N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

May 8, 1978

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

The next meeting of the Countil on Court Procedures will be held in the Courtroom of The Honorable William M. Dale, Room 318, Multnomah County Courthouse, Portland, Oregon, on Saturday, June 3, 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

COUNCIL ON COURT PROCEDURES

AGENDA

JUNE 3, 1978

JUDGE DALE'S COURTROOM

MULTNOMAH COUNTY COURTHOUSE

PORTLAND, OREGON

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1. Report of discovery subcommittee

   A. Interrogatories
   B. Priority in discovery

2. Report of pleading subcommittee

3. Coordination with Oregon State Bar trial practice section and CLE

4. Report on computer run on law and equity

5. New business

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 3, 1978

Multnomah County Courthouse, Portland, OR

Present:	Darst B. Atherly	Garr M. King
	E. Richard Bodyfelt	Laird Kirkpatrick
	Sidney A. Brockley	Harriet Meadow Krauss
	Anthony L. Casciato	Berkeley Lent
	John M. Copenhaver	Donald W. McEwen
	William M. Dale, Jr.	James B. O'Hanlon
	Alan F. Davis	William W. Wells
	James O. Garrett	
	Wendell E. Gronso	

Absent:	Ross G. Davis	Val D. Sloper
	Lee Johnson	Roger B. Todd
	Charles P. A. Paulson	Wendell H. Tompkins
	Gene C. Rose	

Chairman Don McEwen called the meeting to order at 9:35 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse.

Several Council members suggested that the Council meeting time be changed from Saturday to a week day to encourage attendance and allow a full meeting day. The Chairman indicated he would attempt to set a time and place for the next meeting to meet these concerns and would notify members as soon as possible.

The discovery subcommittee reported that the changes suggested by Council members for the discovery rules had been made and revised rules distributed. Judge Dale questioned whether the revision to Rule 101 B.(2) was consistent with the changes requested at the meeting. It was suggested that references to interrogatories and motion to produce be replaced by a request. After discussion, it was decided that the Executive Director would submit a revised version of this section to the discovery subcommittee for further review.

The Chairman said he had received a letter from Hugh Collins regarding requests for admissions. It was pointed out the admissions rule had not been considered at the last meeting. The Chairman requested that the discovery subcommittee submit a recommendation regarding requests for admission to the Council.

The Council next reconsidered interrogatories. Varying opinions were expressed by members of the Council concerning interrogatories in

general, as well as limitation in number and kind. A motion was made by Jim O'Hanlon, seconded by Judge Davis, that interrogatories not be adopted at all. The motion failed, with Judge Davis, Garr M. King, Jim O'Hanlon, Sid Brockley, Wendell Gronso, and Judge Casciato voting in favor of the motion. Laird Kirkpatrick suggested that the Council take another look at Alternative II of Rule 108 mailed out to the Council with a memorandum on April 26, 1978, and suggested that he would work with the Executive Director to develop a version of an interrogatory rule that limited interrogatories by subject matter. The Chairman suggested this be furnished to the discovery subcommittee for report to the Council.

The Executive Director reported that he had presented a first draft of the pleading rules to the subcommittee for their review, after which a revised version had been submitted to the full Council. Discussion and actions taken by the Council were as follows:

B(2). Pleadings allowed. After discussion, the Executive Director said he would amend this section so that there would be no optional reply. A reply would be required to raise any affirmative matter in response to an answer but no reply would be required for a denial. The Executive Director stated he would also amend H(4), Effect of failure to deny, to say that all affirmative matter in an answer would be taken as denied without a reply but not "avoided."

G(3) and H(3). Assertion of right to jury trial. After discussion, upon motion by Judge Dale, seconded by Dick Bodyfelt, the Council voted unanimously to delete these provisions from the rules. It was suggested that courts could develop local rules to require notice of jury or non-jury cases.

D(2)(a). Pleading after motion. After discussion, upon motion by Judge Dale, seconded by Judge Davis, the Council voted unanimously to delete the clause, "or postpones its disposition until trial on the merits," from this subsection.

E(1). Captions, names of parties. Judge Dale suggested that the cross reference to Rule B(1) should be Rule B(2).

E(4). Adoption by reference; exhibits. After discussion, upon motion by Dick Bodyfelt, seconded by Judge Dale, the Council voted to delete the words, "or in any motion," from the first sentence of this section. The motion was opposed by Sid Brockley. Upon motion by Jim Garrett, seconded by Judge Copenhaver, the Council voted to delete the second sentence from this section. The motion was opposed by Sid Brockley and Dick Bodyfelt.

F(1). Subscription by party or attorney; certificate. After discussion, upon motion by Don McEwen, seconded by Judge Dale, the Council voted unanimously to delete from this section the third sentence, "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 an officer thereof upon whom service of a summons might be made."

K(3). Third party practice. Judge Davis voiced a strong objection to third party practice and made a motion to abolish it by deleting this section of the rules; the motion was seconded by Wendell Gronso. After discussion, the Council voted against this motion, with Judge Davis and Wendell Gronso being in favor of it.

