NOTICE

May 16, 1979

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: Council on Court Procedures
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Friday, June 22, 1979, at 1:30 p.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. At that time, the Council will decide which rules of Oregon pleading, practice, and procedure are to be considered by the Council during the next biennium.

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COUNCIL ON COURT PROCEDURES

MEETING

Friday, June 22, 1979

1:30 p.m.

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

AGENDA:

1. Approval of minutes of last meeting.

2. Final report on legislative session.

3. Plan of 1979-81 biennium:

    A. Areas to be considered.
    B. Public meeting schedule.

4. New business.

5. Next meeting.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held June 22, 1979

Judge Riggs' Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Sidney A. Brockley	Laird Kirkpatrick
	Carl Burnham, Jr.	Harriet R. Krauss
	John Buttler	Donald W. McEwen
	John M. Copenhaver	Charles P.A. Paulson
	Wendell E. Gronso	Val D. Sloper
	Wm. L. Jackson	Wendell H. Tompkins
	Garr M. King	William W. Wells
Absent:	Darst B. Atherly	Ross G. Davis
	E. Richard Bodyfelt (unable to attend due to disciplinary committee meeting)	James O. Garrett
		Berkeley Lent
		James B. O'Hanlon
	Anthony L. Casciato	Randolph Slocum
	Wm. M. Dale, Jr.	

The meeting was called to order by Chairman Don McEwen at 1:35 p.m. The following guests were in attendance:

Raymond J. Conboy, Portland
Bruce Hamlin, Portland
Frank N. Pozzi, Portland
Stamm F. Johnson, Lake Oswego

The Council reviewed and discussed the results of the Joint Judiciary Committee work sessions and legislative activity concerning House Bill 3131, which amends the promulgated rules and sets the effective date for the rules as January 1, 1980, and Senate Bill 904, which proposed changes to the present class actions law. It was reported that House Bill 3131 had passed both houses of the legislature and was awaiting signature by the Governor. Senate Bill 904 failed to pass the Senate. The Executive Director reported that the final rules might be published in the Supreme Court Advance Sheets.

Senator Vern Cook, Chairperson of the Senate Judiciary Committee, requested by letter dated June 8, 1979, that the Council undertake a thorough review during the next biennium of the class actions law, including the specific issues addressed in A-Engrossed Senate Bill 904, and report its findings and proposals to the 1981 legislature. A similar request was made by Senator Cook by letter dated May 14, 1979, relating to Senate Bill 813, the adoption of which would have established a uniform procedure for awarding attorney fees in all trial court proceedings.

The Council further considered whether it ought to make some recommendations to the legislature regarding venue. Representative Tom Mason had forwarded a letter from one of his constituents relating to a specific problem in a domestic relations case.

The Chairman announced that appointments of the following Council members expired in September:

E. Richard Bodyfelt	William L. Jackson
Sidney A. Brockley	Donald W. McEwen
John M. Copenhaver	James B. O'Hanlon
Ross G. Davis	Randolph Slocum
Wendell E. Gronso	Wendell H. Tompkins

He stated that he would write to the Oregon State Bar and the Judicial Conference and request that appointments be made. He suggested that final decisions on the agenda and election of officers be deferred until the next meeting after the new appointments.

The Council reviewed the areas to be covered during the 1979-81 biennium as set out in the four-page staff memorandum dated January 15, 1979. It was felt that further consideration should be deferred until the next meeting, by which time all members would have had an opportunity to analyze the list carefully and would be able to make concrete suggestions. The Executive Director reported that he was working on rules relating to judgments, entry of judgments, default, and relief from judgments and hoped to have preliminary drafts and memoranda finished by mid-July. He stated that he also planned to prepare a rule relating to referees. He also reported that Frank Lacy was at work on rules relating to provisional remedies and enforcement of judgments and would have drafts available by September. The Executive Director indicated that the proposed judgment rules would cover pleading and proving attorney fees.

Laird Kirkpatrick stated that the Bar Procedure and Practice Committee had indicated there were several items about which they were concerned, and the Executive Director was asked to write them a letter inquiring further as to the particularity of those matters.

After discussion, it was felt that appointment of a subcommittee at this time would be advisable to study the work in progress relating to judgments. Don McEwen, Sid Brockley, and Judge Buttler volunteered to serve on this subcommittee.

Consideration was given to the time and place of Council meetings during the next biennium. After discussion, it was the consensus that Saturdays were the best days for meetings, that generally Portland was the best location, and that initially meetings should be scheduled once a month beginning in the

fall. It was decided to have the first fall meeting at 9:30 a.m., on Friday, September 28, 1979, at the Bar Convention in Seaside, Oregon. The Executive Director was asked to arrange a meeting place and notify members. Thereafter, meetings will be held on the second Saturday of each month beginning in October. The Council discussed whether or not to schedule the four public meetings in each Congressional District before or after a substantial amount of the work had been completed. It was tentatively decided that the meetings in February, March, April, and May, 1980, be the scheduled public meetings to be held in the four Congressional Districts.

The Executive Director asked for suggestions for further research this summer after he completes work on judgments and referees. It was suggested that some work might be done on order of trial in third party and mixed law equity cases and jury trial problems associated with third party cases. It was also suggested that some background research could be generally done on class actions, third party practice, and summary judgments.

Wendell Gronso voiced a complaint about third party practice in general and summary judgments. Judge Wells suggested that summary judgments and third party practice be put on the agenda for September and also that members of the bar be invited to make their comments. The Executive Director stated that he would prepare an article for the Bar Bulletin indicating a schedule for the meetings and soliciting suggestions and comments.

Frank Pozzi addressed the Council relating to class actions, saying that they should be considered by the Council. Stamm Johnson stated that he would favor adoption over a period of time of uniform forms for process and summons, a uniform hearings form, and trial setting rules.

A motion was made by Wendell Gronso, seconded by Laird Kirkpatrick, that the minutes of the meeting held April 7, 1979, be approved. The motion passed unanimously.

The meeting adjourned at 2:57 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEMORANDUM

TO: JOINT HOUSE AND SENATE JUDICIARY COMMITTEES

FROM: Fred Merrill

DATE: April 11, 1979

I. The following suggested changes by the Bar Procedure and Practice Committee were endorsed by the Council on Court Procedures at their April 7, 1979, meeting.

