COUNCIL ON COURT PROCEDURES

Saturday, November 14, 1992, Meeting
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

REVISED AGENDA
(revised to include attachments)

1. Approval of minutes of meetings held September 26, 1992 and October 17, 1992

2. OLD BUSINESS

3. Rule 32 (Mike Phillips) (Attachment A)

4. Rule 69 (Win Liepe and Bill Snouffer) (Attachment B)

5. NEW BUSINESS

# # # # #

CORRECTED 11-14-92 (to add E.(2) In paragaraph 1 and H.(1) to subparagraph B)

November 6, 1992

TO: Chair and Members, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

RE: Proposed ORCP 32 Amendments (Class Actions)

The first substantive agenda item for our November 14 meeting is the class action subcommittee's recommendations regarding proposed amendments to R. 32. Since you have received an enormous amount of materials on this subject over several meetings, I thought it might assist in your preparation for this meeting if I provided you with a brief "road map" referring to those materials in the order I anticipate they will become germane in the course of discussion:

1. At the September 26 meeting Jan Stewart summarized for the Council each of the ad hoc group's proposed amendments to R. 32 (see Attachment A to July 19, 1992 memo of Jan Stewart et al.) which the class action subcommittee unanimously recommends that the Council adopt and regards as "non-controversial." For ease of reference, these proposed amendments (to Rules 32 C.(1), D., E.(1), (2), (3), F.(4) (F.(3) as amended), F.(5) (F.(4) as amended), F.(6) (F.(5) as amended), G. and M.) are set forth in my October 12, 1992 memo to the Council. Each of them remain pending final action at our December 12, 1992 meeting, but should occasion little or no discussion at the November 14 meeting.

2. The only tentative action taken to date by the Council respecting any of the ad hoc group's proposals and the subcommittee's recommendations regarding them was the unanimous vote at the September 26 meeting to accept the recommendation that R. 32 N. be left unchanged in its present form.

3. Referencing Attachment A to the July 19, 1992 memo of Jan Stewart et al, discussion at our November 14, 1992 meeting is likely to focus primarily upon the following amendments:

A. The class action subcommittee unanimously recommends that Rules 32 F.(2) and (3) be deleted in their entirety, rather than amended as indicated in Attachment A (see pp. 8-11 of the said memo). This would effectively abolish the mandatory claim form procedure and related limitation on amounts of judgments entered in class actions that effect joinder of separate money damage claims.

B. By a divided 2-1 vote the subcommittee recommends that Rule 32 F.(1) be amended as shown in Attachment A (see pp. 2-6 of the said memo together with Jan Stewart's "Minority Report" dated July 16, 1992). This would make individual post-certification notice to all class members in class actions effecting joinder of separate money damage claims discretionary, rather than mandatory as the present 32 F.(1) requires. If this amendment is approved, the following additional amendments should also be approved as logically entailed: Rules 32 A.(5), B., B.(1), B.(1)(a), B.(1)(6), B.(2) and B.(3), and H.(1).

Attachments B 1-4-92 Agenda

(Win Liepe Draft Proposal)

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default; failure to appear for trial.

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

A.(2) Failure to appear for trial. When a party who has filed an appearance fails to appear for trial after notice of the date and time of trial, the court may enter an order of default against the non-appearing party without further notice to the non-appearing party.

A.(3) Default judgment. When an order of default has been entered pursuant to subsection* A.(2) of this rule the court may enter a judgment by default against the non-appearing party in the manner provided in subsection* B.(2) of this rule. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate.

(Remainder of R. 69 unchanged)

* "subsection" substituted by MJH for "paragraph" in interest of stylistic consistency.

DISTRICT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

WINFRID K. LIEPE
DISTRICT JUDGE
687-4218

October 28, 1992

MR MAURY HOLLAND
SCHOOL OF LAW
UNIVERSITY OF OREGON
ROOM 275A
1101 KINCAID ST
EUGENE OR 97403-3720

HON WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE
MULTNOMAH COUNTY COURTHOUSE
1021 S W 4TH AVE
PORTLAND OR 97204

Re: Rule 69 and Van Dyke vs. Varsity Club, 103 Or App 99, review denied 310 Or 476 (1990)

Dear Fellow Subcommittee Members:

At the October 17 Council meeting I suggested that the Van Dyke problem be solved by an additional paragraph or two in Rule 69. I agree with Bill Snouffer that is the simplest approach.