K(4). Joinder of additional parties. After discussion, upon motion of Dick Bodyfelt, seconded by Sid Brockley, the Council voted unanimously to delete the wording of the draft, and substitute for it the language of existing ORS 13.180.

I(4)(a). Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded. On motion of Wendell Gronso, seconded by Sid Brockley, the Council voted unanimously to change the reference to "State of Oregon" to "state of its incorporation" in the first sentence and to "state in which it is located" in the second sentence.

O(3). Pleading reasons for nonjoinder. After discussion, upon motion of Dick Bodyfelt, seconded by Don McEwen, the Council voted unanimously to delete this section.

L(6). How amendment made. The Executive Director stated he would change the first sentence of this section from "or otherwise, as the case may be" to "by interlineation, deletion, or otherwise" after "amended complaint."

The Council approved as submitted the minutes of the meeting held April 1, 1978, and May 6, 1978.

The Executive Director indicated he had received a letter from George Corey, Chairman of the OSB Trial Practice Section, which said the Oregon State Bar is interested in setting up a committee to examine a tentative draft of all the rules as soon as they are complete. He also has been contacted by the CLE director regarding distribution of proposed rules at a full CLE session. It was suggested that the Executive Director do anything necessary to cooperate in these areas.

The Chairman announced that the Council members would be notified as soon as possible as to the date of the next meeting.

The meeting was adjourned at 11:58 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

REVISIONS TO DISCOVERY RULES

Page 1

B.(1) Second line. Deleted "the subject matter involved in the pending action or proceeding, whether it relates."

B.(2) Insurance agreements. Revised entire subsection.

Page 3

C.(4) Added subparagraph (9).

Page 7 (now page 8)

E. Costs. Deleted this section.

Page 8 (now page 9)

A. Substituted "preceded" for "initiated."

Page 9 (now page 10)

C. Disqualification for interest. Deleted this section. Foreign depositions changed to section C.

Page 10 (now page 11)

A. When deposition may be taken. Deleted last sentence of this section.

B. Order for deposition or production of prisoner. Revised this section.

Page 11 (now page 12)

C.(2) Special notice. Fourth line. Deleted "expiration of the 30-day period" and added in lieu thereof, "the expiration of the period of time specified in Rule _____ (service of process) to appear and answer after service of summons on any defendant."

Page 13

D. Examination and cross-examination, etc. After first sentence, inserted, "The person described in Rule 103 shall put the witness on oath."

Page 14 (now page 15)

F. Submission to witness, etc. Fourth line down. Added, "by the party taking the deposition." Remainder of section revised starting with "The witness" on the seventh line.

Page 15 (now page 16)

G.(1) Certification. Fourth line down. Added, "or such party's attorney."

Page 17

(5) Notice. Deleted this subsection.

Page 19

C. Notice of filing. Deleted this section.

Page 20

C.(3) Rule 31 changed to Rule 106 and 5 days changed to 20 days.

Page 25

D. Report; effect of failure to comply. Subsection (1) added and the former first paragraph changed to subsection (2).

F. Discovery by other means. This section was deleted.

Page 34 (now Page 35)

E. Heading changed to add the word, prisoners. Former first paragraph changed to subsection (1) and new subsection (2) added.

Page 35 (now page 36)

F. Subpoena for taking depositions, etc.. Second paragraph of subsection (1) was deleted.

Page 37

H.(2)(c) The phrase, "Unless the parties to the proceedings.........to appear personally," was deleted and in lieu thereof the words, "After filing," were inserted. The following words were added after "records" on the first line of (c): "may be inspected by any party or the attorney of record of a party in the presence of the custodian of court files, but otherwise..."

DISCOVERY AND SUBPOENA RULES

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Revision
5/10/78

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 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) A party may by interrogatory obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business 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. A party may also by interrogatory inquire whether such person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of liability for the claims being asserted in the action, and the party

discovered against shall reveal the existence and nature of any coverage questions which have been raised and must supplement the response to the interrogatory if any such questions are raised at a later time. If any questions as to the existence of liability has been raised or is raised, then the party seeking discovery may obtain production and inspection of the insurance agreement or policy under Rule 109.

(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance 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 statetment 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, electrial, 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; (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.

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 of expenses incurred in relation to the motion.

RULE 102

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

A. Before action.

(1) Petition. A person who desires to perpetuate testimony or to obtain discovery to perpetuate 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 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 Rule _____ (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 examination and whether the depositions shall be taken upon oral examination or written 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.

RULE 103

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

A. Within Oregon. Within this state, depositions shall be preceded 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. 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 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 _____.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the 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 the expiration of the period of time specified in Rule _____ (service of process) to appear and answer after service of summons on any defendant, 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 shall 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 person described in Rule 103 shall put the witness on oath. 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 by the party taking the deposition, 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 witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 107 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

(1) Certification. When a deposition is stenographically 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, or such party's attorney, shall certify under penalty of perjury 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.