A. Rule 21

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

The Council did not accept the changes proposed by the Bar Committee relating to Rule 44 D. which appear on page 10 of the March 29, 1977, memorandum.

The Council considered the changes that have been adopted by the Joint Committee in work sessions to date. It was suggested that changing "certified" to "true" in Rule 7 D.(2) did not clarify what was needed. The present practice involves having a party or attorney sign a statement on service copies saying, "I certify the foregoing paper is a true, exact and full copy of the original." Perhaps this could be clarified by adding the following sentence to section A.:

> For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint with a certificate upon the copy signed by an attorney of record, or if there is no attorney, by a party which indicates that the copy is exact and complete.

It was also suggested that the word "affidavit" in lines 9 and 12 of subparagraph 7 F.(2)(a)(i) should be changed to "certificate" to conform to the previously adopted change in line 1.

The Council also considered the remaining changes in the Committee memo of March 29, 1979, which will be considered at the next work session.

The Council accepted the proposed changes submitted by Committee staff to sections 44 A. (page 8 of March 29 Committee memo); 44 E. (page 11 of March 29 Committee memo); 54 A. (page 11 of March 29 Committee memo); 54 D. (page 15 of March 29 Committee memo); 55 C. (page 18 of Committee memo); and, 57 C. (page 19 of Committee memo).

The Council also endorsed the changes suggested by Frank Pozzi to section 54 B.(4) (page 14 of March 29 Committee memo) and section 64 B. (page 26 of Committee memo). The changes would appear as follows:

Rule 54

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 64

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

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

[B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.]

B.[(6)]<u>(5)</u> Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.[(7)]<u>(6)</u> Error in law occurring at the trial and objected to or excepted to by the party making the application.

All other changes suggested in the March 29, 1979, Committee memo which have not as yet been discussed in Committee work sessions did not appear desirable to the majority of the Council members.

MEMORANDUM

May 16, 1979

TO: COUNCIL MEMBERS

FROM: Fred Merrill

RE: LEGISLATIVE ACTION ON RULES

Enclosed is HB 3131 which contains the changes to the rules agreed upon by the Joint Senate and House Judiciary Committees and the auxiliary changes relating to effective date, scope of rulemaking power, and law-equity changes. At the present time, it appears that this Bill will pass both the Senate and House sometime this month and, except for possible changes in Rule 32 pending in a separate Bill, the rules will not be subject to further change.

A notice and agenda for the next meeting on Friday, June 22, 1979, at 1:30 p.m., in Judge Dale's Courtroom, is also enclosed. Please refer to the memorandum dated January 15, 1979, relating to the agenda for the next biennium.

Enclosures: HB 3131
Notice and agenda for next meeting

House Bill 3131

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Describes provisions of law relating to pleading, practice and procedure in civil court proceedings presently deemed rules of court as including provisions relating to form and service of summons and process and personal and in rem jurisdiction. Specifies authority of Council on Court Procedures to promulgate rules of civil procedure as including rules governing form and service of summons and process and personal and in rem jurisdiction. Specifies January 1, 1980, instead of 90 days after end of 1979 legislative session, as effective date of rules of civil procedure promulgated by Council on Court Procedures and submitted to 1979 legislature. Operative on January 1, 1980, modifies certain rules of civil procedure submitted by Council on Court Procedures, modifies statutory provisions to conform to rules of civil procedure submitted by council, and repeals statute sections superseded by rules of civil procedure submitted by council.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to certain proceedings, including but not limited to procedure in civil court proceedings; creating new provisions; amending ORS 1.025, 1.470, 1.735, 1.745, 8.360, 12.010, 13,310, 13.370, 13.400, 13.410, 17.065, 18.010, 18.060, 18.090, 18.115, 18.335, 19.026, 19.104, 20.040, 20.210, 23.020, 29.030, 30.230, 30.275, 30.370, 30.610, 33.210, 33.230, 33.720, 34.170, 34.180, 34.190, 34.670, 34.680, 35.255, 35.305, 41.930, 41.945, 44.040, 44.320, 45.050, 45.250, 52.120, 52.130, 52.320, 55.070, 69.450, 69.500, 82.120, 88.080, 92.305, 93.680, 105.130, 105.230, 105.505, 105.705, 105.715, 107.065, 109.100, 109.330, 111.095, 111.105, 111.205, 113.055, 114.425, 115.315, 128.110, 128.130, 128.250, 128.260, 136.210, 136.330, 136.535, 136.600, 137.285, 171.510, 174.120, 176.765, 179.507, 183.484, 193.070, 197.320, 226.570, 226.590, 261.610, 271.310, 275.220, 276.242, 280.390, 280.480, 280.990, 287.334, 305.130, 308.240, 308.560, 312.060, 345.060, 348.855, 418.327, 419.488, 419.515, 433.770, 443.991, 448.250, 454.020, 454.030, 454.645, 456.205, 459.690, 465.020, 465.120, 468.100, 469.080, 471.630, 481.095, 481.950, 481.957, 484.725, 498.464, 509.910, 520.175, 526.332, 536.560, 539.150, 541.660, 545.256, 547.030, 548.110, 548.355, 548.935, 548.940, 554.150, 570,175, 583.096, 585.047, 586.527, 599.251, 604.180, 604.190, 604.230, 604.323, 625.340, 646.170, 650.020, 650.060, 656.285, 662.090, 662.825, 663.185, 676.220, 679.027, 686.270, 696.545, 709.330, 709.400, 756.598 and 758.465; repealing ORS 11.010, 11.020, 11.050, 11.060, 13.010, 13.020, 13.030, 13.041, 13.051, 13.060, 13.070, 13.080, 13.090, 13.110, 13.120, 13.130, 13.140, 13.150, 13.161, 13.170, 13.180, 13.190, 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.320, 13.330, 13.340, 13.350, 13.360, 13.380, 13.390, 14.010, 14.020, 14.035, 15.010, 15.020, 15.030, 15.040, 15.060, 15.070, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.190, 15.200, 15.210, 15.220, 16.010, 16.020, 16.030, 16.040, 16.050, 16.060, 16.070, 16.080, 16.090, 16.100, 16.110, 16.120, 16.130, 16.140, 16.150, 16.210, 16.221, 16.240, 16.250, 16.260, 16.270, 16.280, 16.290, 16.305, 16.315, 16.320, 16.325, 16.330, 16.340, 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, 16.430, 16.460, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540, 16.610, 16.620, 16.630, 16.640, 16.650, 16.660, 16.710, 16.720, 16.730, 16.740, 16.760, 16.765, 16.770, 16.780, 16.790, 16.800, 16.810, 16.820, 16.830, 16.840, 16.850,

