N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

April 5, 1978

FROM: COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON LAW CENTER
EUGENE, OREGON

The next meeting of the Council on Court Procedures will be held in the Courtroom of The Honorable William M. Dale, Room 318, Multnomah County Courthouse, Portland, Oregon, on Saturday, May 6, 1978, commencing at 9:30 A.M. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

FRM:gh

AGENDA

COUNCIL ON COURT PROCEDURES

MAY 6, 1978

JUDGE DALE'S COURTROOM

PORTLAND, OREGON

1. Affidavits of prejudice

2. Pleading

3. Subcommittee report - discovery rules

4. Interrogatories

5. New business

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of May 6, 1978

Multnomah County Courthouse, Portland, OR

Present:	Sidney A. Brockley	Harriet Meadow Krauss
	John M. Copenhaver	Berkeley Lent
	William M. Dale, Jr.	Donald W. McEwen
	Alan F. Davis	James B. O'Hanlon
	James O. Garrett	Charles P.A. Paulson
	Wendell E. Gronso	Gene C. Rose
	Garr M. King	Val D. Sloper
	Laird Kirkpatrick	Wendell H. Tompkins
Absent:	Darst B. Atherly	Lee Johnson
	E. Richard Bodyfelt	Roger B. Todd
	Anthony L. Casciato	William W. Wells
	Ross G. Davis	

Chairman Don McEwen called the meeting to order at 9:40 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse.

The Council discussed Justice Denecke's letter to the Chairman regarding affidavits of prejudice. It was the consensus of the Council that the procedure involved applied to both civil and criminal cases and the Council could only promulgate a rule that applied to civil cases, and it would be more appropriate to have one rule which applied to all cases. Therefore, any changes that might be necessary should be done by statute rather than by rule. It was suggested that the Chairman communicate this to Justice Denecke and furnish him with the Council staff memorandum on the problem.

The Executive Director suggested that discussion of pleading revision be deferred until such time as the pleading subcommittee had reviewed the latest revision which incorporated changes suggested by the Council at the last meeting. A motion to that effect made by Charles Paulson, seconded by Justice Lent, was unanimously passed by the Council.

Garr King, chairman of the discovery subcommittee, presented his report concerning their meeting and indicated that the subcommittee had revised the discovery rules draft and felt that several issues should be discussed by the full Council.

Rule 101 B.(1). In general. Upon motion of Garr King, seconded by Don McEwen, the Council voted to delete the wording in the first sentence, "...to the subject matter involved in the pending action or proceeding, whether it relates to...", in conformance with the recommendation of the Committee of the Federal Judicial Conference set out on Page 3 of the memorandum of April 26, 1978, relating to discovery rules. Sidney Brockley, James Garrett, Wendell Gronso, Laird Kirkpatrick and Charles P.A. Paulson voted against the motion.

Rule 101 B.(2). Insurance agreements. Upon motion of Judge Sloper, seconded by Judge Davis, the Council voted to have this section reworded so that discovery is limited to the existence of insurance and limits, unless there is a policy defense, at which time there would be an obligation to disclose to opposing counsel. The Rule would provide that the person from whom discovery was sought would be obligated to disclose any coverage question existing at the time of discovery or which arose at a later time. Sidney Brockley voted against this motion. A question was raised regarding the procedure for discovery and what would happen if a party did not respond to the request for production. The Executive Director was asked to clarify this in the revision.

Rule 101 C.(4). Court order limiting extent of disclosure. The Executive Director stated that he had inadvertently omitted the following statutory language:

> (9) That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

Rule 102 A.(2). Notice and service. After discussion, the Council decided to leave this section as submitted.

Rule 102 E. Costs. Upon motion made by Judge Sloper, seconded by Charles Paulson, the Council unanimously voted to delete this section.

Rule 103 A. Within Oregon. In the first sentence, it was suggested that the words, "preceded by", be used instead of the word, "initiated".

Rule 103 C. Disqualification for interest. Upon motion made by Judge Davis, seconded by Charles Paulson, the Council voted unanimously to delete this section.

Rule 105 F. Submission to witness; changes; signing. Suggestions were made for the rewording of the second to the last sentence starting on Page 14. Included in these were: failure to return the deposition would be a waiver of the right to correct; insert, "or lesser time upon court order", after 30 days on Page 15; in the event a witness refuses to sign a deposition, it may be used at trial unless otherwise ordered by court; and, if the witness refuses to sign the deposition, the signing is waived. The Executive Director said that he would revise this section.

Rule 105 G.(1). Certification. The Executive Director stated that this language followed the A.B.A. committee's recommendations and that he had added the sentence in the eighth line down in this section starting, "When a recording

or a non-stenographic deposition.....and that the recording has not been altered." It was suggested that in the eleventh line, the words, "or his or her attorney", be added after the word, "party."

Rule G.(5). Notice. Upon motion of James Garrett, seconded by Laird Kirkpatrick, the Council voted to delete this subsection. James O'Hanlon opposed the motion.

Rule 106 (6). Notice of filing. Since this is identical to Rule 105 G.(5), it was also deleted.

Rule 107 C.(3). As to taking of deposition. It was suggested that the reference to Rule 31 be changed to Rule 106 and that 5 days be changed to 20 days.

Rule 109 B. Procedure. There was a discussion as to whether 60 days was too long, but no change was made.

Rule 110 D. Effect of failure to comply. Sid Brockley made a motion, seconded by James Garrett, that this Rule be revised so that a party shall be entitled to compel the written report of the opposing party at the latter's expense in the event one is not produced by the parties. The motion passed, with James O'Hanlon, Garr King and Don McEwen opposing it.

Rule 110 F. Discovery by other means. Upon motion of Wendell Gronso, seconded by James Garrett, the Council unanimously voted to delete this section.

Rule 111. Requests for admission. After a brief discussion, the Executive Director was asked to furnish the Council with copies of the material previously furnished to the discovery subcommittee so that they could review this Rule further.

Rule 500 H.(2)(c). Mode of compliance with subpoena of hospital records. Upon motion made by Wendell Gronso, seconded by Charles Paulson, the Council voted unanimously to amend (c) on Page 37 to read, "...After filing, it may be inspected by any attorney of record in the presence of the custodian of the records."

Rule 500 F.(1). Subpoena for taking depositions; place of examination. Upon motion of Sid Brockley, seconded by Charles Paulson, the Council unanimously voted to eliminate the provision contained in the last paragraph of (1) on Page 35 and to retain the present procedure which would require a witness who objects to a subpoena duces tecum to seek a protective order.

Upon motion made by Garr King, seconded by Sid Brockley, the Council unanimously voted to adopt the discovery rules as submitted, subject to the changes suggested at this meeting and subject to future detailed consideration of the admissions rule.

The meeting was adjourned at 12:14 p.m. The next meeting will be held on

Saturday, June 3, 1978, commencing at 9:30 a.m., in Judge Dale's Courtroom, Portland, Oregon.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEMORANDUM

TO: DISCOVERY SUBCOMMITTEE

April 12, 1978

FROM: Fred Merrill

IN RE: DISCOVERY RULES

The purpose of this memorandum is to clean up some loose ends in the discovery area not covered by the draft of the discovery rules furnished at the last meeting. The provision relating to subpoenas need to be reworked to conform to the discovery rules, and the subcommittee should consider discovery-related statutes that must be retained as statutes and a few modifications to existing statutes required by the proposed rules.

I would suggest that the committee meet and agree on a set of proposed rules and statutory changes that can be recommended to the full Council.

I. SUBPOENAS

Since one method of discovery is deposition of a non-party witness, the subpoena rule should conform to the discovery rules. The following suggested draft of a subpoena rule integrates all subpoena statutes existing in Oregon into one rule. It is primarily based on ORS 44.110 to 44.220 and ORS 41.915 to 41.945. Modifications, based on Federal Rule 45, were made to conform to the subpoena rules to the discovery rules. The Oregon statutes come from the original Deady Code and do not particularly cover discovery depositions. Some of the language of the Oregon statutes is outmoded and archaic and was modified.

RULE 500

SUBPOENA

(a) Defined; form. The process by which attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Issuance. (1) A subpoena is issued as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein: (i) it may be issued by the clerk of the court in which the action or proceeding is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by the attorney of record of the party to the action or proceeding in whose behalf the witness is required to appear, subscribed by the signature of such attorney;

(b) To require attendance before any person authorized to take the testimony of a witness in this state under Rule 103(d)(1), or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of the circuit court

in the judicial district in which the witness is to be examined;

(c) To require attendance out of court in cases not provided for in subdivision (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice or other officer before whom the attendance is required.

(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

(d) Service; service on law enforcement agency; proof of service. (1) Except as provided in subsection (2) of this section, a subpena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to him at the same time the fees to which he is entitled for travel to and from the place designated and one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(2) (a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

(b) If a peace officer's attendance at trial is required as a result of his employment as a peace officer, a subpena may be served on him by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

(c) When a subpena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

(3) Proof of service of a subpoena is made in the same manner as in the service of a summons.

(e) Subpoena for hearing or trial; witness' obligation to attend.