(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.

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 served, 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.

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 becomes 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 106 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 20 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 obtaned, 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 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, 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 person 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. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

(2) 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.

D. 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.

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 reponse. 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) or 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 foreging 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 interrogatories or respond to request for insepction. 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; prisoners. (1) 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: (a) double attendance fee, if his residence is not more than 200 miles from the place of examination; or (b) triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if his residence is more than 300 miles from such place; and (d) single mileage to and from such place.

(2) If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for purposes of testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

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 constitiute 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.

(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 microphotographic reproduction.

(b) The copy of the records shall be separately enclosed in a sealed evenloep 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 follwos: (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) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise 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 of 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

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

FROM: FRED MERRILL

RE: PLEADING

DATE: May 26, 1978

Attached is a revised version of the PLEADING RULES reflecting changes previously suggested by the Council, changes suggested by the pleading subcommittee and some staff revisions. The rules marked by asterisks have either been modified or require discussion by the full Council.

Rules B(2) and H(4). The subcommittee suggested that the draft of this section was not as clear as it should be. This redraft is taken from New York CPLR 3011. The proper response of a party summoned under K(4) for a cross-claim is an answer; the proper response of a party summoned under K(4) for a counterclaim is a reply. The re-draft eliminates the court-ordered reply.

The subcommittee also was not clear whether the prior recommendation of the Council relating to the reply was that a reply would always be required where a plaintiff wished to plead new matter in avoidance of affirmative defenses or that a reply would be entirely at the option of the plaintiff unless a counterclaim was asserted. The present draft makes the reply optional. Under Rule H(4), if no reply is filed, any affirmative allegations in the plaintiff's complaint are taken as denied or "avoided."

Rule D(1). Several words were changed for clarity and the last sentence was eliminated because of the elimination of the court-ordered reply.

Rule E(4). This section was not changed, but the subcommittee suggested that the last sentence should be considered carefully by the full Council.

Rule F(1). The subcommittee added the second sentence. It was felt that this should be required to avoid having attorneys evade the ethical obligation by having clients sign pleadings. The last part of the third sentence of the prior draft was eliminated as unnecessary. The state would always have an attorney. The last clause was added to the fourth sentence and the word, "harrassment," was added to the last sentence.

Rules G(3) and H(3). The subcommittee did not change the draft which reflects a change suggested by the Council, but a question was raised whether failure to plead relating to jury trial could be construed as a waiver of jury trial. The draft is intended to require assertions by the parties relating to issues to be tried by jury, and the sanction for failure to plead would be that the complaint or answer is subject to a motion. If no motion is made, however, no penalty results. The subcommittee was concerned (a) that it be clear that failure to plead does not constitute a waiver of jury trial and (b) there should be some way other than motion by an opponent to require an assertion of right to jury trial; if the requirement is for the benefit of the court in docketing, perhaps the court should be allowed to require the proper pleading of jury trial expectation.

Rule I(3). The Council asked whether a private statute existed in Oregon. ORS 43.060 makes this distinction for purposes of evidence, and Article IV, Sec. 27, of the Constitution, states that all laws are public unless the law states otherwise, suggesting that a statute could be private.

Rule I(7). The language of the last sentence was changed. As originally drafted, the subcommittee felt this would suggest that an equivocal denial could not be subject to a motion. The vice of a negative pregnant rule is that assertions intended as denials are treated as admissions, and this is what the rule is intended to eliminate.

Rule I(10). This is ORS 13.070, which is a designation statute which was inadvertently omitted from the prior draft.

Rule J(1). This rule was substantially modified to clarify the procedure for dealing with two different types of defenses which are incorp ated in the rule. Defenses (A) through (B) are technical defenses which may appear on the face of a pleading but are more frequently dependent on the existence of facts outside the pleading. If these facts did not appear on the face of the pleading, the defense was formerly raised by a plea in abatement, and the court decided the existence or non-existence of the facts.

Defenses (H) and (F) go to the merits of the claim. For these defenses, the court cannot pass on the existence or non-existence of any facts but only whether the party has correctly pled facts. If an assertion is made that facts do not exist to support the claim or which require a statute of limitation defense, this can only be considered in the context of a summary judgment and then the court only decides whether there is any factual dispute which must go to the jury.

The prior draft of this rule closely follows Federal Rule 12(b). Under that rule, the technical defenses are treated in the manner described above, but the rule is not clear as to the authority of the court to decide facts and the procedure to be followed in submitting the facts to the court. See 5 Wright and Miller, Sec. 1351, p. 565-567. The rule was re-drafted in the following respects:

1. The defenses were re-ordered to put all technical defensis first, followed by the two defenses which are limited to the face of the pleading.

2. The reference in subpart (D) to capacity appearing only on the face of the pleading was eliminated. If such a defense appears on the face of the pleading, it is raisable simply on motion but if it does not, evidence to establish the defense of capacity can be submitted and the court can pass upon it.

