugerman
	Don Corson	John L. Svoboda

Richard L. Barron and Russell B. West attended by speaker telephone.

Excused:

- Bruce J. Brothers
- Martin E. Hansen
- Nely L. Johnson
- Alexander D. Libmann
- Ronald D. Thom

Guests:

- Attorney James N. Gardner, Portland
- Attorney Phil Goldsmith, Portland
- Susan Grabe, Director, Public Affairs Department, Oregon State Bar
- Mr. Tim Martinez of Martinez & Sons, lobbyist for Oregon Bankers Association
- Mr. Thomas A. Perrick, President and Chief Executive Officer, Oregon Bankers Association
- Attorney Nancie K. Potter, of Foster Pepper Tooze, Portland (Ms. Potter participated in the meeting by speaker telephone)

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

CORRECTION IN AGENDA ITEM 2 -- REFLECTING CORRECT MEETING DATE

Agenda Item 1: Call to order. The meeting was called to order by the Chair, Ms. Clarke, at 9:05 a.m.

Agenda Item 2: Approval of 6-12-04 minutes. The minutes of the 6-12-04 meeting were unanimously approved without correction.

3. Reports and recommendations (Ms. Clarke)

3a. ORCP 32 - proposed amendments regarding class actions (see Attachment A to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman reported that, following the Council's June meeting, this committee met with representatives of the banking industry and Associated Oregon Industries invited by Mr. Thomas A. Perrick to discuss the currently proposed amendment to ORCP 32 F(2) that would make use of claim forms discretionary with the court rather than mandatory in all class actions. He stated that, among others attending the meeting, were Mr. James N. Gardner, Mr. Bruce C. Hamlin, and Ms. Nancie K. Potter.

Mr. Sugerman referred members to a 9-9-04 letter to the Council from Ms. Potter (copy attached to original of these minutes). He said that, as that letter indicates, the representatives of bankers and other business groups who have been consulted are not wholly opposed to making the current requirement of claim forms in every class action less rigid, but strongly favor making any decision to dispense with them in a given case solely dependent on a stipulation to that effect by the parties rather than a matter of the court's discretion. Mr. Sugerman added that the Rule 32 committee continues to favor the version of the amendments shown in Attachment A to the agenda of this meeting primarily because the latter leaves it to the court to decide, on a case-by-case basis, whether claim forms should be used rather allowing any party to preempt that decision by refusing to stipulate that they not be used. He further added that the committee does not believe that rules of construction should be included in the ORCP, as the amendment to subsection 32 F proposed in Ms. Potter's letter would do.

In response to a question by Judge Barron Mr. Sugerman stated that the federal class action rule, and those of the majority of states which have the model act, do not include an inflexible claim form procedure comparable to subsection 32 F(2). He also explained, in response to a question by Judge Carp, the meaning of "fluid recovery" or "cy pres" as those terms are used in class action practice.

The Council then heard remarks by Mr. Perrick, Chief Executive Officer of the Oregon Bankers Association, who said that he was in general agreement with Mr. Sugerman's summary and urged further careful consideration of the amendment proposed in Ms. Potter's letter.

The Council next heard remarks by Mr. Gardner, who identified himself as a partner in a law firm and a lobbyist for various business groups before the Legislative Assembly. Mr. Gardner described the amendment proposed by the committee as a major break with past practice in Oregon courts, and therefore was in marked contrast to the slow incrementalism he said usually characterizes ORCP amendments promulgated by the Council. He concluded his statement by noting that a less drastic way of tempering the inflexibility of the present claim form requirement would be by providing, as proposed in Ms. Potter's letter, that the requirement would be dispensed with if all parties so agree.

Judge Carp asked whether this question concerning claim forms had any legislative history about which the Council should be aware. Prof. Holland responded that, in the sole instance of an ORCP amendment promulgated by the Council being disallowed by the legislature, that body in 1981 requested an Attorney General's opinion as to whether dispensing with claim forms was within the Council's statutory authority. Despite the opinion's affirmative response, the legislature overrode an amendment to Rule 32, simply on policy grounds, that would dispense with claim forms and thus leave open the possibility of fluid recoveries in appropriate circumstances. At this point Mr. Gardner remarked that the Attorney General's opinion referred to concluded that, while the amendment in question was sufficiently procedural as to be within the Council's statutory authority, it also concluded that the question was a very close one.

