MEMORANDUM

TO: Dennis Bromka and Jim McCandlish

FROM: Fred Merrill

RE: HEARING HELD MARCH 8, 1979

DATE: March 9, 1979

The following is a list of matters raised at the March 8, 1979, meeting and not included in the attached list of changes, together with the reason no change was submitted.

RULE 36

I could not determine what committee reaction was to Don Atchison's arguments on 36 B.(2) and 36 B.(4) relating to insurance policies and expert witnesses. The arguments have already been made to the Council and rejected. If the committees want to reinstate the automatic right to an insurance policy, the existing statute, ORS 41.622, has a couple of warts that should be ironed out.

RULE 39 F.

I think we straightened out the question raised about witnesses changing testimony in depositions. Since reporters and transcribers err, the witness has, and should have, the right to examine a transcript or recording and say, "I didn't say that." The language used in the rule differs from the Oregon statute, but the net effect is exactly the same.

RULE 39 G.(2)

The Council considered the possibility of eliminating filing of depositions but felt that for security with a non-stenographic deposition, or to provide a basis for summary judgment in any case, there

Rule 36

B.(2) Insurance agreements.

[B.(2)(a) A party may obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be informed of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to inform the party who sought discovery immediately of the question regarding the existence of coverage. The party seeking discovery shall be informed of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.]

B.(2)(a) A party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be

liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(2)(b) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in section C. of this rule.

B.(2)[(b)](c) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application forinsurance shall not be treated as part of an insurance agreement.

B.(2)(d) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

[B.(4) Expert witnesses.

B.(4)(a) 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 and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.(4)(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.(4)(d) As used herein, the term "expert witness" includes 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, an agent, or a representative of the party, or has been specifically retained or employed.

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

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserting in the action. In such case, the party seeking discovery shall be informed of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to inform the party who sought discovery immediately of the question regarding the existence of coverage. The party seeking discovery shall be informed of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For the purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

COMMENT: Rule 36 B.(2)(a) changes the substance of both present Oregon law (ORS 41.622, enacted last session) and the federal rule (26(b)(2)) upon which the Oregon law is modeled.

Rule 36 B.(2)(a) eliminates the requirement that a person is required to disclose "the contents" of any insurance agreement involved. The contents of the insuring agreement can frequently be helpful in expediting settlement and resolution of issues between the parties. See, for example, the Notes of Advisory Committee on Rule 26(b), U.S.C.A., 1970 Amendments, for a discussion of the factors leading to the adoption of the federal rule.

Significantly, there is no stated reason given for this change in present Oregon law, and since ORS 41.622 only became law in 1966, it would seem unlikely that significant adverse experience has been accumulated to require the change.

Rule 36 B.(2)(a) should be changed to either set forth the present statute ORS 41.622 or that the language "limits of liability" is replaced by "the contents" in the first sentence of the rule.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney,

consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

B.(4) Expert Witnesses.

B.(4)(a) 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 and address of any person the other

party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.(4)(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.(4)(d) As used herein, the term "expert witness" includes 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, an agent, or a representative of the party, or has been specifically retained or employed.

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

COMMENT: This a departure from present law, in that there is no duty to disclose the names of expert witnesses.

The major defect of this rule is that although it appears to be a balanced treatment on the subject that operates equally on both plaintiff and defendant, in fact any adverse effects will be felt almost exclusively by plaintiffs. This is particularly true in medical malpractice cases, where it has frequently occurred that expert wientsses who have agreed to testify on behalf of the plaintiff will refuse to do so as a result of pressure being brought to bear against them by other persons in the medical profession, after the identity of the plaintiff's witness is made known. This pressure will be much more intense, likely to occur, and prejudicial if disclosure is mandated soon after the complaint is filed (as would be permitted under this rule).

Additionally, it is predictable that the costs of litigation will increase as experts must be employed earlier. Likewise, delay in settlement negotiations will occur while lawyers attempt to assess the quality of the experts rather than the merits of the case, and attempt to find witnesses "more expert" than those revealed through discovery.