3. The language of defenses (G) and (H) was modified to show that such defenses could go only to material appearing on the face of that pleading.

4. The next to the last sentence of the prior draft was eliminated as unnecessary.

5. The last sentence of the prior draft was eliminated. Although this conversion to summary judgment provision is not required by the other modifications to the rule, the subcommittee suggested that a simpler way to handle the situation would be to require any party who wished to go beyond the face of the pleading to make a summary judgment motion.

6. The last sentence was added to specify the procedure for technical defenses which do not appear on the face of the pleading.

Rule J(2). The summary judgment conversion reference was deleted in accordance with the discussion under Rule J(1) above.

Rule K(4). No change was made in this rule, but the subcommittee suggested that the full Council carefully consider the additional joinder procedure specified in this rule.

Rule K(5). The words, "or upon the court's own motion," were added to give the court more flexibility to avoid confusion or prejudice to the original parties after impleader.

Rule L(5). The last clause of the last section was stricken as it is a rule of appellate procedure.

Rule O(3). One of the Council members has suggested that this provision is confusing and unnecessary and should be eliminated.

The rules in the draft beginning with Rule Q (except for Rule V) have not been considered by the pleading subcommittee. Since the pleading rules in the prior draft incorporated a large portion of Chapter 13, as well as the material in Chapter 16, these additional rules were drafted to incorporate the balance of the material in Chapter 13. The sources for these rules are as follows:

Rule Q. This was the interpleader rule adopted by the Council at the meeting in Pendleton.

Rule R. This is ORS 13.220 to 13.390 which is the existing class action statute in Oregon. The Council has tentatively decided to make no changes. ORS 13.210 was eliminated as unnecessary. ORS 13.400 and 13.410 should be retained as statutes since they relate to appeals. ORS 13.310 should be retained as a statute because it is an evidentiary statute. We should suggest that the Legislature amend this statute to refer to "the provisions of Sec. 10 of Rule R of the Oregon Rules of Civil Procedure," rather than to ORS 13.290.

Rule S. This rule retains the Oregon intervention procedure specified by ORS 13.130. It differs from that statute in organization, recognition of mandatory statutory intervention and specification of procedure.

S(1). This is the second sentence of ORS 13.130. Since it defines intervention, it logically should be the first section.

S(2). This is a new provision. Federal Rule 24 provides for both mandatory and permissive intervention. ORS 13.130 refers only to permissive intervention, but ORS 105.755, 105.760 and 373.060 appear to grant a right to intervene in certain cases. Other mandatory statutes may exist or may be adopted by the Legislature. Federal Rule 24 also provides for mandatory intervention where the intervenor's ability to protect his interests might be impaired by the action. This was not included.

S(3). This was the first sentence of ORS 13.130 and would retain the present intervention procedure and case interpretation. The last sentence of the section is new and is taken from Federal Rule 24(b).

S(4). This section is new. ORS 13.130 does not provide any

procedure and this has created some confusion, including whether intervention can be allowed ex parte and whether a motion is the proper procedure. The statute also refers to intervention by complaint which is inappropriate for a party seeking to intervene to defend. In practice, intervening defendants usually file answers anyway. See cases at 227 Or. 432, 223 Or. 17 and 186 Or. 253.

Rule T. This rule is basically the existing Oregon substitution procedure as set out in 13.080. That statute was revised in 1975 as recommended by the Oregon State Bar Procedure and Practice Committee to provide substitution of parties when a claim was transferred. The Oregon procedure is generally the same as Federal Rule 25 except that the federal rule provides no absolute time limit for substitution but only requires a motion for substitution 90 days after suggestion of death on the record.

T(1). This is ORS 13.080. The only change was the addition of the words, "if the claim survives or continues," in the first sentence. These words appeared in the original Oregon abatement statute but for some unexplained reason were omitted from the 1975 Bar revision. They make clear that the rule refers only to the procedural question of abatement and does not deal with survival of the claim. There is a separate statute, ORS 13.090, dealing with non-abatement after verdict. It seems unnecessary and was eliminated.

T(2). This does not appear in the Oregon statute but was taken from Federal Rule 25(a)(2).

T(3). This does not appear in the Oregon statute but comes from Federal Rule 25(d). Existing Oregon cases provide that the action does not abate but continues in the name of the original official. The federal rule seems more flexible.

T(4). This is a new section. There is some confusion in the case law relating to procedure for substitution. It is not clear who may make the motion; whether substitution may be ordered ex parte; and, if a motion is required, who must be served and how. This section specifies a procedure to cover all these questions.

Rule U. This is Federal Rule 17(a) which appeared as Rule Q in the prior draft. Logically, this rule and Rule V which follows it should be inserted between Rules M and N in the final draft of the rules.

Rule V. This rule is ORS 13.041 and 13.051 without change.

