N O T I C E

PROPOSED OREGON RULES OF CIVIL PROCEDURE — September 15, 1978

COUNCIL ON COURT PROCEDURES

The Council on Court Procedures, established by ORS 1.725 to 1.750, has authority to promulgate rules which supersede, modify and repeal the existing rules of civil procedure in Oregon. Such rules are to be submitted to the legislature and go into effect if not rejected or modified by the legislature. The Council has prepared a tentative draft of new Oregon rules of Civil Procedure relating to personal jurisdiction, service and filing of summons, process and other papers, pleading, joinder of claims and parties, discovery and trials. The council expects that these rules, numbered 1 to 64, would be part of general rules for Circuit and District Courts in all civil cases which would appear as a separate section of the Oregon Revised Statutes. The rules to be submitted to the 1979 Legislature would supersede most of ORS Chapters 11, 13, 15, 16 and 17 and portions of ORS Chapters 14, 18, 41 and 45.

Final action in relation to promulgation of new rules based upon the tentative draft will be taken at a meeting on Saturday, December 2, 1978, at 9:30 a.m. in Judge Dale's Courtroom at the Multnomah County Courthouse in Portland, Oregon. Written and oral comments and suggestions received before that meeting, relating to the rules, will be considered by the Council. Council members are listed at the end of this notice. Written statements may be submitted to the Executive Director of the Council on Court Procedures, University of Oregon School of Law, Eugene, Oregon 97403. A public hearing on the proposed rules will be held in the County Commissioners Meeting Room (Room 602) in the Multnomah County Courthouse in Portland, Oregon, on Friday, November 3, 1978, commencing at 9:30 a.m.; oral statements relating to the proposed rules will be received at that time.

The summary of the proposed new rules which follows does not fully cover all changes and modifications which would result from the new rules. Interested persons are urged to consult the full text of the new rules which will be available as follows:

1. Upon request from the Council office;
2. Published in the Oregon Appellate Court's Advance Sheets during October 1978;
3. In the materials distributed by the Oregon State Bar Continuing Legal Education Committee for the Civil Practice Developments Seminars during October 1978.

SUMMARY OF NEW RULES

I. Introductory

The new rules would apply in all civil actions and proceedings in circuit and district courts unless a different procedure is provided by a special statute or rule. Procedural distinctions between actions at law and suits in equity are abolished but right to jury trial is not affected.

II. Personal Jurisdiction

Existing grounds for personal jurisdiction are retained and a number of specific situations, not covered by existing long arm statutes, are added. A general provision is added providing personal jurisdiction for any action or proceeding arising out of minimum contacts by the defendant with the state where such personal jurisdiction is not inconsistent with the Oregon or Federal Constitution. Rules relating to jurisdiction in rem and consent to jurisdiction are added.

III. Service of summons; service and filing of other papers and time computation

All general provisions relating to form and service of summons are gathered in one rule. The rule is designed to reduce technical requirements relating to summons and service; the basic test of validity of service is notice of the existence and pendency of the action. Methods of service, generally similar to existing service methods, are provided as forms of sufficient notice for individuals, corporations and public bodies. Provisions relating to service upon the state are added. No general service by mail is provided; mail may be used for service of summons upon corporations where no agent or officer can be found in the county where the action is filed. The methods of service described apply for both in state and out of state service. Service by publication is limited to cases where no other method of service more reasonably calculated to give notice is available; the procedure for publication is generally similar to existing statutes. The requirement of proof of service of subsequent papers is eliminated.

IV. Pleading

The rules retain all existing pleadings, except that a reply to simply deny affirmative matter in an answer is not required; a reply is required to allege new facts in avoidance of defenses in an answer. The existing requirement of specificity in pleading facts is retained and separate statement of claims and defenses would be required. Hypothetical and alternative pleading would be allowed. The general requirement of verification of pleadings is eliminated; signature is required on all motions and pleadings. General denials would only be allowed where a party intends to controvert every allegation of an opponent's pleading. Specific examples of affirmative defenses are listed in the rules.

Motion practice would be modified. Demurrers and pleas in abatement are abolished and defenses formerly asserted by those devices may be raised by motion to dismiss or responsive pleading. The existing Oregon motion for judgment on the pleadings, motion to strike and motion to make more definite and certain are retained. A requirement of consolidation of all grounds for motion into one motion and waiver rules, modeled upon Federal Rule 12, are included. The special appearance is eliminated and objections to jurisdiction are raised by motion to dismiss

or pleading and waiver of the defense of lack of personal jurisdiction is covered by the general waiver rules. The pleadings may be amended without leave of court before a responsive pleading is served; leave of court to amend after that time is to be freely given when justice so requires. Issues not raised by the pleadings, which are tried by express or implied consent of the parties, are treated in all respects as if they had been raised by the pleadings. Federal Rule 15(c) governing relation back of amendments is incorporated into the rules.

V. Joinder of Claims and Parties

The existing Oregon rules relating to joinder of claims, counterclaims, cross-claims, third party claims, joinder of parties and class actions are retained. The rules governing real party in interest, minor and incapacitated parties, intervention and substitution of parties are modified slightly, but are similar to existing rules. The rules provide that defects of misjoinder and nonjoinder of parties are not grounds for dismissal, but parties may be dropped or added by the court. A new interpleader rule, providing for interpleader in any case where a plaintiff might be exposed to double and multiple liability is added. A new rule modeled upon Federal Rule 19, governing necessary and indispensable parties, is also added.

VI. Discovery

Existing Oregon discovery provisions are heavily based upon the federal rules. These are retained with some language changes to conform to the 1970 amendments to the federal rules and reorganized into logical order. The scope of discovery is defined as any matter, not privileged, which is relevant to the claim or defense of a party. Discovery of liability insurance is limited to the existence and limits of the policy, unless there is a coverage question. A new provision regulating discovery of trial experts is added. A new provision relating to perpetuation of testimony or evidence before trial and pending appeal is added. The rules contain special provisions relating to the taking of nonstenographic depositions, and such depositions are allowed without court order. The rules allow a severely limited form of interrogatories, limited in both number (30) and subject matter. (The Council is closely divided on the question of whether to have any interrogatories at all). Physical examinations may be ordered in any situation in which the physical or mental condition of a party is in controversy. Failure to respond to a request for admission, other than the genuineness of documents and things, does not automatically result in admission; a court order establishing the admission is required. The form of requests for admissions is changed and the number of requests is limited to 30 without a court order. All sanctions for failure to comply with the discovery rules are incorporated into one rule modeled upon Federal Rule 37. The subpoena rules were revised to clearly apply to discovery subpoenas.

VII. Trial

The rules relating to trial are based upon the provisions of ORS Chapter 17. Waiver of right to jury trial continues to require affirmative action by the parties. The device of nonsuit is eliminated. A plaintiff may take a voluntary dismissal without prejudice, until a responsive pleading or a summary judgment motion is filed. After that time, leave of court is required for a dismissal and the dismissal is with prejudice unless the court orders otherwise. In a nonjury trial, the sufficiency of the evidence may be challenged by a motion to dismiss at the close of the plaintiff's case, and if the dismissal is granted, it is with prejudice unless the court orders otherwise. The method for challenging the sufficiency of the evidence in a jury case, either at the close of the plaintiff's evidence or all the evidence, is by motion for directed verdict. The provisions relating to jurors and submission of cases to the jury are the same as the existing ORS sections. The procedures for alternate jurors were clarified. Submission of written instructions and statements of issues to the jury are at the discretion of the trial judge. The case may be submitted by a general verdict, special interrogatories or a general verdict accompanied by interrogatories, at the discretion of the court. Existing provisions relating to findings of fact, judgment notwithstanding the verdict and new trials are generally retained.

NOTICE

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

September 18, 1978

FROM: Council on Court Procedures
University of Oregon Law Center
Eugene, Oregon

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, October 21, 1978, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, October 21, 1978

JUDGE DALE'S COURTROOM

MULTNOMAH COUNTY COURTHOUSE

Portland, Oregon

1. Report of process committee
2. Questions raised in memorandum dated 10-3-78
3. Comments received - CLE sessions
4. Budget
5. Plan for completion and submission of rules to legislature
6. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

MINUTES OF MEETING HELD OCTOBER 21, 1978

ROOM 318, MULTNOMAH COUNTY COURTHOUSE

PORTLAND, OREGON

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

Chairman Don McEwen called the meeting to order at 9:35 a.m., in Room 318, Multnomah County Courthouse, Portland, Oregon.

The Chairman announced that Judge Alan Davis and Gene Rose had resigned and that Judge William L. Jackson and Carl Burnam, Jr., had been appointed to take their places. Copies of letters received from Robert Ringo and Harvey Shulman were furnished to the Council.

Judge Sloper stated that several alternative ways of dealing with statutes providing for service of process on state officials had been submitted to the process committee by the Executive Director and that the question should be considered by the full Council. The Executive Director stated that he would furnish the memo discussing the alternatives to all Council members and place the question on the agenda for the next meeting.

Mike King reported that the final result of the poll on the interrogatories rule was 11 for, 11 against and one abstention. Since the motion was not to have interrogatories, they stayed in the draft. After a discussion concerning the adoption of interrogatories, the Council decided to defer a final decision until after the public meeting to be held Friday, November 3.

A discussion followed concerning whether Rule 54 should allow a voluntary dismissal without prejudice up to five days before trial. Upon motion by Don McEwen, seconded by Laird Kirkpatrick, the Council voted

unanimously to amend Rule 54 A.(1) to provide that plaintiff can take a dismissal on the condition that a motion is made five days before the time set for trial. The question was raised whether a non-prejudicial dismissal should be allowed after a summary judgment motion was filed by defendant. It was suggested that the right to a voluntary non-prejudicial dismissal could be limited when a summary judgment was pending, but it was unclear how a motion for partial summary judgment would be treated. The Executive Director was asked to provide alternative versions of 54 A.(1) for Council consideration.

The Council then considered whether Rule 36 B.(2) was too limited and would make insurance policies undiscoverable in any situation where a party would need to see the policy. It was the consensus of the Council that since Rule 36 B.(2)(a) provided for discovery of the policy when there was "any question regarding the existence of coverage for the claims being asserted in the action or proceeding", the rule covered any situation where the policy was needed, including any situation where a policy defense was raised by the insurer.

The following actions were taken concerning those numbered items in the memorandum to the Council dated October 3, 1978:

1. After discussion, upon motion by Judge Wells, seconded by Judge Casciato, the Council voted unanimously to amend Rule 1 to expressly state that the rules are not applicable to small claims procedures in district courts.

2. After a discussion concerning Rule 4 E., it was the consensus of the Council that the basis of jurisdiction provided did not exceed constitutional limits and the provision should be retained. A discussion followed concerning the reference to trust deed note in Rule 4 F., and upon motion by Judge Wells, seconded by James O'Hanlon, the Council voted unanimously to delete "trust deed note" from that section.

3. The Council discussed Rule 5, JURISDICTION IN REM, section C. (When the action or proceeding is to declare property within this state a public nuisance). Upon motion by Judge Johnson, seconded by Don McEwen, the Council voted unanimously to delete section 5 C. After discussion, upon motion by Don McEwen, seconded by Mike King, the Council voted to add "or other applicable statute or rule" at the end of the second sentence in the introduction in Rule 5. Judge Johnson opposed the motion.

4. The Executive Director stated that the redraft of Rule 7, dated October 16, 1978, generally did not change the provisions of the rule but changed the order of the sections and added more headings to make the rule easier to understand. The Council discussed Rule 7 D.(2)(c) of the new draft. It was suggested that the words, "during normal working hours", be included in the appropriate place and that "accessible to the public" be deleted. The Council also discussed the redraft of Rule D.(5)(a), adding an option on the part of the court to order that summons

be mailed to a specified post office address or last known address of the defendant, return receipt requested, deliver to addressee only, instead of ordering publication. After further discussion, upon motion by Don McEwen, seconded by Judge Sloper, the Council voted unanimously to accept the redraft of Rule 7, incorporating the suggested changes to Rule 7 D.(2)(c).

5. The Council discussed Rule 9 D. and whether proof of service should be required on subsequent papers to show the court or parties when time periods begin to run. Laird Kirkpatrick made a motion, seconded by James O'Hanlon, that proof of service be restored and that the section be redrafted to provide that all pleadings should contain proof of service within the pleading, or on a backer. The motion passed with Judge Johnson voting against the motion.

6. and 7. Upon motion by Don McEwen, seconded by Judge Wells, the Council unanimously voted that Rule 15 A. and Rule 21 be reworded and/or reorganized as set out on Page 2 of the October 3rd memorandum.

8. The Council discussed Rule 36 B.(4)(c). They discussed whether or not payment of costs of preparing a report is necessary when a report is already in existence. It was the consensus that it was not the intent of the rule to include payment of any additional expenses where reports already existed. It was suggested that the rule be redrafted to clarify this point. It was also suggested that Rule 36 B.(4)(f) relating to supplementation was ambiguous in not making clear whether it applied to new expert witnesses chosen by a party or additional information from expert witnesses already identified. It was pointed out that the definition of experts was quite broad and attorneys might not regard a prospective witness as an expert who would be applying some kind of specialized knowledge to give an opinion. In such case there could be a dispute whether such witness should have been included in a response to a request for information about expert witnesses. Carl Burnam suggested that the rule should allow a party to request the names, addresses, qualifications and area of expertise of experts. The question then was raised as to what further discovery would be allowed from expert witnesses. The Executive Director was asked to furnish a draft of Rule 36 B.(4) providing that a party would furnish the names, addresses, qualifications and subject matter of testimony of expert witnesses upon request and allowing discovery from expert witnesses. The draft will be considered at the next meeting.

9. After discussion, Judge Sloper moved, seconded by Judge Johnson, that Rule 39 G.(1) be amended to say "certify under oath" rather than "under penalty of perjury."

10. It was the consensus of the Council that Rule 41 C.(1), relating to preserving objections at a deposition, should not be changed.

11. Upon motion by Judge Sloper, seconded by Judge Wells, the Council voted unanimously to change the time for a defendant to respond

to a request for production and inspection in Rule 43 B. from 60 days to 45 days.

12. It was decided that Rule 43 C., relating to the necessity of offering writings produced at a deposition into evidence, should be left in the rules.

13. After discussion concerning Rule 52, a motion was made by Judge Wells, seconded by James O'Hanlon, to delete section 52 A. from the rule. The motion passed unanimously. It was suggested that the title of the rule should be changed to CONTINUANCES.