A witness is not obliged to attend for ~~examination~~ at a place outside the county in which he resides or is served with subpena unless his residence is within 100 miles of such place, or, if his residence is not within 100 miles of such place, unless there is paid or tendered to him upon service of the subpena:

(1) Double attendance fee, if his residence is not more than 200 miles from the place of examination; or

(2) Triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or

(3) Quadruple attendance fee, if his residence is more than 300 miles from such place; and

(4) Single mileage to and from such place.

(f) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules ~~30(b)~~ and ~~31(a)~~ constitutes a sufficient authorization for the issuance ~~by the clerk of the district court for the district in which the deposition is to be taken~~ of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule ~~26(b)~~, but in that event the subpoena will be subject to the provisions of Rule ~~26(c)~~ and ~~subdivision~~ (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of ~~the district in which the deposition is to be taken~~ may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of ~~the district~~ may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(g) Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action or proceeding is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, his complaint, answer or reply may be stricken.

(h)(1) . As used in ~~ORS 41.915 TO 41.945,~~ → this section unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442.340 to 442.450.

(2) **Mode of compliance with subpena of hospital records.** (a) Except as provided in subsection (1) of ~~ORS 41.940,~~ → section (5) of this rule when a subpena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in ~~ORS 41.925.~~ → section (4) of this rule. The copy may be photographic or microphotographic reproduction.

(b) The copy of the records shall be separately inclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpena are clearly inscribed. The sealed envelope or wrapper shall be inclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows:

(i) If the subpena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk.

(ii) If the subpena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpena for the taking of the deposition or at the officer's place of business.

(iii) In other cases, to the officer or body conducting the hearing at the official place of business.

(c) Unless the parties to the proceedings otherwise agree, or unless the sealed envelope or wrapper is returned to a custodian of hospital records who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.
[1973 c.268 §2]

(3) **Affidavit of custodian of records.** (a) The records described in ~~ORS 41.920~~ → section (2) of this rule shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following:

(i) That the affiant is a duly authorized custodian of the records and has authority to certify records.

(ii) That the copy is a true copy of all the records described in the subpena.

(iii) The records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition or event described or referred to therein.

(b) If the hospital has none of the records described in the subpena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which he has custody.

(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(4) **Personal attendance of custodian of records may be required.** (1) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpena. The procedure authorized pursuant to ~~ORS 41.920~~ → Oregon Rule of Civil Procedure 500(b) shall not be deemed sufficient compliance with this subpena.

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(2) If more than one subpena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to subsection (1) of this section, the custodian shall be deemed to be the witness of the party serving the first such subpena.

(5) ↗ this rule **Tender and payment of fees.** Nothing in ~~ORS 41.915 to 41.945~~ requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT:

(a) The first two sentences are the equivalent of the first two sentences of ORS 44.110 and do not appear in the federal rule. The last sentence does not appear in the Oregon rules and comes from Federal Rule 45(a).

(b) This is Federal Rule 45(b). It has the same effect as the last sentence of ORS 44.110, but the language is more clearly related to the discovery rules and specific protective provisions are included. The reference in ORS 44.110 to maintaining attendance and discharge was eliminated as unnecessary.

(c) This is based on ORS 44.120. It retains the Oregon procedure of allowing attorneys to issue subpoenas and covers depositions on foreign commissions. The federal rule only provides subpoenas to be issued by a district court clerk. The Oregon statute, however, has awkward language, e.g., ORS 44.120(2), where a misplaced comma impairs meaning. The language used comes from California Civil Practice Code § 1986, which is based on the same Field Code provision as the Oregon statutes. Subdivision (1)(b) should be read in conjunction with draft Rule 103(d) which is the Uniform Depositions Act. Rule 103 authorizes a foreign deposition in this state; this rule indicates who shall issue a subpoena if one is required. It replaces ORS 44.120(2) which only covers commissions. The Oregon statute allows any clerk of a court of record "in places within the jurisdiction of that court" (whatever that means). This rule specifies the circuit court clerk.

Subsection (1)(c) would cover any other situation that could arise. It is similar to ORS 44.120(3) and would authorize any

person authorized to take testimony for a deposition, including a person specially appointed by the court under Rule 103(e), to issue a subpoena.

Subdivision (2) has the same effect as ORS 44.130.

(d) This is ORS 44.140 without change. It differs from the federal rule by allowing any person, party, attorney, etc., to serve the subpoena and has specialized provisions for law enforcement agencies. Subsection (3) is ORS 44.160.

(e) This is ORS 44.171. The statutory language, however, was limited to subpoenas for attendance at trial or hearings and deposition subpoenas are covered under the next subsection. At $.08 a mile and $5.00 witness fee, this may not be worth a specific provision.

(f) This is Rule 45(d) and has no parallel in the Oregon statutes except the last sentence of ORS 45.190 which makes a deposition subpoena subject to the protective order provisions of the existing production and inspection statute. It is specifically designed to cover discovery subpoenas and provides protective devices. The most significant change would be part (2) which limits where a deposition subpoena may be taken. Present Oregon law allows a deposition subpoena to be taken anywhere upon payment of the enhanced witness fees of ORS 44.171. This is not a substantial enough sanction to prevent abuse of a witness on a deposition. On trial, the person issuing the subpoena has little choice as to the location of the trial, but under the deposition statutes there is free choice as to where the deposition could be taken.

(g) This replaces ORS 44.190. It has basically the same effect. Refusal to subscribe a deposition is already covered under Rule 105(f), although a new statute may be needed in this area as discussed below. The statute also refers to failure to subscribe an affidavit, but this was eliminated as unnecessary. The rule gives the contempt sanction power to the court before whom the action is pending or the judge or justice who issued the subpoena. ORS 44.190 says "court or officer before whom he is required to attend". This is misleading in a case of a discovery deposition and literally would authorize a notary public, clerk of court or person specially appointed to take a deposition, to issue a contempt order.

ORS 44.190 provides special sanctions against a party who refuses to answer or be sworn. For depositions, this would be covered under proposed Rule 112. A refusal of a party to testify or be sworn at a trial, however, is not covered under Rule 112 and was retained in this rule. (It should be noted that the comment to Rule 112(d) at Page 72 of the rules draft is erroneous; I missed ORS 44.190 which does provide a sanction for failure to be sworn or answer at a deposition).

ORS 44.200 provides for a $50.00 penalty in damages for failure of a witness to attend. This was eliminated as unnecessary and probably unused. ORS 44.210 provides a form of body arrest to compel attendance, and ORS 44.220 has specific provision as to a warrant to be issued on a contempt order. Both were eliminated as unnecessary. The witness could be ordered brought before the

court on a contempt order and the reference in ORS 44.220 to the issuance of a warrant to the sheriff where the "witness is attending" is confusing.

(h) This is ORS 41.915 to 41.940, except ORS 41.930, which is an evidentiary rule and must be retained as a statute, and except ORS 41.945, which was eliminated as unnecessary.

(Other miscellaneous statutory provisions)

ORS 44.150 refers to the power to break and enter to serve a subpoena. This appears to more than a procedural rule and for safety's sake should be retained as a statute.

ORS 44.230 and 44.240 have already been covered under Rule 105. ORS 44.230 becomes Rule 105(b) and ORS 44.240 is retained as a statute.

ORS 44.180, referring to the power of a court to compel testimony of any person attending court without a subpoena, was eliminated as unnecessary.

II. MISCELLANEOUS RETAINED AND MODIFIED STATUTES

The first four statutes of the deposition section of ORS refer to both affidavits and depositions. ORS 45.110, requiring persons and affidavits and depositions to speak in the first person, should be eliminated as unnecessary. ORS 45.120 to 240, referring to use of affidavits to prove service of process and compelling testimony of an affiant in a provisional remedy situation, are more properly part of the process rules and the provisional remedy rules and should be retained pending revision of those particular statutes. ORS 45.140 seems unnecessary and

confusing and should be eliminated.

At the present time, there are separate use provisions in the statutes for discovery depositions after the case is filed and perpetuation depositions before a case is filed. ORS 45.450, relating to perpetuation depositions, is unnecessary and should be eliminated. ORS 45.250 should be retained as a statute and should cover both perpetuation depositions under Rule 102 and oral and written depositions under Rules 105 and 106. No statutory change is necessary as the statute refers to "a deposition".

Other existing deposition related statutes to be retained are as follows:

ORS 41.930, admissibility of evidence of hospital records produced pursuant to Rule 500(h);

ORS 44.151, authority to break and enter to serve a subpoena;

ORS 44.240, delivery of a witness in penal institution and expenses;

ORS 45.260, introduction of part of a deposition in evidence;

ORS 45.270, use of deposition in other proceedings.

The following minor changes will be required in other retained statutes:

ORS 44.040(d) should be changed from "subject to ORS 44.610" to "subject to Oregon Rule of Civil Procedure 110".

ORS 44.320, relating to authority to administer oaths, which, in addition to listed officers, also says as "authorized by statute", should read, "authorized by statute or rule". This change is required because of the possibility of persons specially

appointed to take depositions under Rule 103.

