

AMENDMENTS

TO ORCP 71

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

RULE 71

RELIEF FROM JUDGMENT OR ORDER

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B.(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and

for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B.(2) When appeal pending. With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court during the pendency of an appeal. Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.

C. Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, or the power of a court to grant relief to a defendant under Rule 7 D.(6)(f), or the power of a court to set aside a judgment for fraud upon the court.

D. Writs and bills abolished. Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

COMMENT

This rule is intended to provide a comprehensive procedure for vacating a judgment by motion to replace ORS 18.160. The rule also regulates nunc pro tunc entry of judgments, which are not covered by existing ORS sections. The rule is a modified form of Federal Rule 60, adapted to Oregon cases and practice.

Section 71 A. codifies existing Oregon practice and was taken from Federal Rule 60 (a). The last sentence is not in the federal rule. Under existing Oregon law, a trial court may change a judgment during the pendency of an appeal to correct the record. Caveny v. Asheim, 202 Or. 195, 208-212, 274 P.2d 281 (1954). The appellate court should be aware of any change in the judgment order, particularly if there is a question whether the change is actually a correction of the record.

Subsection 71 B.(1) uses the same motion procedure as ORS 18.160. Paragraph 8.(1)(a) eliminates the requirement in ORS 18.160 that the mistake be that of the moving party. This would allow vacation based upon error by the trial judge, at least of an unusual nature, after the time for a motion for new trial has elapsed. Paragraph 71 B.(1)(b) explicitly authorizes a motion based upon newly discovered evidence. Wells, Fargo & Co. v. Wall, 1 Or. 295, 297 (1860). Paragraph 71 B.(1)(c) clarifies that fraud can be used as a basis for a motion to vacate. Compare Nichols v. Nichols, 174 Or. 390, 396, 143 P.2d 663, 149 P.2d 572 (1944); Miller v. Miller, 228 Or. 301, 307, 365 P.2d 86 (1961). Note, the provision differs from the federal rule and does not eliminate the distinction between extrinsic and intrinsic fraud. Paragraph 71 B.(1)(d) codifies cases allowing motion to vacate a void judgment. State ex rel Karr v. Shorey, 281 Or. 453, 466, 575 P.2d 981 (1978). Paragraph 71 B.(1)(e) is new but simply codifies the common law remedy of audita querela (available in Oregon by motion invoking the inherent power of the court). Herrick v. Wallace, 114 Or. 520, 525, 236 P.2d 471 (1925). The reference to "no longer equitable" restates the rule that a judgment with prospective operation may be subject to change based upon changed conditions. Farmers' Loan Co. v. Oregon Pac. R. Co., 28 Or. 44, 65-69, 40 P. 1089 (1895).

Subsection 71 B.(1) also explicitly requires that the party who makes the motion must demonstrate that a claim or defense is being asserted and that vacation of the judgment would not be a waste of time. That requirement existed for motions under ORS 18.160. Lowe v. Institutional Investors Trust, 270 Or. 814, 817, 529 P.2d 920 (1974), Washington County v. Clark, 276 Or. 33, 37, 554 P.2d 163 (1976). The requirement would not make sense for paragraphs 71 B.(1)(d) and (e). State ex rel Dial Press v. Sisemore, 263 Or. 460, 463, 502 P.2d 1365 (1972).

The one-year time limit of ORS 18.160 is retained for paragraphs 71 B.(1)(a), (b), and (c). The time limit is neither necessary nor desirable for paragraphs (d) and (e). The rule also requires that any motion be made in a reasonable time, which would be the same as the existing due diligence requirement in Oregon. This would not apply to ground 71 B.(1)(d). The most important change in the time limits is the reference to "filing," instead of granting the motion. Compliance with the time limit should depend upon the diligence of the moving party and not upon the court.

The provisions relating to service of the motion are not in the federal rule and were drafted to conform to Herrick v. Wallace, *supra*, at 526.

Under Oregon case law, during the pendency of an appeal the trial judge could not vacate a judgment for the reasons specified in section 71 B. Caveny v. Asheim, *supra*. Since there may be a one-year time limitation for filing the motion, it should be possible to file such a motion in the trial court during the one-year period to await disposition of the appeal; this is provided by subsection 71 B.(2). Since the motion might affect the appellate court's consideration of the case, the rule requires notice and leave from the appellate court. After the termination of the appeal there is no reason to require permission of the appellate court. See Nessley v. Ladd, 30 Or. 564, 566-567, 48 P. 420 (1897).

Subsection 71 B.(3) simply recognizes the other existing methods of seeking vacation of judgment, e.g., separate suit for equitable relief, Oregon-Washington R. & Navigation Co. v. Reid, 155 Or. 602, 609, 65 P.2d 664 (1937), and a motion invoking the inherent power of a court to vacate a judgment within a reasonable time. ORS 1.055; Braat v. Andrews, 266 Or. 537, 540, 574 P.2d 540 (1973).

Coram nobis, *coram vobis*, and *audita querela* were common law procedures for vacating judgments. Bills of review and bills in the nature of review were used by the courts of equity. Any grounds for vacation which could be raised by such devices are covered by this rule and the earlier procedures are specifically eliminated to avoid confusion.

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B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B(1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be

made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B(2) When appeal pending. [With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a] A motion under [this section] sections A or B may be filed with and decided by the trial court during the time an appeal from a judgment is pending before an appellate court [but no relief may be granted by the trial court during the pendency of an appeal]. The moving party shall serve a copy of the motion on the appellate court. [Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.] The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.

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COMMENT

When the ORCP were originally promulgated, the Council wished to provide some way to deal with motions to vacate

judgments which were on appeal. It provided that leave of court was required to file a motion to vacate during the pendency of an appeal. The apparent assumption was that the appellate court could allow the trial court to pass on the motion to vacate or deal with the motion itself. In fact, the trial court probably lacks authority to rule on a motion to vacate during the pendency of an appeal and the appellate courts have no authority to consider such a motion. State ex rel. Juvenile Dept. v. Shaver, 74 Or. App. 143, 145 n.2, 700 P.2d 1066 (1985).

The Council amendment to ORCP 71 A and B eliminates the requirement of leave of the appellate court to file the ORCP 71 motion. It requires notice to the appellate court of the motion and its disposition. The question of the effect of the motion on the appeal and the possible modification of appeal due to a successful motion are left to the appellate rules. The Council recognized that it probably does not have authority to confer jurisdiction on a trial court to act during the pendency of an appeal. It has recommended that the legislature amend ORS 19.033 to accomplish this.

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