Ms. Potter commented that a major purpose of the proposed amendments as shown in her aforementioned letter was to avoid exchanging the costs of litigating about claim forms for the costs of employing them. She briefly elaborated on this point by stating that, under the committee's proposals, the question of whether to use claim forms would likely be vigorously contested and expensively litigated in nearly every class action.

Prof. Holland added that, in response to a set of Rule 32 amendments drafted by Mr. Phil Goldsmith among others, some of which were ultimately approved and promulgated, the Council in 1992 again considered the question of whether to dispense with the claim form requirement or make it discretionary, but finally voted not to promulgate the amendment that would have had that effect. The principal reason stated by some members for not promulgating this amendment was that they regarded it as primarily relating to a matter verging close to the domain of substantive public policy, and was thus more appropriate for the legislature, rather than the Council, to decide.

Judge Barron asked if anyone knew roughly what the cost of distributing and processing claim forms tends to be. Mr. Goldsmith responded that he had recently had a class action in Multnomah County where the class consisted of about 40,000 persons and the cost of soliciting and processing claim forms was on the order of \$250,000.

Justice Durham asked Mr. Sugerman what changes, beyond making claim forms discretionary with the court, the committee's proposed amendment would accomplish. Mr. Sugerman responded that the amendment would add the factors courts would use in ruling on whether claim forms would be employed, and would also make clear that when claim forms are used the existing restriction on fluid recoveries would continue in force.

On motion of Mr. Sugerman, seconded by Mr. Svoboda, the Council voted to publish for comment the Rule 32 amendments proposed by the committee. The vote was 11 in favor, 7 opposed, and no abstentions.

At this point Ms. Potter signed off the phone conference with thanks to the Council for considering the alternative proposals set forth in her letter.

3b. ORCP 44 A - proposed amendments regarding court-ordered physical or mental examinations (see committee proposal copies of which were distributed at this meeting and a copy attached as Attachment B to agenda of this meeting) (Justice Durham for the committee). Justice Durham stated that the current proposal was intended to take into account members' comments made at the Council's June meeting, and also noted that it did not reflect the views of all committee members. He further commented that the current, revised proposal deleted the previously proposed amendment that would have permitted examinees to have a representative present during examinations as a matter of right because the committee judged that it did not have sufficiently broad support. But it contained, he stated, two important changes to Rule 44 which the committee sensed had wide support among the members, namely, the provision that examinations be recorded by audiotape unless either of the two exceptional circumstances pertains the parties otherwise agree in writing, or the court otherwise orders, and the provision that examinations may be compelled on notice rather than by motion and court order. Justice Durham also noted that the former change responded to the frequently expressed criticism of the current rule that it authorizes the only form of discovery for which no record is created.

Before signing off the phone conference Judge West stated that he supported these amendments in their revised form as the best compromise that can be achieved. Judge Carp asked who, under these amendments, could be present at examinations apart from the examiner and the examinee, to which Justice Durham responded that no other person could be present unless the parties so agreed in writing.

Mr. Corson then offered the following friendly amendments agreed to by the committee:

1. To restore the words "manner and conditions" in section 44 A following "shall state the time, place, ..." and to delete "Acting pursuant to ORCP 17 D, ..." at the beginning of subsection 44 A(2). Other friendly amendments also agreed to by the committee were: 1. To substitute

"However, the court shall limit or prohibit ..." for "However, the court may limit or prohibit ..." in subsection 44 A(3); 2. To substitute "an ethical rule that applies to the physician or psychologist" for "an ethical rule that applies to the medical professional" in subsection 44 A(3), and 3. To add ", and for good cause, ..." following "The court by order ..." in subsection 44 A(5).

On motion offered by Judge Carp, seconded by Judge Schuman, the Council voted to publish these amendments with the aforesated friendly amendments. The vote was 17 in favor, 1 opposed and no abstentions.