Finally, as noted on Page 42 of the rules draft, the provisions for using a deposition when a witness refuses to sign, from Rule 30 of the federal rules, could not be included as an Oregon rule because it is probably evidentiary. Present Oregon law under ORS 44.190 provides a contempt sanction when a witness refuses to sign his deposition. Since the main objective, however, of the signing is to make the deposition usable, it is suggested that the federal approach of making the deposition admissible in evidence, despite a witness' refusal to sign, be used rather than a contempt sanction. To accomplish this, we should recommend the adoption of a new statute as follows:

"If a witness refuses to affirm as correct a transcription or recording of a deposition of such witness pursuant to Oregon Rule of Civil Procedure 105(f), the recording or transcription may be used as fully as though affirmed inwriting by the witness, unless on a motion to suppress the deposition pursuant to Oregon Rule of Civil Procedure 107(d), the court holds that the reasons given for the refusal to affirm require suppression of the deposition in whole or in part".

MEMORANDUM

TO: PLEADINGS SUBCOMMITTEE April 18, 1978

FROM: Fred Merrill

RE: PLEADING REVISION

Enclosed is a second draft of the pleading rules reflecting the clean-up suggested in the comments and the determinations made at the last Council meeting. Some of the most important changes are in Rules B, G(3), H(3) and (4), and I(9). Chuck Paulson also raised some reasonable objections to the inclusion of Rule O(3) after the meeting. I think these should be passed on by the subcommittee and reported to the Council.

FRM:gh

Encl.

OREGON RULES OF CIVIL PROCEDURE

A. PLEADINGS LIBERALLY CONSTRUED - DISREGARD OF ERROR

A(1) Liberal Construction. All pleadings shall be liberally construed with a view of substantial justice between the parties.

A(2) Disregard of error or defect not affecting substantial right. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

B. KINDS OF PLEADINGS ALLOWED - FORMER PLEADINGS ABOLISHED

B(1) Pleadings. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses.

B(2) Pleadings allowed. There shall be a complaint and an answer; a permissive reply to any answer or third party answer and a mandatory reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule K(5); and a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a mandatory reply to an answer or a third-party answer.

B(3) Pleadings abolished. Demurrers and pleas shall not be used.

C. MOTIONS

C(1) Motions, in writing, grounds. (1) An application for an order is a motion. Every motion, unless made during trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(2) Form. The rules applicable to captions, signing and other matters or form of pleadiings apply to all motions and other papers provided for by these rules.

4/18/78

D. TIME FOR FILING PLEADINGS OR MOTIONS - NOTICE OF APPEARANCE

D(1) Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint or the answer or reply of a party summoned under the provisions of Rule K(6) shall be filed with the clerk by the time required by Rule _____ to appear and answer. A motion or answer by any other party to a cross-claim shall be filed within 10 days after the service of an answer containing such cross-claim, but in any case, no defendant shall be required to file a motion or an answer to a crossclaim before the time required by Rule _____ to appear and respond to a complaint or third party complaint served upon such party. A motion or reply by any other party, if any is allowed, to an answer shall be filed within 10 days after the service of the answer or, if a reply is ordered by the court, within 10 days after service of the order, unless the order otherwise directs.

D(2) Pleading after motion. (a) If the court denies a motion or postpones its disposition until trial on the merits, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

(b) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.

(c) A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

D(3) Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by the procedural rules, or by an order enlarge such time.

E. PLEADINGS - FORM

E(1) Captions, names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the register number of the cause and a designation as in Rule B(1). In the complaint the title of the action shall include the names of all the parties, but in such other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

E(2) Concise and direct statement; paragraphs; statement of claims or defenses. Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Separate claims or defenses shall be separately stated and numbered.

E(3) Consistency in pleading alternative statements. Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both. All statements shall be made subject to the obligation set forth in Rule J.

E(4) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

F. SUBSCRIPTION OF PLEADINGS

F(1) Subscription by party or attorney, certificate. Every pleading shall be subscribed by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties or his resident attorney. When a corporation, including a public corporation, is a party, and if the attorney does not sign the pleading, the subscription may be made by any officer thereof upon whom service of a summons might be made; and when the state or any branch, department, agency, board or commission of the state or any officer thereof in its behalf is a party, the subscription, if not made by the attorney, may be made by any person to whom all the material allegations of the pleading are known. Verification of pleadings shall not be required. The subscription of a pleading constitutes a certificate by the person signing that such person has read the pleading, that to the best of the person's knowledge, information and belief there is a good ground to support it and that it is not interposed for delay.

F(2) Pleadings not subscribed. Any pleading not duly subscribed may, on motion of the adverse party, be stricken out of the case.

G. COMPLAINT, COUNTERCLAIM, CROSSCLAIM AND THIRD PARTY CLAIM

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain: (1) a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition; (2) a demand of the relief which the party claims; if

recovery of money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded; (3) a statement specifying whether the party asserts that the claim, or any part thereof, is triable of right by a jury.

H. RESPONSIVE PLEADINGS

H(1) Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all the allegations except such designated allegations or paragraphs as he expressly admits; but, when the pleader does so intend to controvert all its allegations, the pleader may do so by general denial subject to the obligations set forth in Rule F.

H(2) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, unconstitutionality, waiver, and any other matter constituting an

avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

H(3) Assertion of right to jury trial. The party filing the responsive pleading shall, in that pleading, admit or deny the assertions of right to jury trial and affirmatively assert whether the defenses, or any part thereof, asserted in the responsive pleading are triable of right by a jury.

H(4) Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which a reply is permitted but not required shall be taken as denied or avoided unless a permissive reply is filed admitting or denying such allegations. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

I. SPECIAL PLEADING RULES

I(1) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

I(2) Judgment or other determination of court or officer, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

I(3) Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

I(4) Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded. (a) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the State of Oregon. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the State of Oregon.

(b) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

I(5) Libel or slander action. (a) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out

of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

(b) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

I(6) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

I(7) Recitals and negative pregnants. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be held insufficient to raise an issue on the grounds that it contains a negative pregnant.

I(8) Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I(9) Designation of unknown heirs in actions and suits relating to real property. When the heirs of any deceased person are proper parties defendant to any suit or action relating to real property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. DEFENSES AND OBJECTIONS - HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

J(1) How presented. Every defense, in law or fact, excepting the defense of improper venue, to a claim for relief in any pleading, whether a complaint, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (A) lack of jurisdiction over the subject matter, (B) lack of jurisdiction over the person, (C) that there is another action pending between the same parties for the same cause, (D) that plaintiff has not the legal capacity to sue, where such lack of capacity appears in a pleading, (E) insufficiency of process or insufficiency of service of process, (F) the complaint does not contain ultimate facts sufficient to constitute a claim, (G) that the action has not been commenced within the time limited by statute, and (H) failure to join a party under Rule O. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defenses denominated (F) or (G), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(2) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(3) Preliminary hearings. The defenses specifically denominated (A) through (H) in subdivision (1) of this rule, whether made in a pleading or by motion and the motion for summary judgment mentioned in subdivision (2) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

J(4) Motion to make more definite and certain. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent, upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 20 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

J(5) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken: (A) any sham or frivolous or irrelevant pleading or defense; (B) any insufficient defense or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

J(6) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (7)(b) of this rule on any of the grounds there stated.

J(7) Waiver. (a) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of process, or insufficiency of service of process, is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this rule, or (ii) if it is neither made by motion under this rule not included in a responsive pleading or an amendment thereof permitted by Rule L (1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) of this rule shall not be raised by amendment.

(b) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute,

a defense of failure to join a party indispensable under Rule O, and an objection of failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under Rule B(2) or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule L(2) in light of any evidence that may have been received.

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

K. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

K(1) Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against the plaintiff.

K(2) Crossclaim against codefendant. (a) In any action where two or more parties are joined as defendants, any defendant may in his answer allege a crossclaim against any other defendant. A crossclaim asserted against a codefendant must be one existing in favor of the defendant asserting the crossclaim and against another defendant, between whom a separate judgment might be had in the action and shall be: (i) one arising out of the occurrence or transaction set forth in the complaint; or (ii) related to any property that is the subject matter of the action brought by plaintiff.

(b) A crossclaim may include a claim that the defendant against whom it is asserted is liable or may be liable, to the defendant asserting the crossclaim for all or part of the claim asserted by the plaintiff.

(c) An answer containing a crossclaim shall be served upon the parties who have appeared and who are joined under subdivision (4) of this rule.

K(3) Third party practice. (a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule J and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections (1) and (2) of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule J and his counterclaims and crossclaims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

(b) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

K(4) Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or crossclaim in accordance with the provisions of Rules N and O. The parties so joined may respond to the claim by reply, answer or motion.

K(5) Separate trial. Upon motion of any party, the court may order a separate trial of any counterclaim, crossclaim or third-party claim so alleged if to do so would: (a) be more convenient; (b) avoid prejudice; or (c) be more economical and expedite the matter.

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L(1) Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

L(2) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

L(3) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

L(4) Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule J is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, and it appears to have been made in good faith, the party filing the motion shall file a responsive pleading if any is required.

L(5) Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require

that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike, and such ruling shall be subject to review on appeal from final judgment in the cause.