14. The Executive Director indicated that he would change the reference to plaintiff and defendant in Rule 54 E. to "party against whom a claim is asserted" and "party asserting the claim" and there was no objection.

15. The Council discussed Rule 57 B.(1), relating to the possibility of challenging the jury panel. Council members questioned the constitutionality of a prohibition against a challenge to the panel, and the Executive Director was asked to furnish a draft of a rule that would allow such a challenge. The Executive Director indicated he would try to redraft Rule 57, cleaning up the language used and including a challenge to the panel.

16. The Council discussed subsection 58 B.(5), relating to limiting final argument, and decided to leave the provision as drafted.

17. The Council decided to retain the existing language relating to informal verdicts in Rule 59 G.(4). The Executive Director was asked to check the cases relating to the necessity of objecting to instructions and statements of issues and to draft a version of subsection 59 C.(5) that would allow the jury to be released temporarily before rendering a verdict.

18. The Council discussed Rules 60 and 61. Laird Kirkpatrick moved, seconded by Charles Paulson, that Rule 60 be redrafted to provide a specific option to the trial judge to grant a dismissal without prejudice in lieu of a directed verdict. The motion passed, with James O'Hanlon, Don McEwen, Carl Burnam, Judge Copenhaver and Judge Wells voting against the motion. Judge Wells moved that Rule 61 D. be amended to use the language set forth on Page 4 of the October 3, 1968, memorandum. The motion was seconded by James O'Hanlon and passed unanimously. The Executive Director was asked to draft a clearer version of section 61 E.

19. On motion of Richard Bodyfelt, seconded by Judge Wells, the Council voted unanimously to modify the language of Rules 63 D. and 64 F., changing "within" to "not later than" and changing "entry" to "filing".

20. The Council discussed Rule 64 B.(5) and (6). Charles Paulson moved to delete subsection B.(5), seconded by Carl Burnam. The motion

passed with Richard Bodyfelt, James O'HanLon and Don McEwen voting against the motion.

21. Judge Wells moved, seconded by Charles Paulson, that the references to the court's "own motion" in Rules 9 C., 22 E., 32 M.(1)(a) and 64 G. be changed to reference to the court's "own initiative." The motion passed unanimously.

James O'Hanlon, Treasurer, reported on the proposed budget for the next biennium. He stated that the Court Administrator's Office needed a proposed budget for submission to the Executive Department and that he had consulted with members of the Executive Committee and other Council members. It had been suggested that a budget be submitted which projected the existing monthly budget for this biennium over a full 24-month period with an added 10% increase for inflation. This would result in a budget in the area of $80,000 for the 1979-81 biennium. Wendell Gronso made a motion, seconded by Don McEwen, that the proposal of the Treasurer be accepted and the Treasurer be authorized to submit a budget conforming to these guidelines to the Court Administrator.

The next scheduled meeting of the Council is a public meeting to be held on Friday, November 3, 1978, beginning at 9:30 a.m., in the County Commissioners' Meeting Room, Multnomah County Courthouse, Portland, Oregon. Depending upon the length of public testimony, the Council will either meet on November 3 or on November 4 to conduct a business meeting. The Executive Director suggested that another meeting might be necessary before the final meeting scheduled for December 2, 1978. A tentative date of November 18, 1978, was suggested, subject to confirmation of the November 3rd meeting.

The meeting was adjourned at 1:15 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

PROPOSED OREGON RULES OF CIVIL PROCEDURE

Tentative Draft

September 15, 1978

Final action on the adoption or modification of the proposed rules, numbered 1 to 64, will be taken by the Council on Court Procedures at a meeting on Saturday, December 2, 1978, at 9:30 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The Council solicits comments and suggestions relating to these proposed rules. Written comments may be sent to the Executive Director, University of Oregon, School of Law, Eugene, Oregon 97403. The Council will receive oral statements relating to the rules at a public hearing on Friday, November 3, 1978, commencing at 9:30 a.m. in the County Commissioners Meeting Room, (Room 602), Multnomah County Courthouse, Portland, Oregon.

Council Members:

Donald W. McEwen, Portland (Chairman)
Hon. William H. Dale, Portland (Vice Chairman)
James B. O'Hanlon, Portland (Treasurer)
Darst B. Atherly, Eugene
E. Richard Bodyfelt, Portland
Sidney A. Brockley, Oregon City
Hon. Anthony L. Casciato, Portland
Hon. John M. Copenhaver, Bend
Hon. Alan F. Davis, Portland
Hon. Ross B. Davis, Medford
James O. Garrett, Salem
Wendell E. Gronso, Burns
Hon. Lee Johnson, Salem
Garr M. King, Portland
Laird Kirkpatrick, Eugene
Harriet Meadow Krauss, Corvallis
Hon. Berkeley Lent
Charles P. A. Paulson, Portland
Gene C. Rose, Ontario
Randolph Slocum, Roseburg
Hon. Val D. Sloper, Salem
Hon. Wendell H. Tompkins, Albany
Hon. William W. Wells, Pendleton
Fred Merrill (Executive Director)

TABLE OF CONTENTS

INTRODUCTION

By virtue of ORS 1.745, all provisions of law relating to pleading, practice and procedure in all civil proceedings in courts of this state are deemed to be rules of court. As such, they remain in effect until they are superseded, modified or repealed by rules promulgated by the Council on Court Procedures which have been submitted to the legislature and not amended, repealed or supplemented by statute.

It has been the purpose of the Council on Court Procedures to undertake a systematic review of the general rules of pleading and practice, primarily contained in ORS Chapters 11 through 45, and to gradually replace the existing sections with comprehensive, integrated and logically arranged rules. During this biennium, the Council has concentrated upon the areas of process and personal jurisdiction, pleading, discovery, joinder and trial practice. The Oregon Rules of Civil Procedure, numbered 1 through 64, which follow, would either entirely or substantially replace rules which now appear in ORS Chapters 11, 13, 15, 16, 17 and in portions of ORS Chapters 14, 18, 41, and 45. The ORS sections superseded are given following each rule. It is anticipated that these rules would be published as a separate "Oregon Rules of Civil Procedure" section of the Oregon Revised Statutes and that in future years other substantial portions of ORS Chapters 11 through 45 would be replaced by additional Oregon Rules of Civil Procedure. Because the authority of the Council is limited to

procedural rules in civil proceedings, not including rules of evidence or appellate procedure, some portions of existing statutes in ORS Chapters 11 through 45 will remain as statutes.

The rules which follow are unique Oregon Rules of Civil Procedure. The Council sought to promulgate the best rules which could be developed for practice in Oregon courts. Existing ORS sections are heavily relied upon, with an attempt to clarify the language of those sections where necessary and to arrange the provisions in a logical and useful sequence for guidance of litigants, attorneys, and judges. Where the existing procedural rules were inadequate, the Council has not hesitated to incorporate procedural rules from other states and the Federal Rules of Civil Procedure or to develop entirely new rules.

The comment which follows most rules was prepared by Council staff. It reprsents staff interpretation of the rules and the intent of the Council, and is not officially adopted by the Council.

For reference, subdivisions of rules are called sections and indicated by capital letters, e.g., A.; subdivisions of sections are called subsections and indicated by Arabic numerals in parenthesis, e.g., (1); subdivisions of subsections are called paragraphs and indicated by lower case letters in parenthesis, e.g., (a); and subdivisions of paragraphs are called subparagraphs and indicated by lower case Roman numerals in parenthesis, e.g., (iv).

RULE 1

SCOPE

These rules govern procedure and practice in all circuit and district courts of this state for all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity or of statutory origin, for all other courts of this state to the extent they are made applicable to such courts by rule or statute. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date.

BACKGROUND NOTE

For district courts, see: ORS 46.100 and 46.110. For justice courts, see: ORS 52.010 and 52.020. For tax court, see: ORS 305.425(3). For effective date of rules, see: ORS 1.735.

RULE 2

ONE FORM OF ACTION

There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute or by the Constitution.

BACKGROUND NOTE

For right to jury trial, see: Rule 50.

ORS sections superseded: 11.010, 11.020, 15.010, 16.010, 18.020, 18.310, 23.010, 29.510, 32.225.

COMMENT

This rule abolishes the last vestiges of procedural difference based upon a case being historically legal or equitable. Right to jury trial is not affected as it is a constitutional right. Different procedures are, of course, followed in cases tried to a jury and to a court. In the rules, where a "law - equity" or an "action - suit" distinction was used to specify procedures appropriate to a jury trial or non-jury trial, this has been changed to a direct reference to cases tried to a court or a jury. Dual terminology, such as "actions and suits" and "judgments and decrees" has been eliminated. Since the Oregon statutes have a number of references to special "proceedings", references to "actions and proceedings" are retained.

RULE 3

COMMENCEMENT OF ACTION

Other than for purposes of statutes of limitations, an action or proceeding shall be commenced by filing a complaint with the clerk of the court.

BACKGROUND NOTE

For commencement of an action and statutes of limitations, see ORS 12.020.

COMMENT

This is based on the existing rule in the first sentence of ORS 15.020.

RULE 4

PERSONAL JURISDICTION

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action or proceeding pursuant to Rule 7 under any of the following circumstances:

A. Local presence or status. In any action or proceeding whether arising within or without this state, against a defendant who when the action or proceeding is commenced:

A.(1) Is a natural person present within this state when served; or

A.(2) Is a natural person domiciled within this state; or

A.(3) Is a corporation created by or under the laws of this state; or

A.(4) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise; or

A.(5) Has specifically consented to the exercise of personal jurisdiction over such defendant.

B. Special jurisdiction statutes. In any action or proceeding which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

C. Local act or omission. In any action or proceeding claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

D. Local injury; foreign act. In any action or proceeding claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

D.(1) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

D.(2) Products, materials or things distributed, processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

E. Local services, goods or contracts. In any action or proceeding which:

E.(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff or to guarantee payment for such services; or

E.(2) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant or payment for such services was guaranteed by the defendant; or

E.(3) Arises out of a promise made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship

from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents or things; or

E.(4) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction or shipped to a third person when payment for such goods, documents or things was guaranteed by defendant; or

E.(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

F. Local property. In any action or proceeding which arises out of the ownership, use or possession of real property situated in this state or the ownership, use or possession of other tangible property, assets or things of value which were within this state at the time of such ownership, use or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage or trust deed note or conditional sale contract or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

G. Director or officer of a domestic corporation. In any action or proceeding against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office

as a director or officer.

H. Taxes or assessments. In any action or proceeding for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this state.

I. Insurance or insurers. In any action or proceeding which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property or risk and in addition either:

I.(1) The person, property or risk was located in this state at the time of the promise; or

I.(2) The person, property or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

I.(3) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property or risk insured was located.

J. Securities. In any action or proceeding arising under the Oregon Securities Law, including an action or proceeding brought by the Corporation Commissioner, against:

J.(1) An applicant for registration or registrant, and any person who offers or sells a security in this State, directly or indirectly, unless the security or the sale is exempt from ORS 59.055; or

J.(2) Any person, a resident or nonresident of this state, who has engaged in conduct prohibited or made actionable under the Oregon Securities Law.

K. Certain marital and domestic relations actions.

K.(1) In any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state; or

K.(2) In any action to enforce personal obligations arising under ORS Chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if if an action to enforce personal obligations arising under ORS Chapter 106 or 107 is not commenced within one year following the date which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K.(3) In a filiation proceeding under ORS Chapter 109, when the act or acts of sexual intercourse which resulted in the birth of the child are alleged to have taken place in this state and the child resides in this state.

L. Other minimum contacts. In an action or proceeding otherwise arising out of some minimum contacts by the defendant with this state where, under the circumstances, it is fair and reasonable to require the defendant to come to this state to defend an action. The minimum contacts referred to in this section shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of sections B. to L. of this rule, so long as the prosecution of the action against a defendant in this state is not

inconsistent with the Constitution of this state or the Constitution of the United States.

M. Personal representative. In any action or proceeding against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in section B. to L. would have furnished a basis for jurisdiction over the deceased had the deceased been living and it is immaterial under this subsection whether the action or proceeding had been commenced during the lifetime of the deceased.

N. Joinder of claims in the same action. In any action or proceeding brought in reliance upon jurisdictional grounds stated in sections B. to L., there cannot be joined in the same action or proceeding any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

BACKGROUND NOTE

For statutes relating to appointment of registered agents and consent to jurisdiction by engaging in activities within the state, see: 57.075, 57.485, 57.630, 57.700, 57.721, 57.822, 61.086, 61.471, 69.450, 69.500, 69.520, 91.578, 91.611, 92.375, 345.060, 486.521, 509.910, 648.061, 650.070, 650.075, 673.395, 696.250, 697.640, 703.120, 722.102, 731.324, 731.370, 744.055, 746.320, 746.330, 746.340, 746.350, 746.360, 746.370, 767.495. For jurisdiction in child custody matters, see ORS 109.700 et seq. and 110.75. ORS sections superseded: 14.010, 14.020, 14.035, 15.190, 15.200, 59.155.

COMMENT

This rule is designed to: (a) incorporate most provisions for personal jurisdiction in one rule; (b) to extend the exercise of jurisdiction over persons by Oregon courts to the permissible limit under the United States and Oregon Constitutions; and

(c) to give a comprehensive and useful description of generally accepted grounds for personal jurisdiction. The rule deals only with amenability to jurisdiction. Methods of service of process are found in Rule 7. The basic form of the rule was drawn from Wisconsin Statutes § 801.05, modified to incorporate Oregon statutes and case law.

4 A. This section includes the traditional territorial jurisdiction that creates general amenability to jurisdiction without any reference to the subject matter of the action. In slightly different language the grounds for jurisdiction are all covered under existing Oregon statutes. See ORS 14.010, 14.020 and 15.080(6). Subsection A.(4) covers a situation where a defendant engages in such substantial activities in this state, that it would be subject to jurisdiction in any action whether or not the action arose out of actvities in the state. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

4 B. This section recognizes that some other statutes or rules provide grounds for jurisdiction beyond this rule, including the separate provision relating to child custody cases in ORS Chapters 109 and 110.

Sections 4 C. through L. all require that the cause of action arise out of a described contact with this state.