FRM:gh

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. An answer may include a counterclaim against a plaintiff including a party joined under Rule K(4) and a cross-claim against a defendant including a party joined under Rule K(4). A pleading against any person joined under Rule K(3) is a third-party complaint. There shall be an answer to a cross claim and a third party complaint. ~~There shall be a reply to a counterclaim denominated as such. A party may reply to any answer. There shall be no other pleading unless the court orders otherwise.~~

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 pleadings apply to all motions and other papers provided for by these rules.

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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 to a cross-claim or reply to a counterclaim of a party summoned under the provisions of Rule K(4) 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 cross-claim 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 to an answer shall be filed within 10 days after the service of the answer.

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.

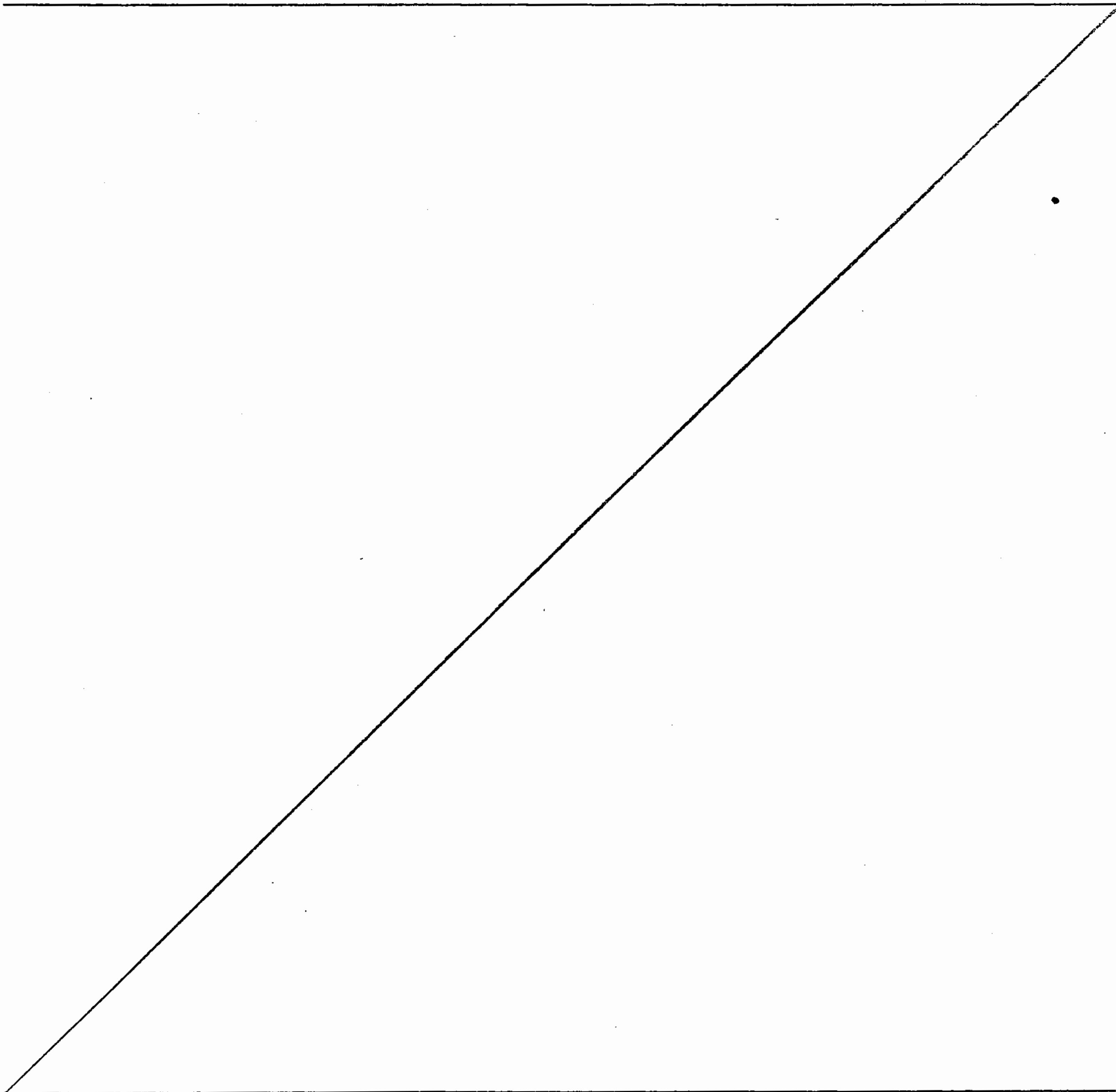
E. PLEADINGS - FORM

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 in accordance with 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) <u>Adoption by reference; exhibits</u>. 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. If any party is represented by an attorney, every pleading shall be signed by at least one attorney in such attorney's individual name. 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 an officer thereof upon whom service of a summons might be made. Verification of pleadings shall not be required unless otherwise required by rule or statute. 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 harrassment or 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, CROSS-CLAIM 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 bankrupty, 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) <u>Judgment or other determination of court or officer, how pleaded</u>. 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) <u>Private statute, how pleaded</u>. 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) <u>Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded</u>. (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 treated as an admission 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 relating to real property. When the heirs of any deceased person are proper parties defendant to any 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.