L(6) How amendment made. When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

L(7) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

M. JOINDER OF CLAIMS

M(1) Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

M(2) Forcible entry and detainer and rental. If an action of forcible entry and detainer and an action for rental due are joined, the defendant shall have the same time to appear as is now provided by law in actions for the recovery of rental due.

M(3) Separate statement. The claims united must be separately stated and must not require different places of trial.

N. JOINDER OF PARTIES

N(1) Permissive joinder as plaintiffs or defendants. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

N(2) Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

O. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

O(1) Persons to be joioned if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (a) in that person's absence complete relief cannot be accorded among those already parties, or (b) that person claims an interest relating to the subject of the action and is so situated that the disposition of the action in that person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If the joined party objects to venue and the joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

O(2) Determination by court whenever joinder not feasible. If a person as described in subdivision (1) (a) and (b) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

O(3) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (1) (a) and (b) of this rule who are not joined, and the reasons why they are not joined.

O(4) Exception of class actions. This rule is subject to the provisions of Rule _____ (class action rule).

O(5) State agencies as parties in governmental administration proceedings. In any action or proceeding arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action or proceeding.

P. MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Q. REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES April 26, 1978

FROM: FRED MERRILL

RE: LIMITED INTERROGATORIES

As requested, a limited interrogatories rule is attached. It follows the Bodyfelt suggestion of using the federal rule with an added numerical limitation. Other than the numerical limitation, the suggested rule deviates from Federal Rule 33 in two respects:

(1) The last sentence was added to section C.; this language was recommended by the A.B.A. discovery committee with the following comment:

> "The addition to subsection (c) is designed to eliminate the mechanical response of an invitation to 'look at all my documents.' The Rule as proposed makes clear that the responding party has the duty to specify precisely, by category and location, which documents apply to which question. Further, such answers being given under oath are intended to eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request."

(2) Section D. was added. This is similar to the New Jersey, Florida, California and Ohio rules and avoids shuffling between two documents. The exact language comes from Florida.

Three alternative forms are given for Section E. limiting the interrogatories. The Council members suggested that language be proposed to limit use of interrogatories beyond that existing in other jurisdictions. All three alternatives incorporate both the Illinois provision placing a duty to avoid abuse on attorneys, with the New Hampshire numerical limit containing a definition of interrogatories. The last sentence was added to the New Hampshire language in Section E.(2) to avoid compound questions, e.g., name, address, present location, title, past experience, etc.

Alternative II adds the limitation as to subject matter. This would be the most severely limited form of interrogatories. Interrogatories could be used to obtain some background information as a basis for other discovery but not for general discovery. The provisions relating to expert witnesses would not be necessary if a party requested a statement under the Bodyfelt expert rule but were included in the interrogatories for a person who simply wants the name and qualifications of an expert witness and does not wish to pay fees for a report or deposition. In the federal system, interrogatories are frequently used to narrow issues; that is, to secure more information about general allegations in pleadings. This would not be possible under this limitation, but with the more specific Oregon pleading may be less necessary.

Alternative III takes a different approach, seeking to use costs as a deterrent to abuse. The expense payment is automatic and mandatory and does

not require a court order. The sanction for failure to pay if costs are requested is no answer to the interrogatories, and disputes about reasonableness of costs requested are settled by the court on a motion to compel answers.

I have just received a copy of proposed amendments to the federal rules submitted by a committee of the Judicial Conference in March 1978. The Judicial Conference did not accept the A.B.A. recommendation of a numerical limit on interrogatories but did add a provision that would allow the district court to place a numerical limit on the number of interrogatories that might be used by a party. The committee of the Judicial Conference is also proposing adoption of the suggested last sentence of section (c), which was recommended by the A.B.A., and incorporated in the attached rule under section C.

FRM:gh

Encl.

RULE 108

INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 60 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 112 A. with respect to any objection to or other failure to answer an interrogatory.

B. Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 101 B., and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed.

C. Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form. The interrogatories shall be so arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the answers and refer to them in the space provided in the interrogatories.

ALTERNATIVE I

E. Limitations.

(1) Duty of attorney. It is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid

undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

(2) Number. A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged. Each question shall inquire only as to one specific subject matter area, and compound questions that inquire into more than one specific subject matter area shall be counted as separate questions for each specific subject matter area for the purpose of applying this limitation in number.

ALTERNATIVE II

(The same as ALTERNATIVE I, except drop the last sentence of paragraph (2) and add the following subsection):

(3) Purpose. Interrogatories may only be used to obtain the following information:

(a) The names and addresses of persons or entities having knowledge within the scope of discovery under Rule 101 B. and the source of such knowledge;

(b) The identity, description and location of documents (including writings, drawings, graphs, charts, photographs, phono-records and other data compilations from which information can be obtained) and tangible things within the scope or discovery under Rule 101 B.; and

(c) The name, address, subject matter of testimony and qualifications of any expert witness to be called at trial.

ALTERNATIVE III

(The same as ALTERNATIVE I, except add the following subsection):

(3) Costs. Unless the court orders otherwise, the party submitting interrogatories shall pay the reasonable costs and expenses, including a reasonable attorney's fee, necessary to prepare answers to such interrogatories. If payment of such reasonable costs and expenses is requested prior to the time required for service of a copy of the answers to interrogatories, such answers need not be served until such payment is made. If the party submitting the interrogatories objects to the amount of payment requested, such party may move for an order under Rule 112 A. with respect to the failure to answer the interrogatories

INTERROGATORIES

The merits and demerits of interrogatories have been extensively debated by the discovery subcommittee. The procedure provides an inexpensive method of obtaining simple facts and background for other discovery, but is easily subject to abuse and if abused, can be burdensome. The purpose of this memorandum is to survey the interrogatory rules in other jurisdictions to determine if any effective controls have been developed. Two proposals were included in the Dick Bodyfelt memorandum; the ABA approach, which simply limits the number of interrogatories to 30 without defining an interrogatory, and the Oregon state Bar bill, which is similar to the federal rule and relies upon protective orders.

The statutes and rules of forty-eight states were examined (Hawaii and South Carolina were not available). The only other state besides Oregon that does not have interrogatories is Connecticut. Forty-one states do not have any specific limitations on interrogatories. Thirteen states have some variation of the pre-1970 federal rule which expressly said that the number of interrogatories is not limited "except as justice requires to protect the party from annoyance, expense, embarrassment, harrassment, or oppression" (see Bar bill). Twenty-eight states have no reference to limiting interrogatories at all.

Six states do limit the number of interrogatories. Two of them, Rhode Island and Maine, are similar to the ABA proposal in that they limit interrogatories to 30 without any definition of interrogatories. For example, Rhode Island says:

A party shall not serve more than one set of interrogatories upon an adverse party nor shall the number of interrogatories exceed thirty (30) unless the court otherwise orders for good cause shown. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Four states attach a number of limits and attempt some definition of what constitutes an interrogatory. The language from each state is as follows:

Minnesota

No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

Massachusetts

No party shall serve on any other party as of right more than one set of interrogatories, unless the total number of all interrogatories in all sets combined does not exceed thirty, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped or combined. The court, on a showing of good cause, or upon agreement of the parties, may allow service of additional interrogatories.

Maryland

A party may not, without leave of court, serve upon the same party more than one set of interrogatories or more than thirty interrogatories (including interrogatories subsidiary or incidental to, or dependent upon other interrogatories, however grouped, combined or arranged)...

New Hampshire

A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed thirty, unless the Court otherwise orders for good cause shown after

> the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

Iowa had a thirty-interrogatory limit until 1973 and abandoned it in favor of the new federal rule. The only federal court with a formal local rule limiting interrogatories appears to be the Northern District of Illinois:

> No party shall serve on any other party more than twenty (20) interrogatories in the aggregate without leave of court. Subparagraphs of any interrogatory shall relate directly to the subject matter of the interrogatory.

The Illinois local rule is inconsistent with the federal rule, and under Federal Rule 83 is probably invalid.

One state attempts to limit interrogatories by encouraging attorneys to control abuse. The Illinois rules contain the following provision:

> (5) Duty of Attorney. It is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

Three states, New Jersey, Florida and as of 1978, California, have a provision that requires the questions and answers to interrogatories to be on the same document. For example, the California language is as follows:

> (b)(2) The propounding document shall be addressed to one party only, and each page thereof shall be paginated and numbered consecutively, contain no more than 4 questions per page, contain no subdivision of questions, and provide reasonable space under each question for the answer.
>
> (c) The responding party shall respond to each question on the space provided in the original propounding document and if the space is insufficient shall append such additional pages as may be necessary for the continued response, paginate the same consecutively by alphabet, and insert the same immediately following the page which propounded the question. * * *

This approach is less designed to control abuse than to provide convenience for the court and parties in handling and filing interrogatories and avoid a shuffling back and forth between questions and answers.