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION.**

16.860, 16.870, 16.880, 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.033, 17.035, 17.040, 17.045, 17.050, 17.055, 17.105, 17.110, 17.115, 17.120, 17.125, 17.130, 17.135, 17.140, 17.145, 17.150, 17.155, 17.160, 17.165, 17.170, 17.175, 17.180, 17.185, 17.190, 17.205, 17.210, 17.215, 17.220, 17.225, 17.235, 17.240, 17.245, 17.255, 17.305, 17.310, 17.320, 17.325, 17.330, 17.335, 17.340, 17.345, 17.350, 17.355, 17.360, 17.405, 17.410, 17.415, 17.420, 17.425, 17.431, 17.435, 17.441, 17.505, 17.510, 17.515, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630, 18.020, 18.105, 18.140, 18.210, 18.220, 18.230, 18.240, 18.250, 18.260, 18.310, 20.030, 23.010, 29.040, 29.510, 30.350, 35.225, 41.616, 41.617, 41.618, 41.620, 41.622, 41.626, 41.631, 41.635, 41.915, 41.920, 41.925, 41.935, 41.940, 44.110, 44.120, 44.130, 44.140, 44.160, 44.171, 44.180, 44.190, 44.200, 44.210, 44.220, 44.230, 44.610, 44.620, 44.630, 44.640, 45.030, 45.110, 45.120, 45.140, 45.151, 45.161, 45.171, 45.185, 45.190, 45.200, 45.230, 45.240, 45.280, 45.320, 45.325, 45.330, 45.340, 45.350, 45.360, 45.370, 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470, 45.910, 46.110, 46.155, 46.160, 52.140, 52.150, 52.160 and 441.810, and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 1.735 is amended to read:

1.735. The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, **including rules governing form and service of summons and process and personal and in rem jurisdiction,** in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect 90 days after the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

Section 2. ORS 1.745 is amended to read:

1.745. All provisions of law relating to pleading, practice and procedure, **including provisions relating to form and service of summons and process and personal and in rem jurisdiction,** in all civil proceedings in courts of this state are deemed to be rules of court and remain in effect as such until and except to the extent they are modified, superseded or repealed by rules which become effective under ORS 1.735.

SECTION 3. Notwithstanding ORS 1.735, the Oregon Rules of Civil Procedure promulgated on December 2, 1978, and submitted to the Legislative Assembly at its 1979 Regular Session by the Council on Court Procedures pursuant to ORS 1.735 shall become effective January 1, 1980.

SECTION 4. (1) As used in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, "Oregon Rules of Civil Procedure" means the rules adopted, amended or supplemented as provided in ORS 1.735.

(2) In citing a specific rule of the Oregon Rules of Civil Procedure, the designation "ORCP (number of rule)" may be used. For example, Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), may be cited as ORCP 7 D.(3)(a)(i).

SECTION 5. References in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, in effect on or after January 1, 1980, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

SECTION 6. In an amendment by this Act of any rule, or section thereof, of the Oregon Rules of Civil Procedure, matter in bold face is new matter to be added and matter in italic and bracketed in existing matter to be deleted.

Section 7. ORCP 1 is amended to read:

RULE 1

SCOPE; CONSTRUCTION; APPLICATION; CITATION

A. Scope. These rules govern procedure and practice in all circuit and district courts of this state, except in the small claims department of district courts, for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of district courts and for all other courts of this state to the extent they are made applicable to such courts by rule or statute. Reference in these rules to actions shall include all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin.

B. Construction. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

C. Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date, **except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.**

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 64. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice and procedure established by ORS 1.745, or promulgated under ORS 1.002, 1.735, 2.130 and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice and procedure in any manner not inconsistent with these rules.

[D.] E. Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), as ORCP 7 D.(3)(a)(i).

Section 8. ORCP 4 K., relating to personal jurisdiction over parties served, is amended to read:

K. Certain marital and domestic relations actions.

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

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

K.(3) *[In a filiation proceeding under ORS Chapter 109]* **In any proceeding to establish paternity under ORS Chapters 109, 110, or 419, or any action for declaration of paternity where the primary purpose of the action is to**

establish responsibility for child support, when the act [*or acts*] of sexual intercourse which resulted in the birth of the child [*are*] is alleged to have taken place in this state [*and the child resides in this state*].

Section 9. ORCP 7 is amended to read:

RULE 7

SUMMONS

A. [*Plaintiff and defendant defined*] Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint with a certificate upon the copy signed by an attorney of record, or if there is no attorney, by a party, which indicates that the copy is exact and complete.

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

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

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

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

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

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses, other than a summons [*to join a party pursuant to Rule 22D.*] referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." [*This paper*] The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

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

C.(3)(b) Service [*on maker of contract*] for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D. [*(2)*] (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." [*This paper*] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.[*(3)*] (2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." [*This paper*] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

D. Manner of service.

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

summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

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

D.(2)(b) Substituted service. Substituted service may be made by delivering a [*certified*] **true** copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, [*immediately*] **as soon as reasonably possible,** shall cause to be mailed a [*certified*] **true** copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. **For the purpose of computing any period of time prescribed or allowed by these rules,** substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leving a [*certified*] **true** copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff [*immediately*], **as soon as reasonably possible,** shall cause to be mailed a [*certified*] **true** copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office service was made. **For the purpose of computing any period of time prescribed or allowed by these rules,** office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a [*certified*] **true** copy of the summons and a [*certified*] **true** copy of the complaint to the defendant by certified or registered mail, return receipt requested. **For the purpose of computing any period of time prescribed or allowed by these rules,** service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

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

D.(3)(a) Individuals.