When a party duly notified fails to appear for trial, there should be no need of further notice before entry of an order of default - or for entry of a default judgment when appropriate. I would suggest that present 69A be renumbered 69A.(1) and that two new paragraphs be added:

> "A.(2) When a party who has filed an appearance fails to appear for trial after notice of the date and time of trial, the court may enter an order of default against the non-appearing party without further notice to the non-appearing party.
>
> "A.(3) When an order of default has been entered pursuant to paragraph A.(2) of this Rule the court may enter a judgment by default against the non-appearing party in the manner provided in paragraph B.(2) of this Rule. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate."

The wording in paragraph A.(2) differs somewhat from the language proposed by Bill Snouffer. His version provides that "default

Attachment B (2)

shall be entered". I would suggest "may". This should not be mandatory. There are many situations in which it would be inappropriate to enter an order of default even where one party has failed to appear for trial. It may be that the party is ill, has been in an accident, did not receive the trial notice, or has some other reasonable excuse for not appearing. If the court is reliably advised of such circumstances at the time of trial, it would be pointless to have an order of default entered only to take the additional time later on to unravel it by proceedings to set it aside under ORCP 71. In other cases it may be that the appearing party would for tactical reasons not want to have a default order entered in view of pending settlement negotiations. In some cases the appropriate solution may simply be a new trial date.

The above proposal authorizes order of default "without further notice to the non-appearing party". This is exactly what we intend. Bill suggests the phrasing "regardless of the time limits imposed by subsection A.(1) of this rule." This refers to current section 69A. Strictly speaking, this rule does not contain a "time limit" but a ten day notice requirement.

The purpose of paragraph A.(3) is to make clear that the court may in appropriate circumstances immediately proceed to enter a default judgment and to do so in the manner provided by section 69B.(2). The court could hold an immediate hearing with witnesses provided by the appearing party, or the court could simply proceed "upon affidavits" as allowed by Rule 69B.(2). This may afford considerable saving of time and money.

Attached is an excerpt from the Van Dyke case, pages 102 and 103 of 103 Or. App. Please see particularly footnote 2 on page 102. Van Dyke dealt with a former version of ORCP 69. This former version required ten days notice prior to entry of a default judgment under 69B.(2). It did not require ten day notice before order of default under 69A. Within that framework the Oregon Court of Appeals concluded that former ORCP 69 applied to failure to appear at trial.

Argument may be made that the Van Dyke reasoning does not apply to the current version of ORCP 69. The current version contains no requirement of a ten day notice before a default judgment is entered under Rule 69B.(2). Ten notice is required only with respect to entry of an order of default under Rule 69A. This applies where a party "has filed an appearance in the action or has provided written notice of intent to file an appearance to the party seeking an order of default". Is the current version of ORCP 69A really intended to encompass failure to appear for trial? Or is it simply intended to deal with the situation where there has been some initial appearance filed or noticed and subsequent failure to file timely responsive pleadings?

Attachment B (3)

We do not need to resolve that issue. It is better to clarify the current rule in any event.

At one point we should also address the policy questions on what kind of showing is required for a default judgment against a party who has failed to appear for trial. In the case of liquidated damages such as an action on a promissory note should it really be necessary to require testimony or affidavit to support the allegations of the complaint? In FED cases is a prima facie case or some affidavit necessary where plaintiff-landlord appears and defendant-tenant fails to appear for trial? Requiring a prima facie case or an affidavit usually results in mere repetition of the bare bones allegations of the complaint by some witness.

Claims involving unliquidated damages (injury to person or property, punitive damages) or other relief present more difficult problems.

A radical and efficient approach to simplifying default judgments after failures to appear for trial might include authority of the court to enter judgment based on the allegations of the complaint and such evidence (if any) the court in its discretion may require. This might be accomplished by a version of 69A.(3) reading as follows:

> "A.(3) When an order of default has been entered pursuant to paragraph A.(2), the court may, without taking evidence, enter a judgment by default against the non-appearing party on the basis of the pleadings filed by the appearing party or parties; provided that the court, in its discretion, may require evidence by hearing, jury trial, order of reference, affidavits, or other proceedings. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate."

