



DEPARTMENT OF JUSTICE

CIVIL ENFORCEMENT DIVISION

1162 Court Street NE

Salem, Oregon 97310

Telephone: (503) 378-4732

FAX: (503) 373-7067

October 15, 1992

Maurice J. Holland
Acting Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Proposed Amendments to ORCP 68

Dear Sir:

The proposed amendment would limit the reimbursement for the expense of copying public records, books or documents to those admitted into evidence at trial. I agree it is appropriate to withhold reimbursement for copies either unused or not admitted at trial. However, reimbursement should be provided for copies supporting successful summary judgment motions because they resolve the case just as a trial resolves the case.

Since the copies are not technically admitted into evidence, under the revised rule reimbursement would be denied. Instead of the phrase "admitted into evidence at trial," I would suggest the phrase "admitted into evidence at trial or considered by the court in support of a successful summary judgment motion."

Sincerely,


Randall C. Jordan
Assistant Attorney General

RCJ:mks/EWO0123A

DUNN, CARNEY, ALLEN, HIGGINS & TONGUE

ROBERT L. ALLEN
J. WILLIAM ASHBAUGH*
BRADLEY O. BAKER
JONATHAN A. BENNETT*
ROBERT F. BLACKMORE
RICHARD T. BORST
WILLIAM H. CAFFEE
JOHN C. CAHALAN
ROBERT R. CARNEY
GEORGE J. COOPER
ANDREW S. CRAIG
I. KENNETH DAVIS
JOHN C. DEVOE
KITRI C. FORD* **
MICHAEL J. FRANCIS
NANCY R. GREENE
BRYAN W. GRUETTER**
JACK D. HOFFMAN
MARSHA MURRAY-LUSBY

ATTORNEYS AT LAW

851 S. W. SIXTH AVENUE, SUITE 1500
PACIFIC FIRST FEDERAL BUILDING
PORTLAND, OREGON 97204-1357

FACSIMILE (503) 224-7324
TELEPHONE (503) 224-6440

CENTRAL OREGON OFFICE
700 N.W. HILL STREET
BEND, OREGON 97701
FACSIMILE (503) 389-6907
TELEPHONE (503) 382-9241

ROBERT L. NASH**
GREGORY C. NEWTON††
JEFFREY F. NUDELMAN*
JOAN O'NEILL P.C.*
GILBERT E. PARKER
HELLE RODE
CHARLES D. RUTTAN
G. KENNETH SHIROISHI††*
SHANNON I. SKOPIL*
JAMES G. SMITH
DONALD E. TEMPLETON*
THOMAS H. TONGUE
DANIEL F. VIDAS
ROBERT K. WINGER

* ADMITTED IN OREGON
AND WASHINGTON
†† ADMITTED IN OREGON
AND CALIFORNIA
** RESIDENT, BEND OFFICE

September 25, 1992

Maurice J. Holland
Acting Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed amendment to ORCP Rule 68

Dear Maury:

I disagree with the proposed amendment to ORCP 69(A) which would allow recovery for costs of documents only if they are admitted into evidence at trial, instead of the current rule which allows recovery of costs of documents used as evidence at trial. There may not be much of a distinction between "used as evidence" and "admitted into evidence". However, I can think of numerous instances where costs are necessarily incurred to obtain copies of documents which are used for necessary and proper purposes at trial but which may not themselves be introduced into evidence. For example, articles and publications by an expert witness which are inconsistent with the expert's opinions in a given case are often useful in impeaching or undermining the expert's current opinion. Transcripts of testimony given in other cases, or in earlier hearings in the same case, are often used for the purposes of both substantive evidence and impeachment even though those transcripts are not themselves introduced as exhibits. Costs may be incurred to obtain documents which are intended to be used as exhibits, but which later become unnecessary due to a change in the issues, or withdrawal of one or more parties or issues from the case, prior to the time that those documents would otherwise have been used. There are certainly other examples when necessary costs and disbursements were incurred

Maurice J. Holland
September 25, 1992
Page 2

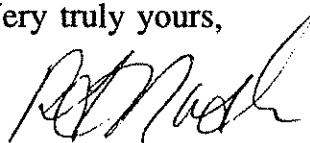
to obtain evidentiary materials which, for one reason or another, end up not being admitted into evidence. Trial judges should have discretion to decide what costs were reasonable and necessary as of the time they are incurred, and which therefore should be recoverable, without an arbitrary limitation allowing consideration only for documents actually admitted into evidence.

The rule as currently awarded is also somewhat confusing as to the phrase "expense of copying of any public record, book or document ... ". I have always understood the rule to allow recovery for the costs of copying any documents used as evidence, and not just public records. For example, it has always been my position that the cost of copying business records, medical records, etc., which are then introduced as exhibits are recoverable costs. I believe the council should issue a comment clarifying that recoverable costs include the cost of copying any documents, public or private, used as evidence.

The state of the law is also unclear as to whether the expense of taking perpetuation depositions is recoverable. The law appears well settled that the cost of discovery depositions are not recoverable, but the case law distinguishes between discovery depositions and perpetuation depositions, allowing recovery of the costs of necessary perpetuation depositions. Rule 68(A)(2) states that the expense of taking "depositions" shall not be allowed ... except as otherwise provided by "rule or statute". It would be helpful if a comment could be issued by the council on the subject of perpetuation depositions, and cross-referencing any other applicable rules or statutes addressing the issue of whether the costs of perpetuation depositions are recoverable. In a recent search I was unable to locate any rule or statute which specifically addresses the issue of whether perpetuation deposition costs are recoverable, so that final sentence of ORCP 68(A)(2) creates confusion.

Thanks for your attention. Best regards.

Very truly yours,



Robert L. Nash

RLN:slf