3c. ORCP 67 - notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment C to agenda of this meeting) (Judge Barron). Ms. Clarke explained that the amendment proposed by Judge Barron would delete existing subsections 67 C(1) and (2), and add the underlined language shown on Attachment p. C-3. On motion offered by Mr. Corson, seconded by Judge Coon, the Council voted to publish this amendment for comment.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business.

5a. ORCP 54 E - proposal to amend submitted by the Procedure and Practice Committee of the Oregon State Bar (see Attachment D to agenda of this meeting) (Mr. Scott Pratt). Mr. Pratt explained the reason the committee recommended dividing section 54 E into three subsections as shown in Attachment D. Justice Durham suggested a friendly amendment whereby the underlined language in subsection 54 E(2) be changed to read as follows: "If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursement or attorney fees to the court as provided in Rule 68." Mr. Pratt agreed to this suggested change. On motion offered by Mr. Sugerman, seconded by Judge Carp, the Council voted unanimously to publish this amendment for comment as thus amended.

Agenda Item 6: Adjournment. Without objection Ms. Clarke declared the meeting adjourned at 11:33 a.m.

Respectfully submitted,

Maury Holland, Executive Director

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(503) 221-7750

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(503) 221-1510

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pottn@fosterpdx.com

September 9, 2004

VIA HAND-DELIVERY

Council on Court Procedures
c/o David F. Sugerman, Esq.
Paul & Sugerman PC
520 SW 6th Avenue, Suite 920
Portland, OR 97204

Re: Proposed Amendments to ORCP 32F

Dear Council:

Last Friday a group met at the offices of West Coast Bank to discuss proposed amendments to ORCP 32F. David Sugerman attended the meeting on your behalf, and I believe I can speak for all others in attendance in saying that it was a helpful discussion. I believe we all appreciated the opportunity to consider the proposal already before you and hear from David in advance of your September 11 meeting. David mentioned that the Council directed his subcommittee to seek outside opinions and report back to it. Speaking only for myself, I welcome that approach and encourage the Council to continue to look for ways to increase participation in its processes.

After our meeting, a smaller group of us worked together under Bruce Hamlin's leadership to craft the enclosed alternative proposal. I believe you have already received it in an e-mail I sent to David this morning for forwarding on to you.

David filled us in on the reasons for proposing a change at all. We understand that the current rule's inflexibility could ultimately result in extra expense to the parties. There may be any number of sound reasons why claim forms should not be required in a particular case. We are not philosophically opposed to relaxing the claim form requirement. We propose, however, to put that decision into the hands of the parties. We believe it is the better way to address the underlying concerns without simply trading one economic issue for another.

The original proposal grants the court discretion in every case. It goes on to prescribe a number of factors the court must weigh in exercising its discretion, both as to whether to require statements from claimants and, if so, what form the statements must take. It is an absolute

David F. Sugerman, Esq.
September 9, 2004
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certainty that this decision-making process will involve costly and time-consuming motion practice. It will likely lead to unpredictable results, and, no doubt, inconsistent outcomes.

Our proposal, on the other hand, leaves it to the parties to decide for themselves whether a particular case requires claim forms. If the parties do not take up the issue, or if they cannot agree, the current procedures will remain in place. Thus, our proposal is a less dramatic change and will have a less disruptive impact. To the extent that the Council moves incrementally to amend the rules (and I, for one, do believe it should), our proposal is the more conservative one.

We also suggest a revision to make it clear that this new procedure is not intended to support "fluid class recovery." While it may appear somewhat unusual to include such a revision in the procedural rules, we recognize that the issue could arise and that it could generate significant litigation. We believe that including the express statement would short-circuit this potentially costly debate.

I understand that Tom Perrick of the Oregon Bankers Association and Jim Gardner will appear in person at your Saturday meeting to discuss our proposal. Bruce Hamlin sends his regrets, but he had a previous conflicting engagement. Andy Morrow and I will be in central Oregon at our firm retreat, but we hope that one or both of us will be able to participate by telephone.

Thank you again for inviting our input. Please feel free to call on me if you have any questions.