*I(10) Designation of unknown claimants. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property,the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real property described in the complaint herein."

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, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, 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, (E) insufficiency of process or insufficiency of service of process, (F) failure to join a party under Rule O, (G) failure to state ultimate facts sufficient to constitute a claim, and (H) that the pleading shows that the action has not been commenced within the time limited by statute. 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, on a motion asserting defenses (A) through (F), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits and the court may determine the existence or non-existence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

*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.

*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 judgment on the pleadings 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 motión 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 consituting 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, CROSS CLAIMS 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) Cross-claim against codefendant. (a) in any action where two or more parties are joined as defendants, any defendant may in his answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim 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 cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

(c) An answer containing a cross-claim 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 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 cross-claims 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 cross-claim 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 or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim 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 therby 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) <u>Relation back of amendments</u>. 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) <u>Amendment or pleading over after motion</u>. 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) <u>Amended pleading where part of pleading stricken</u>. 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.

L(6) <u>How amendment made</u>. 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) <u>Supplemental pleadings</u>. 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 untied 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 joined 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 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, ot 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 administraion 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. INTERPLEADER

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by statute.

*R. CLASS ACTIONS

R(1) <u>Requirement for class action</u>. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(a) The class is so numerous that joinder of all members is impracticable; and

(b) There are questions of law or fact common to the class; and

(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(d) The representative parties will fairly and adequately protect the interests of the class; and

(e) In an action for damages under subsection (c) of section (2) of this Rule, the representative parties have complied with the prelitigation notice provisions of section (9) of this Rule.

R(2) <u>Class action maintainable</u>. An action may be maintained as a class action if the prerequisites of subsection (1) of this section are satisfied, and in addition:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of:

(i) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of

the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice; (v) the likelihood that the damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court; (vi) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

R(3) Court discretion. In an action commenced pursuant to subsection (c) of section (2) of this Rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (b) of section (2) of this Rule.

R(4) Court order to determine maintenance of class actions. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in an action pursuant to subsection (c) of section (2) of this Rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

R(5) Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to his attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

R(6) Court authority over conduct of class actions. In the conduct of actions to which this Rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

(a) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or agument;

(b) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(c) Imposing conditions on the representative parties or on intervenors;

(d) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(e) Dealing with similar procedural matters.

R(7) Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (c) of section (2) of this Rule:

(a) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

(i) The court will exclude him from the class if he so requests by a specified date;

(ii) The judgment, whether favorable or not, will include all

members who do not request exclusion; and

(iii) Any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(b) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of his damages, the nature of the class, including the probable degree of sophistication of its members and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.

(c) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing his claim without prejudice to his right to maintain an individual, but not a class, action for such claim.

(d) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to

be voiced or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation or regulation.

R(8) <u>Commencement or maintenance of class actions regarding particular issues; division of class; subclasses</u>. When appropriate:

(1) An action may be brought or maintained as a class action with respect to particular issues; or

(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this Rule shall then be construed and applied accordingly.

R(9) <u>Notice and demand required prior to commencement of action for damages</u>. (1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (c) of section (2) of this Rule, the potential plaintiffs' class representative shall:

(a) Notify the potential defendant of the particular alleged cause of action.

(b) Demand that such person correct or rectify the alleged wrong.

(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.

R(10) <u>Limitation on maintenance of class actions for damages</u>. No action for damages may be maintained under the provisions of

section (2) of this Rule upon a showing by a defendant that all of the following exist:

(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;

(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction or remedy of the alleged wrong;

(3) Such compensation, correction or remedy has been, or, in a reasonable time, will be, given; and

(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in, such methods, acts or practices alleged to be violative of the rights of potential class members.

R(11) Application of sections (9) and (10 of this Rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under section (2) of this Rule may be commenced without compliance with the provisions of section (9) of this Rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section (9) of this Rule, the class representative may amend his complaint without leave of court to include a request for damages. The provisions of section (10) of this Rule shall be applicable if the complaint for injunctive relief is amended to request damages.

R(12) Limitation on maintenance of class actions for recovery

of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

R(13) Coordination of pending class actions sharing common question of law or fact. (a)(i) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, on his own motion or the motion of any party may request the Supreme Court to assign a circuit court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

(ii) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

(b) If the assigned judge determines that coordination is appropriate, he shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice

shall assign a judge to hear and determine the actions in the site or sites he deems appropriate.

(c) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, on his own motion or the motion of any party may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (a) of this section.

(d) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

(e) Notwithstanding any other provision of law, the Supreme Court shall rpovide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

R(14) <u>Judgment; inclusion of class members; description; names</u>. The judgment in an action maintained as a class action under subsections (a) or (b) of section (2) of this Rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (c) of section (2) of this Rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section (7) of this Rule was directed, and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each member.