The policy justification for default judgments is that the court owes little or no protection to persons who would stick their heads in the sand or snub the processes of the court. This may not be charitable or perfect, but it may be fair and efficient.

Sincerely yours,

Winfrid K. Liepe
District Judge

WKL:ga
cc: Henry Kantor
Dennis Hubel
Judge Elizabeth Welch
Judge Jack Mattison

Attachment B(4)

(Bill Snouffer Draft Proposal)

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default; failure to appear for trial.

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

A.2) Failure to appear for trial. When a party who has filed an appearance fails to appear at trial, an order of default shall be entered, regardless of the time limits imposed by subsection A.(1) of this rule.

(Remainder of R. 69 unchanged)

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE

(503) 248-3986

October 20, 1992

Mr. Maury Holland
School of Law
University of Oregon
Room 275A
1101 Kincaid Street
Eugene, OR 97403-3720

Hon. Winfrid Liepe
District Court Judge
Lane County Courthouse
125 E. 8th Avenue
Eugene, OR 97401-2926

Re: Rule 69 and Van Dyke

Dear Fellow Subcommittee Members:

I would like to suggest that we focus our immediate, short-term efforts to "fixing" Van Dyke v. Varsity Club, 103 Or App 99 (1990). We need a prompt solution to solving the problem faced by Judge Deiz in Van Dyke and by Judge Mattison: What to do when a party fails to appear at trial.

There are a number of additional issues lurking in Rule 69 that probably should be addressed later when (or if) we deal with comprehensive revision of the Rule. Some of these issues are discussed in Maury's memo of Oct. 5, 1992, and in Dennis Hubel's letter of Oct. 16, 1992.

I suggest, however, that, for the time being, we "fix" Van Dyke. I think there is a consensus in the Council that we do this as rapidly as possible. We need to provide a procedural mechanism for achieving pragmatic and realistic results. My guess is that Van Dyke is being honored in the breach and probably is not being followed. We should rectify that promptly and worry about long-range revision later.

I believe that whoever came up with the idea during our October 17 meeting (having a separate paragraph in Rule 69) provided the spark for the simplest (and therefore most elegant) solution. All we need to do is add a new section to indicate

Attachment B(6)

that a failure to appear at trial is not subject to the 10-day notice provisions.

To achieve this, my proposal would be to divide Rule 69.A. into two sub-paragraphs. Existing Paragraph A., should be renumbered A.(1). It should be followed by a new sub-paragraph A.(2), as follows:

> A.(2). When a party who has filed an appearance fails to appear for trial, an order of default shall be entered, regardless of the time limits imposed by subsection A.(1) of this Rule.

This amendment should be coupled with a Staff Comment that the intent of the new subsection A.(2) is to revoke the procedural straight jacket imposed by Van Dyke (which admittedly relied upon the Council's own commentary to arrive at its result).

My proposal has a number of advantages. (1) It is a minimal amendment that accomplishes exactly what is required to "fix" Van Dyke. (2) It does not require any additional amendments to any other parts of Rule 69. (3) It does not impose a new procedure on litigants, lawyers and courts, but allows them to solve a problem pragmatically, and solve it in a manner that has been used historically for a number of years. (4) It does not require any additional language or changes to either Rule 52 or Rule 58, which, as Dennis Hubel pointed out, are relevant rules. (5) It does not attempt to struggle with issues of due process or with recasting Rule 69, as suggested in Maury Holland's memo of October 5 (although we may wish to do this in the future). (6) It does not try to resolve the (probably unresolvable) linguistic problem of what a default actually is; in other words, it does not try to achieve Dennis Hubel's suggestion that we use the word "default" only when discussing pleadings.

One draw-back of my suggestion is its use of "appear" -- the proposal uses "filed an appearance" in reference to pleading stages, and it uses "fails to appear" in the physical sense of presence in the courtroom for trial. The dual use or meaning is perhaps offensive to the linguistic purist. But the meaning is clear enough, and a comment reference to Van Dyke eliminates confusion.