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

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

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

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

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

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found [*and does not have an office*] in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to [*a registered agent, officer, director, general partner, or managing agent*] **the last registered office of the corporation, limited partnership, or association, if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation, limited partnership, or association is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation, limited partnership, or association, and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.**

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

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

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads, highways, and streets; service by mail. In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, may be served with summons by mail, except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and (iii) any other address of the defendant known to the plaintiff, which might result in actual notice.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D.(4)(c) Default. No default shall be entered against any defendant served by mail under this subsection who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address

given by the defendant at the time of the accident or collision, or residing at the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail.

D.[*(4)*] (5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court.[, *provided,*] However, [*that*] in all cases such service shall be reasonably calculated to give actual notice.

D.[*(5)*](6) [*Service by publication or mailing to a post office address; other service by court order*] **Court order for service; service by publication.**

D.[*(5)*](6)(a) [*Order for publication or mailing or other service*] **Court order for service by other method.** On motion upon a showing by affidavit that service cannot be made by any [*other*] method [*more reasonably calculated to apprise the defendant of the existence and pendency of the action*] **otherwise specified in these rules or other rule or statute, the court, at its discretion,** may order service **by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to:** [*by*] publication **of summons;** [*or at the discretion of the court, by*] mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or [*by any other method*] **posting at specified locations.** If service is ordered by any manner other than publication, the court may order a time for response.

D.[*(5)*](6)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "[*This paper*] **The 'motion' or 'answer' (or 'reply')** must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.[*(5)*](6)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.[*(5)*](6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.[*(5)*](6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and

served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.[*(5)*](6)(f) Defending before or after judgment. **A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action.** A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.[*(5)*](6)(g) Completion of service. **For the purpose of computing any period of time prescribed or allowed by these rules** service **by publication** shall be complete at the date of the last publication.

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

F. Return; proof of service.

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

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

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

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

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

[*F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.*]

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

Affidavit of Publication

State of Oregon)
ss.
County of)

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

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

_____
Notary Public for Oregon

My commission expires
_____ day of _____, 19_____.

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

F.(2)(d) Form of certificate or affidavit. A certificate or affidavit containing proof of service may be made upon the summons or as a separate document attached to the summons.

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

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

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

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

Section 10. ORCP 9 is amended to read:

RULE 9

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

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

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address [*or, if no address is known, by leaving it with the clerk of the court*]. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing.

C. Filing; proof of service. All papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

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

Section 11. ORCP 13 is amended to read:

RULE 13

KINDS OF PLEADINGS ALLOWED; FORMER PLEADINGS ABOLISHED

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

B. Pleadings allowed. There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff, including a party joined under Rule 22 D., and a cross-claim against a defendant, **including a party joined under Rule 22 D.** A pleading against any person joined under Rule 22 C. is a third party complaint. There shall be an answer to a cross-claim and a third party complaint. There shall be a reply to a counterclaim

denominated as such and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer. There shall be no other pleading unless the court orders otherwise.

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

Section 12. ORCP 14 is amended to read:

RULE 14

MOTIONS

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

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

Section 13. ORCP 15 A. is amended to read:

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint [*or*] **and** the reply to a counterclaim **or answer to a cross-claim** of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by Rule 7 C.(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

Section 14. ORCP 17 is amended to read:

RULE 17

[*SUBSCRIPTION*] SIGNATURE OF PLEADINGS

A. [*Subscription*] Signature by party or attorney; certificate. Every pleading shall be [*subscribed*] **signed** by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading may be [*subscribed*] **signed** by at least one of such parties or one resident attorney. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The [*subscription of a pleading*] **signature** constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.

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

Section 15. ORCP 21 F. is amended to read:

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, **except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process,** but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated. **A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.**

Section 16. ORCP 21 G. is amended to read:

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, [*that a plaintiff has not legal capacity to sue,*] that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, [*or that the party asserting the claim is not the real party in interest,*] is waived **under either of the following circumstances:** (a) if **the defense is** omitted from a motion in the circumstances described in section F. of this rule, or (b) if [*it*] **the defense** is neither made by motion under this rule nor included in a responsive pleading. [*or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however,*] The defenses [*denominated (2) and (5) of section A. of this rule*] **referred to in this subsection** shall not be raised by amendment.

G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G.[*(2)*](3) A defense of failure to state ultimate facts constituting a claim, [*a defense that the action has not been commenced within the time limited by statute,*] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.[*(3)*](4) 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.

Section 17. ORCP 22 D. is amended to read:

[*D. Joinder of Persons in contract actions.*]

[*D.(1) As used in this section of this rule:*]

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

[*D.(1)(b) "Contract" includes any instrument or document evidencing a debt.*]

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

D. Joinder of additional parties.

D.(1) 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 28 and 29.

D.[*(3)*](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. **As used in this subsection "contract" includes any instrument or document evidencing a debt.**

D.[*(4)*](3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

Section 18. ORCP 24 is amended to read:

RULE 24

JOINDER OF CLAIMS

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

B. Forcible entry and detainer and rental due. If a claim of forcible entry and detainer and a claim for rental due are joined, the defendant shall have the same time to appear as is provided by [*law*] **rule or statute** in actions for the recovery of rental due.

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

Section 19. ORCP 27 is amended to read:

RULE 27

MINOR OR INCAPACITATED PARTIES

A. Appearance of minor parties by guardian or conservator. When a minor, who has a conservator of such minor's estate or a guardian, is a party to any action, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the minor does not have a conservator of such minor's estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem.

A.(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A.(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by [*law*] **these rules or other rule or statute** for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person, who has a conservator of such person's estate or a guardian, is a party to any action, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem apponted by the court in which the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem.

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

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by [*law*] **these rules or other rule or statute** for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

Section 20. ORCP 29 is amended to read:

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If a person should join as a plaintiff but refuses to do so, such person shall be made a defendant, the reason being stated in the complaint.

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

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

[*D. State agencies as parties in governmental administration actions. In any action 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.*]

Section 21. ORCP 33 B. is amended to read:

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

Section 22. ORCP 34 D. is amended to read:

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be shown upon the record **by a written statement of a party signed in conformance with Rule 17** and the action shall proceed in favor of or against the surviving parties.