SUMMARY

Interrogatories are popular in other jurisdictions and not limited in most states. If the Council decides to adopt limited interrogatories, the New Hampshire statute appears to contain the best limiting language. It has worked there in practice. See 9 New Hampshire Bar Journal 79 (1967). The procedure of having the answers and questions on the same document seems desirable but would not control abuse.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

April 26, 1978

FROM: FRED MERRILL

RE: DISCOVERY RULES

Enclosed is the draft of the recommended rules of discovery. With the exception of interrogatories, Oregon has adopted much of the federal discovery rules. The Oregon assimilation of the federal discovery rules began in 1955 and continued through the last Legislature. This piecemeal adoption has resulted in:

(a) Minor language differences and some missing background provisions because each rule was being treated as a separate unit.

(b) Duplication and confusing provisions relating to scope of discovery, control of abuse and sanctions.

(c) Failure to adopt changes in the federal rules as they occurred; all the federal discovery rules were substantially reorganized in 1970, and only part of this revision was picked up by the 1977 Oregon Legislature.

(d) No logical organization.

The draft seeks to reorganize the existing statutes into a set of rules in logical sequence with appropriate cross-references and background provisions. Since the Oregon statutes come from the federal rules, the sequence used is that of the federal rules. When language differences existed, an attempt was made to choose the best rule, with some deference to recent legislative enactment.

Each provision was compared with a number of other state rules having the federal rules of discovery. In addition, changes recommended in the Report of the Special Committee for the Study of Abuse, Section on Litigation, American Bar Association, October 1977 (hereinafter referred to as the ABA Committee), was examined, and if the changes advocated by that committee were desirable, they were incorporated into these rules.

These rules have been reviewed and modified by the discovery subcommittee. Those portions of the rules marked with an asterisk were debated by the subcommittee. The language of the rules was that accepted by the majority of the subcommittee, but it was felt that some of the issues presented should be carefully considered by the full Council. The questions presented are the following:

1. Rule 101 B.(1)

This is ORS 41.635 adopted by the last Legislature. The A.B.A. has recommended that the definition of scope of discovery be changed from "relevant to the

subject matter involved in the pending action" to "relevant to issues raised by the claims or defenses of any party." The reasoning of the ABA Committee for this change was as follows:

> "The changes proposed in this Rule are the most significant revisions suggested by the Committee.
>
> Determining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy. Nonetheless, the Committee recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery.
>
> The Committee determined to narrow the scope of permissible discovery. It concluded that sweeping and abusive discovery is encouraged by permitting discovery confined only by the 'subject matter' of a case (existing Rule 26 language) rather than limiting it to the 'issues' presented. For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the 'subject matter' of an action, even though only specified industry practices raise the 'issues' in the case. The Committee believes that discovery should be limited to the specific practices of acts that are in issue.
>
> With respect to the question of defining the 'issues' presented, the Committee believes that the parties should be able to agree upon their definition, but if agreement cannot be reached, recourse can be had to the discovery conference provided for in proposed Rule 26(c).
>
> Although the Committee has retained intact the language of the last sentence of present Rule 26(b), it intends that the rubric 'admissible evidence' contained in that sentence be limited by the new relevancy which emerges from the term 'issues,' rather than from the more comprehensive term 'subject matter.'"

The Council staff comment on these proposed changes was as follows:

> "These changes were not incorporated for several reasons. The definition of 'scope" in the Oregon statute was adopted after serious consideration by the last Legislature. It seems inappropriate to modify it without a strong indication of need for such modification in Oregon practice. Secondly, as indrectly recoganized in the ABA comment, the language chosen will create more problems than it solves. Under the language suggested by the ABA Committee, any court which wishes to 'err' on the side of expansive discovery will continue to do so, as the 'issues' presented and 'relevant to the subject matter' are not capable of a precise interpretation. Under the suggested ABA language, the parties would simply end up

with a new area for argument and no substantial gain. The ABA Committee rationale for the change is unimpressive. The only concrete example given is of limited application and could as easily be controlled by saying the 'subject matter of an action' relating to specific industry practices does not include the entire business and industry. Finally, the ABA Committee appears to basically feel that expansive discovery is a bad thing. This is contrary to the entire philosophy of the federal rules and the Oregon statutes in practice. There is nothing basically wrong with broad discovery. Abusive and useless discovery is wrong, but this is better controlled either by limiting the discovery devices or court control under the general protective provisions of the discovery rule."

The proposed ABA changes have also resulted in a committee of the Federal Judicial Conference recommending some changes in the federal discovery rules. The committee did not accept the ABA committee's recommendations but did propose the following change in the definition of scope of discovery:

"(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party,including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."

The reasoning of the Judicial Conference committee was as follows:

"The Committee doubts that replacing one very general term with another equally generally one will prevent abuse occasioned by the generality of language. Further, it fears that the introduction of a new term in the place of a familiar one will invite unnecessary litigation over the significance of the change. As the Report notes, 'Determining when discovery spills beyond 'issues' and into 'subject matter' will not be easy. Nevertheless, the Committee recommends the change if only to direct courts not to continue the present practice of erring on the side of discovery.' Report 3.

If the term 'subject matter' does in fact persuade courts to err ' on the side of expansive discovery,' it should be eliminated, and that is the course recommended by the Committee."

2. Rule 101 B.(2).

This is ORS 41.622 adopted by the last Legislature. It apparently was not a Bar-sponsored bill. Some committee members suggested that discovery should be

limited to the existence and limits of the policy rather than the contents of the policy, with contents of the policy only discoverable when the insured party indicated that there was a coverage question being raised by the insurer. The last sentence of section (d) does not appear in ORS 41.622, and some committee members thought it should not be included.

3. Rule 101 C.

This language is based on Federal Rule 26(c). Virtually identical provisions appear in ORS 41.618 and 41.631. The federal language, however, allows a non-party witness to move for a protective order; the Oregon statutes only allow a party to move for a protective order. The subcommittee felt that a non-party witness should be able to secure protection from discovery.

4. Rule 102 A.(2).

Under the existing Oregon perpetuation statute, ORS 45.430, notice by publication is allowed when the expected adverse party is outside the state. This is of doubtful Constitutionality, and this Rule requires personal notice whenever the expected party may be found. Publication is only authorized when the expected party cannot with due diligence be found. In such case the Rule requires the court to appoint an attorney to represent the absent party (fees paid by petitioner) and to also cross examine the deponent. Several subcommittee members questioned whether this procedure would, in fact, make the deposition admissible in the later action and, if not, whether it was worth including the provision. The admissibility of a deposition, against a party not receiving actual notice, is unclear. Under the federal rules, Rule 27(a)(4) specifically makes such depositions admissible in a later action. Since these rules cannot, however, make rules of evidence, that provision was not included. Use of a perpetuation deposition under this Rule in Oregon then would have to be either by a specific statute enacted to make the deposition usable or under some other exception to the hearsay rule. The previous testimony exception to the hearsay rule is the probable one that would be used and admissibility would depend upon whether the court was willing to accept cross examination by the appointed attorney as the equivalent of presence or opportunity to be present to cross examine on the part of the expected party. The present state of the law on availability of cross examination under the prior testimony exception is not clear in Oregon and whether the procedure specified would make the testimony admissible is not clear.

The Uniform Perpetuation of Testimony Act, promulgated by the Uniform Law Commissioners, which was used as a basis for much of the language in this Rule, does not include the provision for attorney appointment for an absent party. The Uniform Law Commissioners doubted the validity of the procedure. See 13 ULA, p. 447.

The question boils down to whether to provide a procedure that may result in an unusable deposition, leaving it to the petitioners to proceed at their peril but holding open a possibility of perpetuation when the expected party

cannot be found, or to not provide any perpetuation deposition when the expected opponent cannot be found and thus avoid the wastage of court time. The subcommittee left the provision for appointment of attorneys but added the next to the last sentence to warn any petitioner seeking to use the procedure that no guarantee of admissibility is included.

5. Rule 105 F.

This Rule governs submission of the deposition to a witness and signing. ORS 45.171 presently requires submission of the deposition to a witness and signing and ORS 44.190 provides for a contempt sanction if the witness refuses to sign. This section requires submission only if (a) the deposition is to be used in the case in any manner, or (b) the deposition is to be filed. Filing occurs only when a request is made by a party under section G.(2). In any case, inspection of the deposition is waivable only by the parties and the witness; the witness has a right to see a transcript of the deposition to be used or filed or to listen to a recording to be used or filed. The Rule also requires signing when the deposition is to be used or filed, but this is waivable by the parties.

The subcommittee considered the possibility of making submission of the deposition to the witness waivable by the parties only but concluded that a witness should have a right to examine their own deposition. The practice of having the witness waive examination and signing at the time of the deposition, which apparently is the current practice in Oregon, could be continued under this rule.

The sanction for refusal to sign is specified in the last sentence. The deposition may be used as if it were signed. Admissibility is still governed under the rules of evidence, but this rule essentially is a waiver of deposition procedure.

6. Rule 105 G.(5).

The requirement of notice of filing appears in the federal rules but not in the existing Oregon statutes. The subcommittee considered deleting this requirement as an unnecessary step but retained it because, with filing only taking place at the request of a party, other parties should have some notice that the deposition has been filed.

