MEMORANDUM

TO: Members - Council on Court Procedures February 27, 1978

FROM: Fred Merrill

RE: PLEADING RULES

The attached rules are a revision of Chapter 16 into a logical sequence form. Rules A, C, I, K, L(4)-(7), M and N are almost entirely based on existing statutes. Most other rules have some parallel in the existing Oregon statutes. The modifications are based on federal rules and other jurisdictions. The organization is derived from that used in other jurisdictions. The comparative jurisdictions were Alabama, Florida, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. Rules N through Q are not strictly pleading rules but were included because they are referred to in the pleading rules. Letters were used rather than numbers because these rules would be preceded by general rules relating to scope of application, form of action, process, time computation, etc. When a final draft of Council rules is developed, the letters will be converted to numbers.

Rule F has already been adopted by the Council. Rule L(3) has been considered and action deferred. Rule D(4) is the notice of appearance procedure requested by the Council.

The general approach in this revision was:

(a) To retain the present level of specificity in Oregon pleading, that is, fact pleading. This was primarily accomplished by retaining a requirement of pleading ultimate facts in Rule G, retaining the motion to strike and motion to make more definite and certain in Rules J(4) and (5), and retaining the requirement for separate statement of claims and defenses in Rule E(2).

(b) To reduce waste of time at the pleading stage by eliminating useless pleading rules and discouraging frivolous motion practice. The primary rules in this area are: B, limiting the number of pleadings; E(3), relating to consistency; J, relating to defenses and motions, and L, relating to amended pleadings. Although these rules eliminate the label of the demurrer, the same function is performed by the motion to dismiss under J(1). Translating the grounds of demurrer into grounds for a motion to dismiss made drafting much simpler and allowed one rule relating to consolidation and waiver, J(6) and (7). A demurrer to an answer is replaced by a motion to strike under J(5).

A section-by-section commentary showing the source of each rule will be furnished at the meeting.

FRM:gh

OREGON RULES OF CIVIL PROCEDURE

A. PLEADINGS LIBERALLY CONSTRUED - DISREGARD OF ERROR

Liberal construction.

A1. ✓All pleadings shall be liberally construed with a view of substantial justice between the parties. Based on ORS 16.120.

A2.

> ~~16.680~~ **Disregard of error or defect not affecting substantial right.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

(Existing ORS 16.660)

B. KINDS OF PLEADINGS ALLOWED - FORMER PLEADINGS ABOLISHED

pleadings allowed.

B1. ✓There shall be a complaint and an answer. An answer may include a counterclaim and a crossclaim. A defendant's pleading against any other person not already a party under Rule K is a third party complaint. There shall be a reply to a counterclaim denominated as such and the court may order a reply to any matter constituting a defense in an answer. There shall be an answer to a crossclaim and to a third party complaint. Based on CPLR 3011 and Federal Rule 7.

pleadings Abolished.

B2. ✓Bills of revivor and bills of review, of whatsoever nature, exceptions for insufficiency, impertinence or irrelevancy, and cross-bills, demurrers and pleas shall not be used. Based on ORS 16.460(1)

C. ORDERS AND MOTIONS

orders

C1. ✓Every direction of a court or charge made and entered in writing in an action of special proceeding, and not included in a judgment, is denominated an order.

motions, [illegible] pleadings and more exact

C2. ✓An application for an order is a motion. Every motion, unless made during trial, shall be made in writing, shall state with particularity

the grounds therefor, and shall set forth the relief or order sought. Based on ORS 16.710 and Federal Rule 11.

C3. 16.720 Where and to whom motions made. Motions shall be made to the court or judge as provided by statute. They shall be made within the circuit where the action or suit is triable, except when made to a judge of the court before whom the action is pending, and without notice, in which case an order may be made by such judge in any part of the state.

Existing ORS 16.720

C4. ~~16.730~~ Notice of motion. When a notice of a motion is necessary, it shall be served 10 days before the time appointed for the hearing; but the court or judge thereof may prescribe, by order indorsed upon the notice, a shorter time. Notice of a motion is not necessary except when required by statute, or when directed by the court or judge in pursuance thereof.

Existing ORS 16.730

C5. 16.740 Renewal of motions previously denied. If a motion made to a judge of the court in which the action, suit or proceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent motion for the same order shall be made to any other judge. A violation of this section is punishable as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by the court or judge thereof in which the action, suit or proceeding is pending.

Existing ORS 16.740

D. TIME FOR FILING PLEADINGS OR MOTIONS - APPEARANCES

D1. A motion or answer to the complaint or third party complaint shall be filed with the clerk by the time required by law to appear and

answer. A motion or answer to a crossclaim shall be filed within 20 days after the service of an answer containing such crossclaim. A motion to or reply to ~~a crossclaim~~ an answer shall in like manner be filed within 20 days after the service of the answer or, if a reply is ordered by the court, within 10 days after service of the order, unless the order otherwise directs. Based on ORS 16.040 and Federal Rule 12(a).

D2. pleading after motion
If the court denies a motion or postpones its disposition until trial on the merits, any responsive pleading required shall be filed within 10 days after notice of the court's action. (Based on FR 12(a))

D3.

16.050 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 statutes, or by an order enlarge such time.

Existing 16.050

D4.

What constitutes appearance—entitling defendant to be heard; notice to defendant not appearing; serving notice of motions upon defendant. A defendant appears in an action or suit when he answers, ~~demurs~~ or files a motion therein, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him unless he is imprisoned for want of bail, or unless directed by the court or judge thereof in pursuance of the procedural statutes. When the defendant has appeared, notice of all motions, except motions for orders setting times for appearances or hearings, shall be served upon the defendant unless the court determines that immediate action without notice is in the furtherance of justice.

Existing 16.040 ~~Repealed~~

E. PLEADINGS - FORM

E1. Captions, names and addresses.
Every pleading shall contain a caption setting forth the name of the court, the title of the action, the register number of the

cause and a designation as in Rule B1. In the ~~caption~~ complaint the title of the action 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. (Based on Federal Rule 10(a).)

concise and direct statement; paragraphs; separate statement of causes of defense; consistency.

E2. 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. Reference to ~~or~~ OR incorporation of paragraphs may subsequently be by number. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency ~~or~~ and whether based on legal or equitable grounds. Facts constituting causes of action or defenses may be stated alternatively and hypothetically.

(Based on Federal Rule 10(b) and CPLR 3014.)

E3.

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

(~~Based on~~ Federal Rule 10(c).)

F. SUBSCRIPTION OF PLEADINGS

F1.

~~Section 1.~~ ORS 16.070 is amended to read:

~~16.070~~ (1) Every pleading shall be subscribed by the party [~~if he~~ is a resident of the state,] or by a resident attorney of the state, [~~and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true.~~ The ~~verification~~ must be made by the affidavit of the party, or] except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties [~~, if such party is within the county and capable of making the affidavit; otherwise, the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense is founded on a~~

F2. Any pleading not duly [~~verified and~~] subscribed may, on motion of the adverse party, be stricken out of the case.

(ORS 16.120 as Amended by Council)

G. COMPLAINT, COUNTERCLAIM, CROSSCLAIM AND THIRD PARTY CLAIM

A pleading which asserts a right to relief, whether a complaint, counterclaim, crossclaim or third party claim, shall contain:

(1) A plain and concise statement of the facts constituting a cause of action without unnecessary repetition;

(2) A demand of the relief which the plaintiff 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.

(Based on ORS 16.210.)

H. RESPONSIVE PLEADINGS

H1. Defenses; Form of Denials. A party shall state in short and plain terms ~~his~~ defenses to each claim asserted and shall admit or deny the ~~averments~~ allegations upon which the adverse party relies. If ~~he~~ is without knowledge or information sufficient to form a belief as to the truth of an ~~averment~~ allegation, ~~he~~ shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the ~~averments~~ allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an ~~averment~~ allegation, ~~he~~ shall specify 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 ~~averments~~ allegations of the preceding pleading, ~~he may make his~~ denials as specific denials of designated ~~averments~~ allegations or paragraphs, or ~~he~~ may generally deny all the ~~averments~~ except such designated ~~averments~~ allegations or paragraphs ~~as he expressly admits~~; but, when ~~he~~ does so intend to controvert all its ~~averments~~ allegations, including ~~averments~~ allegations of the grounds upon which the court's jurisdiction depends, ~~he~~ may do so by general denial subject to the obligations set forth in Rule ~~11.~~ F.

(Based on Federal Rule 8(b).)

H2. 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.

Based on Federal Rule 8(c).

H3. Effect of Failure to Deny. ~~Averments~~ 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. ~~Averments~~ Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Based on Federal Rule 8(d).