Section 23. ORCP 36 B. is amended to read:

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

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

B.(2) Insurance agreements **or policies.**

[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 questions 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 subsection 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 subsection as provided in section C. of this rule.

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

B.(2)(d) As used in this subsection, "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.]

Section 24. ORCP 38 is amended to read:

RULE 38

PERSONS WHO MAY ADMINISTER OATHS

FOR DEPOSITIONS; FOREIGN DEPOSITIONS

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

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

C. Foreign depositions.

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

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

Section 25. ORCP 39 F. is amended to read:

F. Submission to witness; changes; [*signing*] **statement**. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes [*in form or substance*] which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

Section 26. ORCP 43 A. is amended to read:

A. Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, **and** translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

Section 27. ORCP 44 A. is amended to read:

A. Order for examination. When the mental or physical condition [*(including the blood group)*] **or the blood relationship** of a party [*or of a*], **or of an agent, employee, or** person in the custody or under the legal control of a party **(including the spouse of a party in an action to recover for injury to the spouse)**, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Section 28. ORCP 44 E. is amended to read:

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with [*the hospitalization of the injured person*] **any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.**

Section 29. ORCP 45 A. is amended to read:

A. Request for admission. After commencement of an action, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B. specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. **The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."**

Section 30. ORCP 45 B. is amended to read:

B. Response. [*The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Each matter of which an admission is requested shall be separately set forth.*] The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon such defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that

the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C., deny the matter or set forth reasons why the party cannot admit or deny it.

Section 31. ORCP 47 D., relating to motions for summary judgment, is amended to read:

D. Form of affidavits; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this [*section*] **rule** an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

Section 32. ORCP 54 is amended to read:

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E. and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim **unless the court directs that the dismissal shall be without prejudice**. Upon notice of dismissal or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them

and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B.(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [*with*] **without** prejudice.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

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

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time before trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim, and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

Section 33. ORCP 55 A. is amended to read:

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. **It also requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance.** Every subpoena shall state the name of the court and the title of the action.

Section 34. ORCP 55 C. is amended to read:

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued **in blank** by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

Section 35. ORCP 55 H. is amended to read:

H. Hospital records.

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

H.(2) Mode of compliance with subpoena of hospital records.

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

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

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian or records.

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

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

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required.

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

Section 36. ORCP 57 C. is amended to read:

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. [*The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.*] **The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.**

Section 37. ORCP 57 F. is amended to read:

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

peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by [*law*] **these rules or other rule or statute** shall not be used against an alternate juror.

Section 38. ORCP 59 B. is amended to read:

B. Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. **If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or** if in the opinion of the court it is desirable, the charge shall be reduced to writing, and then read to the jury by the court. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations. The clerk shall file the instructions in the court file of the case.

Section 39. ORCP 64 B. is amended to read:

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

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B. (2) Misconduct of the jury or prevailing party.

B. (3) Accident or surprise which ordinary prudence could not have guarded against.

B. (4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

[*B. (5) Excessive damages, appearing to have been given under the influence of passion or prejudice.*]

B. [*(6)*] (5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B. [*(7)*] (6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

Section 40. ORS 1.025 is amended to read:

1.025. (1) Where a duty is imposed by law **or the Oregon Rules of Civil Procedure** upon a court, or upon a judicial officer, clerk, bailiff, sheriff, constable or other officer, which requires or prohibits the performance of an act or series of acts in matters relating to the administration of justice in a court, it is the duty of the judicial officer or officers of the court, and each of them, to require the officer upon whom the duty is imposed to perform or refrain from performing the act or series of acts.

(2) Matters relating to the administration of justice include, but are not limited to, the selection and empaneling of juries [*as provided in ORS 10.010 to 10.080 and 10.110 to 10.990 and ORS chapter 132*], the conduct of trials [*as provided in ORS 17.005 to 17.030, 17.035 to 17.050 and 17.105 to 17.765*], the entry and docketing of judgments [*as provided in ORS 18.010 to 18.100, 18.110 to 18.120, 18.130 to 18.440, 18.470 and 18.510*] and all other matters touching the conduct of proceedings in courts of this state.

(3) The duty imposed by subsection (1) of this section may be enforced by writ of mandamus.

Section 41. ORS 1.470 is amended to read:

1.470. (1) Process issued by the commission or by the chairman and vice chairman of the commission shall be served by a person authorized to serve summons [*under ORS 15.060,*] and in the manner prescribed for the service of a summons upon a defendant in a civil [*proceedings*] **action in a circuit court**. The process shall be returned to the authority issuing it within 10 days after its delivery to the person for service, with proof of service **as for summons** or [*proof*] that the person cannot be found. [*A person other than an officer making service shall give proof thereof as provided in ORS 15.160.*] When served outside the county in which the process originated, the process may be returned by mail. The person to whom the process is delivered shall indorse thereon the date of delivery.

(2) Each witness compelled to attend any proceedings under ORS 1.420, other than an officer or employe of the state, a public corporation, or a political subdivision, shall receive for [*his*] attendance the same fees and mileage allowance allowed by law to a witness in a civil case, payable from funds appropriated to the commission.

Section 42. ORS 8.360 is amended to read:

8.360. (1) The report of the official reporter, when transcribed and certified to as being a correct transcript of the notes, tapes or audio records of the testimony, exceptions taken, charge of the judge, and other proceedings in the matter, shall be prima facie a correct statement thereof, and may thereafter be read in evidence as the deposition of a witness [*in the cases mentioned in ORS 45.170*].

(2) When the official reporter in any cause has ceased to be the official reporter of that court, any transcript [*by him*] made [*therefrom*] **from the notes, tapes or audio records by the former official reporter**, or made by a competent person under direction of the court, and duly certified to by [*him*] **the maker**, under oath, as a full, true and complete transcript of [*said*] **the** notes, tapes or audio records, shall have the same force and effect as though certified in the same manner by the official reporter.