Very truly yours,



Nancie K. Potter

NKP:ng

Cc: Bruce C. Hamlin
James N. Gardner
Thomas A. Perrick
Andrew J. Morrow, Jr.
Gordon E. Crim
Bill Linden
Richard M. Butrick
Darrel Fuller
John A. Powell

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 judgment against a defendant the court shall, unless the parties agree otherwise, request members of the class who may be entitled to individual monetary recovery to submit a 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. The right of the parties to agree to dispense with the requirement of statements shall not be interpreted as supporting "fluid class recovery" or the cy pres doctrine. The statement shall be designed to meet the ends of justice. In determining 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, and the availability of relevant information from sources other than the individual class members. 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) 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 employes 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.

THORP
PURDY
JEWETT &
URNESSE
WILKINSON, P.C.
ATTORNEYS AT LAW

Lance A. LeFever

October 18, 2004

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MARVIN O. SANDERS (1912-1977)
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JILL E. GOLDEN (1951-1991)

Maury Holland
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1221 University of Oregon
1515 Agate Street
Eugene, OR 97403

(Acknowledged 10-30-04)

Re: **Council on Court Procedures**
Proposed amendment to ORCP 67 C

Dear Maury:

I recently received a copy of the agenda for the Council's September 11, 2004 meeting, and noted Judge Barron's proposed changes to ORCP 67 C. I believe that the proposed consolidation of ORCP 67 C (1) and (2) does not change the result of *Montoya v. Housing Authority of Portland*, 192 Or App 408, 86 P3d 80 (2004), but does change beneficial aspects of ORCP 67 C(2). I write to request that the Council either not recommend the proposed changes to ORCP 67 C, or change the text of its proposed change so as to leave in place the existing rule found in ORCP 67 C(2).

Montoya's result is not changed by the proposed amendment

The rule *Montoya* applied is one based on the federal constitution. *Montoya* concluded that, because the judgment given exceeded the amount of the complaint's prayer, the judgment was void to the extent that it exceeded the amount of the prayer. *Montoya*, 192 Or App at 413 - 16, 86 P3d at 83 - 84. While the court did note that notice and an opportunity to be heard are requirements of ORCP 67 C(1), it also noted that the rule merely codifies the due process requirement of the federal constitution. *Montoya*, 192 Or App at 416, 86 P3d at 84. Accordingly, it is unlikely the proposed change to ORCP 67 C will change the result of *Montoya*.

The proposed amendment changes beneficial aspects of ORCP 67 C(2)

Montoya involved a default judgment, where the due process concerns involving (usually) unrepresented defendants are high. The same is not true where the parties have all filed their responsive pleadings. When all parties file responsive pleadings, they know with some certainty their maximum liability, because ORCP 67 C(2) requires that any judgment given may

not exceed the amount claimed for damages in the pleadings.¹ As Judge Barron's March 15, 2004 memo notes, the existing rule requires that, to obtain judgment exceeding the amount prayed for, a party must either obtain an order authorizing the filing of an amended pleading prior to trial under ORCP 23 A, or obtain an order conforming the pleadings to the evidence presented during trial under ORCP 23 B. *See Laursen v. Morris*, 103 Or App 538, 545-46, 799 P2d 648, 652 (1990) (no error to enter judgment on jury verdict exceeding amount of prayer, where the trial court authorized an amended pleading under ORCP 23 B after verdict but before judgment in the amount of the jury verdict).

One of the advantages of Oregon's code pleading system over federal notice pleading is that it narrows the issues to those that are alleged. The pleadings serve to notify each party of the precise nature of the charges or defenses, the facts supporting each, and (as it pertains to ORCP 67 C) the amount of damages claimed. One component of that code pleading system is the rule requiring that a judgment not exceed the amount of the prayer. The rule appears to have a lengthy history, though I am unsure of its precise historical source. *See, e.g.*, Matthew P. Deady (Ed.), CODE OF CIVIL PROCEDURE, Ch. 2, Title XII, section 246 (1866); *Wiebe v. Seely*, 215 Or 331, 357, 335 P2d 379, 391 (1959) ("Regardless of the rule in other states . . . , it has been the accepted practice in Oregon for the courts to instruct the jury that their verdict must not exceed the amount of damages alleged and prayed for in the complaint.")