I. SPECIAL PLEADING RULES

I1. Pleading Account. A party may set forth in a pleading the items of an account alleged therein or file a copy thereof with the pleading filed by ~~himself~~ the party or by the party's agent or attorney. If the party does neither, the party shall deliver to the adverse party within 5 days after demand a copy of such signed account. Any other party may move for an order under Rule ____ (discovery sanctions rule) with respect to any failure to furnish an account when demanded or when the account filed is incomplete or defective.

Based on ORS 16.470.

I2.

> **Performance of condition precedent, how pleaded; proof.** In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. If such allegation is controverted, the party pleading is bound to establish on the trial the facts showing such performance.

Existing ORS 16.480

I3.

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.

Existing ORS 16.490.

I4.

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.

Existing ORS 16.500

I5.

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

(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.

Existing ORS 16.510.

I6.

Libel or slander action, pleadings in. (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.

(2) ~~The defendant may in his answer~~, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, ~~he~~ may give in evidence the mitigating circumstances.

Existing ORS 16.530.

I7.

~~Same~~ Property distrained, answer in action for. In an action to recover the possession of property, distrained doing damage, an answer that the ~~defendant or person~~ by whose command ~~he acted~~ was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

Existing ORS 16.540

I8.

~~(1)~~ Capacity. It is not necessary to ~~aver~~ allege the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, ~~he~~ shall do so by specific negative ~~averment~~ allegation, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(Based on Federal Rule 9(a).)

I9. Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

Based on Federal Rule 9(d).

I10. Recitals and Negative pregnants. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be held insufficient to raise an issue on the grounds that it contains a negative pregnant.

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

J1. ~~(b)~~ How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a ~~claim~~ complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

~~(1)~~ (A) lack of jurisdiction over the subject matter,

~~(2)~~ (B) lack of jurisdiction over the person,

(C) ~~(3) improper venue,~~ that plaintiff has not the legal capacity to sue,

(D) ~~(4)~~ insufficiency of ~~process~~, that there is another action pending between the same parties for the same cause,

(E) ~~(5) insufficiency of service of process~~, insufficiency of process or insufficiency of service of process,

(F) ~~(6) failure to state a claim upon which relief can be granted~~, The complaint does not contain facts sufficient to ~~state~~ constitute a cause of action,

(G) ~~(7) failure to~~ join a party under Rule 19, that the action has not been commenced within the time limited by statute.

(H) failure to join a party under Rule 0.

A motion making any of these defenses shall be made before pleading; if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense ~~numbered (6)~~ to dismiss for failure of the pleading to ~~state a claim upon which relief can be granted~~, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule ~~56~~, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule ~~56~~.

(Based on Federal Rule 12(b), combined with ORS 16.260.

J2. ~~(c)~~ Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule ~~56~~, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule ~~56~~.

(Based on Federal Rule 12(c).)

J3. Preliminary Hearings. The defenses specifically enumerated ~~(1) - (7)~~ (A) through (H) in subdivision 1 of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision ~~(c)~~ 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.

(Based on Federal Rule 12(d).)

J4. Motion to Make More Definite and Certain. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent, upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 20 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment.

Based on ORS 16.110.

J5. Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken ~~from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.~~

(A) any sham, frivolous and irrelevant pleading or defense;

(B) any insufficient defense or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

Based on ORS 16.100 and Federal Rule 12 (f).

J6. ~~(c)~~ 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 him~~. If a party makes a motion under this rule but omits therefrom any defense or objection then available ~~to him~~ which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision ~~(h)~~ (b) hereof on any of the grounds there stated.

Based on Federal Rule 12 (g).

J7.

(A) A defense of lack of jurisdiction over the person, ~~improper venue~~, insufficiency of process, or insufficiency of service of process is waived ~~(1)~~ (2) if omitted from a motion in the circumstances described in subdivision ~~(g)~~ (6), or ~~(h)~~ (7) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule ~~15(a)~~ 15(a), 15(c) to be made as a matter of course.

~~improper venue~~ → (3) (4)

capacity to sue, that there is another action pending between the same parties for the same cause,

(B)

~~A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19,~~ and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule ~~7(a)~~ B(2), or by motion for judgment on the pleadings, or at the trial on the merits.

A defense of failure to state a cause of action, a defense that the action has not commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule 0, ...

Based on Federal Rule 12(h).

K. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

K1.

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

(Existing ORS 16.305)

K2.

Cross-claim against codefendant; rights of third-party plaintiffs and defendants. (1) In any ~~action or suit~~ 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 or suit 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 or suit brought by plaintiff.

(Existing 16.315 (1))

K3.

~~The~~ 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.

(Existing 16.315 (2))

K4.

~~The~~ An answer containing a cross-claim shall be served upon the parties who have appeared, who may answer or demur to it within 10 days after the date of service of the answer containing the cross-claim.

(Existing 16.315(3))

K5.

(a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in ORS 16.290 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this section. 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 ORS 16.290 and his counterclaims and cross-claims as provided in this section. 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 him for all or part of the claim made in the action against the third-party defendant.

(b) When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

such leave shall not be given if it would substantially prejudice the rights of existing parties

(EXISTING ORS 16.315(4))
K5 modified slightly

K6. Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules ~~19~~ N and ~~20~~ O. The parties so joined may respond to the claim by reply, answer or motion.

(Based on Federal Rule 13(h).)

K7. Separate trial

Upon motion of any party, the court may order a separate trial of any counterclaim, cross-claim or third-party claim so alleged if to do so would:

(a) Be more convenient;

(b) Avoid prejudice; or

(c) Be more economical and expedite the

(Existing ORS 16.315(5).)

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L 1. A pleading may be amended by a party

Amendments. ~~A party may amend his pleading~~ 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 and the action has not been placed upon the trial calendar, ~~he~~ may so amend it at any time within 20 days after it is served. Otherwise a party may amend ~~his~~ pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. 2

to party

the

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

(Based on Federal Rule 15(a) and ORS 16.430)

L2.

Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

~~Based on~~ Federal Rule 15(b).

L3.

Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

the party.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Based on Federal Rule 15(c).

L4. (A) AMENDMENT OR PLEADING OVER AFTER MOTION. When a motion to dismiss or a motion to strike an entire pleading under Rule J is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If the motion is disallowed, and it appears to have been made in good faith, the court shall allow the party filing the motion to file a responsive pleading if any is required.

Based on ORS 16.380 and 16.400(1).

L5 (B) Amended Pleading where part of Pleading Stricken

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

Existing ORS 16.400(2).

L5.

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

Existing ORS 16.410.

L6. Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit ~~him~~ 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.

~~Based on~~ (Federal Rule 15(d).)

M. JOINDER OF CAUSES OF ACTION

M1. ~~Joinder of causes of action.~~ Permissive joinder. ~~(1)~~ A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as ~~he~~ the plaintiff has against an opposing party.

M2. ~~(2)~~ 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.

Forcible entry and detainer and action for rent.

M3. ~~(3)~~ The claims united must be separately stated and must not require different places of trial.

separate statement.

~~Based on~~ (existing ORS 16.221 (1), (2) and (3).)

N.

N.1 13.161 **Permissive joinder as plaintiffs or defendants.** (1) All persons may join in one action ~~or suit~~ 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.

N.2 (2) All persons may be joined in one action or suit 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.

(3) 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.

Separate Trials

N.3 (4) The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(existing ORS 13.161)

01.

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. (If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.)

02.

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

03.

Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

04.

Exception of Class Actions. This rule is subject to the provisions of Rule 57. (Class action rule).

(Based on ORS 19)

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

(Existing ORS 13.190)

Misjoinder and Non-Joinder of Parties

P.

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

(C Federal Rule 21)

Q Real Party in Interest

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

(Based on FR 17(a))

OREGON RULES OF CIVIL PROCEDURE

A. PLEADINGS LIBERALLY CONSTRUED - DISREGARD OF ERROR

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

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

B. KINDS OF PLEADINGS ALLOWED - FORMER PLEADINGS ABOLISHED

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

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

C. MOTIONS

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

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

C(2) Where and to whom motions made. Motions shall be made to the court or

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judge as provided by statute or rule. They shall be made within the circuit where the action or suit is triable, except when made to a judge of the court before whom the action is pending, and without notice, in which case an order may be made by such judge in any part of the state.

C(3) Notice of motion. When a notice of a motion is necessary, it shall be served 10 days before the time appointed for the hearing, but the court or judge thereof may prescribe, by order indorsed upon the notice, a shorter time. Notice of a motion is not necessary except when required by statute or rule, or when directed by the court or judge in pursuance thereof.

C(4) Renewal of motions previously denied. If a motion made to a judge of the court in which the action or proceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent motion for the same order shall be made to any other judge. A violation of this section is punishable as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by the court or judge thereof in which the action or proceeding is pending.

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

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

party, if any is allowed, to an answer shall be filed within 10 days after the service of the answer or, if a reply is ordered by the court, within 10 days after service of the order, unless the order otherwise directs.