7. Rule 109 B.

This entire rule is based on ORS 41.616, which is an adaption of Federal Rule 34. The federal rule requires a written response or objection to the request for production. The Oregon statute simply requires compliance with the production request or an objection. The Oregon procedure is preferable as eliminating an unnecessary writing. The Oregon statute, however, is ambiguous in that it allows the request to specify a time for production and then says the respondent has 30 days to object. This raises the question of what happens when the specified time is less than 30 days. The Rule changes the statutory language to clarify this by

requiring an objection prior to the time for production. This, in turn, creates the possibility that a defendant could be required to produce before an attorney could be obtained or an answer was due. The Rule was modified to limit the right to require production from a defendant until after expiration of the 60-day period following service of summons and complaint.

8. Rule 110 D.

The provisions of Rule 110 B. and C. require production of medical reports under certain conditions. These provisions assume that a report either exists or will be made. The subcommittee added the reference to failure to request a report to this section to make it clear that if a physician has examined a person under circumstances giving rise to a duty to allow the inspection of a report, this duty cannot be avoided by not having a written report made or refusing to request one.

9. Rule 111 B.

This entire rule is based on ORS 41.626. Some committee members suggested that the 30-day period to deny, or an automatic admission results (which exists in the statute), resulted in a procedural trap. Other committee members suggested that the number of requests for admissions could be limited in the same way in which the Council is considering limitation of interrogatories. Neither of these changes was incorporated in the proposed Rule.

General Commentary

A detailed commentary on all the rules was submitted to the discovery subcommittee. Copies are available to any Council member upon request.

FRM:gh

Encl.

DISCOVERY AND SUBPOENA RULES

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4-26-78 Rev.

RULE 101

GENERAL PROVISIONS GOVERNING DISCOVERY

A. Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B. Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

*(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action or proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

*(2) Insurance agreements. (a) In a civil action, a party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to

disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in section C of this rule.

(c) Information concerning the insurance agreement or policy is not by reason of disclosure under this section admissible in evidence at trial.

(d) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy. For purposes of this section, an application for insurance shall not be treated as part of an insurance policy agreement.

(3) Trial preparation materials. Subject to the provisions of Rule 110 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request

is refused, the person may move for a court order. The provisions of Rule 112 A.(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation; experts.

* C. Court order limiting extent of disclosure. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters: (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 112 A.(4) apply to the award expenses incurred in relation to the motion.

RULE 102

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

A. Before action.

(1) Petition. A person who desired to perpetuate testimony or to obtain discovery to perpetrate evidence under Rule 109 or Rule 110 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petitioner, or petitioner's agent, shall verify that the petitioner believes that the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or his personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each, and shall ask for an order authorizing the petitioner

to take the deposition of the person to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 109 or Rule 110 from the persons named in the petition.

*(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state and within the time and in the manner provided for service of summons in Rules _____ (rules relating to personal or substituted service), but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rules _____ (personal or substituted service), an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule _____ (guardian ad litem rule) apply.

(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the xamination and whether the depositions shall be taken upon oral examination or writ en questions; or shall make an order designating or describing the persons from whom

discovery may be sought under Rule 109 and specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 110. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 109 or Rule 110 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in paragraph (3) of section A. of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

D. Filing of depositions. Depositions taken under this rule shall be filed with the court in which the petition is filed or the motion is made.

E. Costs. The party taking any deposition or engaging in any discovery under this rule shall pay the costs thereof and of all proceedings hereunder unless otherwise ordered by the court.

RULE 103

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

A. Within Oregon. Within this state, depositions shall be initiated by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of his appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Disqualification for interest. No oath shall be administered to initiate a deposition by a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or who is financially interested in the action, except for a deposition taken by non-stenographic means under Rule 105 C.(4), where the oath may be administered by an attorney or counsel of any of the parties or an employee of such attorney or counsel.

D. Foreign depositions.

(1) Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

(2) This rule shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

RULE 105

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition or oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule _____ (service of process) to appear and answer after service of summons and complaint on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this rule. The attendance of a witness may be compelled by subpoena as provided in Rule _____. The deposition of a person confined in prison may be taken only by leave of court as provided in section (b) of this rule.

B. Order for deposition or production of prisoner. (1) If the witness is a prisoner confined in a prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows: (a) by the court of judge in which the action or proceeding is pending, unless it is a court of a justice of the peace; (b) by any judge of a court of record when the action or proceeding is pending in a justice's court, or when the witness' deposition, affidavit or oral examination is required before a judge or other person out of court.

(2) The order shall only be made upon the affidavit of the party

desiring it, or someone on his behalf, showing the nature of the action or proceeding, the testimony expected from the witness and its materiality.

(3) If the witness is imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for a felony, or if he is a party plaintiff or defendant, his production may be required; in all other cases, his examination shall be taken by deposition.

C. Notice of examination.

(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subsection and he was unable through the exercise of diligence to obtain counsel to

represent him at the taking of the deposition, the deposition may not be used against him.

(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 109 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 109 shall apply to the request.

(6) Deposition of organization. A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This section does not preclude taking a deposition by any other procedure authorized in these rules.

(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall

designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any

party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 101 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 112 A.(4) apply to the award of expenses incurred in relation to the motion.

*F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness

within 30 days of its submission to him, the reasons for the refusal shall be stated on the transcription or in a writing to accompany the recording by the party desiring to use such transcription or recording or the party requesting the filing of the transcription or recording. The transcription or recording may then be used in any manner that a deposition affirmed in writing by the witness might be used under the applicable rules of evidence, unless on a motion to suppress under Rule 107 C., the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

(1) Certification. When a deposition is stenograhically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition shall certify in writing that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered. A deposition so certified shall be considered prima facie evidence of the testimony of the witness.

(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.

(3) Exhibits. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

*(5) Notice. The party requesting filing of the deposition shall cause notice of its filing to be given to all other parties.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

RULE 106

DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 500. The deposition of a person confined in prison may be taken only as provided in Rule 105 B.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 105 B.(6).

Within 30 days after the notice and written questions are serve, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 105 D., F., and G., to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail

the deposition, attaching thereto the copy of the notice and the questions received by him.

C. Notice of filing. The party requesting filing of the deposition shall cause notice of its filing to be given to all other parties.

RULE 107

EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

A. As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

B. As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer administering the oath is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becom es known or could be discovered with reasonable diligence.

C. As to taking of deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

D. As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with under Rules 105 and 106 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 109

PRODUCTION OF DOCUMENTS AND THINGS AND

ENTRY UPON LAND FOR INSPECTION AND

OTHER PURPOSES

A. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 101 B. and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 101 B.

*B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 60 days after service of summons and complaint upon him, unless the court specifies a shorter time. The party upon whom a request

has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 112 B. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

D. Persons not parties. This rule does not preclude an independent action against a party not a party for production of documents and things and permission to enter upon land.

RULE 110

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his 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 scope of the examination and the person or persons by whom it is to be made.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this Rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed report of the examining physician setting out his 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 whom the order is made 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 that he is unable to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. Reports of claimants for damages and 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 him a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply.

* D. Effect of failure to comply. If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.

F. Discovery by other means. This Rule does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule or any other form of discovery authorized by this rule.

RULE 111

REQUESTS FOR ADMISSION

A. Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 101 B. set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

*B. Response. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states

that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 112 C., deny the matter or set forth reasons why he cannot admit or deny it.

C. Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 112 A. apply to the award of expenses incurred in relation to the motion.

D. Effect of admission. Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his case or his defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending proceeding only, and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

E. Form of response. Admissions, denials and objections to requests for admissions shall identify and quote each request for admission in full immediately preceding the statement of any admission, denial or objection thereto.

RULE 112

FAILURE TO MAKE DISCOVERY; SANCTIONS

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:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 105 or 106, or a corporation or other entity fails to make a designation under Rule 105 C. (6) of Rule 106, or a party fails to answer an interrogatory submitted under Rule 108, or if a party in response to a request for inspection submitted under Rule 109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

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 101 C.

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

(1) Sanctions by court in judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 106 C.(6) or 106 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 110, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

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

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

(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 orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 110 A. requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 111, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 111 A.,

or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatorires or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 105 C.(6) or 106 A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 108, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 109, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 101 B.

RULE 500

SUBPOENA

A. Defined; form. The process by which attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance. (1) A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein: (i) it may be issued by the clerk of the court in which the action or proceeding is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by the attorney of record of the party to the action or proceeding in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 103 D.(1), or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of the circuit court in the judicial district in which the witness is to be examined; (c) to require attendance out of court in cases not

provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice or other officer before whom the attendance is required.

(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; proof of service.

(1) Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to him at the same time the fees to which he is entitled for travel to and from the place designated and one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(2) (a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

(b) If a peace officer's attendance at trial is required as a result of his employment as a peace officer, a subpoena may be served on him by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance

is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

(3) Proof of service of a subpoena is made in the same manner as in the service of a summons.

E. Subpoena for hearing or trial; witness' obligation to attend. A witness is not obliged to attend for trial or hearing at a place outside the county in which he resides or is served with subpoena unless his residence is within 100 miles of such place, or, if his residence is not within 100 miles of such place, unless there is paid or tendered to him upon service of the subpoena: (1) double attendance fee, if his residence is not more than 200 miles from the place of examination; or (2) triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or (3) quadruple attendance fee, if his residence is more than 300 miles from such place; and (4) single mileage to and from such place.