4 C. and D. These sections apply in all tort and contractual claims for injury when either the acts giving rise to the injury occurred in Oregon or the injury took place in Oregon. The limits of the application of section 4 D. are the generally accepted limit of due process in this area. See: Hanson v. Denckla, 357 U.S. 235 (1958). These sections also eliminate any need for a separate Nonresident Motor Vehicle Act, ORS 15.190 and 15.200.

4 E. This section covers contractual activity.

4 F. This is based on ORS 14.035 (1)(c). Coverage is extended to actions arising out of ownership, use or possession of personal property if the property was located in the state at the time the action arose. No provision is made for quasi in rem jurisdiction. See Shaffer v. Heitner, 433 U.S. 186 (1977).

4 G. The situation described is that covered in Shaffer v. Heitner, supra.

4 H. This was the situation covered in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

4 I. This is an expanded version of ORS 14.035 (1)(d).

4 J. This section incorporates the provisions of ORS 59.155.

4 K. Subsection K.(1) should be read in conjunction with ORS 107.075. Subsection K.(2) is the same as ORS 14.035(2). Subsection K.(3) is not covered by existing statutes, but provides a basis for jurisdiction in the situation involved in State ex rel Poole v. Dorroh, 271 Or 410 (1975) and State ex rel McKenna v. Bennett, 28 Or App. 155 (1977).

4 L. This section is designed to extend jurisdiction in any case not covered in the specific sections, within the limits of due process. It is modeled upon Rule 4.2 of the Alabama Rules of Civil Procedure.

4 M. If a basis for jurisdiction over a decedent exists under sections 4 B. through L., this also provides a basis for jurisdiction over the personal representative.

4 N. This is the equivalent of ORS 14.035 (4).

RULE 5
JURISDICTION IN REM

A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem on the grounds stated in this section. A judgment in rem may affect the interests of a defendant in the status, property or thing acted upon only if a summons has been served upon the defendant pursuant to Rule 7. Jurisdiction in rem may be invoked in any of the following cases:

A. When the subject of the action of proceeding is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subsection shall apply when any such defendant is unknown.

B. When the action or proceeding is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real property within this

state.

C. When the action or proceeding is to declare property within this state a public nuisance.

COMMENT

With the comprehensive personal jurisdiction provided by Rule 4, this rule probably will not be needed in most cases. No provision is made for quasi in rem jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977).

RULE 6

PERSONAL JURISDICTION WITHOUT SERVICE OF SUMMONS

A court of this state having jurisdiction of the subject matter may, without a summons having been served upon a person, exercise jurisdiction in an action or proceeding over a person with respect to any counterclaim asserted against that person in an action or proceeding which the person has commenced in this state and also over any person who appears in the action or proceeding and waives the defense of lack of jurisdiction over the person, insufficiency of summons or process, or insufficiency of service of summons or process, as provided in Rule 21 G. Where jurisdiction is exercised under Rule 5, a defendant may appear in an action or proceeding and defend on the merits, without being subject to personal jurisdiction by virtue of this rule.

COMMENT

This describes the voluntary submission to jurisdiction presently covered in ORS 14.010 and 14.020 by reference to jurisdiction when a defendant "appears." The last sentence provides for a limited appearance by a defendant when the jurisdiction is in rem.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

If you have questions, you shoud see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant

or the defendant's attorney. If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within ____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer, director or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person seved is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be promptly returned to the clerk with whom the complaint is filed

with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action or proceeding is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a)(i) Personal service or mailing shall be proved by the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances

of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidfavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19__.

_____
Notary Public of Oregon.

My commission expires

_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

F. Manner of service. (1) Summons shall be served, either within or without this State, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action or proceeding and to afford a reasonable opportunity to appear and defend.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail or mailing of summons and complaint as otherwise required or allowed by this rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested.

Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this rule and service pursuant to subsection (4) of this section, service of summons either within or without this state may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon such minor's father, mother, conservator of such minor's estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, director, general partner or managing agent, such copies may be left at the office of such registered agent, officer, director, general partner or managing agent, with the person who is apparently in charge of the office; or

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent can be found nor has an

office in the county where the action or proceeding is filed, the summons may be served: by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of such registered agent, officer, director, general partner or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to such registered agent, officer, director, general partner or managing agent. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of a registered, agent, officer, director, general partner, or managing agent, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by

personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action or proceeding, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this rule, a published summons shall

also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot be made by another method described in section F. of this rule because defendants are unknown heirs or persons as described in sections I. and J.

of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action or proceeding was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines

that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of service of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

BACKGROUND NOTE

For service of process, see Rule 8. For service of subpoenas, see Rule 55.

ORS sections superseded: 15.020, 15.030, 15.040, 15.060, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.210, 15.220, 45.120.

COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met, then deviations from the prescribed procedures for form of summons, issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E.(3) and F.(1) and Section 7 H. make this clear. Subsection F.(1) is the basic rule for manner of service; subsection F.(3) describes acceptable methods of service that would meet the standard of subsection F.(1), but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in Rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule does not include any service of process on state agents who are fictionally appointed as agents for service of

process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants. To the extent that such service is retained in separate ORS sections, it would be within subparagraphs F.(3)(a)(iii) and F.(3)(d)(iii).

Section B. is based upon ORS 15.020.

Subsections C.(1) to (3) are based upon ORS 15.040 and 15.220. Subsection C.(4) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30-day period. Service upon another authorized to accept service of summons for the defendant would include leaving a copy of the summons and complaint at a dwelling house or usual place of abode or an office or any type of service upon someone other than the named defendant.

Section 7 D. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 E. is based upon 15.060, 15.110 and 15.160. Subsection E.(3) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections E.(1) and (2).

The methods of service described in subsection F.(3) are modified forms of the methods of service described in 15.080. The most significant change is paragraph F.(3)(d), which provides that the preferred method of service is personal service (including leaving at their office) upon a responsible officer, director or agent in the county where the action is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service (including leaving at their office) upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph F.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules

dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection F.(4) was adapted from Federal Rule 4 (i).

The publication provisions of section 7 G. differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon the nature of the case or location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method but makes such publication available for any case. Once publication is available, the procedure followed is similar to that of the present statutes.

RULE 8

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, the seal of office of such clerk shall be affixed to such process. Summons and subpoenas are not process and are covered by Rules 7 and 55, respectively.

B. County is a party. Process in an action or proceeding where any county is a party shall be served on the county clerk or the person exercising the duties of that office, or if the office is vacant, upon the chairperson of the governing body of the county, or in the absence of the chairperson, any member thereof.

C. Service or execution. Any person may serve or execute any civil process on Sunday or any other legal holiday. No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

D. Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy as defined in ORS 757.631, of such writ, order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by such officer or person if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to such officer or person. The officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

E. Proof of service or execution. Proof of service or execution of process shall be made as provided in Rule 7 E.

BACKGROUND NOTE

ORS sections superseded: 16.760, 16.765, 16.820, 16.830, 16.840, 16.880.

COMMENT

This rule is primarily based on existing ORS sections in Chapter 16. A separate section for service of process is necessary, as subpoenas and summons not issued by a court are not court process. The only substantial change is section 8 C., which is the modification of ORS 16.830 suggested to the last legislature by the Oregon State Bar. ORS 16.880 and 16.765 are eliminated

entirely. Persons who may serve process and manner of service are covered in the various sections of ORS relating to such process.

RULE 9

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer or judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within

this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing.

C. Service; numerous defendants. In any action or proceeding in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereupon upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. Filing; no proof of service required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party or a party's attorney shall constitute a representation that a copy of the paper has been or will be served upon each of the other parties

as required by section A. of this rule. No further proof of service is required unless an adverse party raises a question of notice. In such instance the affidavit of the person making service shall be prima facie evidence.

E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of day, the day of the month and the year. The clerk or person exercising the duties of that office is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is legibly endorsed on the front of the document, nor unless the contents thereof can be read by a person of ordinary skill.

F. Effect of failure to file. If any party to an action or proceeding fails to file within five (5) days after the service any of the papers required by this rule to be filed, the court, on motion of any party or of its own motion, may order the papers to be filed forthwith, and if the order is not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

BACKGROUND NOTE

ORS sections superseded: 16.430, 16.770, 16.780, 16.790,

16.800, 16.810, 16.850, 16.860, 16.870.

COMMENT

This rule replaces the existing statutory provisions relating to serving and filing of papers subsequent to the summons and original complaint. The language used was adapted from Rhode Island Rule of Civil Procedure 5. The major variation from Oregon practice is section 9 D. which eliminates the need for proof of service of papers subsequent to the original complaint and summons unless a question is raised as to service. ORS 16.810, 16.850 and 16.870 are eliminated.

RULE 10

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in ths rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

B. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court

to do any act or take any proceeding in any civil action which has been pending before it.

BACKGROUND NOTE

ORS section superseded: 174.120.

COMMENT

Section 10 A. is based upon Federal Rule 6 (a). The only substantial difference from the time computation provided in ORS 174.120 is the next to the last sentence of section 10 A. relating to intermediate Saturdays, Sundays and holidays for periods of less than 7 days. Section 10 B. was eliminated from the federal rule in 1968 because federal courts no longer have terms. Since Oregon courts do have terms, it was included in this rule.

RULE 11 (RESERVED)

RULE 12

PLEADINGS LIBERALLY CONSTRUED
DISREGARD OF ERROR

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

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

BACKGROUND NOTE

ORS sections superseded: 16.120, 16.660.

RULE 13
KINDS OF PLEADINGS ALLOWED
FORMER PLEADINGS ABOLISHED

A. Pleadings. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses.

B. 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 22 D. and a cross-claim against a defendant. A pleading against any person joined under Rule 22 C. 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 and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer. There shall be no other pleading unless the court orders otherwise.

C. Pleadings abolished. Demurrers and pleas shall not be used.

BACKGROUND NOTE

ORS sections superseded: 16.020, 16.030, 16.240, 16.325, 16.460.

COMMENT

The description of pleadings in section 13 B. changes the existing Oregon practice by eliminating the routine reply containing only denials of affirmative matter in the answer. No reply is required to deny affirmative matter in an answer. Under Rule 19 C., allegations in a pleading to which no responsive pleading is required or permitted are automatically taken as denied. A reply is required to a counterclaim in an answer or to raise new matter in avoidance of defenses asserted in the answer. The proper response to a crossclaim is an answer; the proper response of a party summoned to respond to a counterclaim under Rule 22 D. is a reply. ORS 16.020 and 16.460 are unnecessary under Rules 1 and 2.

RULE 14

MOTIONS

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

B. Form. The rules applicable to captions, signing and other matters or form of pleadings, including Rule 17 A., apply to all motions and other papers provided for by these rules.

BACKGROUND NOTE

ORS sections superseded: 16.710, 16.720, 16.730, 16.740.

COMMENT

Section 14 A. is based on ORS 16.710. Section 14 B. is based on Federal Rule 7 and incorporates Rule 17 A. to make clear that a party or attorney signing a motion or other paper is certifying that there is good ground to support it and it is not interposed for harassment or delay. ORS 16.720 to 16.740 are eliminated.

RULE 15

TIME FOR FILING PLEADINGS OR MOTIONS

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint or the reply to a counterclaim of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by Rule 7 C.(4) to appear and defend. A motion or answer to a cross-claim shall be filed within 10 days after service of an

answer containing a cross-claim and a motion or reply to an answer, other than a party summoned under the provisions of Rule 22 D., shall be filed within 10 days after the service of the answer. A motion to a reply shall be filed within 10 days after service of the reply.

B. Pleading after motion. (1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B.(2) 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. Responding to amended pleading. 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 directs.

D. 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.

BACKGROUND NOTE

For provisions relating to amended pleadings and responding to amended pleadings, see Rule 23.

ORS sections superseded: 16.040, 16.050, 16.420.

COMMENT

This rule brings all time requirements for responding to pleadings together in one rule. Section 15 A. provides the same time for response to pleadings as ORS 16.040. Subsections 15 B. (1) and (2) are new; section 15 C. was covered by ORS 16.420. Section 15 D. is ORS 16.050.

RULE 16

PLEADINGS - FORM

A. Captions, names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action or proceeding, the register number of the cause and a designation in accordance with Rule 13 B. In the complaint the title of the action or proceeding shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B. 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.

C. 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 17.

D. Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading.

BACKGROUND NOTE

ORS sections superseded: 13.010, 16.060, 16.090.

COMMENT

The Council intends to retain existing Oregon practice in sections 16 A., 16 B. and 16 D., including separate statements of claims and defenses required by ORS 16.040. Section 16 C. is intended to eliminate any objection based upon hypothetical, alternative and inconsistent pleading as such. Inconsistent statements of simple facts clearly within the knowledge of the pleader would, however, be improper because of the obligation to plead truthfully under Rule 17 A.

RULE 17

SUBSCRIPTION OF PLEADINGS

A. 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 may 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. 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 harassment or delay.

B. Pleadings not subscribed. Any pleading not duly subscribed may, on motion of the adverse party, be stricken out of the case.

BACKGROUND NOTE

For subscription of actions brought in the name of the state, see: 30.610.

ORS sections superseded: 16.070, 16.080, 30.350.

COMMENT

This replaces the general verification requirements of ORS 16.070, 16.080 and 30.350, with a rule requiring only signature but specifying that such signature certifies truthfulness and merit. The approach is that suggested to the last legislature by the Oregon State Bar. If a corporation or entity were litigating without an attorney, the pleading would be signed by a person with authority to act for such corporation or entity.

RULE 18

COMPLAINT, COUNTERCLAIM, CROSS-CLAIM THIRD PARTY CLAIM

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain:

A. a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition;

B. 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.

BACKGROUND NOTE

ORS section superseded: 16.210.

COMMENT

The Council decided to retain fact pleading as opposed to notice pleading, i.e., to retain a requirement of fairly specific description of facts as opposed to adopting the less specific fact description allowable in federal courts. This rule is a rewording of ORS 16.210 to fit any form in which a claim for affirmative relief is asserted and to refer to pleading a claim for relief rather than a cause of action. The necessity of pleading ultimate facts retains the present Oregon requirements of pleading facts at a fairly specific level. For a comparable rule, see Florida Rules of Civil Procedure, 1.110(b)(2).

RULE 19

RESPONSIVE PLEADINGS

A. 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 the pleader 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 17.

B. Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, unconstitutionality, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

C. 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 no responsive pleading is required or permitted shall be taken as denied, except allegations in a reply to a counterclaim which shall be taken as denied or avoided.

BACKGROUND NOTE

ORS sections superseded: 16.290, 16.620.