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

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

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

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

D(4) Notice of appearance. A party served with summons under Rule _____ shall have an additional 10 days beyond the time required by law to move or answer or reply, if within the time required by law to move, answer or reply, such party files a notice of appearance. Such notice of appearance shall be signed by an attorney and must state that the attorney has been retained to represent the party and has not had sufficient time to adequately prepare a motion, answer or reply.

E. PLEADINGS - FORM

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

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

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

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

F. SUBSCRIPTION OF PLEADINGS

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

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

G. COMPLAINT, COUNTERCLAIM, CROSSCLAIM AND THIRD PARTY CLAIM

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

(1) A plain and concise statement of the ultimate facts constituting a claim without unnecessary repetition;

(2) A demand of the relief which the plaintiff 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.

H. RESPONSIVE PLEADINGS

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

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

as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

H(3) 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 or avoided.

I. SPECIAL PLEADING RULES

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

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

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

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

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

I(5) Libel or slander action. (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.

(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 he prove the justification or not, the defendant may give in evidence the mitigating circumstances.

I(6) Property distrained, answer in action for. In an action to recover the possession of property, distrained doing damage, an answer that the defendant or person by whose command the defendant acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

I(7) Capacity. It is not necessary to allege the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the pleader shall do so by specific negative allegation, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, or by motion under Rule J(1), and on such issue the party relying upon such capacity, authority or legal existence shall establish the same at trial.

I(8) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

I(9) Recitals and negative pregnants. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be held insufficient to raise an issue on the grounds that it contains a negative pregnant.

I(10) Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

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

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

responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense denominated (F), to dismiss for failure of the pleading to contain ultimate facts sufficient to constitute a claim, or to assert the defense denominated (G), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

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

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

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

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

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

defense or objection so omitted, except a motion as provided in subdivision 7 (b) of this rule on any of the grounds there stated.

J(7)(a) A defense of lack of jurisdiction over the person that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this rule, or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule L (1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) of this rule shall not be raised by amendment.

(b) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule O, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule B(2) or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule L(2) in light of any evidence that may have been received.

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

K. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

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

K(2) Cross-claim against codefendant; rights of third-party plaintiffs and defendants. (1) In any action where two or more parties are joined as defendants, any defendant may in his answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be:

(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.

K(3) 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.

K(4) An answer containing a cross-claim shall be served upon the parties who have appeared and who are joined under subdivision (6) of this rule.

K(5)(a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint,

hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in ORS 16.290 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this section. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule J and his counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

K(6) Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules N and O. The parties so joined may respond to the claim by reply, answer or motion.

K(7) Separate trial. Upon motion of any party, the court may order a separate trial of any counterclaim, cross-claim or third-party claim so alleged

if to do so would:

(a) Be more convenient;

(b) Avoid prejudice; or

(c) Be more economical and expedite the matter.

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L(1) Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, 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 prcoess thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

L(2) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court

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

L(3) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (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 him.

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

L(5) Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike, and such ruling shall be

subject to review on appeal from final judgment in the cause.

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

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

M. JOINDER OF CAUSES OF ACTION

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

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

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

N. JOINDER OF PARTIES

N(1) Permissive joinder as plaintiffs or defendants. All persons may join in one action as plaintiffs if they assert any right to relief jointly,

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

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

O. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

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

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

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

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

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

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

P. MISJOINDER AND NONJOINDER OF PARTIES

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

Q. REAL PARTY IN INTEREST

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

COMMENTARY

OREGON RULES OF CIVIL PROCEDURE

PLEADING

RULE A

(1) Based on ORS 16.120.

(2) Existing ORS 16.660.

RULE B

(1) This section was inserted to clearly indicate the intent to retain fact pleading. It was taken from the Indiana statutes.

(2) This section is Federal Rule 7(a). For the most part it describes existing Oregon practice replacing separate coverage of plaintiff's and defendant's pleadings. It also clearly describes the pleadings to be used in cross claims and third party practice.

The most significant change is the elimination of the automatic reply to new matter in an answer. The rule only requires an answer where there is a counterclaim denominated as such. In any other situation it must be read in conjunction with Rule H(3) which says that allegations in a pleading to which no responsive pleading is required are taken as avoided or denied. Usually the reply is a routine denial and the rule eliminates an unnecessary pleading step. For those situations where a reply would in fact contribute to clarifying the issues, the court is given the authority to order a reply. This pleading simplification not only follows the federal rule approach but a number of other states which retain code pleading, e.g. California.

(3) For absolute clarity a third section should be added here which states, "Pleadings abolished. Demurrers and pleas shall not be used." ORS 16.460 contains language abolishing a number of common law pleadings but no such statement seems necessary.

Eliminating the plea in abatement is so recent that a specific statement on pleas is desirable. The present statutes list the demurrer as a pleading. The device of demurrer is replaced by the motion to dismiss under Rule J which performs the same function.

RULE C

(1)(a) This is an expansion of the last sentence of ORS 16.710 by adding a requirement of a writing and a specific statement of grounds and relief sought.

(b) This comes from Federal Rule 7 and makes clear that the captions and form for motions are the same as pleadings. It makes the provisions of Rule F applicable to motions, including the provision that the party or attorney signing the motion certifies that it is not interposed for delay.

(2) This is identical to ORS 16.720. It may not be necessary as the first part states the obvious and the exception is confusing.

(3) This is identical to ORS 16.730. It was included because at this point it is not clear whether there are any other statutes requiring notice of motion. (We will check this on the computer).

(4) This is identical to ORS 16.740. Arguably, it does not correctly describe existing practice. Read literally it prohibits the trial judge from striking a section of a pleading at the commencement of trial if a motion to strike was previously denied.

RULE D

This rule attempts to bring all the references to time to respond to pleadings together in one rule.

(1) The time for response to an original pleading is presently specified

by Chapter 15 provisions relating to summons. This rule continues that scheme but clearly refers to the summons rule; it also makes clear that this applies to any original process served with a summons, whether it is a complaint, third party complaint or an answer served to bring in a party to respond to a crossclaim or counterclaim. (The summons provisions in ORS 15.210 and 200 would be modified to cover the last situation).

With two exceptions, the rest of the section retains the 10-day requirement of ORS 16.040 for subsequent pleadings. Under the summons statutes, a party might be served with a complaint giving up to six weeks to file an answer; the rule makes clear that the answer to the crossclaim is not required until an answer to the original complaint is required. If a plaintiff is required to reply to a counterclaim ordered by the court, the time begins to run, not upon filing the answer, but upon service of the order.

(2)(a) This is a new provision. Existing ORS 16.380 and 400 give the court discretion to allow a party to plead over after a motion or demurrer are denied. Absent bad faith, Rule L(4) gives the party losing a motion a right to plead over. This section provides the time.

(b) If a motion is allowed, Rule L(4) gives the court discretion to allow repleading. If a repleading is ordered, the order may specify a time limit. If it does not, this section provides 10 days.

(c) Under this subsection, if a pleading is amended for any reason and a responsive pleading is required, 10 days are allowed for such responsive pleading.

(3) Existing ORS 16.050.

(4) This is the notice of appearance rule requested by the Council. It is a new draft. The Washington and California notice of appearance rules are very vague as to form and further pleading and appear to be rarely used. The notice of appearance here operates as an automatic time extension. It must be filed by an attorney retained by a party, which prevents the party from securing the extension and then still waiting until the last day to contact an attorney. The required affirmative statement, coupled with the Rule F certification of truthfulness, should limit abuse. Since under Rule J the concept of special appearance is abolished, there is no need to specify the nature of the appearance.

RULE E

(1) This combines ORS 16.060 and 16.210(2)(a). The language comes from Federal Rule 10(a) but reference to "register number" from 16.060 is used rather than "file number".

(2) Most of this rule states existing Oregon practice. The language comes from Federal Rule 10(b) and New York CPLR 3014. The most significant aspect is the last sentence which retains the requirement of separate statements of claims and defenses. This is not consistent with the federal rules and most states; the federal rule only requires separate counts when claims are founded on separate transactions or occurrences. The requirement of separate statement is more consistent with fact pleading.

(3) In existing practice, one theoretically cannot plead inconsistent statements of fact within one count or between counts or present inconsistent causes of action. The court, however, has held that if an apparent inconsistency is in the application of law to facts or in interpretation, inconsistent

statements are permitted. Thus, in Pruett v. Lininger, 224 Or. 614 (1960), a defendant was allowed to allege that a worker was employed by two different people in the same pleading. Therefore, the only alternative or inconsistent pleading not allowed is where the statements are simple expositive fact clearly within the knowledge of the pleader. This limit would be retained because the obligations of Rule F regarding truthful pleading apply, e.g. a party could not file a pleading alleging that he had mailed a letter on two different dates if he clearly knew the correct date because one of the statements would be untruthful. Requiring any more consistency at the pleading stage is unrealistic and does not appear to be required under present Oregon law; this rule will eliminate useless motions to elect and make more definite and certain and simplify pleading. The language used was taken from Michigan Rule 112.9(2).