Section 43. ORS 12.010 is amended to read:

12.010. Actions [*at law*] shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. [*The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260.*]

Section 44. ORS 13.310 is amended to read:

13.310. Attempts to comply with the provisions of [*ORS 13.290*] **ORCP 32 J.** by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence. Such attempts to comply with a demand shall not be considered an admission of engaging in the act or practice alleged to be unlawful nor of the unlawfulness of that act. Evidence of compliance or attempts to comply with the provisions of [*ORS 13.290*] **ORCP 32 J.** may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of [*ORS 13.290*] **ORCP 32 J.**

Section 45. ORS 13.370 is amended to read:

13.370. Notwithstanding any other provision of law **or the Oregon Rules of Civil Procedure**, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions **under ORCP 32** in convenient courts, including provision for giving notice and presenting evidence.

Section 46. ORS 13.400 is amended to read:

13.400. When a district or circuit court judge, in making in a class [*suit or*] action **under ORCP 32** an order not otherwise appealable, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [*he*] **the judge** shall so state in writing in such

order. The Court of Appeals [*or the Supreme Court, whichever court has jurisdiction over the subject matter of the case,*] may thereupon, in its discretion, permit an appeal to be taken from such order to the [*Supreme Court or the*] Court of Appeals if application is made to the [*appropriate*] court within 10 days after the entry of the order[*, however,*]. Application for such an appeal shall not stay proceedings in the district or circuit court unless the district or circuit **court** judge or the [*Supreme Court or the*] Court of Appeals or a judge thereof shall so order.

Section 47. ORS 13.410 is amended to read:

13.410. The aggregate amount of the claims of all potential class members **in a class action under ORCP 32** shall determine whether the amount in controversy is sufficient to satisfy the provisions of subsection (3) of ORS 19.010 for the purposes of any appeal to the [*Supreme*] Court **of Appeals**.

SECTION 48. ORS 13.400 and 13.410 are added to and made a part of ORS chapter 19.

Section 49. ORS 17.065 is amended to read:

17.065. As used in ORS [*17.055*] **17.065** to 17.085, unless the context requires otherwise:

(1) "Compromise" means an agreement to allow judgment [*or decree*] to be given for a sum or value specified.

(2) "Employer" includes any agent or representative of an employer.

(3) "Release" means an agreement to abandon a claim or right to the person against whom the claim exists.

(4) "Settlement" means an agreement to accept as full and complete compensation for a claim a sum or value specified.

Section 50. ORS 18.010 is amended to read:

18.010. (1) A final judgment shall include both the final determination of the rights of the parties in an action or special proceeding as well as a final judgment entered pursuant to ORS 18.125.

[*(2) The final determination of the rights of the parties to a suit includes decrees as well as final judgments entered pursuant to ORS 18.125.*]

[*(3)*] (2) Other determinations in an action [*or suit*] **that are** intermediate in nature are called orders.

Section 51. ORS 18.060 is amended to read:

18.060. (1) When a motion for new trial, for a particular judgment, or for a judgment notwithstanding the verdict, is decided in vacation, the decision shall be in writing, and filed with the clerk. Within the day of such filing, judgment shall be entered by the clerk in conformity with the decision.

(2) When upon the submission of [*a suit*] **an action tried without a jury** the court is undecided as to what [*decree*] **judgment** ought to be given therein, it may reserve the case for further consideration, and may decide the same and give such [*decree*] **judgment** in vacation by filing it with the clerk. When a [*decree*] **judgment** is given, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given.

[*(3) If a judgment or decree is entered in vacation, the clerk shall entitle and date the entry substantially as follows:*]

[_____]

[*"State of Oregon, County of ———. ——— Court for the County of ———. In vacation, after the ——— term, 19—. ——— the —, 19—." as the fact may be, and such entry shall have the same effect as if entered in term time.*]

[_____]

Section 52. ORS 18.090 is amended to read:

18.090. When a decision has been made sustaining or overruling a [*demurrer*] **motion to dismiss**, unless the party against whom the decision is made is allowed to amend or plead over, judgment shall be given for the prevailing party, for such amount, or relief, or to such effect, as it appears from the pleadings [*he*] **the prevailing party** is entitled; but, if the cause is otherwise at issue upon a question of fact, the court may order the entry of judgment to be delayed until such issue is tried or otherwise disposed of.

Section 53. ORS 18.115 is amended to read:

18.115. [*Judgment may be had upon failure to reply against a party joined under ORS 13.180.*] When it appears that [*such*] a party **joined under ORCP 22 D.(2)** has been duly served with the summons, and has failed to file a reply with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the defendant filing a claim against that party shall have judgment against [*him as follows:*] **that party.**

[*(1) In a claim under subsection (1) of ORS 13.180, as provided for complaints under subsections (1), (3) and (4) of ORS 18.080.*]

(2) In a claim arising under subsection (2) of ORS 13.180,] Upon written application of defendant filed with the clerk, and upon the event of defendant's prevailing in the action or suit, the clerk shall enter judgment against the party joined under [*subsection (2) of ORS 13.180*] **ORCP 22 D.(2)** and in favor of defendant for the amount of reasonable attorney fees as determined under ORS 20.096. The provisions of subsections (3) and (4) of ORS 18.080 shall apply to judgments under this [*subsection*] **section** as if judgment were rendered on a complaint.

Section 54. ORS 18.335 is amended to read:

18.335. In every proceeding, the clerk shall attach together and file in [*his*] **the office of the clerk**, in the order of their filing, all the original papers filed in the court, whether before or after judgment, including but not limited to the summons and proof of service, pleadings, [*demurrers,*] motions, affidavits, depositions, stipulations, orders, the judgment and the notice of appeal and the undertaking on appeal, if any.

Section 55. ORS 19.026 is amended to read:

19.026. (1) Except as provided in subsections (2) and (3) of this section, the notice of appeal shall be served and filed within 30 days after the entry of the judgment appealed from.

(2) Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days [*from*] **after** the earlier of the following dates:

(a) The date of entry of the order disposing of the motion.

(b) The date on which the motion is deemed denied, as provided in [*ORS 17.615*] **ORCP 63 D. or 64 F.**

(3) Any other party who has appeared in the action, suit or proceeding, desiring to appeal against the appellant or any other party to the action, suit or proceeding, may serve and file [*his*] notice of appeal within 10 days after the expiration of the time allowed by subsections (1) and (2) of this section. Any party not an appellant or respondent, but who becomes an adverse party to a cross appeal, may cross appeal against any party to the appeal by a written statement in [*his*] **the** brief.