R(15) Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.

*S. INTERVENTION

S(1) Definition. Intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant.

S(2) Intervention of right. At any time before trial, any person shall be permitted to intervene in an action when a statute of this state or these rules confers an unconditional right to intervene.

S(3) Permissive intervention. At any time before trial any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

S(4) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule ____ (service of papers after summons). The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. If the court allows the intervention, parties shall, within 10 days,

file those responsive pleadings and motions to the intervenor's pleading which are required by these rules for such pleading.

*T. SUBSTITUTION OF PARTIES

T(1) Nonabatement of action or suit by death, disability or transfer; continuing proceedings. No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the claim survives or continues. In case of the death of a party, the court shall, on motion, allow the action to be continued:

(a) By his personal representative or successors in interest at any time withine one year after his death.

(b) Against his personal representative or successors in interest at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after his death.

(c) In case of the disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his guardian or conservator or successors in interest.

(d) In case of the transfer of an interest in the action, the court may, on motion, allow the action to be continued by or against the successors in interest of the transferor.

T(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not

abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

T(3) Public officers; death or separation from office. (a) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(b) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

T(4) Procedure. The motion for substitution may be made by any party or by the successors in interest or representatives of the deceased or disabled party or the successors in interest of the transferor and shall be served on the parties as provided in Rule ______ (service of papers after summons) and upon persons not parties in the manner provided in Rule _____ for the service of a summons.

*U. 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.

*V. MINOR OR INCAPACITATED PARTIES

V(1) Appearance of minor parties by guardian or conservator. When a minor who has a conservator of his estate or a guardian is a party to any action or proceeding, he shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the minor does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

(a) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

(b) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by law for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

V(2) Appearance of incapacitated person by conservator or guardian. When an incapacitated person who has a conservator of his estate or a guardian is a party to any action or proceeding, he shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the incapacitated person does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

(a) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

(b) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by law for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

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TELEPHONE
(503) 222-0201

May 31, 1978

Fred Merrill
Executive Director
University of Oregon Law School
Eugene, Oregon 97401

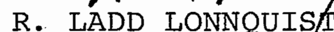
Dear Mr. Merrill:

The May Oregon State Bar Bulletin printed an article on the council on court procedures and specifically referenced a number of rules. Included in those rules is "to adopt a rule making information held by expert witness discoverable". I would appreciate receiving a copy of that rule and any other information which was used as a model for that rule.

Frankly, I am concerned that, in many cases, such rule would result in substantially increased pre-trial costs in behalf of injured plaintiffs and am thus interested in what policy considerations were considered both pro and con in suggesting a proposed rule.

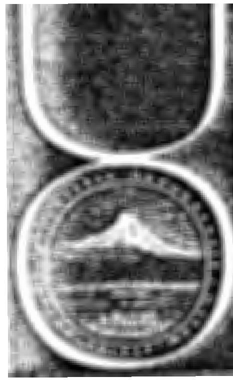
Thank you for your courtesy and cooperation.

Very truly yours,



R. LADD LONNQUIST

RLL:dbr
cc: Chuck Paulson
Honorable William M. Dale
Honorable Berkley Lent



School of Law
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503/686-3837

June 6, 1978

Mr. R. Ladd Lonnquist
Attorney at Law
Jackson Tower
806 S.W. Broadway
Portland, Oregon 97205

Dear Mr. Lonnquist:

I am enclosing the original proposal on expert discovery submitted to the Council by Dick Bodyfelt and a staff analysis of the problem. The proposal has been referred back to the discovery subcommittee for submission of a recommended rule. We would, of course, welcome any suggestions or comments that you may have in this area.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.

cc: Charles P. A. Paulson
William M. Dale, Jr.
Berkeley Lent
Donald W. McEwen

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1 PROPOSAL FOR MANDATORY EXCHANGE OF EXPERT'S REPORTS

2

3 Prepared by E. Richard Bodyfelt,
Member of the Discovery Subcommittee
4 of the Oregon Council on Court Procedures

5 PROPOSED RULE

6 (1) Upon the request of any party, any other party shall
7 deliver a written report of any person the other party reasonably
8 expects to call as an expert witness at trial. The report shall
9 be accompanied by a statement prepared and signed by the expert,
10 the other party, or the other party's attorney, stating the areas
11 in which it is claimed the witness is qualified to testify as an
12 expert, the facts by reason of which it is claimed the witness is
13 an expert, and the subject matter upon which the expert is expected
14 to testify. The report prepared by the expert shall set forth the
15 substance of the facts and the opinions to which the expert will
16 testify and a summary of the grounds for each opinion. The report
17 and statement shall be delivered within a reasonable time after
18 the request is made, and in no event less than thirty days prior
19 to commencement of trial.