(4) This is Federal Rule 10(c). There are some old Oregon cases discussing the necessity of specific incorporation of exhibits, but this rule seems more sensible.

RULE F

This is the new subscription rule adopted by the Council.

RULE G

This is the crucial rule retaining fact pleading. It follows a federal rule format of stating the requirements for any type of pleading asserting a claim (Chapter 16 deals only with complaints).

(1) Differs from the federal rules in requiring the pleading of ultimate facts rather than merely a statement of a claim. The language is based upon existing ORS 16.210 but substitutes the word, claim, for cause of action and says "ultimate" facts. Most of the recently enacted Oregon statutes in the

pleading and joinder area and the balance of these rules use the word, claim, rather than cause of action: retaining cause of action here would be confusing and is unnecessary. It is the reference to pleading ultimate facts that will retain the present level of specificity in pleading.

Of the jurisdictions with modern pleading rules, only three do not utilize to the federal description of pleading (Texas, Michigan and Florida). Texas and Michigan retain the use of cause of action. The language of this rule is adapted from Florida Rule 1.110 (b) (2), "A short and plain statement of the ultimate facts showing that the pleader is entitled to relief". The Oregon courts have developed the required level of pleading specificity through a series of cases distinguishing ultimate facts from evidentiary facts and conclusions of law, and this rule would retain the existing court-defined level of specifity.

Sebsection (2) is based on existing ORS 16.210 (c). The last sentence was added. The word, plaintiff, will be changed to party to conform to the broader scope of the rule.

RULE H

This rule governs all responsive pleadings. The language is that of Federal Rule 8 (b) through (d), slightly modified to fit Oregon practice. Except as pointed out below, it is consistent with existing Oregon practice.

(1) The only substantial change here would be the last clause of the last sentence which authorizes a general denial only when a pleader truly intends to controvert all allegations in an opponent's pleading. Since few cases would arise when a pleader would truly be able to deny absolutely all

allegations in a pleading, the general denial would be rarely used. (Note there is a typographical error in the draft -- it should read obligations in Rule F instead of Rule J). Existing Oregon practice sanctions use of the general denial, but this is inconsistent with the fact pleading objective of sharpening issues through pleading.

(2) This does not change any existing burden of pleading in Oregon but spells out some common situations of affirmative defenses. ORS 16.290 simply requires affirmative statement of new matter without any specific illustrations. The list of items is not exclusive; for any potential defense not listed, the pleader must decide if this is "any other matter constituting an avoidance or affirmative defense". The defenses listed under the federal rule were modified by addition of "comparative negligence" and "unconstitutionality" which are the subject of existing Oregon cases. There also are Oregon cases on estoppel, failure of consideration, release, res judicata and statute of limitations. Assumption of risk, contributory negligence and fellow servant have generally been replaced in Oregon, but could arise in an occasional case and were not deleted.

(3) Except for the situation where no reply is required, this is the existing rule.

RULE I

Most of these special pleading rules are taken directly from the Oregon statutes; with the exceptions of Sections (6) and (9), similar provisions exist in most other states.

(1) This is Utah Rule 9(c). It is identical to ORS 16.480 except that

the defendant must specify which condition precedent has not been performed. The Oregon statute allows the defendant to generally deny performance of condition precedent. Under the Oregon rule you could then have a general allegation of performance and a general denial, and the pleadings do not reflect a specific issue. This rule seems more consistent with our pleading theory. (Note the word, "aver", should be changed to "allege" in the first sentence).

(2) This is existing ORS 16.490.

(3) This is existing ORS 16.500.

(4) This is existing ORS 16.510

(5) This is existing ORS 16.530.

(6) This is existing ORS 16.540. This rule may not be necessary as the situation described is not one of common occurrence.

(7) This rule is not covered in existing Oregon statutes. Lack of capacity can be asserted in a demurrer, if it appears in the complaint and formerly would be raised by a plea in abatement if it did not (now by affirmative defense). Under Rule J, lack of capacity is grounds for a motion to dismiss if it appears on the face of a complaint or an affirmative defense. The only change may be the necessity to allege; there are some Oregon cases suggesting a plaintiff must plead some types of capacity, particularly corporate. A capacity defect is not common and requiring allegation by the moving party seems wasteful. There is a special rule for cities under I(4).

The last clause of the last sentence does not appear in the federal rule but does in a number of state rules, e.g. Wisconsin and Utah, and is consistent with Rule I(1) and the Oregon law.

(8) This section is Federal Rule 9(d); it does not appear in the existing Oregon statutes. It seems like a sensible rule.

(9) This does not appear in the Oregon statutes but was put in specifically to eliminate a couple of archaic pleading rules from old Oregon cases. There is no logical reason for a distinction between recitals and allegations and few people can even define a negative pregnant much less decide what difference it makes.

(10) This is the equivalent of ORS 13.020. It is placed here because most other states include it as a special pleading rule. It more properly refers to pleading than parties. The language comes from Rule 9(h) of the Alabama Code. The language used in ORS 13.020 is confusing and suggests a possible use of the California John Doe pleading.

RULE J

This rule contains all rules relating to attacks on pleadings and motion practice. It is generally based upon Federal Rule 12(b) through (h), but substantially modified to fit Oregon practice and the retention of fact pleading. It is a critical component of an attempt to eliminate costs and delay in pleading. The rule provides specific rules for order in making motions before pleading, requires that all attacks on an opponent's pleading be made at one time and provides for waiver of defenses.

(1) This section groups together all attacks based on the substance of an opponent's pleading. It replaces the demurrer and other motions. All of the grounds of the demurrer are retained as grounds for the motion to dismiss, except misjoinder of parties, which will result in an order adding parties under Rule P, and misjoinder of causes of action which no longer

exists because of the legislative adoption of ORS 16.221. Grounds (A), (B) and (E) are from the federal rule but would come under the Oregon demurrer statute. Grounds (B) and (C) come from the Oregon demurrer statute. Ground F appears both in Federal Rule 12 and the demurrer statute, but the language used is conformed to Rule G. Ground (H) is not covered in the Oregon statutes. The federal rules include venue as a basis for a motion to dismiss; this was eliminated. The choice of motion or defense is up to the pleader, and a motion is not required even if the defect appears on the face of the opponent's complaint.

The elimination of the label, demurrer, was based on several grounds. The single rule approach to motions and defenses and standard rules of preclusion and waiver for pleading attacks are desirable. The demurrer also has acquired some very archaic pleading rules by court interpretation, such as interpreting the pleading against the pleader in the face of a demurrer.

One important side effect of this rule is the elimination of the concept of special appearance. Defects of personal jurisdiction and process are treated the same as any other dilatory defense. Under J(4) these defenses are given special treatment that requires them to be asserted in the first pleading or motion, but the theory of a special appearance is gone. The special-general appearance distinction was required by early jurisdictional concepts but not by present theories of personal jurisdiction and remains only as a procedural trap.

The requirement of specific statement of grounds for defenses comes from the Florida rules.

(2) This section essentially retains the same judgment on the pleadings motion covered in 16.130. The language from Federal Rule 12 (c) is clearer.

(3) This rule gives the court flexibility in handling defenses to avoid a full trial. It is Federal Rule 12 (d).

(4) This rule is identical to the existing motion to make more definite and certain in ORS 16.110. If fact pleading is to be retained, this motion must be retained as it is the primary means of requiring specificity. The federal rules have a motion for more definite statement, 12(e), but it can only be used where a responsive pleading is required and then only when the pleading is so vague that no responsive pleading can be formed. The last sentence is new.

(5) This rule also retains the existing Oregon motion. The language, "sham, frivolous and irrelevant", is not very precise but most other jurisdictions use "redundant, immaterial, impertinent or scandalous", which is not much better. In any case, the Oregon language has been clarified by court interpretation to fit fact pleading. The only change was the addition of "any insufficient defense" to subsection (B) which makes clear that this motion replaces the demurrer to a defense.

(6) This subsection requires consolidation of all attacks to be made against an opponent's pleading into one motion, if any motions are made. It should eliminate one of the primary defects of fact pleading motion practice which is excessive delay from repetitive or consecutive motions against the same pleadings. The rule does not require

defenses to be made by motion or limit the number of defenses or objections that may be raised in the one motion that is allowed. It also does not prohibit attacks by motion against new defects in an amended pleading because it applies only to defenses or motions "then available to a party". Thus, if a motion to make more definite and certain were sustained and the amended pleading became subject to a motion to dismiss for failure to state a claim, this motion could be made; if a motion to strike or make more definite and certain were sustained and the new language still did not meet the fact pleading requirements, another motion could be made. What the rule does prevent is a motion as to form going to part of a pleading followed by other form motions, followed by a demurrer, followed by another demurrer, etc.