(4) When more than one notice of appeal is filed, the date on which the last such notice was filed shall be

used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

Section 56. ORS 19.104 is amended to read:

19.104. Except as otherwise provided in ORS 19.023 to 19.190, where ORS 19.023 to 19.190 require any paper to be served and filed, the paper shall be served in the manner provided in [*ORS 16.780 to 16.800*] **ORCP 9 B**, on all other parties who have appeared in the action, suit or proceeding and who are not represented by the same counsel as the party serving the paper, and shall be filed, with proof of service indorsed thereon, with the trial court clerk.

SECTION 57. Section 58 of this Act is added to and made a part of ORS 19.074 to 19.190.

SECTION 58. If an appeal is taken from an order of the trial court granting a new trial on its own initiative, the order shall be affirmed on appeal only on grounds set forth in the order or because of reversible error affirmatively appearing in the record.

Section 59. ORS 20.040 is amended to read:

20.040. Costs are allowed, of course, to the plaintiff upon a judgment in [*his*] favor **of the plaintiff** in:

(1) An action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof, arises upon the pleadings, or is certified by the court to have come in question upon the trial.

(2) Actions for fines and forfeitures, and the actions provided for in ORS 30.310, 30.315 to 30.330, [*30.350,*] 30.390, 30.400[,] **and** 30.510 to 30.640 [*and 34.810*].

(3) An action involving an open mutual account where it appears to the satisfaction of the court that the sum total of such accounts of both parties exceeds $100.

(4) An action for the recovery of personal property when the value of the property claimed and the damages for the detention thereof exceed $100.

(5) An action not hereinbefore specified for the recovery of money or damages when the plaintiff shall recover $100 or more.

(6) Any action in a district, county or justice's court.

(7) Any action tried to the court without the intervention of a jury or in which before trial the plaintiff shall have consented in writing to such trial to the court, except such action be for the recovery of personal property, or money, or damages, and then only if the judgment for value and damages, or money, or damages be in the sum of $50[,] or more.

Section 60. ORS 20.210 is amended to read:

20.210. Costs and disbursements shall be taxed and allowed by the court or judge thereof in which the action[, *suit*] or proceeding is pending. No disbursements shall be allowed to any party unless [*he*] **that party** serves on such adverse parties as are entitled to notice by law, or rule of the court, and files with the clerk of such court within 10 days after the rendition of the judgment [*or decree*], a statement showing with reasonable certainty the items of all disbursements, including fees of officers and the number of miles of travel and number of days' attendance claimed for each witness, if any. The statement must be verified, except as to fees of officers. Where notice to the adverse party is required, proof of service must be indorsed on or attached to the statement. A disbursement which a party is entitled to recover must be taxed whether the same has been paid or not by such party. The statement of disbursements thus filed and costs shall be entered as of course by the clerk as a part of the judgment [*or decree*] in favor of the party entitled to costs and disbursements, unless

the adverse party within five days [*from*] **after the expiration of the time allowed to file such statement shall file** [*his verified*] objections thereto, stating the particulars of such objections. Questions of law and of fact, denials of any or all of the items charged in the statement, and allegations of new matter, may be joined and included in the objections, and these shall be deemed controverted and denied by the party filing the statement without further pleading. The statement of disbursements, and the objections thereto, constitute the only pleadings required on the question, and they shall be subject to amendment like pleadings in other cases.

Section 61. ORS 23.020 is amended to read:

23.020. (1) A [*decree*] **judgment** requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed to be equivalent thereto.

(2) The court or judge thereof may enforce an order or [*decree in a suit*] **judgment granting an equitable remedy** by punishing the party refusing or neglecting to comply therewith, as for a contempt.

(3) Subsection (2) of this section does not apply to an order or [*decree*] **judgment** for the payment of money, except orders and [*decrees*] **judgments** for the payment of [*suit*] money **to prosecute or defend**, alimony and money for support, maintenance, nurture, education or attorney's fees pendente lite, or by final [*decree*] **judgment**, in:

(a) [*Suits*] **Actions** for dissolution of marriages.

(b) [*Suits*] **Actions** for separation from bed and board.

(c) Proceedings under ORS 108.110 and 108.120.

Section 62. ORS 29.030 is amended to read:

29.030. (1) [*Except under ORS 29.040,*] no court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction.

(2) In absence of the finding described in subsection (2) of ORS 29.035 the court shall not order issuance of provisional process.

(3) In absence of specific application by the plaintiff the court shall not order issuance of provisional process.

Section 63. ORS 30.230 is amended to read:

30.230. Before an action can be commenced by a plaintiff other than the state, or the public corporation named in the undertaking or security, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or security, and an affidavit of the plaintiff or some person on [*his*] behalf **of the plaintiff** showing the delinquency, but if the matters set forth in the affidavit are such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that leave has been granted, the defendant on motion shall be entitled to judgment of [*nonsuit*] **dismissal without prejudice**, if it does, the defendant may controvert the allegation, and if the issue be found in [*his*] favor **of the defendant**, judgment shall be given accordingly.

Section 64. ORS 30.275 is amended to read:

30.275. (1) Every person who claims damages from a public body or from an officer, employe or agent of a public body acting within the scope of [*his*] employment or duties for or on account of any loss or injury within the scope of ORS 30.260 to 30.300 shall cause to be presented to the public body within 180 days after the

alleged loss or injury a written notice stating the time, place and circumstances thereof, the name of the claimant and [*his*] **of the claimant** and the amount of compensation or other relief demanded. Claims against the State of Oregon or a state officer, employe or agent shall be presented to the Attorney General. Claims against any local public body or an officer, employe or agent thereof shall be presented to a person upon whom process could be served upon the public body in accordance with [*subsection (3) of ORS 15.080*] **ORCP 7 D.(3)(d)**. Notice of claim shall be served upon the Attorney General or local public body's representative for service of process either personally or by certified mail, return receipt requested. A notice of claim which does not contain the information required by this subsection, or which is presented in any other manner than [*herein*] provided **in this section**, is invalid, except that failure to state the amount of compensation or other relief demanded does not invalidate the notice.