The proposed amendment to ORCP 67 C changes the absolute rule of ORCP 67 C(2), because it would allow a judgment exceeding the amount of the prayer if "reasonable notice and opportunity to be heard are given." The proposed amendment may also make UCJI 70.02 an erroneous instruction on Oregon law. For example, assume a plaintiff or counterclaiming defendant (Plaintiff) sends opposing counsel (Defendant) a letter one month prior to trial of Plaintiff's intent to amend the pleadings to seek damages in a certain amount. The amount Plaintiff describes exceeds the amount in Plaintiff's prayer. Plaintiff forgets to amend before or at the close of trial. The jury awards more than the amount in the prayer. At a hearing on the disputed form of the judgment authorizing judgment in the amount of the jury verdict, Defendant, an experienced Oregon attorney, knowing the old, existing rule, argues that Plaintiff's failure to move to amend ends the analysis.² However, if I am Plaintiff, I will argue that I am no longer required to amend the pleadings since I have given Defendant reasonable notice (the letter a month before trial) and an opportunity to be heard (the hearing on the form of the judgment). Whatever the likelihood or merits of that scenario and arguments, Plaintiff's arguments based on the proposed ORCP 67 C are inconsistent with the spirit of Oregon's code

¹ See also the third paragraph of Uniform Civil Jury Instruction No. 70.02, which provides in substance that the jury may not award an amount exceeding the amount claimed for damages in the pleadings. The basis for that jury instruction is ORCP 67 C(2).

² I suspect that amendment will likely be the preferred procedure for Plaintiff, even if Judge Barron's proposed change to ORCP 67 C is ultimately adopted. However, it will no longer be the exclusive procedure for Plaintiff.

pleading regime, which requires that the pleadings be the mechanism to provide notice and an opportunity to be heard on the amount of damages sought.

Conclusion

I request that the Council either not amend ORCP 67 C, or change the proposed amendment so as to leave in place the existing rule found in ORCP 67 C(2). I include a draft proposal for the latter, in the event the Council decides to go forward with a proposed amendment to ORCP 67 C.

Thank you for your consideration of this matter.

Sincerely,

THORP, PURDY, JEWETT,
URNESS & WILKINSON, P.C.



Lance A. LeFever

LAL:da
enclosure
(doc.90966)

Matter in [brackets] deleted and matter underlined added

C Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled[,]. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount. However, a judgment by default may grant relief different in kind from or exceeding the amount prayed for in the pleadings, if the court entering the judgment by default finds that reasonable notice of the different or exceptional relief sought, and an opportunity to be heard thereon, have been given to any party against whom such a judgment is to be entered. [even if such relief has not been demanded in the pleadings, except:

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

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

OCT. 31, 1882.

court ought if required, set it aside for want of evidence to support it.

Effect of judgment of non-suit.

SEC. 245. When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

TITLE XII.

Judgment on failure to answer.

Sec. 246. When judgment may be given for want of answer.

Judgment for want of answer.

SEC. 246. When the time for answering the complaint has expired, and it appears that the defendant, or one or more of several defendants, in the cases mentioned in section 59, has been duly served with the summons, and has failed to answer the complaint, the plaintiff shall be entitled to have judgment against such defendant or defendants:

1. When it appears that the action is upon a contract, and for the recovery of money or damages only, the plaintiff, on motion, shall have judgment immediately for the amount stated in the summons.

2. In other actions, the plaintiff, on motion, shall have judgment immediately for the amount stated in the summons or the relief demanded in the complaint, unless it be necessary to enable the court to give judgment, or carry the same into effect, to take proof of any matter of fact, in which case the court may order the entry of judgment to be delayed until such proof be taken. The court may hear the proof itself, or make an order of reference, or that a jury be called to enquire thereof.

3. When the defendant has answered and admits the plaintiff's claim, but sets up a counter claim amounting to less than the plaintiff's claim, the plaintiff, on motion, shall have judgment for the excess of his claim over such counter claim, as for want of answer thereto.