(7) This rule governs waiver of defenses. The previous rules cover preclusion or loss of a procedural device. This rule deals with waiver or loss of the underlying defect or objection. There are three categories:

(a) Dilatory defenses which are waived if not made in any motion filed, or if no motion is filed if not raised by a responsive pleading or an amendment allowed as a matter of course. The defects of jurisdiction over the person and relating to process, however, cannot be raised by amendment. This preserves some of the special appearance treatment for these defects and forces the person having such an objection to raise it in the initial pleading or motion. This treatment of jurisdiction is not in the federal rules, but comes from Rule 12(h) of the Tennessee rules of procedure.

(b) Failure to state a claim, statute of limitations, failure to join an indispensable party, and failure to state a defense are treated differently. These are not waived and may be asserted at trial (in other words, may arise as

an issue at trial and be considered either by consent or by amendment by leave under Rule L2) or by a motion for judgment on the pleadings.

(c) Jurisdiction over the subject matter is never waived and is treated separately.

RULE K

This rule is a combination of existing ORS 16.305 and 16.315. There are two changes:

The words, "Such leave shall not be given if it would substantially prejudice the rights of existing parties", were added to the first paragraph of (5)(a). This is intended to encourage trial judges to protect existing parties against late impleader or impleader that would have an adverse effect on existing parties.

The second change is the addition of section (6) which is based on Federal Rule 13(h) and allows a party asserting a crossclaim or counterclaim to join additional parties to respond. This is a fairly limited joinder provision but useful. Oregon statutes already authorize such joinder in the common situation where an action is brought by an assignee under a contract, and the maker of the contract can be joined to respond to the counterclaim. ORS 13.180. A party joined is served with an answer and summons. Rule B specifies the response. Special provisions are required in the summons rule.

Federal Rule 13 has provisions relating to compulsory counterclaims which are not in the existing Oregon statutes and which were not included in this rule. While the compulsory counterclaim rule may have utility in concentrating disputes between parties in one case; this is outweighed by the danger of loss of rights through a procedural error.

RULE L

(1) This is based on Federal Rule 15(a) and would replace ORS 16.370 and 16.390. It differs in two respects from existing law. The time to amend of right extends to the actual filing of a responsive pleading rather than the time period for filing such pleading and the rule specifically encourages the trial judge to give leave "freely....when justice so requires". The last sentence of the rule is existing ORS 16.430.

(2) This is Federal Rule 15(b) and would replace the existing Oregon statutes covering the area, ORS 16.610-16.650. It eliminates the necessity of a distinction between a material and immaterial variance and simply provides that if a variance objection is made at trial, the court can allow an amendment and grant a continuance if necessary and that such amendment should be given when presentation of the merits will be subserved thereby. The rule does not, however, eliminate the concept of variance and the trial judge has discretion to sustain a variance objection and refuse a continuance in the proper circumstances.

The rule also clearly indicates that if no variance objection is made and the parties proceed to try the case on issues not in the pleadings, no objection can then be raised based upon the pleadings; if requested, an amendment to conform to the proof must be given and in any case, the pleadings are deemed to be amended to conform to the proof.

(3) This is Federal Rule 15(c) previously considered by the Council.

(4) This is based upon ORS 16.380 and 400(1). If a motion to strike an entire pleading or to dismiss is allowed, the court retains discretion to allow or not allow an amended pleading. The authority to allow an amended

pleading after a successful motion for judgment on the pleadings was added to give the trial judge discretion where such motion is actually a late blooming motion to dismiss for failure to state a claim. If the motion is denied, the existing statute relating to demurrers gave the trial judge discretion to not allow further pleading. This rule automatically allows pleading over after an unsuccessful motion, absent bad faith.

(5) This is ORS 16.400(2) and covers a motion to strike a part of a pleading.

(6) This is existing ORS 16.410.

(7) The language is taken from Federal Rule 15(d). It does not change the existing rule under ORS 16.360 but the language is clearer.

RULE M

This is existing ORS 16.221. (The title should be JOINDER OF CLAIMS).

RULE N

This is existing ORS 13.161.

RULE O

This is Federal Rule 19. This is one of the best drafted federal rules and seems to be a clear and reasonable elaboration of ORS 13.110. The last section, (5), is ORS 13.190 covering a specific situation.

RULE P

This is Federal Rule 21 and replaces all other remedies for party joinder problems with the simple device of dropping or adding parties.

RULE Q

This is Federal Rule 17(a) and has the same effect as ORS 13.030, using clearer language. It also provides a procedure for dealing with real party in interest objections.

ORS SECTIONS -- EQUIVALENT RULES

Chapter 16

16.010--None
16.020--None
16.030--B(2)
16.040--D(1)
16.050--D(3)
16.060--E(1)
16.070--F
16.080--None
16.090--E(2)
16.100--J(5)
16.110--J(4)
16.120--A
16.130--J(2)
16.140--None
16.150--J(1)
16.210--G
16.221--M
16.240--D(2)
16.250--J(5)
16.260--J(1)
16.270--J(1)
16.280--J(1)
16.290--H(1) and (2)
16.305--K(1)
16.315--K(2), K(5) and K(7)
16.320--None
16.325--K(6) and B(2)
16.330--J(6) and (7)
16.340--J(7)(b)
16.360--L(7)
16.370--L(1)
16.380--L(4)
16.390--L(1)
16.400--L(4) and (5)
16.410--L(6)
16.420--D(2)(c)
16.430--L(1)
16.460(1)--B(3)
16.460(2) and (3)--None
16.470--None (will be included in discovery if no interrogatories)
16.480--I(1)
16.490--I(2)
16.500--I(3)
16.510--I(4)
16.530--I(5)
16.540--I(6)
16.610--L(2)
16.620--H(3)
16.630-L(2)
16.640--L(2)
16.650--None
16.660--A(2)
16.710--C(1)
16.720--C(2)
16.730--C(3)
16.740--C(4)

Chapter 13

13.020--I(10)
13.030--Q
13.110--O
13.161--N
13.170--O
13.180--K(6)
13.190--O(5)

DISCOVERY OF EXPERTS: RULE 26(b)(4) AND THE BODYFELT PROPOSAL

I. THE PROBLEM

As requested by the Council, this memorandum will comment on the Dick Bodyfelt proposal for mandatory exchange of expert reports. To do so, it is necessary to make an extensive review of the problem area being addressed by that proposal. The proposal was first discussed by the Council as a question of procedure for exchange of expert reports, somewhat equivalent to the existing provisions following a physical examination of an opponent.

The discovery problem involved, however, is a complex and delicate one of the proper limits on the scope of discovery from an opponent's expert. The federal rule relating to the discovery of experts, Rule 26(b)(4), is part of the general rule defining the scope of federal discovery and modifies the broad scope of discovery under Rule 26(b)(1)(ORS 41.635).

This memo will first discuss the nature of the problem and then analyze the Bodyfelt proposal, Rule 26(b)(4), and other possible approaches to the problem.

A. The Nature of the Problem

The problem presented is best illustrated by the federal experience with discovery of experts which led to the adoption of Rule 26(b)(4). Rule 26(b)(4) was not included in the original federal rules but was added by the 1970 amendments which substantially revised the discovery rules. The primary reason for the adoption of the new rule was the existing confusion in the federal system as to the limits of discovery from expert witnesses. There are three

basic objections which could be made when an attempt is made to discover information held by an opponent's expert:

(a) That the information is protected by the attorney-client privilege. This could be argued either on the basis that the expert was a conduit of information from client to attorney or the expert was functioning as an assistant counsel.

(b) That the knowledge of the expert is the result of the work product of the attorney and thus privileged under the qualified privilege of Hickman vs. Taylor, 229 U.S. 495 (1947).

(c) That discovery of an opponent's expert is "unfair" either because (1) the expert or the employer of the expert has a property interest in the results of the expert's work, which should not be taken by an opponent through discovery, or (2) one party should not be able to delay preparation of their case and then take advantage of the other party's diligence in securing expert assistance.[1]

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1. For a discussion of these theories as applied in various cases, see Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stanford L.Rev. 455 (1962); Long, Discovery and Experts Under the Federal Rules, 39 Wash. L.Rev. 655 (1962). Both authors strongly indicate that attorney-client privilege and work product are not appropriate doctrines to control expert discovery, that unfairness is the underlying question, and that cases applying attorney-client privilege and work product are stretching those doctrines to reach a desired result.

The application of these doctrines, however, varies enormously depending upon the nature of the expert, the sources of the expert's information, the relationship between the expert and the attorney, and whether the expert is a prospective trial witness. Also, general attitudes toward the proper breadth of discovery from experts differ greatly.[2] The result was a series of federal cases reaching inconsistent results as to the permissible scope of discovery from experts.[3] The high (or low) point of confusion was reached in one case where two federal courts reached completely inconsistent results as to permissible discovery from the same experts in the same case.[4]

B. The Oregon Cases

Thus far, Oregon has no cases dealing directly with the scope of discovery from experts. There are, however, two Oregon cases dealing with the ability to call an opponent's expert at the trial. Although discovery of an expert and calling an expert as a witness do present slightly different problems, the arguments against access to the facts and opinions held by an opponent's expert are basically the same in both cases.