COMMENT

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon practice. The rule is consistent with Oregon practice in most cases. In section 19 A. a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19 B. does not change the existing burden of pleading. Several specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included. Assumption of risk, contributory negligence and fellow servant are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law.

RULE 20

SPECIAL PLEADING RULES

A. 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.

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

C. Private statute; how pleaded. In pleading a private

statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) 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 its incorporation. 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 in which it is located.

D.(2) 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.

E. Libel or slander action.

E.(1) 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.

E.(2) 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.

F. 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.

G. 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.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. 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.

J. Designation of unknown persons. 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, lien or interest in the real property described in the complaint herein."

BACKGROUND NOTE

For provisions relating to service of summons or unknown heirs or persons, see Rule 7 G.(5).

ORS sections superseded: 13.020, 13.060, 13.070, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540.

COMMENT

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d), and section 20 G. is new and designed to eliminate some archaic archaic pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counter-claim, 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: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or proesss, (6) failure to join a party under Rule 29, (7) failure to state ultimate facts sufficient to constitute a claim, and (8) 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 (1) through (6), 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section B. 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.

D. 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 10 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.

E. 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 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham or frivolous or irrelevant pleading or defense; (2) any insufficient defense on or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses. (1) 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 summons or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a

matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

BACKGROUND NOTE

ORS sections superseded: 16.100, 16.110, 16.130, 16.140, 16.150, 16.250, 16.260, 16.270, 16.280, 16.320, 16.330, 16.340.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, Rule 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, ths must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

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

B. Cross-claim against codefendant. (1) In any action or proceeding 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: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B.(2) 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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action or proceeding, 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 or proceeding 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 assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and counterclaims

against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. 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 21 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.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

C.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. 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: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

BACKGROUND NOTE

ORS sections superseded: 13.180, 15.210, 16.305, 16.315, 16.325.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

RULE 23

AMENDED AND SUPPLEMENTAL PLEADINGS

A. 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.

B. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues

made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

C. Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.

D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 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, the party filing the motion shall file a responsive pleading if any is

required. By filing any pleading pursuant to this section, 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.

E. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

F. How amendment made. When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

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

BACKGROUND NOTE

For time for filing and responding to amended pleadings, see Rule 15.

ORS sections superseded: 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, 16.610, 16.630, 16.640, 16.650.

COMMENT

This is a combination of Federal Rule 15 and existing ORS sections. Section 23 A. is based upon Federal Rule 15(a) and ORS 16.430. Section B. is based on Federal Rule 15(b). Section C. is based on Federal Rule 15(c). Section D. is based upon ORS 16.380 and 400; note the court is specially authorized to grant a motion for a judgment on the pleadings but to allow repleading rather than enter a judgment. Section E. is based upon ORS 16.400. Section F. is based upon ORS 16.410, and Section G. is based upon ORS 16.360 and Federal Rule 15(d).

RULE 24

JOINDER OF CLAIMS

A. 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.

B. 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.

C. Separate statement. The claims united must be separately stated and must not require different places of trial.

BACKGROUND NOTE

ORS chapters superseded: 16.221.

COMMENT

This is based on the existing ORS section.

RULE 25 (RESERVED)

RULE 26

REAL PARTY IN INTEREST

Every action or proceeding 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 their own names without joining with them the party for whose benefit the action or proceeding is brought; and when a statute of this state so provides, an action or proceeding for the use or benefit of another shall be brought in the name of the state. No action or proceeding 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 or proceeding 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 or proceeding had been commenced in the name of the real party in interest.

BACKGROUND NOTE

ORS sections superseded: 13.030.

COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

RULE 27

MINOR OR INCAPACITATED PARTIES

A. Appearance of minor parties by guardian or conservator. When a minor, who has a conservator of such minor's estate or a guardian, is a party to any action or proceeding, such minor 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 such minor's estate or a guardian, the minor 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.(1) 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.

A.(2) 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.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person, who has a conservator of such person's estate or a guardian, is a party to any action or proceeding, the incapacitated person 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 such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B.(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B.(2) 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.

BACKGROUND NOTE

ORS sections superseded: 13.041, 13.051.

COMMENT

This rule is based on the existing ORS sections.

RULE 28

JOINDER OF PARTIES

A. Permissive joinder as plaintiffs or defendants. All persons may join in one action or proceeding 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 or proceeding 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.

B. Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expsnse 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.

BACKGROUND NOTE

ORS sections superseded: 13.140, 13.150, 13.161.

COMMENT

This is based on existing ORS 13.161.

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. 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 or proceeding if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action or proceeding and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) 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 a person should join as a plaintiff but refuses to do so, such person shall be made a defendant, the reason being stated in the complaint. 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.

B. Determination by court whenever joinder not feasible. If a person as described in subsections A.(1) and (2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action or proceeding should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a

judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action or proceeding is dismissed for nonjoinder.

C. Exception of class actions. This rule is subject to the provisions of Rule 32.

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

BACKGROUND NOTE

For a specific rule relating to joint obligations, see ORS 15.100.

ORS sections superseded: 13.110, 13.170, 13.190.

COMMENT

This is based upon Federal Rule 19. The existing Oregon rules do not contain an adequate indispensable party rule. This rule directs a court to look to the factors relevant to a decision whether a party should be included and whether the case should proceed when joinder of an interested person is not feasible. Those factors are described in terms of particular consequences to the existing parties and the interested person and the ways by which these consequences might be ameliorated by shaping relief or other steps. Section 29 D. does not appear in the federal rule and was taken from ORS 13.190.

RULE 30

MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action or proceeding. 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.

COMMENT

This is based on Federal Rule 21. Misjoinder or nonjoinder are presently asserted by demurrer, motion to strike or pleading.

RULE 31

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 alleges that plaintiff 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 provision of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by rule or statute.

BACKGROUND NOTE

ORS sections superseded: 13.120.

COMMENT

This rule is based upon Federal Rule 22. Adoption of this rule was recommended to the last legislature by the Oregon State Bar. Two forms of interpleader are covered by existing Oregon law, ORS 13.120 and equitable interpleader. The effectiveness of the interpleader device in Oregon under the existing rules is hampered by the limited scope of ORS 13.120 and the historic limitations on equitable interpleader. This rule is of general application and eliminates the equitable interpleader requirements that the same debt or duty be claimed by all the interpleaded parties, that the claimant's titles or claims be dependent on or derive from a common source, that the stakeholder not have or claim any interest in the subject of the interpleader and that the stakeholder not have incurred any independent liability to any one of the claimants.

RULE 32

CLASS ACTIONS

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied

with the prelitigation notice provisions of section I. of this rule.

B. Class action maintainable. An action or proceeding may be maintained as a class action if the prerequisites of section A. of this rule are satisfied, and in addition:

B.(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

B.(1)(a) 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

B.(1)(b) 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.(2) 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

B.(3) 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 question 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: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions or proceedings, (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice; (e) 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; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

C. Court discretion. In an action commenced pursuant to subsection (3) of section B. 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 (2) of section B. of this rule.

D. Court order to determine maintenance of class actions. As soon as practicable after the commencement of an action or proceeding brought as a class action, the court shall determine by

order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. 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.

E. 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.

F. 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:

F.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

F.(2) 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;

F.(3) Imposing conditions on the representative parties or on intervenors;

F.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

F.(5) Dealing with similar procedural matters.

G. 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 (3) of section B. of this rule:

G.(1) 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:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.

G.(2) 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 such member's 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.

G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

G.(4) 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 voided 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.

H. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

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

H.(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.

I. Notice and demand equired prior to commencement of action for damages.

I.(1) Thirty days or more prior to the comencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(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.

J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B. and C. of this rule upon a showing by a defendant that all of the following exist:

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

J.(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;

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

J.(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.

K. Application of sections I. and J. 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 sections A., B., and C. of this rule may be

commenced without compliance with the provisions of section I. 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 I. of this rule, the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section I. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

L. 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.

M. Coordination of pending class actions sharing common question of law or fact.

M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, on the court's 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.

M.(1)(b) 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.

M.(2) If the assigned judge determines that coordination is appropriate, such judge 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 the Chief Justice deems appropriate.

M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, on the court's 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 (1) of this section.

M.(4) 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.

M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure

for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

N. Judgment; inclusion of class members; description; names. The judgment in an action or proceeding maintained as a class action under subsections (1) or (2) of section B. 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 or proceeding maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section G. 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.

O. 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.

BACKGROUND NOTE

ORS sections superseded: 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.320, 13.330, 13.340, 13.350, 13.360, 13.370, 13.380, 13.390.

COMMENT

These are the existing ORS sections relating to class actions. ORS 13.400 and 13.410 are left as statutes because they are rules of appellate procedure. ORS 13.310 is left as a statute because it is a rule of evidence.

RULE 33

INTERVENTION

A. 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.

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

C. 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.

D. Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 9. 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 which are permitted or required by these rules for such pleading.

BACKGROUND NOTE

ORS sections superseded: 13.130.

COMMENT

This rule is based upon the existing Oregon intervention rule in ORS 13.130. Section 33 B. recognizes the possibility of mandatory statutory intervention; see, ORS 105.760, 105.755 and 373.060. The first sentence of section 33 C. comes from the existing ORS section; the second is taken from Federal Rule 24(b). The existing rules do not clearly cover the procedure for intervention; this rule includes a new section 33 D. relating to procedure.

RULE 34

SUBSTITUTION OF PARTIES

A. Nonabatement of action or proceeding by death, disability or transfer. No action or proceeding shall abate by the death or disability of a party, or by the transfer of any interest therein, if the claim survives or continues.

B. Death of a party; continued proceedings. In case of the death of a party, the court shall, on motion, allow the action or proceeding to be continued:

B.(1) By such party's personal representative or successors in interest at any time within one year after such party's death; or

B.(2) Against such party's 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 such party's death.

C. Disability of a party; continued proceedings. In case of the disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or proceeding

to be continued by or against the party's guardian or conservator or successors in interest.

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action or proceeding in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action or proceeding does not abate. The death shall be suggested upon the record and the action or proceeding shall proceed in favor of or against the surviving parties.

E. Public officers; death or separation from office.

E.(1) When a public officer is a party to an action or proceeding in such officer's official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action or proceeding does not abate and such officer's 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.

E.(2) When a public officer sues or is sued in such officer's official capacity, such officer may be described as a party by official title rather than by name; but the court may require such officer's name to be added.

F. 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 9 and upon persons not parties in the manner provided in Rule 7 for the service of a summons.

BACKGROUND NOTE

ORS sections superseded: 13.080, 13.090.

COMMENT

This rule generally preserves the existing rules of ORS 13.080. ORS 13.090 was unnecessary and was eliminated. Sections 34 A. through D. use the language of the existing statute. The words, "if the claim survives or continues", were added to the first sentence of section 34 A. to make clear that this rule relates only to the procedural question of abatement of the action.

Sections 34 D. and E. are based upon sections (a) and (d) of Federal Rule 25. The federal approach to substitution of federal officials is more direct and flexible than existing Oregon practice. Section 34 F. provides a procedure for substitution, which is not addressed by the existing ORS sections.

RULE 35 (RESERVED)

RULE 36

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:

B.(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.

B.(2) Insurance agreements.

B.(2)(a) A party may 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 proceeding or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action or proceeding. In such case, the party seeking discovery shall be advised of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of

the existence of coverage later arises, the party discovered against has the duty to immediately advise the party who sought discovery of the question regarding the existence of coverage. The party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(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.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 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 an 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 such party's case and 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 proceeding or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B.(4) Trial preparation; experts.

B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the

expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming an opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to such expert witness by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to paragraph (c) of this subsection concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 46 A. (4) apply to the award of expenses incurred in relation to the motion.

B.(4)(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under paragraph (a) of this subsection shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees

for time spent responding to discovery under paragraph (b) of this subsection.

B.(4)(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this paragraph, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

B.(4)(e) As used herein, the terms, "expert" and "expert witness", include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

B.(4)(f) A party who has furnished a statement in response to paragraph (a) of this subsection is under a duty to immediately supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

B.(4)(g) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

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 or proceeding 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 46 A.(4) apply to the award of expenses incurred in relation to the motion.

BACKGROUND NOTE

ORS sections superseded: 41.616(4), 41.618, 41.622, 41.631, 41.635.

COMMENT

This rule is a combination of existing ORS sections (which are primarily drawn from Federal Rule 26), portions of Federal Rule 26, and new provisions drafted by the Council.

Section 36 A. and the introductory language of section 36 B. come from the federal rule. Subsection B.(1) is based on ORS 41.635. The scope of discovery is changed from "relevant to the subject matter involved in the pending action, suit or proceeding..." to "...relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party...". This change conforms to the suggested amendment to Federal Rule 26(b)(1) proposed by the committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance; if there is a coverage question, the subsection provides that a party seeking discovery of the existence and limits of the policy be advised of any existing or later arising coverage question. A copy of the policy shall then be produced upon request. The initial discovery of existence and limits of the policy may be by any method, including interrogatory. Paragraph (b) of subsection B.(2) was drawn from the last two sentences of Federal Rule 26 B.(2).

Subsection B.(3) is based on ORS 41.616(4) and Federal Rule 26 (b)(3). The last paragraph relating to a person's own statement does not appear in the existing ORS language.

Subsection B.(4) is a new provision drafted by the Council. Federal Rule 26 (b)(4) regulates all discovery from experts of information acquired or developed in anticipation of trial. It provides for discovery by interrogatories of basic information from experts to be called at trial, allows further discovery from trial experts and discovery from non-trial experts only upon court order, and prohibits any discovery at all from some types of experts. This rule deals only with experts to be called at trial and leaves regulation of discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases. The Council felt that the need for discovery of basic information relating to the prospective testimony of expert

witnesses was very high because such information is crucial to effective cross-examination. The rule provides that information will be furnished upon request in the form of a statement by the party and a report prepared by the expert. Paragraph (b) gives the court authority to order further discovery in cases where the statement and report do not provide the needed information and it is shown that such information cannot be obtained without further discovery. Any potential for unfairness to the party expecting to call an expert as a witness or to the expert is offset by the mandatory requirement that the discovering party pay the expert's fees for, and the costs of, discovery. Failure to comply with the rule will either result in an automatic right to depose the expert, without cost, or exclusion of the expert's testimony. The request may be made at any time, but the information must be furnished not less than 30 days prior to trial; if a request for discovery has been made and a party has not decided upon an expert witness or discovers new expert witnesses less than 30 days prior to trial, statements and reports for such late experts must be furnished under paragraph (f). The Council anticipates that ethical obligations would prevent attorneys from evading discovery by habitually putting off decision as to which experts to call until just prior to trial.