20 (2) Unless the court upon motion finds that manifest injustice
21 would result, the party requesting the report shall pay the reasonable
22 costs and expenses, including expert witness fees, necessary to pre-
23 pare the report.

24 (3) If a party fails to timely comply with a request for
25 expert's reports, or if the expert fails or refuses to make a report,
26 and unless the court finds that manifest injustice would result, the

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1 court shall require the expert to appear for a deposition or ex-
2 clude the expert's testimony if offered at trial. If an expert
3 witness is deposed under this subsection of this Rule, the party
4 requesting the expert's report shall not be required to pay expert
5 witness fees for the expert witness' attendance at or preparation
6 for the deposition.
7 (4) Nothing contained in this Rule shall be deemed to be a
8 limitation of one party's right to take the deposition of another
9 party's expert if otherwise allowed by law.
10 (5) As used herein, the terms "expert" and "expert witness"
11 include any person who is expected to testify at trial in an ex-
12 pert capacity, and regardless of whether the witness is also a
13 party, an employee, agent or representative of a party, or has been
14 specifically retained or employed.
15
16 COMMENTS BY E. RICHARD BODYFELT (PROPONENT)
17 This proposed Rule plagiarizes to a large extent ORS
18 44.620 and 44.630 (regarding medical reports) and FRCP Rule 26(4)
19 (interrogatories to another party regarding that other party's
20 experts). As of the time this Rule is proposed, Oregon does not
21 have interrogatory procedures. Although the report and opinions
22 of an opponent's expert probably fall within the broad ambit of
23 ORS 41.635 (scope and disclosure), such information and materials
24 have generally been wrapped in a shroud of work product privilege.
25 To the extent that this Rule is adopted, of course, there would
26 necessarily be some yielding of the scope and extent of the work

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product privilege insofar as it applies to expert reports and opinions. It is felt that this Rule would facilitate open discovery, avoid surprise, encourage (actually, require) exchange of information, and perhaps produce earlier settlements.

The Rule is specifically and expressly applicable both to "in-house" and "outside" experts, and thus anticipates and avoids the propensity by some courts to distinguish between in-house and outside experts under FRCP Rule 26. See, e.g., Virginia Electric & Pow. Co. v. Sun Shipbuilding and D. D. Co., 68 F R D 397 (E D Virginia 1975).

The Rule specifically provides that the party requesting the report shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the report. In this regard, it is intended that the only costs allowed would be those necessary to reduce to written form a report on the expert's work. It is not intended that the requesting party be required to pay the cost of the expert's analyses, testing, research, etc., necessary to arrive at his opinions. It is anticipated that the cost would include necessary reproduction costs, costs of photographs included in the report, and a presumably limited time required on the expert's part to write the report.

It should be noted that under this Rule, actually two things are required, a statement prepared and signed by the expert, the party, or the party's attorney, and an expert report. It is felt that the statement could be as easily, and perhaps more cheaply, prepared by a party or, particularly, the party's attorney. It is

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1 likely that the attorney knows as well, if not more so, the reasons
2 why the witness is purportedly qualified, the areas in which he is
3 expected to be qualified, and the subject matter of the expert's
4 testimony.

5 It should be noted also that in one respect, the proposed
6 Rule goes beyond ORS 44.630 (sanctions for failure to comply with
7 request to produce medical reports) in that the Rule provides, upon
8 a limited exception, that the court shall impose sanctions, as opposed
9 to providing that the court may impose sanctions. It is felt that
10 these additional sanctions, of a compulsory nature, will more likely
11 carry out the intended purpose of this Rule. If the expert is de-
12 posed under subsection (3) of the Rule, the party who filed the re-
13 quest for an expert's report is not required to pay expert witness
14 fees for the expert's preparation for or attendance at the deposition.
15 It is felt that if the opposing party, or the expert, is intractible
16 in the response to the request for an expert report, the requesting
17 party should not be penalized by such charges.

18 It is somewhat difficult to suggest the time within which
19 the report must be provided. The words used are "within a reasonable
20 time" and "in no event, less than thirty days prior to commencement
21 of trial." It was not felt that if a request was filed at the threshold
22 of the case, or midway through the case, the request necessarily should
23 be complied with within some arbitrary number of days. It is entirely
24 possible that at the time the request is made, the other party has
25 not retained an expert, or if he has, is in no position to finalize
26 the expert's report. If the report is delivered within thirty days

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prior to trial, in most instances this would be adequate time. Presumably, the trial court would have inherent power to reduce or enlarge the days before trial within which the reports had to be filed, if particular circumstances, such as the complexity or difficulty of the case, warranted it.

Subparagraph (4) is inserted to preserve inviolate the right to take another party's expert's deposition under circumstances where not even the work product privilege shields the witness. An expert may have knowledge of certain facts, which knowledge another party is entitled to discover irrespective of the work product privilege. This might occur where the expert has examined a piece of evidence which has been lost or altered, or where the expert is an employee of a party and has knowledge of certain facts which establish a duty or breach thereof.

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