4. When in any action the service of the summons appears to have been made by publication, the court may in its discretion order the entry of judgment to be delayed, until the plaintiff file with the clerk an undertaking with one or more sureties, to be approved by the clerk, in an amount equal to the sum for which judgment may be given, upon the condition that the

1, 1882.

will abide by and perform any order of the court... restitution to be made to the defendant or his representative, in case either of them shall afterwards be admitted to the action. The sureties in the undertaking shall have the qualifications of bail, and justify before the clerk as provided in section 116.

TITLE XIII.

Judgment by confession.

Judgment by confession, when action pending. Who to make confession. When judgment may be given against several defendants on the confession of one.

Sec. 250. Confession to be in writing; how judgment given. 251. Judgment by confession without action. 252. How confession made in such cases. 253. Same subject. Execution, when judgment for instalments.

247. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

Judgment by confession in action pending.

248. When the action is against the state, a county or public corporation therein, or a private corporation, or a partnership, the confession shall be made by the person who at the time sustains the relation to such state, corporation, county or partnership, as would authorize the service of a summons upon him, or, in the case of a minor, if a guardian for the action has been appointed, then by such guardian. In all other cases, the confession shall be made by the defendant in person.

Who to make confession.

249. When the action is upon a contract and against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants against all the defendants jointly liable, whether such defendants have been served with the summons or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession.

Judgm't against several on the confession of one.

250. The confession and assent thereto, shall be in writing, and subscribed by the parties or their attorneys making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds; but such acknowledg-

Confession to be in writing.

... P. Deane, General Laws of Oregon (1882)

DAMAGES—PRELIMINARY INSTRUCTION

If you find that the [plaintiff/defendant] is entitled to prevail, then you must decide whether the [plaintiff/defendant] has been damaged and, if so, the amount of [his/her] damages.

The fact that I am instructing you with respect to damages is not to be considered by you as an attempt by the court to suggest [or indicate] that you should or should not award damages.

[Nor should the amount claimed for damages by the (plaintiff/defendant) in the (complaint, counterclaim, or cross-claim) be considered by you in arriving at your verdict except in one respect: that is, the amount of damages claimed does fix a maximum amount you can award the (plaintiff/defendant).]

There are [two/three] types of damages alleged in this case, economic, [and] noneconomic [and punitive] damages.

Of these [two/three] types of damages, you should consider those which you find to have been sustained by the [plaintiff/defendant] as a result of the [plaintiff's/defendant's] [fault/negligence].

The [plaintiff/defendant] must prove economic and noneconomic damages by a preponderance of the evidence [and punitive damages by clear and convincing evidence].

I will now explain what are economic and noneconomic [and punitive] damages.

COMMENT: Modify this instruction accordingly when only property damage is at issue. With regard to the third paragraph, the verdict must not exceed the amount alleged and prayed for in the complaint, counterclaim, or cross-claim. *Lovejoy Specialty Hospital v. Advocates for Life*, 121 Or App 160, 167, 855 P2d 159 (1993). However, the plaintiff or defendant is not required to state a specific amount of noneconomic damages in the complaint, counterclaim, or cross-claim despite the requirements of ORCP 18 B. *McKenzie v. Pacific Health & Life Ins. Co.*, 118 Or App 377, 382, 847 P2d 879 (1993).

PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface (with underlining>) denotes new language; italicized language within bold brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent to:

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

and

Kathryn H. Clarke
Chair, Council on Court Procedures
921 Southwest Washington, Suite 764
Portland, OR 97205

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 11, 2004 Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

The Council will take final action on the proposed amendments at the December 11, 2004, meeting.

**PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE**

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Proposed Amendments to ORCP

RULE 32**SERVICE AND FILING OF PLEADINGS
AND OTHER PAPERS****RULE 9**

F 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 10 C.

CLASS ACTIONS**RULE 32**

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

RULE 32**Proposed Amendments to ORCP**

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 [*statement in a form*] **claim 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]the [*statement*] claim form shall be designed to meet the ends of justice. In determining [*the form of the statement*] whether to require a claim form and what form it shall take,** 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, [T]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, [F]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

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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.