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2. One illustration of this is the discovery proposals submitted by the Advisory Committee. In 1946 they would have changed the federal rules to bar any discovery of expert witnesses. The original 1967 draft of Rule 26(b)(4) would have allowed unlimited discovery of trial experts relating to the subject of their direct testimony at trial and restricted the discovery of other experts. See Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure; Part One, An Analytical Study, 1976 Univ. of Ill. Law Forum, 895, 921-922 (1976).

3. The cases are cited in 8 Wright and Miller, Federal Practice and Procedure, § 2029, 245-249.

4. Cold Metal Processing Company v. Aluminum Company of America, described in 8 Wright and Miller, supra, pp. 240-241.

In the first case, Brink v. Multnomah County, 224 Or. 507, 356 P.2d 536 (1960), the county retained an appraiser to examine property in anticipation of condemnation litigation. The county did not call the appraiser at trial, but the landowner did. The county objected to testimony by the appraiser. The basis for the objection was not clear, but the trial court refused to let the landowner secure the appraiser's testimony as to the value of the property. The Supreme Court sustained the trial court's decision principally because the landowner failed to make a proper offer of proof. The court, however, also stated that the testimony should be excluded because it was a communication from the client to the attorney and covered by the attorney-client privilege. The court said that a communication "by any form of agency" is within the privilege and relied upon a line of California cases that had applied this reasoning to discovery of experts. The court also said that work product might apply but it was unnecessary to consider this doctrine because the decision rested on other adequate grounds. Finally, the court also said that the result reached was justifiable because broad discovery did not warrant one party making use of an opponent's preparation for trial to build the discovering party's case.

Two years later the Oregon court was again faced with the problem of use of an opponent's expert in Nielsen v. Brown, 232 Or. 426, 374 P.2d 896 (1962). This was a guest passenger case. Defendant's attorney had retained a plastic surgeon to examine plaintiff in preparation for trial. Plaintiff had consented to the examination without a court order. At trial, the

plaintiff subpoenaed the plastic surgeon. The defendant asked that the plaintiff not be allowed to call the doctor. The court allowed the doctor to testify and the testimony was favorable to the plaintiff. The case was reversed on other grounds, but the Supreme Court said that there was no error in allowing the doctor to testify.

The Brink case was distinguished because anything being communicated to the defendant's attorney in the Nielsen case originated with the plaintiff and not the defendant, and thus could not be a privileged communication.

The defendant's main contention was that the expert's knowledge was work product. After extensive review of the federal and California discovery cases, the court finally concluded that this was more properly the work product of the doctor rather than the attorney. The court then said:

> "We are not required to determine in this case whether on the trial a party may compel his adversary to produce the report of an expert employed by the latter. The question here is whether the expert can be called as a witness by the party who did not employ him and compelled to testify concerning his investigation, examination, etc., and express his opinion on a question within his professional knowledge. Neither the Hickman case nor any other that we have seen is authority for the proposition that the information and knowledge in the mind of the expert must be kept there and away from the jury on the theory that they are the work product of the lawyer." 232 Or. at 436.

The court also discussed the "unfairness" ground for excluding the testimony. The court suggested that "testimony which could be properly admitted at the trial might be excluded

in a discovery proceeding" (Page 439), but said in this particular case no claim of unfairness could be made because the information held by the doctor was the result of a physical examination of the plaintiff herself and the court pointed out that Federal Rule 35 required the furnishing a copy of the examining physician's report when a physical examination was ordered by the court. The Oregon court said that disclosure was not unfair to the doctor because the expert was not being compelled to make an investigation but only to testify to an opinion already formed as a result of an investigation paid for by the defendant. Any unfairness to the defendant was offset by the unfairness of having a party consent to a physical examination and then not have access to the results. The court said:

> "We are not called upon to express an opinion as to the correct rule when the testimony involved is that of an expert employed by a litigant to appraise real property, make a chemical test, investigate an engineering problem, or the like. It is sufficient to say that the ruling of the trial judge in this case, for the reasons we have stated, was not erroneous." 232 Or. at 444-445.

In summary, the present situation in Oregon is very unclear.

(a) The cases discussed did not deal with discovery, but the opinions clearly indicate that the limitations on access to information discussed would apply, possibly even more strongly, to discovery of information held by an opponent's expert.

(b) In dicta, all three of the potential grounds for limiting expert discovery (attorney-client privilege, work product and unfairness) applied in the federal courts to limit expert discovery are applied to discovery in Oregon.

(c) The application of these three doctrines is not clear. For example, why is the defense expert who examines plaintiff's property communicating information from defendant to defendant's attorney when a defense expert, who examines plaintiff's body, is not? Under what circumstances would the information in the mind of an expert be an attorney's work product? Is the unfairness of securing information from an opponent's expert based upon a party's property interest in the information developed by his paid expert or the reaction to having one party take advantage of another's work in securing expert testimony? What different considerations would apply in discovery of an opponent's expert than apply in calling an opponent's expert at trial?

(d) The expanded scope of discovery in Oregon that results from the 1977 adoption of the federal definition of scope of discovery and request for production and inspection, as opposed to motion for production and inspection (ORS 41.635 and 41.616), is likely to create more frequent situations where problems with discovery from experts arise.

II. RULES

A. The Federal Rule

The text of Federal Rule 26(b)(4) is as follows:

> (4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

The federal rule regulates all discovery of opinions held by experts "acquired or developed in anticipation of litigation or for trial". The basic scheme of the federal rule separates experts into four types:

(a) Experts a party expects to call at trial. By interrogatories, a party may learn the names of these experts, subject of their testimony and the substance of the facts or opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Further discovery is only possible by court order.

(b) Experts retained or specially employed by a party and not expected to be called at trial. Discovery of these experts is only possible upon a court order after a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the facts or opinions through his own experts.

(c) Experts informally consulted but not retained and not expected to be called at trial. These are not specifically provided for under the rule and since the discovery and the methods provided are exclusive, no discovery at all is possible. The advisory committee drafting the rule so indicated.

(d) Experts who have information not gained in preparation for trial. The federal rule advisory committee indicated that experts who are actors or viewers of occurrences that give rise to the suit are not included in Rule 26(b) at all. The rule only applies to facts and opinions "acquired or developed in anticipation of litigation or for trial".

Section (c) of the rule recognizes that a substantial element

of potential unfairness in expert discovery is one party having free access to an expert paid by another party or not paid at all. The rule, therefore, has detailed provisions for payment of expenses and in some cases underlying investigation fees when discovery is allowed.

The rationale behind the principal distinction made in the rule is sensible. It is clear that the necessity for discovery from potential expert witnesses at trial is much higher than other experts. Effective cross examination of an expert witness is difficult without knowing what the expert will say. This is particularly true in a jurisdiction that does not automatically require a hypothetical question and where an expert may give an opinion based upon facts outside their records and without prior disclosure of the underlying facts or assumptions giving rise to the opinion. The burden to explore the basis for the expert opinion falls squarely on the opponent and full discovery would seem to be essential. This appears to be the situation in Oregon. See Wulff v. Sprouse-Reitz Co., Inc., 262 Or. 293, 498 P.2d 766 (1972).[5] For non-trial experts, the need for disclosure is much less and the rule need only cover exceptional circumstances where a party cannot secure the same information by hiring his own expert witnesses.

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5. The court adopted Rule 58 of the Uniform Act on Expert Testimony of the National Conference of Commissioners and Uniform State Laws, see 262 Or. 307-308. The approach is similar to that used in Rule 703 and 705 of the Federal Rules of Evidence. The drafters of the federal rules made reference to the potential scope of discovery in deciding to avoid use of the hypothetical question. See discussion in Graham, supra, n. 2, pp. 895-898.

The federal rule, however, has a number of problems:

1. The rule does not define experts. Probably this would be anyone who applies specialized knowledge not possessed by the general public to draw conclusions. The rule is usually discussed in the context of highly specialized or scientific or medical experts, but arguably anyone possessing any type of specialized knowledge could be within the rule.

2. The limitation of discovery of trial experts to interrogatories is too severe. Interrogatories are useful for securing names and simple facts and leads for further discovery. They are not amenable to detailed or flexible discovery. Since the interrogatories are answered by the opposing attorney, they are generally artfully phrased to comply with the requirements of the rule and yet say as little of value as possible. The rule does not provide a standard for further discovery, and some courts have held very minimal answers, clearly inadequate for trial preparation, sufficient and refuse to allow further discovery.[6]

In an empirical study of the operation of Rule 26(b)(4), the single largest complaint about the rule was the inadequacy of the interrogatory procedure.[7] Objections included:

> The answers generally contained insufficient information.
>
> The answers usually related what the attorneys hoped the experts would say rather than their actual opinions.
>
> No provision was made for discovery of qualifications and background of the expert.