Section 36 C. is based upon Federal Rule 26 (c) and two duplicative ORS sections, 41.618 and 41.631. The rule allows a non-party witness to move for a protective order which was not possible under the ORS sections. Subsection C.(9) does not appear in the federal rule.

RULE 37

PERPETUATION OF TESTIMONY OR EVIDENCE BEFORE ACTION OR PENDING APPEAL

A. Before action.

A.(1) Petition. A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule 43 or Rule 44 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 the

petitioner's 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. The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony, or to seek discovery under Rule 43 or Rule 44 from the persons named in the petition.

A.(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 in the manner provided for service of summons in Rule 7 F., 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 7 F., 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 27 apply.

A.(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 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. 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 43 or Rule 44 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 subsection (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 filed with the court in which the petition is filed or the motion is made.

BACKGROUND NOTE

ORS sections superseded: 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate by specified and the reasons for perpetuation be given, it cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27 (a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (1)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (1)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in Rule 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may

proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

RULE 38

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

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 such person's 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.

C.(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.

C.(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.

BACKGROUND NOTE

ORS sections superseded: 45.161, 45.320, 45.330, 45.350, 45.360, 45.370, 45.910.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December, 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

RULE 39

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 upon 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 7 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 55.

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.

C.(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 or proceeding. 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 such person or the particular class or group to which such person 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.

C.(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 the deposition is taken before the expiration of the period of time specified in Rule 7 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 such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C.(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.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C.(6) Deposition of organization. A party may in the 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 such person 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.

C.(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 38 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 36 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 46 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 41 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.

G.(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 such person heard the witness sworn on the recording and that the transcript is a correct transcription 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.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action or proceeding 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.

G.(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, such person 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. The person producing the materials 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.

G.(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 such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a

deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party 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 such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

BACKGROUND NOTE

ORS sections superseded: 45.030, 45.110, 45.140, 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, 45.240.

COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under Rule 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

RULE 40

DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action or proceeding, any party may take the testimony of any person, including a party, by deposition upon written questions.

in prison may be taken only as provided in Rule 39 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 such person or the particular class or group to which the person 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 39 C.(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 39 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 the officer.

BACKGROUND NOTE

ORS sections superseded: 45.325, 45.340.

COMMENT

The commission procedure for taking a deposition on written questions provided in the existing ORS sections is unnecessarily cumbersome. The language used is based upon Federal Rule 31.

RULE 41

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.

C.(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.

C.(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.

C.(3) Objections to the form of written questions submitted under Rule 40 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 39 and 40 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.

BACKGROUND NOTE

ORS sections superseded: 45.280.

COMMENT

Sections 41 A., B. and D. are based upon Federal Rule 32. Section 41 C. is based upon ORS 45.280. ORS 45.250 to 45.270 are retained as statutes because they were deemed to be rules of evidence.

RULE 42

LIMITED INTERROGATORIES

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

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within

the scope of discovery under Rule 36 B. and subject to Rule 36 C., interrogatories may be used to obtain the following facts:

B.(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

B.(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

B.(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

B.(4) 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 all or part of a judgment which may be entered into the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all preexisting mental, physical and organic conditions bearing upon such claims.

B.(6) The address, registered agents, offices, places

of business, nature of business, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

B.(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

B.(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action or proceeding.

B.(9) The custody, use, location, description, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action or proceeding.

B.(10) The items of an account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection

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

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

E. Limitations.

E.(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

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

BACKGROUND NOTE

ORS sections superseded: 16.470.

COMMENT

No single rule provoked more debate within the Council than this rule. It was finally determined that interrogatories could serve a useful function, but the unlimited federal approach invited abuse in the form of excessive interrogatories. The Council decided to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections 42 B. and E. Section 42 E. combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what constitutes an interrogatory, it was the intent of the Council that in compound questions, each element of the question be considered as constituting a separate interrogatory, e.g., "What is the present home address, business address and telephone number of X?", equals three interrogatories.

The limitations of subject matter in section 42 B. are entirely new. The scope of interrogatories is, of course, subject to the general requirement that the information sought be relevant to the claims or defenses of a party. Subsection B.(10) was included because an interrogatory would replace the request for particulars on an account, presently provided by ORS 16.470.

The interrogatory procedure provided in section 42 A. and

C. is based upon Federal Rule 33. The Council added the specific option in section 42 C. to respond to an interrogatory by producing a report prepared by an expert.

Section 42 D. is designed to avoid shuffling between two separate documents and is based upon the New Jersey procedure.

RULE 43

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 behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 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 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action or proceeding 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 46 A. 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, the party requesting production is not obliged to offer it in evidence.

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

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section 43 B., the federal rule requires a written response to the request to produce, and ORS 41.616 simply requires that the party comply with the request, or object. The language of ORS 41.616 was modified slightly because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30-day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifies an unreasonably early date for production, a protective order is available under Rule 36 C.

Section C. does not appear in the federal rules and is based upon ORS 41.620. Section D. was not included in the ORS sections and was taken from the federal rule.

RULE 44

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 such party's 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 the requesting person or party a copy of a detailed report of the examining physician setting out such physician's 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 inability 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 or proceeding 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 the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability 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.

D.(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 that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

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

BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

RULE 45

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 or proceeding only, of the truth of any matters within the scope of Rule 36 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 or proceeding and upon any other party with or after service of the summons and complaint upon that party.

B. Response. 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 shall serve upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the attorney for the party, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon such defendant. 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 the answer or deny only a part of the matter of which an admission is requested, the responding party 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 it is stated in the answer that the answering party has made reasonable inquiry and that the information known or readily obtainable by the answering party is insufficient to enable such party 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;

such party may, subject to the provisions of Rule 46 C., deny the matter or set forth reasons why he cannot admit or deny it. If a written answer or objection to any request, other than a request for the admission of the genuineness of documents or things, is not served within the time specified above, the party requesting the admission may apply to the court for an order that the matter requested shall be deemed admitted. The order shall be granted unless the party to whom the request is directed establishes that the failure to respond was due to mistake, inadvertence or excusable neglect. Requests for admission as to the genuineness of documents or things are deemed admitted without court order if a written answer or objection is not served within the time specified above. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

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 46 A.(4) 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 such party in maintaining such party's case or his defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending action or proceeding only, and neither constitutes an admission by such party for any other purpose nor may be used against such party in any other action or proceeding.

E. Form of response. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably calculated to enable the answering party to insert the admissions, denials or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials or objections and refer to them in the space provided in the request.

F. Number. A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary

or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined or arranged.

BACKGROUND NOTE

ORS sections superseded: 41.626.

COMMENT

This rule is a combination of ORS 41.626 and Federal Rule 36. The principal variations from the ORS section, which were taken from the federal rule are: elimination of any restrictions on when requests for admissions may be served in Section 46 A. and the additional time to respond for defendants served with requests; the specific language in section 46 A. allowing requests as to "statements or opinions of fact of the application of law to fact"; and, the addition of a requirement in 46 B. that lack of information and belief may only be used as a response where "the answering party has made reasonable inquiry."

The Council also added several provisions that appear neither in the ORS section or the federal rule. Section 46 B. was modified to eliminate the automatic admission arising from failure to respond within the time allowed for admissions other than the genuineness of documents and things. The party serving the admission must apply to the court for an order that the matter requested is deemed admitted. This was done because it was felt the automatic admission created a procedural trap. Parties receiving requests for admissions cannot simply ignore them, however, and then resist a court order, as the rule provides the order establishing the admission shall be given unless mistake, inadvertence or excusable neglect is shown. Requests for admission of the genuineness of documents and things are automatically admitted if not denied; the danger of a serious procedural mistake arising from an admission of this type is slight, and such admissions are routinely used to avoid the necessity of authentication of exhibits at trial. The Council also added sections 46 E. and F. Section 46 E. replaces ORS 41.626(3) and provides that space shall be left for responses in the admissions form, rather than requiring that the request be retyped on a separate response. It was felt this would be consistent with the approach in the interrogatories rule and would minimize total typing time involved. Section 46 F. provides a number limitation on requests for admissions similar to the rule governing interrogatories.

RULE 46

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:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action or proceeding is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district 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 a circuit or district court in the judicial district where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, 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 applying 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 36 C.

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

A.(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.

B.(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 or

district court judge in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 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 44, the court in which the action or proceeding is pending may make such orders in regard to the failure as are just, and among others the following:

B.(2)(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.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(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;

B.(2)(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.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring such party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party 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 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions 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 45 B. or C., 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 inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 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 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (4) to advise a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action or proceeding 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 such party 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 section 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 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see Rule 36 B.(4). For failure of person taking deposition or witness to appear at deposition, see 39 H. For failure to furnish medical reports when requested, see Rule 44 D. For failure to provide access to hospital records, see Rule 44 E.

ORS sections superseded: 41.617, 61.626(5), (6) and (7), 41.631(3), 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under Rule 36 B. of the existence of a coverage question was added to section 46 D.

RULE 47 (RESERVED)

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

BACKGROUND NOTE

ORS sections superseded: 17.033.

COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

A. Issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried. The trial of all issues of fact shall be by jury unless:

C.(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.(2) The court, upon motion of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and trial by consent. In all actions or proceedings not triable by right by a jury, the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.035, 17.040, 17.045, 46.160.

COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.030, 17.035 and 17.040. ORS 17.020, 17.025 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial.

RULE 52

ASSIGNMENT OF CASES

A. Methods. Each circuit and district court shall provide by local rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems appropriate.

B. Continuances. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

BACKGROUND NOTE

ORS sections superseded: 17.050.

COMMENT

This is a new provision.

RULE 53

CONSOLIDATION; SEPARATE TRIALS

A. Joint hearing or trial; consolidation of actions or suits. When more than one action or proceeding involving a common question of law or fact is pending before the court, the court may order a joint hearing or trial of any or all of the matters in issue in such actions or proceedings; the court may order all such actions or proceedings consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, crossclaim, counterclaim or of any separate issue or of any number of claims, crossclaims, counterclaims or issues, always preserving inviolate the right of trial by jury as declared by the Oregon Constitution or as given by statute.

BACKGROUND NOTE

ORS sections superseded: 11.050, 11.060.

COMMENT

This rule is identical to the existing ORS sections except for the elimination of the words, "upon motion of any party", from sections 53 A. and B. to allow a court to consolidate or separate on its own motion and the addition of the last clause of section 53 B. relating to jury trial.

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action or proceeding may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action or proceeding against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action or proceeding shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon such defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order; insufficiency of

evidence. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or proceeding or of any claim against such defendant. After the plaintiff in an action or proceeding tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 62.

B.(2) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own motion, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that each such case will be dismissed by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall dismiss each such case. Nothing contained in this

subsection shall prevent the dismissing at any time, for want of prosecution, of any action or proceeding upon motion of any party thereto.

B.(3) Effect of dismissal. Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action or proceeding in any court commences an action or proceeding based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action or proceeding previously dismissed as it may deem proper and may stay the proceedings in the action or proceeding until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect

therein specified. If the plaintiff accepts the offer, the plaintiff or the attorney for the plaintiff shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such plaintiff; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover costs, but the defendant shall recover of the plaintiff costs and disbursements from the time of the service of the offer.

BACKGROUND NOTE

ORS sections superseded: 17.055, 18.210, 18.220.

COMMENT

This rule governs all dismissals, including dismissals for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections 54 A. and C. are based on the federal rule. They limit the right to take a non-prejudicial dismissal, without leave of court, to the period before a responsive pleading or summary judgment are filed. ORS 18.210 and 18.230 allow this until five days prior to trial, unless a counterclaim has been filed. The last sentence of subsection A.(1) is designed to prevent harassment by repeated filing and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection B.(1) comes from the federal rules and covers both a dismissal for failure to comply with rules or court orders and a dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's

case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a dismissal at the close of the plaintiff's case did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment on the merits under Rule 62. Subsection B.(2) is ORS 18.260. Subsection B.(3) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of dismissals covered by section 54 B. only, and not all dismisssals.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 to 17.085 and 17.990 are left as statutes because they are not true procedural rules.

RULE 55

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 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district 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.

C.(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 the witness at the same time the fees to which the witness 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.

C.(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.

D.(2)(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 such officer 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.

D.(2)(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.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

D.(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 the witness resides or is served with subpoena unless the residence of the witness is within 100 miles of such place, or, if the residence of the witness is not within 100 miles of such place, unless there is paid or tendered to the witness upon service of the subpoena: (a) double attendance fee, if the residence of the witness is not more than 200 miles from the place of examination; or (b) triple attendance fee, if the residence of the witness is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if the residence of the witness is more than 300 miles from such place; and (d) single mileage to and from such place.

E.(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.

F.(1) Proof of service of a notice to take a deposition as provided in Rules 39 C. and 40 A. constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B., but in that event the subpoena will be subject to the provisions of Rule 36 C. and section B. of this rule.

F.(2) A resident of this state may be required to attend an examination only in the county wherein such person resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A non-resident of this state may be required to attend only in the county wherein such person 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.

H.(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.

H.(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 or proceeding 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.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, 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.

H.(2)(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.

H.(3) Affidavit of custodian of records. (a) The records described in subsection (2) of this section 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.

H.(3)(b) If the hospital has none of the records descibed in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(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.

H.(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 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(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.

H.(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.

BACKGROUND NOTE

ORS sections superseded: 41.915, 41.920, 41.925, 41.935, 41.940, 44.110, 44.120, 44.130, 44.140, 44.160, 44.171, 44.180, 44.190, 44.200, 44.210, 44.220, 44.230.

COMMENT

This rule is a combination of existing ORS provisions and Federal Rule 45. The existing ORS provisions contain some archaic language and do not clearly cover deposition subpoenas.

Section 55 A. is based upon ORS 44.110. Section 55 B. comes from the federal rule.

Section 55 C. retains the basic procedure of ORS 44.120, but the language of the ORS section is awkward and was modified, relying upon California Civil Practice Code, Sec. 1986.

Section 55 D. is based on ORS 44.140 and 44.160.