* * * * *

**PHYSICAL AND MENTAL EXAMINATION
OF PERSONS; REPORTS OF EXAMINATION**

RULE 44

A [Order] Notice for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, *[the court]* **any party for good cause** may *[order]* **compel** the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. *[The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and]* **To compel an examination under this rule, a party shall give reasonable notice in writing to every other party to the action or proceeding and to the person to be examined. The notice shall state the time, place, manner, and conditions for conducting the examination, the scope of the examination [and the person or persons by whom it is to be made], and the name and address of the examiner. The**

RULE 44**Proposed Amendments to ORCP**

following conditions shall apply to an examination under this rule:

(1) The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

(2) No person shall obstruct the examination. The court may impose sanctions against a party or person who obstructs an examination and may order any relief that the court deems necessary to remedy an obstruction.

(3) Any party, the examinee, and the examining physician or psychologist may record the examination by audiotape in an unobtrusive manner. However, the court shall limit or prohibit the audiotaping of an examination to prevent infringement of a right protected by the law of copyright regarding any psychological test, or to prevent a violation of an ethical rule that applies to the physician or psychologist who conducts the examination. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the proceeding unless the court orders otherwise. Upon request, and upon payment of the reasonable charges for copying, the person who records the examination shall make and furnish a copy of the original audiotape recording to any party, the examinee, or their representatives.

(4) All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may refuse to disclose information or a communication that is protected from disclosure by the law of privilege.

(5) The court by order, and for good cause, may alter any of the foregoing conditions or require that the examination occur under different or additional conditions.

B Report of examining physician or psychologist. If requested by the party [*against*] **to** whom [*an order*]

Proposed Amendments to ORCPRULE 44

a notice for examination is [*made*] **delivered** under section **A** of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party [*against*] **to** whom the [*order*] **notice of examination** is [*made*] **delivered** a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provide otherwise.

C Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D Report; effect of failure to comply.

D(1) Preparation of written report. If an obligation to furnish a report arises under sections **B** or **C** of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

D(2) Failure to comply or make report or request report. If a party fails to comply with sections **B** and **C** of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or

RULE 46

Proposed Amendments to ORCP

if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E Access to individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

**FAILURE TO MAKE DISCOVERY;
SANCTIONS****RULE 46**

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)(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 motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover.** When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

Proposed Amendments to ORCPRULE 46

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.

* * * * *

B Failure to comply with order.

* * * * *

B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with [*an order*] **a notice for examination** under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

* * * * *

RULE 54**Proposed Amendments to ORCP****DISMISSAL OF ACTIONS;
COMPROMISE****RULE 54**

* * * * *

E 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.

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 includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 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.

**INSTRUCTIONS TO JURY
AND DELIBERATION****RULE 59**

* * * * *

[H Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made.]

H Necessity of noting exception on error in statement of issues or instructions given or refused

H(1) Statement of issues or instructions given or refused. A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.

H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.

RULE 67

Proposed Amendments to ORCP

JUDGMENTS**RULE 67**

* * * * *

C Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled[, *even if such relief has not been demanded in the pleadings, except: C(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. C(2) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.*]. **A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.**

* * * * *

PROVISIONAL PROCESS**RULE 83**

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 or declarations requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff, affiant or declarant that the action is one in which provisional process may issue, and:

* * * * *

[A(9) *If provisional process is based on notice of a bulk transfer, a copy of the notice;*]

[A-14]

Proposed Amendments to ORCP**RULE 83**

[A(10)] **A(9)** Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser;

[A(11)] **A(10)** Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

[A(12)] **A(11)** Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

[A(13)] **A(12)** That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B Provisional process prohibited in certain consumer transactions. No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C Evidence admissible; choice of remedies available to court.

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

C(2) If from the affidavit, declaration 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*] **E** of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

RULE 83**Proposed Amendments to ORCP**

[D] *Effect of notice of bulk transfer.* *Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.]*

[E] D Issuance of provisional process where damage to property threatened. * * *

[F] E Restraining order to protect property.
* * *

[G] F Appearance; hearing; service of show cause order; content; effect of service on person in possession of property. * * *

[H] G Waiver; order without hearing. If after service of the order issued under subsection **[G(1)] F(1)** of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section **B** of this rule without hearing shall order issuance of provisional process.