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6. See example in Graham, supra, n. 2, pp. 917-921.

7. The results of the survey appear in Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure; Part Two, An Empirical Study and a Proposal. The respondents to the survey were federal judges and magistrates and attorneys practicing in all Federal District Courts. Eighty-five percent of the respondents felt that the interrogatories did not provide adequate information for trial preparation. See pp. 173-174.

There was no way to discover the authorities relied upon by the expert.

Information about tests and experiments undertaken by the expert were not revealed.

Since the interogatories were not signed by the expert, they could not be used effectively for impeachment.

No information on bias, hostility or prior testimony is provided for impeachment purposes.

There is no chance to make a personal observation of the potential witness.

3. The timing of discovery of trial experts has presented some problems. Rule 26(b)(4) must be read in conjunction with Rule 26(e)(1)(b) of the federal rules which require supplementation of responses to expert witness interrogatories. The interrogatories, however, are still only available when the opponent indicates that an expert is expected to testify. Some attorneys apparently postpone the "selection" of their experts until the last moment. The "Saturday night" expert approach hinders effective discovery and preparation.[8]

4. The complete prohibition of any discovery of experts consulted but not retained presents some problem. The knowledge of such an expert is developed in anticipation of litigation, but the expert is not to be called at the trial and has not been retained or specially employed and therefore no discovery is possible at all. The reason for the complete bar of discovery of such experts is that an expert consulted but not retained probably would be not helpful to the party who found the expert and might be very helpful to the opponent; it would discourage parties from investigating and adequately preparing their cases if they were

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8. Graham, supra, n. 7, pp. 186-188.

exposed to the danger of discovery of experts helpful to the opponent. Actually, the problem seems to be mainly one of identification. Once identified the opponent could retain the consulted expert. Whether this is a sufficient basis for the distinction is open to question. In any case, the line between a "consulted" and "retained" expert is not clear. Also, complete elimination of discovery for this situation seems to be too rigid, and there may be some instances where a strong, legitimate need for discovery could be shown.[9]

5. Experts who are not retained by either party or consulted in anticipation of litigation apparently are freely discoverable. The advisory committee referred to experts who were actors or viewers. This does not mean the same thing as persons who have expert qualifications and are only occurrence witnesses relating facts and not opinions. The "expert" might be required to apply his or her expertise to the situation which was observed and draw conclusions and express opinions. The key question is whether the underlying knowledge of the expert was acquired or developed in anticipation of litigation or for some other reason. This distinction is consistent with the underlying rationale of the rule but not easily drawn.[10]

6. The most common difficulty related to the above distinction is employees of a party who are also experts. Arguably, regular employees are not covered at all by the rule because they are not retained or specially employed in anticipation of litigation. The question, however, is whether these employee experts should be

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9. Graham, supra, n. 2, pp. 938-940.

10. Graham, supra, n. 2, pp. 936-938.

treated as consulted experts with no discovery at all, or as occurrence witnesses with completely free discovery. One reasonable resolution would be to say that if the employee has knowledge gained as part of employment and not in anticipation of litigation, he or she is freely discoverable, but if the employee is specially assigned to develop knowledge in anticipation of litigation, then such employee should be treated as specially retained or employed.[11] There has been a difference of opinion on this between commentators on the new rule.[12]

7. The scheme of the federal rule, which allows limited discovery from trial experts but no automatic discovery from non-trial experts, also creates a problem when an expert to be called at trial bases his or her opinions and conclusions on data outside the record.[13] If the testifying expert is relying upon the written report of another expert formally retained or consulted by the opposing party, there may be difficulty in obtaining full discovery. Any discovery of that non-testifying expert would require a showing of exceptional circumstances and if the second-tier expert were to be informally consulted, no discovery would be possible at all.[14]

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11. Graham, supra, n. 2, pp. 941-943.

12. See 8 Wright and Miller, supra, § 2033, p. 258; Comment, Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product. 17 Wayne L.Rev. 1145, 1167 (1971).

13. See discussion at Footnote 5 above.

14. See Graham, supra, n. 7, pp. 196-199.

B. The Bodyfelt Proposal

The Bodyfelt proposal is much simpler and clearer than the federal rule. Most important, the discovery provided for trial witnesses is in the form of a report prepared by the expert rather than a statement of the parties as to what the facts and opinions of the expert are expected to be. The proposal covers discovery of the expert's qualifications. The proposal has a definition of the expert witnesses covered and clearly eliminates any dispute about retained, employed or consulted experts.[15]

The advantages, however, are partially due to the fact that only part of the subject matter of Rule 26(b)(4) is covered. The scope of further discovery from testifying experts and the scope of discovery for non-testifying experts is left to court determination under existing attorney-client privilege, work product and unfairness. The rule does not limit any discovery of experts beyond what presently exists; it simply provides a routine and mandatory exchange of reports for testifying experts and avoids any attorney-client privilege, work product or unfairness arguments. The rule also clearly provides for fee payments to obviate unfairness.

Some specific questions might be raised about the procedure specified in the proposal.

1. Names of Experts

The rule is not clear whether an opponent can request reports only from specified named experts or merely submit a general request for reports of all experts expected to be called at trial.

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15. Actually, Federal Rule 24(b)(4)(1) is not subject to this problem for experts to be called at trial. The difficulty lies with experts not to be called at trial.

Ascertaining the names of experts which an opponent expected to be called for trial, prior to making the request specified in the proposal, would be troublesome and expensive. The more reasonable approach would be to allow a general request for information about all experts expected to be called at trial. The rule could perhaps be clarified in this area.

2. Timing

(a) Request. There is no limit on when a request can be made and theoretically a plaintiff could serve such a request with the complaint. Since, however, the opponent is under no fixed time requirement to respond, this should present no real problem.

(b) Report. No fixed time is set for response to the request for discovery other than not less than 30 days before trial. This seems reasonable, but does not deal with the situation where the request is not made until less than 30 days before trial, or a party does not decide which expert to call within 30 days of trial or a new expert is selected within 30 days of trial. Covering these contingencies does, of course, open up the "Saturday night" expert problem, but escape hatch from 30 days should be built into the rule.

(c) Supplementation. Under the federal rule, the supplementation requirement of 26(e) assures that if a party responds to a request for discovery and then later changes plans, discovers new experts, or for some reason is going to call another or different expert at trial, such information will be furnished to the discovering opponent. There is presently no supplementation duty specified in any of the Oregon rules. Assuming that a general

request can be made for names and information from trial experts, a specific reference to duty to supplement should be added.

3. The Report

One of the principal problems with the report procedure is that it could result in the same limited information situation presented by the interrogatory procedures. The report furnished, of course, could be a complete general report prepared by the expert and submitted to the employing party and probably would provide sufficient information for cross examination. The rule, however, does not specify whether an existing report should be given or one specially prepared to respond to the request. Presumably, if no report were in existence, one would have to be prepared. There is no reason why a special report could not be prepared in any case; it would be advantageous to prepare a special report that limited information included to literal compliance with the rule. With the able assistance of counsel, the expert could easily prepare a report that would be no more helpful than the responses to interrogatories under the federal procedure.

The rule does leave open the possibility of obtaining further information by deposition, but under the Brink and Nielsen cases there may be real problems with work product and attorney-client privilege and arguably the existence of this rule would encourage resistance to any further depositions. This could be an unfortunate situation as the need for discovery for trial preparation is high.

4. Relationship to Existing Exchange of Medical Reports

The rule is not clear what happens in situations where there is a medical examination of an opponent, presently covered by ORS 44.620-630. The report specified under those statutes appears to be more detailed and also there is a specific provision dealing with the medical reports of the experts of the claiming party whether or not the claiming party plans to call these doctors as witnesses. It is suggested that the Bodyfelt rule, if used, be specifically made subject to whatever rule is adopted that is the equivalent of ORS 44.620 to ORS 44.640.

C. Rules in Other States

Some states adopted the proposed amendment to the federal rules of 1946 that would have made conclusions of experts immune from discovery.[16] At the present time, however, most states either have the pre-1970 version of the federal rules that does not cover experts at all or have adopted the 1970 revisions to the federal rules, including 26(b)(4).

Rule 26(b)(4) has not met with unanimous approval among the federal rule states, and at least one state attempted to modify the effect of that rule by advisory comment; the Arizona State Bar Committee that recommended adoption of the new federal rules said as follows:

> "Because of our strong desire to maintain absolute uniformity between the State and Federal Rules, we keep the phrase 'upon motion' in the Rule; but it is intended in this jurisdiction that the motion shall be perfunctory, and that it will be automatically granted, barring the most exceptional circumstances, if the parties are unable to stipulate to the appearance. The Bar reaffirms its belief in the sound practice that 'the deposition of an expert may be taken under the same circumstances as any other witness.'" See Wright and Miller, supra, § 2031, p. 253, f.n. 76.