There are times when a "quick fix" should be viewed with suspicion. This is not one of them. My suggestion states very directly that, when a litigant fails to appear at trial, the court does not have to wait 10 days before proceeding with the

case, but may immediately enter an order of default and proceed to judgment following whatever mode of trial is appropriate under Rule 69B.(2), Rule 52.A, and Rule 58.A.

Very truly yours,

WILLIAM C. SNOUFFER
Circuit Court Judge

WCS/pd

cc: Henry Kantor
Dennis Hubel
Hon. Betsy Welch
Hon. Jack Mattison

(Dennis Hubel Draft Proposal)

PROPOSED ADDITION TO ORCP 58E

When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement as set forth in ORCP 52A. If no good cause is shown, the court shall proceed to try the case. If the plaintiff has not appeared, and, therefore, fails to put on any evidence in support of plaintiff's claim, the case shall be dismissed with prejudice. If the defendant fails to appear, the plaintiff shall proceed to put on plaintiff's case and an appropriate judgment shall be entered based upon the evidence produced at trial.

Comment: More thought should be given to the possibility that one of multiple defendants or one of multiple plaintiffs does not appear while the remaining parties, plaintiff or defendant, do appear for trial. In that instance, perhaps, with respect to the plaintiff who does not appear, their claim should be dismissed for lack of evidence to support it. If it is one or more defendants who do not appear, perhaps the case should proceed to trial with the remaining parties and, at the conclusion of all evidence, both for plaintiffs and for those defendants who do appear, whatever judgment is supported by the evidence as determined by the finder of fact should be entered against the non-appearing defendant. As this possibility only occurred to me at the last moment, I have not given this a great deal of thought and there are perhaps problems with this approach that I've not anticipated.

Attachment B (8½)

Dennis J. Hubel

Admitted in Oregon and Washington

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October 16, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Maury Holland
Executive Director, Council on Court Procedures
U of Oregon, Room 275A
School of Law
1101 Kincaid Street
Eugene OR 97403-3720

Re: Proposed Amendments to ORCP 69

Dear Mr. Holland:

Thank you for providing me with a copy of the Agenda for the Council on Court Procedures meeting for Saturday, October 17, 1992, together with your October 5th memorandum regarding the ORCP 69 problems discussed at the September 26th meeting of the Council. As I agreed to do at that Council meeting, I have given some thought to and, by this letter, I am giving you my suggestions regarding a practical solution to the problem of a party failing to appear either in person or through counsel at the appointed hour for a trial. This assumes that the party has been given proper notice of the trial pursuant to whatever rules apply in the particular court.

First, I think it would be helpful if we removed this hypothetical situation from Rule 69 altogether. I believe that most trial attorneys [certainly all of those to whom I spoken about this since the September meeting] believe that the term default should be restricted to those situations where a party has failed to plead or appear by way of motion in response to the Complaint. Obviously, it does have some application to those situations where a party's pleadings have been stricken for whatever reason by order of the court and they are, therefore, no longer deemed to have entered an appearance. The confusion in this area, [see Judge Diez' comments in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) and Judge Mattison's letter] seems to stem from use of the term "default" in the situation where a party has not appeared for

the appointed trial date. Therefore, I suggest that the clause "or further defend" be either removed from ORCP 69 or be qualified to exclude appearance and defense at trial. It would be helpful to make a clear line of demarcation such that Rule 69 applies to defaults or failure to defend as required by the rules when it occurs prior to the day for trial. If it occurs on the day for trial, this should be handled by an amendment to ORCP 58 TRIAL PROCEDURE. I would suggest the addition of a paragraph E to ORCP 58 that reads as indicated on the enclosure to this letter. The purpose of this addition would be to clearly define and indicate that the trial court has the power and discretion to proceed with trial on the appointed date when the court record reflects that trial notices were mailed to the party or counsel for the party and that that party has failed to appear at trial.