Subsection 55 E.(1) is based upon ORS 44.171 but applies only to trial subpoenas. Subsection E.(2) replaces ORS 44.230. It leaves the question of production of a prison inmate to the discretion of the court. The existing ORS provisions allowed production only if trial was in the county where the inmate was held or when the inmate was a party. ORS 44.240 is left as a statute.

Section 55 F. is based upon Federal Rule 45 (d). It limits the place where a deposition may be taken rather than simply allowing a party to serve a subpoena for a deposition anywhere, with enhanced witness fees if the witness had to travel

a long distance, which is the approach under ORS 44.171. Choice of place of trial is relatively limited but this is not true for depositions. The second paragraph of Federal Rule 45 (d)(1) was intentionally omitted, and a witness who objects to a subpoena must seek a protective order.

Section 55 G. is based upon ORS 44.190 with some modifications because of provisions already incorporated in the discovery rules. ORS 44.180 and 44.200 to 44.210 are eliminated as unnecessary.

Section 55 H. is based upon ORS 41.915 to 91.940. ORS 41.930 is left as a statute because it is a rule of evidence. To the extent ORS 41.945 applies beyond courts, it would remain as a statute. The only change from the existing language is in paragraph H.(2)(c), which allows inspection of the sealed documents by parties or attorneys prior to the trial or deposition.

RULE 56

TRIAL BY JURY DEFINED; NUMBER OF JURORS

A trial jury in the circuit court is a body of persons drawn as provided in Rule 57. The jury shall consist of 12 persons. The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

BACKGROUND NOTE

ORS sections superseded: 17.105.

COMMENT

This is based upon the existing ORS section. The last sentence was added. Note that the six-person jury provision of ORS 46.180 would continue to be applicable in district courts. Under Rule 1, the ORS section is a rule or statute providing a special procedure.

RULE 57

JURORS

A. Jury; how drawn. Trial juries shall be formed as follows: When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall write the names of such persons upon separate ballots, and deposit the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term.

B. Challenges; examination of jurors.

B.(1) Types of challenges. No challenge shall be made or allowed to the panel. A challenge to a particular juror may be either peremptory or for cause.

B.(2) Challenge for cause; grounds.

B.(2)(a) Challenge for cause may be either general, that the juror is disqualified from serving in any action, or particular, that the juror is disqualified from serving in the action or proceeding on trial.

B.(2)(b) General causes of challenges are:

B.(2)(b)(i) A want of any of the qualifications prescribed by law for a juror.

B.(2)(b)(ii) Unsoundness of mind.

B.(2)(b)(iii) Such defect in the faculties of the mind, or organs of the body, as renders the person incapable of performing the duties of a juror in the action or proceeding on trial.

B.(2)(b)(iv) That such person has been summoned and attended said court as a juror at any term of court held within one year prior to the time of such challenge; or that such person has been summoned from the bystanders or body of the county, and has served as a juror in any cause upon such summons within one year prior to the time of such challenge.

An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

B.(2)(c) A particular challenge may be for implied bias, which is such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

B.(2)(c)(i) Consanguinity or affinity within the fourth degree to either party.

B.(2)(c)(ii) Standing in the relation of guardian and ward, attorney and client, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the

adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

B.(2)(c)(iii) Having served as a juror on a previous trial in the same action or proceeding, or in another action or proceeding between the same parties for the same cause of action, upon substantially the same facts or transaction.

B.(2)(c)(iv) Interest on the part of the juror in the event of the action, or the principal question involved therein.

B.(2)(d) A particular challenge may be for actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action or proceeding, or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. A challenge for actual bias may be taken for the causes mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

B.(3) Challenge for cause; procedure.

B.(3)(a) The challenges for cause of either party shall be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

B.(3)(a)(i) For general disqualification.

B.(3)(a)(ii) For implied bias.

B.(3)(a)(iii) For actual bias.

B.(3)(b) The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue and determine the law and the fact.

B.(3)(c) Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge is determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; otherwise, it shall be disallowed.

B.(3)(d) The challenge, the exception and the denial may be made orally.

B.(4) Peremptory challenges. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be

entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges.

B.(5) Order of examining jurors; conduct of peremptory challenges.

B.(5)(a) The full number of jurors having been called shall thereupon be examined as to their qualifications, and having been passed for cause, peremptory challenges shall be conducted as follows: The plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal by a party to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right of peremptory challenge be not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn,

notwithstanding the juror challenged may have been theretofore accepted, but nothing herein shall be construed to increase the number of peremptory challenges allowed.

B.(5)(b) The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

C. Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

D. Alternate jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are

to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

BACKGROUND NOTE

ORS sections superseded: 17.110, 17.115, 17.120, 17.125, 17.130, 17.135, 17.140, 17.145, 17.150, 17.155, 17.160, 17.165, 17.170, 17.175, 17.180, 17.185, 17.190.

COMMENT

This rule is based almost entirely upon existing ORS provisions. The ORS language was reorganized to put the rule in a more logical order. The only notable modifications of ORS language are: Subsection B.(4), which clarifies the language in ORS 17.155 to clearly limit peremptory challenges to three challenges per side when there are multiple plaintiffs or defendants; paragraph B.(5)(b), which was added to make clear that, while the court has the authority to examine, the parties retain the right to conduct their voir dire by reasonable questions; and, section 57 D., which clarifies the language of ORS 17.190 relating to alternate jurors.

Since the ORS sections involved apply to both civil and criminal cases, they would remain as ORS sections for criminal cases.

RULE 58

TRIAL PROCEDURE

A. Order of proceedings on trial by the court. Trial by the court shall proceed in the order prescribed in subsections (1) to (5) of section B. of this rule, unless the court, for special reasons, otherwise directs.

B. Order of proceedings on jury trial. When the jury has been selected and sworn, the trial, unless the court for

good and sufficient reason otherwise directs, shall proceed in the following order:

B.(1) The plaintiff shall concisely state plaintiff's cause of action and the issues to be tried; the defendant then in like manner shall state any defense or counterclaim or both.

B.(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B.(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B.(4) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B.(5) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours; and the court may extend such time beyond two hours.

B.(6) The court then shall charge the jury.

C. Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in

either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his or her duty, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 D., is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

BACKGROUND NOTE

ORS sections superseded: 17.205, 17.210, 17.215, 17.220, 17.225, 17.235, 17.240, 17.245.

COMMENT

This rule is based upon ORS 17.205, 17.210, 17.220 and 17.225. ORS 17.215, 17.235, 17.240 and 17.245 (except the last sentence, which appears in Rule 59) were eliminated as unnecessary. ORS 17.230 and 17.250 were deemed so closely related to evidentiary rules that they were left as statutes.

RULE 59

INSTRUCTIONS TO JURY AND DELIBERATION

A. Proposed instructions. Unless otherwise requested by the trial judge on timely notice to counsel, proposed instructions shall be submitted at the commencement of the trial. Proposed instructions upon questions of law developed by the evidence, which could not be reasonably anticipated, may be submitted at any time before the court has instructed the jury. The number of copies of proposed instructions and their form shall be governed by local court rule.

B. Charging the jury. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive. If in the opinion of the court it is desirable, the charge shall be reduced to writing, and then read to the jury by the court. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations. The clerk shall file the instructions in the court file of the case.

C. Deliberation.

C.(1) Exhibits. Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions.

C.(2) Written statement of issues. Pleadings shall not go to the jury room. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

C.(3) Copies of documents. Copies may be substituted for any parts of public records of private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

C.(4) Notes. Jurors who have taken notes of the testimony or other proceeding on the trial may take such notes into the jury room.

C.(5) Custody of and communications with jury. After hearing the charge, the jury shall retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of such officer's ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. The officer must not suffer any communication to be made to them, nor make any personally, unless by the order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to the officer who shall be then

sworn to conduct himself according to its provisions to the utmost of such officer's ability.

C.(6) Juror's use of private knowledge or information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to fellow jurors, except when called as a witness, nor shall the juror be governed by the same in giving his or her verdict.

D. Further instructions. After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given either orally or in writing in the presence of, or after notice to, the parties or their counsel.

E. Comments upon evidence. The judge shall not instruct with respect to matters of fact, nor comment thereon.

F. Discharge of jury without verdict.

F.(1) The jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court unless:

F.(1)(a) At the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement; or

F.(1)(b) An accident or calamity requires their discharge;

F.(1)(c) A juror becomes ill as provided in Rule 58 D.

F.(2) Where jury is discharged without giving a verdict,

F.(2) Where jury is discharged without giving a verdict, either during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court directs.

G. Return of jury verdict.

G.(1) Declaration of verdict. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, it shall be read.

G.(2) Number of jurors concurring. In civil cases three-fourths of the jury may render a verdict.

G.(3) Polling the jury. When the verdict is given and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

G.(4) Informal or insufficient verdict. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

G.(5) Completion of verdict, form and entry. When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.

H. Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C.(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction, except those contained in instructions given shall import an exception in favor of the party against whom the ruling was made.

BACKGROUND NOTE

ORS sections superseded: 17.245, 17.255, 17.305, 17.310, 17.315, 17.320, 17.325, 17.330, 17.335, 17.340, 17.345, 17.350, 17.355, 17.360, 17.505, 17.510, 17.515, 46.160.

COMMENT

This rule is based upon existing ORS sections. Some archaic language was clarified in most sections. In section A. the provision requiring submission of instructions at commencement of trial was added. Section B. changes ORS 17.255(2) to provide that instructions will be given to the jury in writing entirely at the discretion of the court and to specify that the written instructions shall be read to the jury by the court before being submitted to them. Subsection C.(2) changes 17.320 to make the written statement of the issues at the discretion of the court. Subsection C.(5) changes ORS 17.305 to require that the jury must retire before announcing a verdict. Section 59 E. was added to codify the existing rule. In section G.(2) the rule does not cover application to 6-person juries in district court under ORS 46.180. It has generally been assumed that five jurors must agree on a verdict in order to have three-fourths of a six-person jury render a verdict.

Section 59 H. is based on ORS 17.510.

The language of ORS 17.340, 17.505 and 17.515 was eliminated as unnecessary.

RULE 60

MOTION FOR A DIRECTED VERDICT

Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

BACKGROUND NOTE

ORS sections superseded: 18.230, 18.240, 18.250.

COMMENT

Rule 60 is based upon Federal Rule 50(a). These rules eliminate the device of nonsuit completely. The proper motion to test sufficiency of the evidence in a jury case, at the close of the plaintiff's case, or any other time before submission to the jury, is for directed verdict. The major change from the nonsuit practice is that a directed verdict at the close of the plaintiff's case would be a dismissal with prejudice, whereas the nonsuit was not. For a dismissal in a non-jury case under Rule 54, the judge may direct that dismissal be without prejudice. In a jury case, if a judge feels that a plaintiff should be given a chance to refile when the evidence presented by the plaintiff was insufficient, the trial judge can grant the plaintiff leave to take a dismissal without prejudice under Rule 54 A. instead of directing a verdict. ORS 18.240 was eliminated.

RULE 61

VERDICTS, GENERAL AND SPECIAL

A. General verdict. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant.

B. Special verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires such party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

C. General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more

issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

D. Action for specific personal property. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff, or if they find in favor of the defendant, and that defendant is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer,

which the prevailing party has sustained by reason of the detention or taking and withholding of such property.

E. Assessment of amount of recovery. When a verdict is found for the plaintiff in an action for recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer.

BACKGROUND NOTE

ORS sections superseded: 17.405, 17.410, 17.415, 17.420, 17.425.

COMMENT

Sections 61 B. and 61 C. are based upon Federal Rule 49 (a) and (b). Section 61 D. is based upon ORS 17.410, and Section 61 E. is based upon ORS 17.425.

RULE 62

FINDINGS OF FACT

A. Necessity. Whenever any party appearing in a civil action or proceeding tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein.

B. Proposed findings; objections. Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all parties who have appeared in the case and shall be filed with the clerk; and any party may, within 10 days after such service object to such proposed findings or any part thereof, and request other, different or additional special findings, whether or not such party has previously requested special findings. Any such objections or requests for other, different or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different or additional special findings shall conclusively be deemed denied.

C. Entry of judgment. Upon (1) the determination of any objections to proposed special findings and of any requests for other different or additional special findings, or (2) the expiration of the time for filing such objections and requests if none is filed, or (3) the expiration of the time at which such objections or requests are deemed denied, the court shall enter the appropriate order or judgment. Any such judgment or order filed prior to the expiration of the periods above set forth shall be deemed not entered until the expiration of said periods.

D. Extending or lessening time. Prior to the expiration of the times provided in subsections B. and C. of this rule, the time for serving and filing special findings, or for objecting

to and requesting other, different or additional special findings, may be extended or lessened by the trial court upon the stipulation of the parties or for good cause shown; but in no event shall the time be extended more than 30 days.

E. Necessity. Requests for findings of fact or objections to findings are not necessary for purposes of appellate review.

F. Effect of findings of fact. In an action or proceeding tried without a jury, except as provided in ORS 19.125, the findings of the court upon the facts shall have the same force and effect, and be equally conclusive, as the verdict of a jury.

BCKGROUND NOTE

ORS sections superseded: 17.431, 17.441.

COMMENT

Sections 62 A. through E. are based upon ORS 17.431. The last sentence was added to section 62 A. Section 62 F. is based upon ORS 17.441, changed to refer to trial by the court rather than suit in equity.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

A. Grounds. When a motion for a directed verdict which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

B. Reserving ruling on directed verdict motion. In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request

of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in such party's favor if the verdict is otherwise than as would have been directed.

C. Alternative motion for new trial. A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefor as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

D. Time for motion and ruling. A motion for judgment notwithstanding the vedict shall be filed within ten (10) days after the filing of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D. of this

rule, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.

F. Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 64 not later than 10 days after entry of the judgment notwithstanding the verdict.

BACKGROUND NOTE

ORS section superseded: 18.140 and 46.155

COMMENT

Rule 63 is based upon ORS 18.140. The reference to failure to state a cause of action in a pleading as a ground for judgment NOV was eliminated as unnecessary and inconsistent with the pleading rules. Section 63 F. is based upon Federal Rule 50 (c)(2).

RULE 64

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action or proceeding where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion,

so state and shall be made within 30 days afer the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

BACKGROUND NOTE

ORS sections superseded: ORS 17.435, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630 , 46.155.

COMMENT

This rule is based upon existing ORS sections. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.