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16 Wright and Miller, supra, § 2029, p. 241

Another state that has a different approach is New Jersey, which has a rule that specifies that a party:

> "* * *may require any other party to disclose the names and addresses of proposed expert witnesses, and, unless the court otherwise orders, such experts may be deposed as to their opinions at the expense of the deposing party and at a time and place convenient for the expert * * *." N.J.Court Rules, R. 4:10-2.

Finally, one state has a rule that resembles the Bodyfelt proposal:

> A party may obtain by written interrogatory or by deposition without the showing required under section d of this Rule, a written report concerning the action or its subject matter made by an expert who is expected to testify at the trial whether or not such report was obtained in anticipation of trial or in preparation for litigation. If such expert has not made a written report, he may be examined upon written questions or by oral deposition as to his findings and opinions.

Maryland Rules of Procedure, R. 400(f).

D. The Graham Proposal

There is an exhaustive recent study of the expert discovery area done by Professor Michael H. Graham of the University of Illinois Law School.[17] Graham's report contains an analysis of the federal rule noting most of the problems covered above and also reports the results of an empirical survey of actual discovery practice involving experts in the federal courts.[18] The survey results indicate that actual discovery practice relating to expert witnesses varies considerably from that contemplated by Rule 26(b)(4). The respondents to the survey indicated that, for trial witnesses, there was further discovery beyond the interrogatory responses in 84% of the cases either in the form of a report of the expert or a deposition and in 48% of the cases both of these additional discovery methods were used. Seventy-two percent of the respondents also indicated that discovery of non-witness experts takes place as a routine matter without resort to

17. See footnotes 2 and 7

any further court order. Ninety-four percent of the respondents indicated that the actual discovery that was taking place for trial experts did provide adequate material for cross examination and eighty-three percent of the respondents indicated that the extensive discovery taking place did not result in one party taking advantage of his opponent's diligence in preparing for trial.

Based upon the analysis and survey questions, Graham suggested the following modifications to Rule 26(b)(4):

> (4) Trial Preparation: Experts. Subject to the provision of Rule 35(b), discovery of facts and data known and opinions held by experts, and the grounds for each opinion, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A) A party may discover from a person whom any other party expects to call as an expert witness at trial, and from the other party, facts and data known and opinions held by the expert witness together with the grounds of each opinion. Furthermore, if such expert witness relies in forming his opinion, in whole or in part, upon facts, data, or opinions contained in a document or made known to him by or through another person, a party also may discover with respect thereto.
>
> (B) A party may discover facts, data, opinions, and grounds thereof held by an expert who has been retained, specially employed, or consulted either formally or informally, by another party or by, or for, the other party's representative and who is not expected to be called as a witness at trial, upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts, data, or opinions on the same subject by other means.
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery of an expert pay a reasonable fee for time spent in responding to discovery under subdivision (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts, data, and opinions from the expert.

Graham's explanation of this rule is as follows:

> In this form Rule 26(b)(4) would reflect the actual practice of the discovery of expert witnesses and also would facilitate the policies of the Federal Rules of Evidence.

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18. (Continued) to the questionnaire submitted was not high, 13.42%. See Graham, supra, n. 7, p. 171; for a general discussion of survey results, see pp. 172-193.

Discovery of expert witnesses as it exists in practice in actions pending in federal district courts differs significantly from the procedure theoretically outlined in Rule 26(b)(4) and the Advisory Committee Notes. Full discovery voluntarily conducted between counsel is the accepted procedure with expert witnesses expected to be called at trial. Rule 26(b)(4), therefore, should be amended to reflect the reality of full discovery. Because the discovery of second tier experts is necessary to prepare cross-examination and rebuttal testimony for the testimony of an expert witness at trial, Rule 26(b)(4) should provide for mandatory full disclosure of these second tier experts.

As for all experts contacted by a party or a party's representative not expected to be called at trial, the Proposed Rule attempts to meet three overriding concerns. First, if the expert witness is a second tier expert, the Proposed Rule allows full discovery of the facts, data, or opinions, and the grounds of each opinion on which the testifying expert relies. Second, if the party seeking discovery finds that obtaining facts, data, or opinions on the same subject matter by other means is impracticable, the Proposed Rule permits discovery[64] limited to that information from the expert not expected to testify on a showing of exceptional circumstances. Finally, absent exceptional circumstances the Proposed Rule prohibits discovery of any expert not expected to testify who is contacted in any manner by the party or by, or for, a party's representative regardless of the existence or absence of compensation. The rationale behind the blanket prohibition is that the interests of justice are best served by encouraging access to expert testimony free of any fear that any consultation ultimately will inure to the benefit of an adverse party.

Implementation of the Proposed Rule provisions that allow discovery of experts not expected to testify raises an issue about the disclosure of the identity of consulted experts. A court should prohibit the disclosure of the names of contacted experts unless the moving party first has established exceptional circumstances. If, for example, a party by the use of initial discovery obtains knowledge of the existence of information which cannot be obtained from independent sources, a court should order the disclosure of the name of the expert and discovery of the expert. If the names of contacted experts were made available simply on request, opposing counsel could attempt to contact the expert to obtain favorable information. Seeking formal or informal discovery of non-testifying experts whose names have been disclosed has become a significant practice in a minority of courts. The practice's potential for distortion of the truth-seeking process both by discouraging resort to experts and by misleading the jury at trial through disclosure of prior contact with the opponent mandates barring disclosure of the expert's identity absent "exceptional circumstances."[19]

19. Graham, supra, n. 7, pp. 200-202.

E. Recommendation

The Graham proposal is an improvement over the existing Federal Rule 26(b)(4), but it is suggested that the Bodyfelt rule, with some modifications, is a better approach to regulation of discovery of experts. The question basically is whether to attempt to regulate discovery of all experts or deal only with trial experts. The Graham survey strongly indicates that there is substantial and satisfactory discovery of all experts in the federal system, despite the fairly restricted federal rule. With the lack of reported cases in Oregon, one could assume that the situation is at least that liberal in the Oregon courts.

The need then is not to develop a new rule regulating the abuse of expert discovery but, if possible, to avoid limiting the scope of discovery where there is a high and demonstrated need. There is such a high need for discovery of experts to be called at trial, particularly since Oregon has moved away from the hypothetical question to expert testimony based on outside sources and without prior disclosure of underlying facts and assumptions. The existence of the Brink and Nielsen cases presents a potential for unfair limitation of discovery in the expert witness area and needless controversy over the application of attorney-client privilege, work product and unfairness rules to expert witnesses. The Bodyfelt approach of guaranteeing discovery for these trial expert witnesses seems to be the most reasonable approach.

The same need for discovery from non-trial expert witnesses does not exist, and the grounds for controlling abuse of discovery of non-trial experts exist in the Brink and Nielsen cases. The

application of the Brink and Nielsen cases is not clear, but in many respects the federal rule regulation of non-trial experts breeds its own ambiguities in attempting to make distinctions between retained and consulted experts, in dealing with employees and in dealing with occurrence expert witnesses.

The primary modification in the Bodyfelt approach, however, should be to avoid the possibility that full disclosure of information necessary for cross examination of trial experts would be impeded. This might happen if the reports received are the equivalent of interrogatories in the federal system. The approach taken in the suggested modification is to follow the New Jersey approach and the Graham suggestion and simply allow full discovery from trial experts. The reason for retaining the Bodyfelt approach of the report procedure, rather than simply specifying that full discovery is available from expert witnesses, was a belief that, in some cases, the report would be sufficient and would avoid the expense and difficulty of a deposition. The exchange of reports would be encouraged, while not eliminating ultimate resort to a deposition. The provision for payment of expenses for attendance at and preparation for the deposition probably would discourage routine resort to the deposition procedure.

The other modifications to the rule are a reflection of the problems discussed in Section B above. The proposed modification also contains a provision taken from the Graham proposal to deal with second-tier experts as discussed under Section A above. The proposed rule would be as follows:

(1) Subject to the provisions of Rule _____ (rule relating to the exchange of reports on the physical examination of opponent), 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. 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.

(2) A party may also take the deposition of an expert reasonably expected to be called as an expert witness at trial, identified as such pursuant to Section (1) of this rule. If such expert witness relies in forming his opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to him by or through another person, the party may also discover with respect thereto.

(3) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under Section (1) of this rule 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 the expert witness' attendance at or preparation for any deposition taken under Section (2) of this rule.

(4) 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 section of this rule, 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.

(5) 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.

(6) A party who has furnished a statement in response to Section (1) of this rule is under a duty to 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.

(7) Nothing contained in this rule 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