It is neither practicable nor economical for the court or the parties to use the ten-day notice provision for defaults under ORCP 69 to handle the problem of the non-appearing party at trial. In any case, the party who is at trial will have incurred substantial attorney's fees, costs and potentially expert witness fees in preparation for the trial. If that party is forced, with the non-appearance of the defendant, to then give ten-days written notice of the prima facie hearing, the plaintiff will have incurred the expenses and, most likely, will incur additional charges for the delayed prima facie hearing. As an aside, how many busy trial judges will find a 1 - 3 hour block of time for the prima facie hearing within ten days in their schedule? It's hard to imagine a rational due process argument against allowing the appearing party to proceed to trial, put on their evidence in an abbreviated format (absent cross-examination from the non-appearing party) and obtain his or her judgment.

Likewise, a non-appearing plaintiff should not be allowed to complain about the court dismissing the plaintiff's case for failure to produce any evidence. Certainly, the defendant who is prepared for trial and incurred the expenses necessary to do so, should not be deprived of his or her opportunity to obtain a dismissal with prejudice of the plaintiff's claim at that time. If there is some reasonable explanation for the non-appearance of a defendant or a plaintiff, certainly the service of the judgment upon the non-appearing party or their counsel will trigger their use of the procedures already existing to remedy the result. See ORCP 64B(1) and C, ORCP 71.

Since the September meeting, I have re-read the Court of Appeals decision in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). I have been puzzled continuously by the statement of the court that -

> "The trial court did not intend to act under ORCP 69, but, rather, intended with trial in the absence of defendant. However, the trial court had no authority to proceed in that manner."

Van Dyke, 103 Or App at 102.

I reviewed the Oregon Rules of Civil Procedure looking for something to suggest the trial court had no such authority. Unless ORCP 69 in its current form prohibits this procedure, I find nothing. It seems to be a strained interpretation of ORCP 69 to suggest it prohibits a trial judge from proceeding. On the other hand, ORCP 52A states,

> "When a cause is set and called for trial, it **shall** be tried or dismissed unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party."

It strikes me that ORCP 52A is authority and, in fact, is mandatory in its command to the trial court to try the case when called for trial without consideration of whether a party appears or not. The staff comment for the Council on Section 52A, when it was adopted, indicates that the language of 52A is new. Apparently, in 1980, a modification to the second sentence of 52A was made according to the 1980 staff comment. The last clause of that sentence was apparently suggested by the case of Spalding v. McCaige, 47 Or App 129 (1980). I am enclosing a copy of the relevant portions of that opinion. Apparently, according to the Spalding opinion, prior to the enactment of ORCP 52A, when a party failed to appear at trial, the Court of Appeals felt that the trial judge was left with two choices: (1) To default the non-appearing party; or, (2) To postpone the trial. Spalding, 47 Or App at 137. It is not clear that any court has dealt with the significance of the first sentence of ORCP 52A mandating that the court case shall be tried or dismissed once it is set and called for trial. Certainly, the Spalding case did not resolve this as it acknowledged that ORCP 52A was enacted after the trial of that case.

I am concerned about your suggestion that the second full sentence of ORCP 69A be removed. This sentence requires ten-days written notice of a party's intent to seek "an order of default" if the party against whom the default is sought (1) has filed an appearance; or, (2) has provided written notice of intent to file an appearance. In practice, defaults are becoming more difficult to set aside. When this provision was added, we had certainty in

state court practice for the first time. The court didn't have to speculate about the parties' agreements regarding an extension any more. A defendant knew precisely how to automatically trigger a requirement for ten-days written notice of default. A plaintiff knew precisely how to automatically trigger an absolute deadline for the defendant to do something. This system has worked well. It should not be eliminated.

I indicated when I appeared at the Council's meeting in September that I appeared as the liaison representative of the Oregon State Bar Procedure & Practice Committee. Our Committee has not had a meeting since your September meeting and, therefore, these comments in this letter should not be construed as the position of the Procedure & Practice Committee. Rather, they are merely my thoughts and suggestions which I will review with the Procedure & Practice Committee at our next regularly scheduled meeting on October 24, 1992.

Thank you for your consideration.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Henry Kantor, Esq.\via fax
Stephen C. Thompson, Esq.\via fax

Enclosures