Finally, the provision provides fertile ground for multiple motions, counter-motions and court appearances as the parties argue compliance and non-compliance with this rule.

In personal injury cases, a detailed report of an examining medical expert is discoverable under Rule 44 G. Thus, Rule 36 allows precisely that type of discovery which the counsel claims it does not: i.e., full discovery of a medical expert's testimony before trial.

It is a good deal harder to secure the services of the highly qualified expert who works in the scientific community than it is to obtain one of the growing list of advertising experts whose livelihood is derived from investigation and testimony.

The proposed rule should serve to discourage the highly specialized qualified expert as common sense dictates that the more involvement they are subjected to the less enthusiasm they will have to become involved.

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

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

Item 14, page 8, ORCP 36 A. The Council decided that the language from the federal rule should not be included in this section.

Item 15 and 16, page 8, ORCP 36 B.(3) and ORCP 46 A.(2). Judge Wells moved, seconded by Austin Crowe, that "and subsection B.(4) of this rule" should be deleted from the first sentence of 36 B.(3) and that "to furnish a written statement under 36 B.(4), or if a party fails" should be deleted from the first sentence of 46 A.(2). The motion passed unanimously.

Item 17, page 9, ORCP 46 D. Judge Wells moved, seconded by Austin Crowe, to delete the following language from 46 D.: ["or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 that there is a question regarding the existence of coverage,"]. The motion passed unanimously.

Item 18, page 9, ORCP 52 A. Judge Sloper moved, seconded by Judge Wells, that the last sentence of section A. be changed to read as follows: "At its discretion, the court may grant a postponement, with or without terms." The motion passed unanimously.

Item 19, page 9, ORCP 55 D. On motion made by Judge Casciato, seconded by Judge Wells, the Council unanimously voted to change "over 18 years of age" to "18 years of age or older" in 55 D.(1) to conform to ORCP 7 E. and 7 F.(2)(a).

Item 20, page 9, ORCP 55 F.(2). The Council discussed the suggestion of adding "by subpoena" after "required" in both sentences of F.(2). It was pointed out that the section does not make any distinction between "parties" and "non-parties" and a suggestion was made to include the language "a resident of this state and not a party." The Council decided to defer action until consideration of a redraft of the section.

Item 21, page 10, ORCP 60. On motion made by Judge Sloper, seconded by Austin Crowe, the Council unanimously voted to change "defendant" to "party against whom the claim is asserted" in the last sentence of the rule.

Item 22, page 10, ORCP 62. The Executive Director was asked to prepare a draft of ORCP 62 which would not require findings of fact or conclusions of law for cases subject to de novo review upon appeal.

Judge Jackson stated that the judgments subcommittee would be meeting soon and would have a report at the next meeting.

Don McEwen stated that he had written a letter to all circuit court judges requesting their views and comments regarding any problems with third party practice.

The Council discussed the question of use of Rule 36 B. to authorize interrogatories relating to expert witnesses. It was pointed out that:

Rule 36

B.(2) Insurance agreements.

[B.(2)(a) A party may obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be informed of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to inform the party who sought discovery immediately of the question regarding the existence of coverage. The party seeking discovery shall be informed of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.]

B.(2)(a) A party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be

liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(2)(b) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in section C. of this rule.

B.(2)[(b)](c) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application forinsurance shall not be treated as part of an insurance agreement.

B.(2)(d) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in

anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

[B.(4) Expert witnesses.

B.(4)(a) 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 and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.(4)(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.(4)(d) As used herein, the term "expert witness" includes 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, an agent, or a representative of the party, or has been specifically retained or employed.

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

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 B.(4) in subsection 36 B.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection B.(4).

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 B.(4) in subsection 36 B.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection B.(4).

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 8.(4) in subsection 36 8.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection 8.(4).