[I] H Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

[I(1)] H(1) Subject to section **B** of this rule, if the court on hearing on a show cause order issued under section **[G] F** of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

[I(2)] H(2) Subject to section **B** of this rule, if the court on hearing on a show cause order issued under section

Proposed Amendments to ORCP**RULE 83**

[G] F of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section [F] E of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.



CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge
November 9, 2004

Coos County Courthouse
Coquille, Oregon 97423
396-3121

Mr. Maury Holland
University of Oregon
School of Law
1221 University of Oregon
1515 Agate Street
Eugene, OR 97403

Re: ORCP 67C proposed amendment

Dear Mr. Maury:

I am in receipt of a letter dated October 18, 2004 sent to you by Mr. Lance A. LeFever relating to the above-mentioned rule.

Mr. LeFever points out that the proposed amendment to the rule would not change the result in *Montoya v. Housing Authority of Portland*, 192 Or App 408 (2004). I agree. The proposed change was never intended to change the result of *Montoya* and I believe my memorandum of March 15, 2004 made that clear. The proposed amendment was only intended to shorten the rule and state that no relief greater than prayed for can be obtained without reasonable notice and an opportunity to be heard. Due process is required by the rule as it presently is and as it will be if amended.

The main objection to the amendment offered by Mr. LeFever is, in effect, that the benefit of ORCP 67C(2) will be lost because the proposed amendment eliminates what he characterizes as the absolute rule of ORCP 67C(2), which he believes prohibits a judgment for an amount greater than requested. Mr. LeFever gives an example. A plaintiff's attorney after filing a case in which the relief claimed is a sum certain later writes a letter to a defendant's attorney stating that the plaintiff has decided more money is appropriate. After writing the letter, plaintiff's attorney forgets to amend the complaint, but during trial offers proof of more money damages than prayed for in the complaint. Defendant's attorney fails to object to the evidence of the greater damages and the jury awards more money than requested in the complaint by the plaintiff. The court, then, after hearing arguments by counsel, enters a judgment based on the notice provided by the letter and, apparently, without requiring a motion to amend to conform the pleading to the proof.

In *Laursen v. Morris*, 103 Or App 538, 545-46 (1990), a case cited by Mr. LeFever, the jury returned a verdict in excess of the prayer. ORCP 67C(2) was in effect at the time. *Laursen* really shows that ORCP 67C(2) is not an absolute rule. It also answers Mr. LeFever's concern about a plaintiff receiving more money than demanded in a complaint. Although the jury (even though probably instructed in accordance with UCJI 70.02) in *Laursen* returned a verdict for more than the amount requested despite ORCP

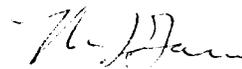
67C(2), no judgment was entered until the court, after the verdict, allowed a motion to amend the pleading. At that point defendant had notice and an opportunity to be heard under ORCP 23B.

Mr. LeFever is worried that the simple fact that plaintiff's counsel writes a letter will be sufficient to allow a court to enter a judgment without a motion to amend a complaint to conform the pleading to the proof offered. He points to no case that has allowed that to happen in Oregon, but surmises it might happen if ORCP 67 is amended as proposed. Mr. LeFever is also concerned that the proposed amendment might mean that the longstanding rule, embodied in UCJI 70.02 (jury cannot award more than requested in a pleading), will cease to exist. Nothing in the amendment was intended to or is in any way suggestive of the major changes in pleading requirements or jury instructions envisioned by Mr. Lefever. As pointed out by Mr. LeFever, UCJI 70.02 and the rule embodied in it have been with us for many years. *Wiebe v. Seely*, 215 Or 331, 357 (1959). The same is true of ORCP 23.

The proposed amendment is designed to provide due process to parties. If a party wants more than the party requested in a pleading, the party must give the other party notice so there is an opportunity to be heard on whether the party can increase the demand in the pleading. No other rule or jury instruction is changed or modified.

The proposed amendment to ORCP 67 was tentatively approved. I still believe it is a good change and does not change the law so new problems are created as envisioned by Mr. LeFever. Due process is provided for under the present rule and will be provided for under the proposed amendment and all other existing rules and instructions will remain the same.

Sincerely,



Richard L. Barron
Presiding Judge

cc. Mr. Lance A. LeFever