OTHER ORS SECTIONS AFFECTED

The Council will also promulgate and recommend changes in other rules and statutes appearing in sections of the Oregon Revised Statutes, to conform definitions, procedures and cross references to these new rules.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES October 3, 1978

FROM: Fred Merrill

RE: October 21, 1978, Meeting

Enclosed are (1) a copy of the revised rules released to the Bar and public, (2) a list of changes from the last draft, and (3) a copy of a notice given to all persons attending the Bar convention, sent to all newspapers and circuit court clerks, and scheduled to appear in the October Bar Bulletin.

The activities of the Council were described at the Trial Practice Section meeting. At this meeting and the convention, most of the comments which I received based on the summary related to:

(1) Interrogatories

(2) Discovery of insurance policies

(3) Inability to take a nonsuit after appearance or summary judgment

The rules will be discussed at the October Civil Practice CLE meetings, and we may get further feedback. The notices state that no final action will be taken until the December meeting which was scheduled by the Chairman. ORS 1.730(b) requires two weeks notice of the "time, place and a description of the substance of the agenda" of "any meeting at which final action will be taken on the promulgation, modification, or repeal of a rule" to be published to all members of the Bar. The notice in the Bar Bulletin will satisfy that, but the October Bulletin may be out less than two weeks before the November meeting.

For the October meeting, I have received some specific questions about the rules:

1. What effect Rule 1 would have on procedure in Small Claims Court. A number of specific procedures are provided for small claims by ORS 46.405 to 46.560, but the question is whether the language of Rule 1 would make procedures not specifically covered, such as, discovery, available in Small Claims Court. Also, should there be some transition period for the summons rule? Will all the sheriffs and process servers be able to change forms and practices that fast?

2. Does Rule 4 E. go beyond constitutional limits? It would subject a person who simply orders non-custom made goods from an Oregon resident to jurisdiction. In Rule 4 F., is the last sentence necessary in view of the limited ability to obtain a deficiency judgment

in Oregon (non-purchase money mortgages and land sale contracts where judicial sale is granted). At least, the reference to trust deeds should be eliminated. The language from the Wisconsin statute is somewhat confusing.

3. In Rule 5, should the words, "or other applicable statute or rule", be added at the end of the second sentence of the introduction?

4. Should Rule 7 be reorganized and clearer headings added? Should issuance be defined in Rule 7 B.? Could Rules 7 C.(4)(a) and (b) be combined and do we want an absolute 30-day period in all cases? Should Rules 7 F.(3)(iii) and F.(3)(d)(iii) be changed to read, "an agent appointed or authorized."

5. Are Rule 9 C. and 9 F. necessary? In Rule 9 D., is proof of service required on subsequent papers to show court or parties when time periods begin to run?

6. In Rule 15 A., could the last two sentences be replaced by the following sentence: "Any other motion or responsive pleading shall be filed within 10 days after service of the pleading moved against or to which the responsive pleading is directed."

7. Would Rule 21 D. be clearer if the language was reorganized as follows: "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 10 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 when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent."

8. In Rule 36 B.(4)(c), does this mean that the party requesting the report shall pay expert witness fees if the report had already been prepared prior to the request? Is this consistent with Rule 44 D.?

9. In Rule 39 G.(1), should the rule say "certify under oath" as opposed to "under penalty of perjury." Can we promulgate a rule creating a perjury penalty? The language comes from the federal rule.

10. In Rule 41 C.(1), the last clause is one reason parties enter the usual stipulation at a deposition preserving all substantive objections until trial. Should we keep the rules in line with practice?

11. Should the time period for a defendant responding to request for production and inspection in Rule 43 B. be 45 days instead of 60 days to conform with other rules.

12. Is Rule 43 C. necessary?

13. Is Rule 52 necessary? Don't all courts do this by local rule?

14. Should the reference to defendant in 54 E. be changed to "party against whom claim is asserted" and plaintiff to "party asserting the claim."

15. In 57 B.(1), do we wish to change the rule to allow a challenge to the panel? How else can a litigant attack impropriety in jury selection? A challenge to an individual jurer based on improper selection has been held to be a challenge of the panel. State v. Ju Nun, 53 Or 1 (1909). But see, Strickler v. Portland Ry., L. and P. Co. 79 Or 526 (1916).

16. Does subsection 58 B.(5) serve any useful purpose? This provision was originally enacted in the 1862 Deady Code, as amended in 1864, as a limitation on trial counsel. It said the time "shall not exceed two hours." In Hurst v. Burnside, 12 Or 520, 526 (1885), the Supreme Court refused to reverse a trial court ruling limiting plaintiff to one and one-half hours. The court said a trial court had inherent power to limit argument and the provision only added a legislative limit; it did not say the trial judge had to allow two hours. In 1905, Ch. 60, however, the reference to "shall not exceed two hours" was changed to "shall not be limited to less than two hours." This changed the statute from a limit on counsel to a limit on the inherent power of the trial judge. In Kelty v. Fisher, 105 Or 696 (1922), the court reversed a judgment because the court had limited plaintiff to 15 minutes and defendant to one-half hour. This is the last Oregon case on the provision but argument on time limits may have some currency as there is a 1965 ALR annotation on the subject. 3 ALR 3rd 1341.

One ambiguity in the statute is application to multiple parties. Strangely, the Hurst opinion quotes section 194 of the Deady Code as reading: "Not more than two counsel on a side shall be allowed to address the jury....and the whole time occupied on either side shall not exceed two hours." The underlined language did not appear in the 1862 law or in the Deady Code, or the Deady and Lane Code, which the court would have been using in 1885. This could be added to clarify the statute but seems a rather severe limit.

17. Should counsel have a right to written instructions under Rule 5 B.? What is an "informal" verdict in Rule 59 G.(4)? Is Rule 59 H. as clear as it could be? Should the last sentence also say, "including a failure to submit a requested statement or issues." Does subsection 59 C.(5) mean that the jury can't go home at night?

18. In Rule 61, could the last two sentences of the first paragraph of the comment be incorporated in the rule? Do sections 61 D. and E. serve any useful purpose. They are taken from ORS. ORS 17.410 was part of the 1853 code in almost exactly the same language. The rule is basically a required special verdict because a judgment in a replevin action must provide, where plaintiff or defendant is entitled to the property, for return of the property or if this is not possible, payment of value. ORS 18.110. There are a number of old cases strictly applying the section and also dealing with whether the assessment of value should be for each item or in the aggregate (at the court's discretion) and whether the jury must find who owns the property (apparently required when right to recover based on ownership). The latest case, Mazama Timber Products v. Taylor, 239 Or 569 (1965), still says the jury must find specially on right to possession. Abolishing the section might leave a party in the position that the special verdicts necessary to support the replevin remedy would be at the discretion of the trial judge. The language used might be clarified as follows:

> "In an action for the recovery of specific personal property, in addition to any general verdict or other special verdict, the court shall require the jury to return a special verdict in the form of a special written finding on the issue of the right to possession of any parties alleging a right to possession and the value of the property, if any party who alleges a right to possession is not in possession at the time of trial."

Section 61 E. is based on ORS 17.425. The language was adopted in 1862 and is virtually unchanged. The provision does not deal with adequacy of damages or general vs. special damages, but merely requires that a general verdict for a party claiming money be accompanied by some assessment of damages. It is clear that a general verdict that simply says we find for the plaintiff and says nothing concerning damages is not sufficient. Goyne vs. Tracy, 94 Or 216 (1919). When a verdict finds for the plaintiff and assesses "0" or "none" for damages, it is not clear whether this provision applies. In McLean v. Sanders, 139 Or 144 (1932), and Klein v. Miller, 159 Or 27 (1938), the Oregon Supreme Court said such a verdict was insufficient and a new trial should be granted if the trial judge did not resubmit the case to the jury. In Fischer v. Howard, 201 Or 426 (1954), the court held that, if defendant was present, he must object immediately to such verdict or waive the objection. The court also suggests strongly that a more sensible rule would be to say that an assessment of no damages is an assessment of the amount of recovery. See 17 OLR 348. Such a verdict logically means the jury thought the defendant was negligent but plaintiff suffered no damage.

For our rules, two changes might be considered. The words, "A specific indication by a jury that no recovery shall be had complies with

this rule," might be added at the end. Secondly, the rule does not conflict with 61 B., giving the trial judge power to make findings on special verdicts not submitted because the damage assessment is part of the general verdict, not a special interrogatory. To make this clearer, why not make this a subsection of 61 A.?

19. Rules 63 D. and 64 F. are taken from ORS 17.615. The language could be interpreted to mean the motion must be filed "within" the 10-day period after judgment only and a motion filed before judgment is not proper. Actually, the Supreme Court interpreted "within" to mean "not later than" 10 days after judgment. Highway Commission v. Fisch-Or, 241 Or 412 (1965). Should the rules reflect this interpretation. The same case also notes that the motion time limit refers to "filing" of the judgment but the decision limit refers to "entry" of the judgment. The court has said that the effective date of orders and judgments is the filing date; that is the date of delivery to the clerk of court. Any other rule would make the effective date dependent upon the whim of the clerk. Charco, Inc. v. Cohn, 242 Or 566 (1966). Should both time limits refer to filing?

20. In Rule 64 B., subsections B.(5) and (6) have been modified by constitutional amendment. The amendment was the result of a 1910 initiative and is Article VII, Section 3. It says, "No fact tried by a jury shall otherwise be re-examined by any court of this state unless the court can affirmatively say there is no evidence to support the verdict." After a number of inconsistent opinions, the court held that this amendment eliminated the common law power of a judge to reduce damages in a verdict solely on the grounds they are excessive and grant a new trial on the grounds the verdict was against the weight of the evidence. Van Lom v. Schneiderman, 187 Or 89 (1949); Bean v. Hostetler, 182 Or 518 (1948). The two provisions may still have some vestigial function. Subsection (5) might still authorize reduction of damages if they are so excessive they indicate passion and prejudice; see Van Lom v. Schneiderman, supra, P. 105, and Brand dissenting and concurring. Subsection (6) refers to a verdict "against law" and also can mean insufficient evidence such that a directed verdict or NOV could be granted, i.e., no "substantial evidence." See, Van Lom v. Schneiderman, supra, P. 97.

The issue for the Council is whether the sections are misleading and should be modified or eliminated. The danger is that change might be interpreted to further restrict new trials. The predecessor of 64 B., ORS 17.610, has been held not to be exclusive and the court can grant a new trial for any reversible error either with or without motion, Pullen v. Eugene, 77 Or 320 (1915). The comments could also reflect the Council intention.

21. The language used to refer to procedures that may be initiated by the court is not consistent. Rules 9 C., 22 E., 32 M.(1)(a) and 64 G. refer to the court's "own motion". Rules 9 C., 21 D., 49 E., 30, and 51 D. refer to the court's "own initiative". Since the court does not actually make a motion, could we use "own initiative" in all cases?

The report of the Oregon State Bar Practice and Procedure Committee had some recommendations that should be considered by the Council (P. 80-85, OSB Committee and Section Reports). They include: pleading and proving attorney fees which the Council has decided to defer to the next legislature; a long arm provision for filiation proceedings which we have covered in Rule 4; and, a referral of the question of third party procedure in contribution claims to the Council. The last may be substantive rather than procedural.

M E M O R A N D U M

TO: Process Committee

FROM: Fred Merrill

RE: ORS SECTIONS COVERING APPOINTMENT OF PUBLIC OFFICIALS FOR IN STATE SERVICE OF PROCESS

DATE: September 27, 1978

At the Bend meeting the Council referred suggested modifications to ORS sections appointing public officials as agents for service of process (hereinafter referred to as public agents statutes) to this committee for consideration and recommendations. The purpose of this memo is to suggest several alternatives available to the committee. At the meeting members raised two questions relating to these statutes.

QUESTION NO. 1

Do the statutes make service of process available in any situation where there would be no basis for personal jurisdiction under the proposed Rules of Civil Procedure or in any manner not covered by the Rules?

A summary of the public agent statutes is attached. As indicated in the original memo to the Council, these statutes both define conditions under which a defendant is subject to jurisdiction by defining circumstances when an agent must be appointed or is deemed appointed, and specify a service method.

In terms of defining jurisdiction, the summary shows that there are four different types of public agent statutes.

(1) The first group relates to a resident or a domestic corporation or to a foreign corporation engaged in substantial activity in the state. These defendants would be covered by traditionally accepted territorial theories of jurisdiction incorporated in Rule 4 A. Included in this group are the provisions related to domestic corporations and other business entities and foreign corporations doing business in the state: ORS 57.075, 57.700, 61.086, 61.471, 61.700, 62.155, and 731.434.

(2) A second group are based upon some type of contact with the state and are equivalent to the long arm statute. In these statutes the defendant is deemed to have appointed a public official as an agent for service of process for suits arising out of some named activity in the state. These fall under the minimum contacts theory and would be covered by our Rules 4 B. through L. Included in this group are ORS 57.822, foreign corporations, etc., holding or foreclosing mortgages or trust

deeds in this state; 59.155, sales of securities or violations of the Oregon Securities Law; 91.578 and 92.375, subdivision activity in this state; 509.910, foreign corporations violating certain environmental laws in this state; 650.070 and 650.075, franchise activities in this state; 673.695, activities as a tax preparer in this state; 699.250, real estate activity in this state; 722.102, activities as director of savings and loan; 731.324, insurance activities within this state; 746.320, insurance activities in the state in suit brought by resident insured; and 761.495, operating or owning motor vehicle involved in accident in this state.

(3) The third group of statutes require the filing of an actual written consent by the defendant. There are two sub groups involved:

(a) Where the consent is to service for activities undertaken within the state. This includes ORS 57.700(c), 61.700 and 69.520, relating to withdrawal of foreign corporations and limited partnerships; 91.578 and 91.611, condominium owners and developers relating to property or activities; and, 486.521, insurance companies seeking to satisfy Financial Responsibility Law.

(b) Where the consent is to any action filed within the state. This includes ORS 57.485 (also, by adoption, 61.086 and 62.455), foreign corporations merging with domestic corporation, and 744.055, nonresident insurance agents.

The first sub group would be covered by our rules. For the second, although Rule 4 A.(5) refers to specific consent as a basis for jurisdiction, without these statutes there would be no specific consent.

(4) The last group includes situations where a defendant is deemed to have consented to general service of process for any suit filed in the state by virtue of some activity undertaken in the state, usually seeking a license or privilege. This group includes ORS 345.060, applying for license to act as agent for vocational school; 648.060, appearing as party in interest in application for assumed business name; 697.640, applying for debt consolidation license; 703.120, applying for license as polygraph examiner, and 731.370, reciprocal insurer applying for certificate of authority.