F. Subpoena for taking depositions; place of examination. (1) Proof of service of a notice to take a deposition as provided in Rules 105 C. and 106 A. constitutes a sufficient authorization for the issuance by a clerk of court of

subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 101 B., but in that event the subpoena will be subject to the provisions of Rule 101 C. and section B. of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of this state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required to attend only in the county wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action or proceeding is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, his complaint, answer or reply may be stricken.

H. Hospital records.

(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442.340 to 442.450.

(2) Mode of compliance with subpoena of hospital records. (a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographis reproduction.

(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

(c) Unless the parties to the proceedings otherwise agree, or unless the sealed envelope or wrapper is returned to a custodian of hospital records who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

(3) Affidavit of custodian of records. (a) The records described in section (2) of this Rule shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time fo the act, condition or event described or referred to therein.

(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which he has custody.

(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(4) Personal attendance of custodian of records may be required. (a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the

following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 500 H.(2) shall not be deemed sufficient compliance with this subpoena.

(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

(5) Tender and payment of fees. Nothing in this Rule requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

SUBPOENAS

DISTRIBUTION OF ORS PROVISIONS

ORS	RULE
41.915	500(h)(1)
41.920	500(h)(2)
41.925	500(h)(3)
41.930	Remains as statute
41.935	500(h)(5)
41.940	500(h)(4)
41.945	None
44.110	500(a) and (b)
44.120	500(c)(1)
44.130	500(c)(2)
44.140	500(d)
44.150	Remains as statute
44.171	500(e)
44.180	None
44.190	500(g)
44.200	None
44.210	None
44.220	None
44.230	105(b)
44.240	Remains as statute

DISCOVERY

DISTRIBUTION OF ORS PROVISIONS

ORS	RULE
41.616(1)-(3)	108
41.616(4)	101(b)
41.617(1) and (2)	112(a)
41.617 (3) and (4)	112(b)
41.618	101(c)
41.620	108(c)
41.622	101(b)
41.626(1)	111(a)
41.626(2) and (4)	111(b)
41.626(3)	111(c)
41.626(5)	111(c)
41.626(6)	112(c)
41.626(7)	112(d)
41.631(1) and (2)	101(c)
41.631(3)	112(a)
41.635	101(a)
44.230	105(b)
44.610	110(a)
44.620(1)	110(b)
44.620(2)	110(c)
44.630	110(d)
44.640	110(b) and (c)
44.110	None
44.120	(to process rules)
44.130	(to provision remedies)
44.140	None
45.151	105(a)
45.161	103(a) and (b) and 105(c)
45.171	105(c), (d), and (f)
45.185	105(c)
45.190	105(a) and 112(b)
45.200	105(h)
45.230	105(g)
45.240	105(g)
45.280	107
45.230	103(b)
45.325	106
45.330	103(b)
45.340	106
45.350	103(b)
45.360	None
45.370	None
45.410	102
45.420	102
45.430	102
45.440	102
45.470	102
45.910	103(d)
44.810	110(e)

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

May 5, 1978

FROM: Fred Merrill

RE: Affidavits of Prejudice

The attached request relating to affidavits of prejudice has been received from Justice Denecke.

Council Jurisdiction

The affidavit of prejudice procedure is covered by ORS 14.250-270. Those statutes apply in both civil and criminal cases. Since the authority of the Council is limited to civil cases, it could only promulgate a rule for civil cases. It might be better to retain a uniform rule for both civil and criminal cases. If the Council thinks that changes should be made in the procedure, it could suggest a statutory modification to the court or to the Legislature.

Background

There is an exhaustive study of the procedure involved in a comment, Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status, and the Oregon Experience, 48 Or. L.Rev. 311 (1969), done by the Oregon Law Review staff (E. Richard Bodyfelt, editor-in-chief). The comment includes the result of a detailed empirical study of the use of affidavits of prejudice in Oregon. Most of the following information is taken from that article.

At the outset, a distinction must be drawn between judicial disqualification for interest, relationship or prior participation, covered in Oregon by ORS 14.210, and judicial disqualification for bias or prejudice. Interest, relationship and prior participation are relatively objective criteria; bias and prejudice are subjective. The affidavit procedure relates only to the latter type of disqualification.

Disqualification of judges for interest, relationship and prior participation was clearly recognized in English and American Common Law. Bias or prejudice disqualification was not, and disqualification of this type is generally created by statute or court rules; a few states still do not clearly allow disqualification of a judge on the grounds of bias and prejudice or have no statutes or cases (approximately 10 states). Those states that do have this type of disqualification generally fall into three categories:

1. Disqualification allowed only after objecting party proves the existence of bias and prejudice at a hearing (approximately 18 states).

2. Disqualification allowed on an affidavit of prejudice, but affidavit must recite the facts upon which the claim of bias or prejudice is based (federal courts and approximately 5 states).

3. Disqualification allowed upon an affidavit of prejudice with no requirement of specification of facts underlying claim (approximately 17 states).

Oregon Procedure

Not all judges in the state can be disqualified by an affidavit of prejudice statute. ORS 14.250-270 apply only to circuit judges. ORS 46.141 makes the same procedure applicable in District Courts. A similar procedure is specified for Municipal and City Recorders' Courts by ORS 221.348. There is no provision for an affidavit for justice courts or appellate courts and ORS 305.455(2) specifically makes the procedure inapplicable to the tax court. There is also a separate statute, ORS 14.110, that provides for change of trial venue based on judicial prejudices.

The procedure was originally adopted by the Legislature in 1919. The statute was held constitutional in 1926 in U'Ren v. Bagley, 118 Or. 77 (1926). In 1946 the Legislature deleted the requirement of alleging prejudice and simply provided for automatic disqualification. This procedure was held unconstitutional in 1955 in State ex. rel. Bushman v. Vandenberg, 203 Or. 326 (1955). The Legislature immediately re-enacted the original 1919 statute which, with minor modifications, remains as ORS 14.250-270.

The procedure is controversial. As of 1969, there were 30 appellate cases directly involving the procedure, and the statute had been considered by 14 different legislative assemblies. Aside from the unconstitutional change in 1946, the most important legislative actions were: in 1925, when the Legislature refused to pass a bill that would have abolished the procedure, but did add the requirement that the affidavit state that the motion was made for good cause and not for purposes of delay; in 1933, when the Legislature refused to pass a bill that would have required the affidavit to recite facts supporting the claim of prejudice; and, in 1951, when the Legislature refused to pass a bill that would have made actual prejudice a question of fact to be determined by the court.

Oregon clearly falls within the third category discussed above. An affidavit must be filed but no facts are required. The person signing the affidavit must be the attorney or party directly affected by the claimed prejudice. The procedure can only be used twice by each side in any case, and that limit applies to challenges by all parties on one side of a case. The statute also has detailed provisions for time limitations on use of the procedure. These time limitations are confusing and badly drafted, applying differently in judicial districts under and over 100,000 population, in districts with and without presiding judges, and in contested and non-contested cases. In any case the procedure cannot be used after a judge has ruled on any petition, motion or demurrer, except a presiding judge who assigns himself to a case where he has previously ruled.

The opinion in the U'Ren v. Bagley case, supra, makes it clear that the Legislature provided the procedure out of a belief that litigants were entitled to litigate before a judge who they believed would be fair; in other words, judges would not be disqualified so much because of actual prejudice as a necessity of maintaining the public image of courts as being fair and impartial.

The challenged judge has no discretion and must step down; however, in State ex rel. Lovell v. Weiss, 250 Or. 252 (1968), the Supreme Court provided that if a judge refused to step down and on a mandamus proceeding claimed lack of prejudice, the Supreme Court would require a hearing to be conducted by another judge. This is the procedure referred to in Justice Denecke's letter. The opinion, however, clearly indicates that the subject of the inquiry is not the existence of actual prejudice but the existence of good cause for believing there is prejudice:

> "The burden of proving good faith, in the particular case in which an affidavit is filed, will be satisfied if the affiant testifies that he has received information about the trial judge which, if true, reasonably could be a basis for a fear of prejudice. The affiant need not prove that the judge is prejudiced, or even prove that the evidence upon which he bases his apprehension is all true. But he must come forward with some evidence, hearsay or otherwise, from which a reasonable person could conclude that anyone possessed of such evidence might reasonably question the trial judge's impartiality in a matter." 250 Or. at 257.

As such, the ability to challenge the affidavit is quite limited. In the Weiss case, the court ultimately held that there was a sufficient basis for the challenge because the judge and the attorney involved were having some unexplained personal difficulties; the judge would on occasion refuse to speak to the attorney or return social greetings.

