

**OREGON STATE BAR LEGISLATIVE
PROPOSAL**

Part I – Legislative Summary

Re: SB 307 Arbitration and the Oregon Rules of Civil Procedure (ORCP) 54(E)

Submitted by: Consumer Law Section

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1. Does this amend current law or program? Yes No Specify

This Amends ORS 36.425(6)

2. Problem Presented:

There is no logical way for the impact of an offer of judgment under ORCP 54(e) to be considered in an court-mandated arbitration. The Court of Appeals concluded that a judgment should be entered first before the impact of the offer of judgment is considered, but that conclusion conflicts with the concept of finality of judgments, and that judgments under ORS 36.425(3) "may not be appealed."

3. Solution:

A simple solution exists to amend ORS 36.425(6) to allow for the current procedure to challenge to fees following an arbitration judgment to specifically include a challenge related to an ORCP 54E offer of judgment. The default time limitation in the paragraph is struck to allow for the necessary procedural due process upon such a challenge.

Additional background materials are available upon request. Please contact Susan Grabe (sgrabe@osbar.org) or Amy Zubko (azubko@osbar.org) for more information.

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Part II – Legislative Language

Please provide your legislative language below

See Attached

1 **SITUATION: Conflict between Court Rules and Arbitration Statute**

2 The purpose of court-annexed arbitration is to promote speedy resolution of
3 disputes and reduce the burdens on court by deciding smaller civil disputes
4 where only money through arbitration with reduced court involvement. But
5 a conflict exists between the arbitration statute and the court rules for certain
6 cases heard in arbitration and are not appealed to trial de novo.

7 In *Mendoza v Xtreme Truck Sales LLC*, 314 Or App 87 (2021), the Court of
8 Appeals held that, based on the language of ORCP 54(E), when a dispute
9 over entitlement to attorney fees or costs arises from an offer of judgment,
10 the arbitrator’s final award—including the attorney fees and costs award,
11 which the arbitrator now makes without knowing about the offer of
12 judgment—must become a final judgment before the offer of judgment is
13 disclosed and the effect of the offer of judgment on the attorney fees and
14 costs award is determined.

15 This creates a conflict with ORS 36.425(3), which states that “If a written
16 notice is not filed under subsection (2)(a) of this section within the 20 days
17 prescribed, the court shall cause to be prepared and entered a judgment
18 based on the arbitration decision and award. A judgment entered under this
19 subsection may not be appealed.”

20 So the statute on arbitrations dictates that final judgments are not subject to
21 appeal, but the *Mendoza* holding directs litigants to wait until the judgment
22 (including the award of attorney fees and costs) becomes final before
23 disclosing the offer of judgment to the court so it can decide the effect on the
24 attorney fees and costs. And there is no procedure in statute or rule for
25 raising this issue, so each trial court who encounters it must create an ad-hoc
26 procedure to consider the issue.

27 **TARGET: A simple, clear procedure for litigants to follow during arbitration**
28 **when an ORCP 54 offer of judgment might affect fees and costs.**

29 Litigants, arbitrators, and courts should have a simple process for cases when
30 an offer of judgment may affect the attorney fees and costs after an
31 arbitration and the case is not appealed to trial de novo.

32 **PROPOSAL: Revise ORS 36.425(6) to have the arbitrator consider and**
33 **determine the effect of any ORCP 54 offers of judgments on the attorney fees**
34 **and costs after submitting the arbitration award to the court.**

1 **ORS 36.425**

2 **Filing of decision and award**

3 (6) Within seven days after the filing of a decision and award under subsection (1)
4 of this section, a party may file with the court and serve on the other parties to the
5 arbitration written exceptions directed solely to the award or denial of attorney fees
6 or costs. Exceptions under this subsection may be directed to the legal grounds for
7 an award or denial of attorney fees or costs, or to the amount of the award. **Any**
8 **claim or defense pursuant to ORCP 54E offer to allow judgment must be filed**
9 **as exceptions under this subsection.** Any party opposing the exceptions must file
10 a written response with the court and serve a copy of the response on the party
11 filing the exceptions. Filing and service of the response must be made within seven
12 days after the service of the exceptions on the responding party. A judge of the
13 court shall decide the issue and enter a decision on the award of attorney fees and
14 costs. *[If the judge fails to enter a decision on the award within 20 days after the*
15 *filing of the exceptions, the award of attorney fees and costs shall be considered*
16 *affirmed.]* The filing of exceptions under this subsection does not constitute an
17 appeal under subsection (2) of this section and does not affect the finality of the
18 award in any way other than as specifically provided in this subsection.