This group clearly goes beyond our rules. The simple act of seeking a license would not be substantial activity subjecting one to general service of process under Rule 4 A.(4), and the action need not arise out of any activity in the state.

The service of process provisions in these public agent statutes clearly go beyond our rules. They all contemplate service in the state on the public official with, in most cases, mailing to the defendant at some specified address. Under Rule 7, if a defendant could not be found within the state, the plaintiff would be required to effectuate personal or substituted service outside the state. The only mail service contemplated by the rule is for corporations where officers and agents cannot be found in the county of filing, in which case process may be mailed to such officers and agents. These public agents statutes contemplate mailing, not to the officers and agents, but to some specified address of the corporation. Also, most of the public agents statutes apply not only to corporations but to individuals as well.

QUESTION NO. 2

The second question raised was the constitutionality of these statutes. The statutes falling in groups (1), (2) and (3)(a) above are probably constitutional. There is very limited case authority, either interpreting them or commenting on their constitutionality. The validity of ORS 57.075 was upheld in Winslow Lumber Co. v. Edward Hines Lumber Co., 125 Or 63 (1928). One of the first minimum contacts analyses of the Oregon Supreme Court concerned the transacting business concept of 57.075. Enco, Inc. v. F. C. Russell Co., 210 Or 324 (1957). In any case, the traditional basis of jurisdiction and the minimum contacts involved generally would meet constitutional standards, although 746.320 could be interpreted in a way that might make it somewhat thin in terms of minimum contacts.

Groups (3) and (4), however, are more troublesome. They purport to subject the defendant, in an action not necessarily arising out of activities in the state, to the jurisdiction of the courts of this state based upon a minimal amount of activity. The approach is one of requiring a defendant to generally subject himself to jurisdiction in this state as a condition of engaging in some activity or applying for a privilege. The jurisdictional basis is either an express consent to jurisdiction or implying consent from the activity or application. These types of statutes were extensively used prior to the minimum contacts theory and a confusing body of law developed. The early Supreme Court cases held that actual specific consent given in response to a statutory requirement was a valid basis for jurisdiction, at least for a corporation. Implied consent arising from activities in the state was only clearly held valid for corporations when the action arose out of activity in the state. See Simon v. Southern Railway, 236 U.S. 115 (1915). Then, in 1919 the court said that implied consent could

not apply to individuals because the state lacked authority to exclude them from activities in the state because of the privileges and immunities clause. Flexner v. Farson, 248 U.S. 289 (1919). However, in 1927 the Supreme Court upheld a nonresident motor vehicle act applied to an individual in Hess v. Pawloski, 274 U.S. 352 (1927). There have been no further Supreme Court cases on implied or actual consent statutes. The minimum contacts analysis of International Shoe v. Washington, 326 U.S. 310 (1945), clearly would not support general jurisdiction for claims not related to activities in a state based on an implied consent theory, unless the activities in the state were very substantial.

This is reinforced by Shaffer v. Heitner, 97 S. Ct. 2569 (1977), which emphasizes that a minimum contacts analysis is the building principal for all types of jurisdiction.

The statutes in group (3)(b), with specific consent, probably are constitutional, but the validity of those statutes in group (4) is very questionable. For example, saying that a person or entity who engages in the one act in Oregon of seeking to receive a vocational school license, become a debt consultant or become a polygraph operator, is completely and forever subject to the jurisdiction of Oregon courts for any action that may be brought, however unrelated to Oregon, is not consistent with modern jurisdictional theory.

ALTERNATIVES

There are four alternative approaches that could be adopted for these public agent statutes:

1. We could simply eliminate the statutes entirely, leaving Rules 4 and 7 as they are. This would be the simplest, but some basis of jurisdiction and flexibility of service of process might be lost. In any case, the statutes apply to notices and demands going beyond civil procedure into substantive law and administrative law and must be retained for those purposes.

2. Incorporate the bases of jurisdiction into Rule 4 and the service method into Rule 7. The modification of Rule 4 to incorporate the statutes is almost impossible. The bases for jurisdiction are so complicated that they don't fit the structure of Rule 4. A more useful approach might be to include those particular public agent statutes that are most closely related to the long arm character of Rule 4 into that rule and leave the rest. To some extent, this has been done by incorporating the securities dealers provision, and the previous memo to the Council suggested incorporation of two of the insurance provisions and the franchise provision.

The service provisions all refer to different addresses and in some cases, different forms of mail, but the essence of these provisions could be retained by eliminating Rules F.(3)(a)(iii) and F.(3)(d)(iii) and adding a new F.(3)(g) as follows:

> "In any case, by serving summons in a manner specified in this rule or by any other rule or statute upon defendant or an agent appointed or authorized by law to accept service of summons. When jurisdiction over the defendant is based upon ORS 57.075, 57.485 (here, list all of the retained statutes), service may be made by mailing a copy of the summons and complaint to the defendant by certified or registered mail to:
>
> (a) The last registered office of the defendant, if any, filed with any state official where filing of a registered office is required by law, or any office which defendant has designated for service of summons, or the principal office of the defendant if such office can be determined; and
>
> (b) Such address, the use of which the person initiating the action or proceeding knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice."

3. Leave the special basis of jurisdiction and service methods in the separate ORS sections but modify the sections to eliminate appointment of state officers as agents for service on state officials. This was the approach followed in the material furnished to the Council before the last meeting.

4. Leave the statutes as they are. This would be possible because of the accommodating provisions in Rules 1 and 4 relating to other specific statutes. As a long-range solution, this would not be desirable because it does not eliminate service of process on state officials and preserves some statutes which are probably unconstitutional. For the present, however, given the short period of time left to prepare the material for the Legislature and the probable need to get some input from the Bar on these proposed changes, it may be better to put off this problem until the next biennium.

ORS SECTION	BASIS	SERVICE
57.075	Domestic corporation (a) No registered agent (b) Cannot find registered agent (c) Dissolved and action commenced in five years; see ORS 57.630. ORS 61.086 makes provision apply to non-profit corporations. ORS 62.155 makes provision apply to cooperatives.	Serve Corporation Commissioner. Mail by certified or registered mail to (A) last registered office, and (B) address most likely to result in actual notice.
57.483	Surviving foreign corporation in merger of foreign and domestic corporation which files actual consent to service of process because wishes to transact business. ORS 61.471 makes section apply to non-profit corporations.	?
7[illegible]00	Foreign corporation which is (A) authorized to transact business in state and does not have a registered agent or agent cannot be found, (B) transacting without being authorized, (C) has been authorized and withdrawn and consented to service; ORS 57.721 requires consent to service to claims arising out of activities in state; (D) transacted w/o authorization and ceased to transact. ORS 61.700 makes this applicable to non-profit corporations.	Upon Corporation Commissioner. Registered or certified mail to (A) principal office or place of business, and (B) address most likely to give notice.
57.822	Foreign business entities not authorized to transact business which holds or purchases notes secured by mortgages or trust deeds or forecloses and holds property up to five years and in order to so do consented to service of process; except National Banking Ass'n.	Upon Corporation Commissioner by registered mail to principal place of business.

ORS SECTION	BASIS	SERVICE
59.155	Applicant for registration as security dealer, person who offers or sells security in state, or person who violates Oregon Security Law for civil proceeding under Oregon Security Law.	Upon Corporation Commissioner. Certified mail to address shown on Commissioner's records, and address most likely to give notice.
69.500	Limited partnership where (a) no registered agent appointed or (b) cannot find registered agent. Under ORS 69.450 a foreign limited partnership that does not appoint registered agent subject to this provision (presumably if transacting business but statute does not say).	Upon Corporation Commissioner by certified or registered mail at last address of registered agent and last known address or general partners served as shown in Corporation Commissioner's records.
69.520	Foreign limited partnership withdrawing from transacting business and filing consent to service for actions based on activities in state.	Upon Corporation Commissioner; mailing to address given in application for withdrawal.
91.578	Condominium unit owners who signed declaration appointing agent for service in action relating to the common elements or more than one unit.	Upon recording officer in county where declaration filed; by certified or registered mail upon person designated in declaration to receive process.
91.611	Nonresident condominium developer who files irrevocable consent to service for actions for violation of 91.500 to 91.671 and 91.990.	Upon Real Estate Commissioner; by registered mail to address set forth in consent.
92.375	Nonresident subdivider filing notice of intent to sell or lease subdivided lands and nonresident developer who acquires more than 10 lots or parcels in a subdivision in a 6-month period; when irrevocable consent to service filed.	Upon Real Estate Commissioner; by registered mail to address given in consent.

ORS SECTION	BASIS	SERVICE
345.060	Non-domiciled applicant for license to act as agent for vocational school.	Upon Superintendent of Public Instruction. By certified mail to the applicant's last known address Publication or out of state service also required.
486.521	Insurance or surety company which furnishes power of attorney authorizing Motor Vehicles Division to accept service of process in actions arising out of vehicle accident involving its principal or assured, in order to have certificate of insurance accepted as part of future responsibility.	?
509.910	Foreign corporation which does not have statutory agent in suit for injunction to restrain certain violations of environmental laws.	Upon Corporation Commissioner as in other cases provided by law.
648.061	Person not domiciled within this state or foreign corporation not authorized to do business in the state who appear as parties of interest in an application for registration of asssumed business name.	Upon Corporation Commissioner; certified mail to principal office.
650.070 650.075	Every person who sells or offers to sell a franchise in state or has engaged in conduct that is subject to proceeding under 650.020.	If personal service cannot be used, upon Corporation Commissioner; by certified mail at (A) address that appears in Commissioner's records and (B) address most likely to give notice.
673.695	Nonresident who accepts license as tax preparer or tax consultant for any action arising out of any business done in state.	Upon the Director of Commerce; by registered mail at most recent address furnished to the State Board of Tax Examiners or his last known address.

ORS SECTION	BASIS	SERVICE
696.250	Nonresident real estate licensee licensed in this state by reciprocal agreement in any action arising out of business done in this state as a real estate licencee.	If cannot be found in state upon Real Estate Commissioner; by registered mail to most recent address furnished to Commissioner or last known address.
697.640	Applicant for debt consolidation agency licence filing written consent appointing Real Estate Commissioner agent for service of process.	?
703.120	Nonresident applicant for license as polygraph examiner who files consent to executive director of the Board on Police Standards and Training to act as agent. (Note: this statute must have been written by one of the polygraph examiners; as written, section (2) authorizes service on any nonresident polygraph examiner for anything).	Upon executive director of Board on Police Standards and Training or by registered or certified mail to most current address on records of executive director.
722.102	Nonresident director of domestic savings and loan association for proceedings in connection with election or service as director.	Incorporates (3) to (5) of ORS 57.075.
731.324	An authorized insurer who "transacts insurance" as defined in 731.146, where action arises out of transacting insurance.	Upon Secretary of State; by certified mail to last known principal place of business.
731.370	Reciprocal insurer applying for certificate of authority.	Same as 731.434.
731.434	Insurers under same circumstances generally as corporations in Ch. 57.	Same as Ch. 57, except upon Insurance Commissioner

ORS SECTION	BASIS	SERVICE
744.055	Nonresident seeking licensing as insurance agent in state who filed written consent to service of process on Corporation Commissioner.	?
746.320	Unauthorized alien insurer who (A) issues or delivers policies of insurance to persons residing or authorized to do business in state; (B) solicits applications from such persons; (C) collects premiums or fees from such persons; (D) engages in any other transaction or business with such persons; and action by or on behalf of insured or beneficiary and arising out of policy with resident or authorized to do business. Certain insurers excluded by 746.360.	Upon Insurance Commissioner; by registered mail to principal office.
.495	Nonresident motor carrier in actions caused by or relating to operation of motor vehicles of or by such carrier within state.	Upon Public Utility Commissioner; by letter directed to residence or place of business as shown by records of Commissioner.

DRAFT

Rule 7

October 16, 1978

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to section D.(3) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in size equal to at least 8-point type which may be suhstantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on maker of contract for attorney's fees. A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable

attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized

to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff shall cause to be mailed a certified copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which substituted service was made.

D.(2)(c) Office service. If the person to be served maintains an office accessible to the public for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office with the person who is apparently in charge.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified

mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or if defendant cannot be personally found, at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of such minor's estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified subparagraph (i) of this paragraph upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem

appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships, unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action or proceeding is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to a registered agent, officer, director, general partner or managing agent.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D. Service by publication or mailing to a post office address.

D.(5)(a) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the

the court may order service by publication, or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only.

D.(5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(3) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at

defendant's last known address. If plaintiff does now know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action or proceeding was brought against such defendants by name.

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may

be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(5)(g) Completion of service. Service shall be complete at the date of the last publication.

E. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Personal service or mailing. Personal service of mailing shall be proved by:

F.(2)(a)(i) The affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(iii) An Affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

F.(2)(b) Publication. Service by publication shall be proved proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published.

Subscribed and sworn to before me this ____ day of _____, 19 ___.

_____
Notary Public of Oregon
My commission expires
_____ day of _____, 19 ___.

F.(2)(c) Making and certifying affidavit. The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F.(3) Written admission. In any case proof may be made by written admission of the defendant.

F.(4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or affidavit or certificate of service of summons and shall disregard any error in the content or

service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

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276-3331

October 19, 1978

Mr. Donald W. McEwen
Chairman
Counsel on Court Procedures
1408 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

Re: Proposed Rule 36B(4)(a)

Dear Don:

Many of the lawyers in this area are concerned about the above proposed Rule which would require a party to deliver a written statement identifying expert witnesses and stating subject matter of his expected testimony. The proposed Rule further provides that with certain exceptions, the report and statement must be delivered not less than 30 days prior to trial.

I realize that a similar practice is followed in the Federal Courts. I would oppose such a rule in the State Courts. One problem area in Eastern Oregon is that we have numerous crop cases usually involving crop damage, comparative yields, farming practices and farm machinery. Ordinarily local farmers testify in these cases as experts and it is not uncommon to have several farm experts of this type involved in the trial. Sometimes we don't know who they are or what they are going to say until our farm clients get them in our office a few days before trial. I realize this might fall within the exception but I think the Rule is unnecessary in the State Courts, makes more work for the attorneys and more expense for our clients.

Sincerely yours,

George H. Corey

GHC:mf
cc: Mr. Fred Merrill
Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403