Actual Use of Affidavits

The most interesting part of the Law Review article is the empirical study. The staff went to all judicial distircts in the state and examined all the cases between 1955 and 1968, some 259,200 cases. They found that challenges had been filed in 1,327 of these cases (2 challenges in 55 cases and 3 challenges in 5 cases). Ninety-two percent of these challenges resulted in a change of judge (.5% of cases). A very few attorneys and firms were responsible for a large number of the challenges. One firm made 31% of the challenges and six firms accounted for 50% of the total challenges. The usual pattern was that most challenges by these firms were against some particular judge before whom they would be regularly scheduled. Challenges based on bias against attornevs were much more frequent than those based upon bias against parties.

The data also showed that challenges were relatively more frequent in criminal cases but that almost all such challenges were filed by defense attorneys; only 8 total prosecution challenges had been filed.

The conclusions drawn by the study were that the procedure was not being overused, there was no evidence it was being used as a judicial selection device in two-judge districts, and, although the procedure does disrupt judicial administration to some extent, it did not cause serious problems. The recommendation was to retain the procedure.

One important factor considered was the unfortunate side effects of any procedure that required an actual showing of prejudice. The automatic disqualification procedure avoids airing and excessive quibbling over the facts leading to the conclusion of prejudice; the element is subjective and frequently involves personalities, rumors, hearsay and bitter disagreement. The result of a hearing is embarrassment for the judge, a lot of wasted time, diminished public image of the courts and future resentment.

Challenges by the District Attorney

There is one unusual element in the problem raised by Justice Denecke; that is whether the procedure should be available to the prosecution in a criminal case. The problem did not appear in the Law Review study because this happened only 8 times in 13 years. The Klamath District Attorney apparently is filing as many as 21 affidavits in several days.

Two arguments could be made against allowing the state to challenge a judge in a criminal case:

(1) The necessity for such a challenge is much less. The possibility that the judge could have a general personal bias against the state in criminal matters is highly unlikely. A judge may or may not like or get along with a particular district attorney, but this is unlikely to influence judgment in favor of all defendants in criminal cases. In any case, the automatic disqualification procedure is mainly based upon the public image of courts and attitudes of individual litigants toward the courts; this does not apply when the state is the affected party.

(2) The potential harm is much greater. The state is always a party in the criminal case and when a district attorney's office begins to file routine affidavits against a judge, the result is a very high number and extreme disruption of judicial administration.

FRM:gh

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RALPH H. CAKE
(1891-1973)
NICHOLAS JAUREGUY
(1896-1974)

May 1, 1978

Fredric R. Merrill, Esq.
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Affidavits of Prejudice

Dear Fred:

I enclose herewith a copy of Chief Justice Denecke's letter dated April 14, 1978, and copies of the enclosures referred to in the first paragraph thereof. Apparently the District Attorney of Klamath County is filing affidavits of prejudice in wholesale fashion, based solely upon the identity of counsel for the defendant, indicating a substantial and serious abuse. It seems fair to assume that the District Attorney makes the decision regarding the filing of the affidavit upon the identity of defense counsel. One could only assume that the District Attorney believes some favoritism exists between the court and certain attorneys.

Absent some mentally or emotionally disturbed person such as Judge Field, it strikes me as a rather sorry business for the state to be disqualifying judges in criminal cases. Without any knowledge of criminal procedure in District Court, all of the criminal cases tried therein, except certain traffic infractions, are tryable to a jury. Assuming that both the state and the defendant must join in a waiver of a jury trial, it would appear to me that in all cases except traffic infractions, the state could avoid any alleged prejudice of Judge Blair by simply insisting upon a jury trial.

In light of the source, I believe we should call the matter to the entire Council at the next meeting. It would be helpful if you are familiar with the statute relating to affidavits of prejudice in detail, and any recent cases relating to their use (if you have time).

Yours very truly,

HARDY, McEWEN, WEISS, NEWMAN & FAUST

Donald W. McEwen

DWM:lam
Enclosures

THE SUPREME COURT
ARNO H. DENECKE
CHIEF JUSTICE

SALEM, OREGON 97310

April 14, 1978

Mr. Donald W. McEwen
1408 Standard Plaza
1100 S.W. 6th Avenue
Portland, OR 97204

Dear Mac:

Enclosed are copies of letters from Judge Blair, Del Parks, and David Vandenberg. These illustrate a growing problem, particularly in Klamath and Lake Counties.

I realize that these cases can be set down for a hearing as illustrated by State ex rel Lovell v. Weiss, 250 OR 252. That was contemplated in one of these Klamath Falls cases, but such a hearing threatened to tie up so many people for so long that Judge Blair decided to drop it.

I too feel as Judge Blair does, that there ought to be a means whereby a party can remove a judge from a case where there is reason to believe the party cannot get a fair trial from that judge.

My person opinion also is that the present statute has been used to accomplish much more than this.

I request that the Council on Procedures consider this subject.

Sincerely,

Arno H. Denecke

AHD:lb
enc.
cc: Loren Hicks

WAYNE H. BLAIR
THEODORE D. ABRAM
DISTRICT JUDGES

PHONE 882-2501
EXT. 246

DISTRICT COURT OF OREGON
FOR KLAMATH COUNTY
KLAMATH COUNTY COURTHOUSE
KLAMATH FALLS, OREGON
97601

March 21, 1978

Mr. Arno H. Denecke
Chief Justice of the Supreme Court
Supreme Court Building
Salem, OR 97310

RE: AFFIDAVITS OF PREJUDICE

Dear Mr. Chief Justice:

You are aware that the District Attorney of Klamath County has filed a number of affidavits of prejudice against me in various cases. He has told me this was not intended to be a blanket affidavit, but only as to selected attorneys.

Most of the cases involving these affidavits have been assigned to other judges. In one case, State vs. Robare, I have asked you to assign a judge to hear the motion for my disqualification.

In the past, from time to time, there have been individual situations in which the lawyer or District Attorney have felt that I should not sit on a particular case. In nearly every case, the reason was obvious, and the case was assigned to another judge. Almost never was an actual affidavit of prejudice filed.

The present District Attorney's practice of selecting the attorneys who can try cases before me is creating some serious maladjustments in our attempt to keep the calendar current. I understand the District Attorney is selecting the judges for some attorneys in Circuit Court also.

My personal opinion is that there must be some statutory means by which a party can remove a judge from a case for good cause. However, the indiscriminate use of the affidavit of prejudice certainly screws up the docket.

Enclosed are two letters from attorneys commenting on the practice.

Yours very truly,

WAYNE H. BLAIR
DISTRICT COURT JUDGE

WHB:dls
Encl: Letter from Vandenberg
Letter from Parks
P.S. Since dictating the above, I have received about 21 more affidavits on cases defended by attorneys on the District Attorneys list.

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March 7, 1978

Honorable Wayne H. Blair
District Court Judge
Klamath County Courthouse
Klamath Falls, OR 97601

Re: State v. Kane, No. 78-00896 dull

Dear Judge Blair:

I have discussed the Affidavit filed against you in the above entitled case with my client, and he frankly cannot understand the position of the District Attorney in filing such an Affidavit.

I believe that since we operate a system where the people have a constitutional right to elect the judiciary, my client does have a constitutional right not to have a segment of the judiciary arbitrarily and systematically excluded from a case in which he may be involved.

Therefore, since this is a motion, my client has the right to be heard before an order is entered. I do not care which judge determines the outcome of the motion, but I do demand on behalf of my client the opportunity to have the motion heard so that evidence can be presented justifying such a motion rather than having the Court summarily grant it and become party to the systematic deprivation of what is in fact a constitutional right.

Very truly yours,

PARKS & RATLIFF
Attorneys at Law

DP:dr
cc: Ulys Stapleton
Paul Kane

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(1896-1974)

April 19, 1978

The Honorable Arno H. Denecke
Chief Justice
Supreme Court Building
Salem, Oregon 97310

Dear Arno:

I have your letter of April 14, 1978, and the enclosures transmitted therewith. I will, in accordance with your request, call this problem to the attention of the Council on Court Procedures.

We are all aware that affidavits of prejudice are frequently used for improper purposes. These purposes include continuances, judge shopping, etc. At the present time I have no suggestion to curb the abuses, and at the same time preserve the right for use in those cases where the litigant or his counsel honestly believe that a particular judge is prejudiced against the litigant, the attorney, or the position they take in the case before him. Hopefully the Council can produce a workable solution.

Sincerely,

Donald W. McEwen

DWM:lam

cc: Mr. Fredric R. Merrill

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EDUCATION: A HERITAGE AND FUTURE FOR OREGON

May 24, 1978

Chief Justice Arno H. Denecke
The Supreme Court
Salem, Oregon 97310

Dear Justice Denecke:

Enclosed is the memorandum on affidavits of prejudice which I mentioned. I did not include any recommendations because I was not sure the Council wanted to take any action. Basically, I feel that the approach of the present statutes (disqualification on affidavit of prejudice with no specification of facts) is correct, but the statute should be modified in two respects:

(1) The time limitations for making the motion in ORS 14.260 and 270 are confusing and unclear.

(2) The affidavit procedure does not make much sense when used by a district attorney or other public attorney. The statute could be amended to specify: (a) that a judge could not be disqualified because of prejudice against the state or a public attorney; (b) that the affidavit of a public attorney or the state must specify facts constituting prejudice, or (c) that the state or a public attorney must prove actual prejudice.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.