(2) When the claim is for death, the notice may be presented by the personal representative, surviving spouse or next of kin, or by the consular officer of the foreign country of which the deceased was a citizen, within one year after the alleged injury or loss resulting in such death. However, if the person for whose death the claim is made has presented a notice that would have been sufficient had [*he*] **the person** lived, an action for wrongful death may be brought without any additional notice.

(3) No action shall be maintained unless such notice has been given and unless the action is commenced within two years after the date of such accident or occurrence. The time for giving such notice does not include the time, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity.

Section 65. ORS 30.370 is amended to read:

30.370. In any suit, action or proceeding commenced under the provisions of ORS 30.360 to which the state is made a party, service of summons upon the state shall be made upon the Attorney General. In addition to [*the requirements of ORS 15.040*] **other required content**, any summons served pursuant to this section shall state the state agency involved in the suit, action or proceeding.

Section 66. ORS 30.610 is amended to read:

30.610. The actions provided for in ORS 30.510 to 30.640 shall be commenced and prosecuted by the district attorney of the district where the same are triable. When the action is upon the relation of a private party, as allowed in ORS 30.510, the pleadings on behalf of the state shall be [*verified*] **signed** by the relator as if [*he*] **the relator** were the plaintiff, or otherwise as provided in [*ORS 16.070*] **ORCP 17**; in all other cases the pleadings shall be [*verified*] **signed** by the district attorney in like manner or otherwise as provided in [*ORS 16.070*] **ORCP 17**. When an action can only be commenced by leave, as provided in ORS 30.580, the leave shall be granted when it appears by affidavit that the acts or omissions specified in that section have been done or suffered by the corporation. When an action is commenced on the information of a private person, as allowed in ORS 30.510, having an interest in the question, such person, for all the purposes of the action, and as to the effect of any judgment that may be given therein, shall be deemed a coplaintiff with the state.

Section 67. ORS 33.210 is amended to read:

33.210. All persons desiring to settle by arbitration any controversy[, *suit*] or quarrel, except such as respect the title to real estate or the terms or conditions of employment under collective contracts between employers and employes or between employers and associations of employes, may submit their differences to the award or umpirage of any person or persons mutually selected.

Section 68. ORS 33.230 is amended to read:

33.230. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in ORS 33.220, shall petition the circuit court, or a judge thereof, for an order directing that the arbitration proceed in the manner provided for in the contract or submission. Ten days' notice in writing of the application shall be served upon the party in default, in the manner provided [*by law*] for personal service of a summons. The court or judge shall hear the parties, and if satisfied that the making of the contract or submission or the failure to comply therewith is not an issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default is an issue, the court or the judge shall proceed summarily to the trial thereof. If no jury trial is demanded by either party, the court or judge shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of the issue, and if such demand is made, the court or judge shall make an order referring the issue to a jury in the manner provided by [*law for referring to a jury issues in a suit in equity*] **ORCP 51 D**. If the jury finds that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury finds that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court or judge shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 69. ORS 33.720 is amended to read:

33.720. (1) The determination authorized by ORS 33.710 shall be in the nature of a proceeding in rem, and the practice and procedure therein shall follow the practice and procedure of [*suits in equity*] **an action not triable by right to a jury**, as far as the same is consistent with the determination sought to be obtained, except as provided in this section.

(2) Jurisdiction of the municipal corporation shall be obtained by the publication of notice directed to the municipal corporation, and jurisdiction of the qualified voters of the municipal corporation shall be obtained by publication of notice directed to all qualified voters, freeholders, taxpayers and other interested persons, without naming such voters, freeholders, taxpayers and other interested persons individually. The notice shall be served on all parties in interest by publication thereof for at least once a week for three successive weeks in a newspaper of general circulation published in the county where the proceeding is pending, or if no such newspaper is published therein, then in a contiguous county. Jurisdiction shall be complete within 10 days after the date of completing publication of the notice as provided in this section.

(3) Any person interested may at any time before the expiration of the 10 days appear and contest the validity of such proceeding, or of any of the acts or things therein enumerated. Such proceeding shall be tried forthwith and judgment rendered as expeditiously as possible declaring the matter so contested to be either valid or invalid. Any order or judgment in the course of such proceeding[, *or any final decree therein,*] may be made and rendered by the judge in vacation or otherwise; and for that purpose, the court shall be deemed at all times to be in session and the act of the judge in making the order[,] or judgment [*or decree*] shall be the act of the court.

(4) [*Either*] **Any** party may appeal to the [*Supreme*] Court **of Appeals** from the final judgment [*or decree*] rendered in such proceeding. The court, in inquiring into the regularity, legality or correctness of any proceeding of the municipal corporation or its governing body shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties to the special proceeding, and may approve the

proceedings in part and may disapprove and declare illegal or invalid in part other or subsequent proceedings, or may approve or disapprove the proceedings, or may approve the proceedings in part and disapprove the remainder thereof.

(5) Costs of the proceeding may be allowed and apportioned between the parties in the discretion of the court.

Section 70. ORS 34.170 is amended to read:

34.170. On the return day of the alternative writ, or such further day as the court or judge thereof may allow, the defendant on whom the writ was served may show cause by [*demurrer*] **motion to dismiss** or answer to the writ, in the same manner as to a complaint in an action.

Section 71. ORS 34.180 is amended to read:

34.180. If the defendant does not show cause by [*demurrer*] **motion to dismiss** or answer, a peremptory mandamus shall be allowed against [*him*] **the defendant**. If the answer contains new matter, the same may be [*demurred*] **moved against** or replied to by the plaintiff, within such time as the court or judge may prescribe. If the replication contains new matter, the same may be [*demurred to*] **moved against** by the defendant within such time as the court or judge may prescribe, or [*he*] **the defendant** may countervail such matter on the trial or other proceedings by proof, either in direct denial or by way of avoidance.

Section 72. ORS 34.190 is amended to read:

34.190. The pleadings in the proceeding by mandamus are those mentioned in ORS 34.170 and 34.180, and none other are allowed. They are to have the same effect and construction, and may be amended in the same manner, as pleadings in an action. Either party may move to strike out, or be allowed to plead over after motion [*or demurrer allowed or disallowed*], and the issues joined shall be tried, and the further proceedings thereon had in like manner and with like effect as in an action.

Section 73. ORS 34.670 is amended to read:

34.670. The plaintiff in the proceeding, on the return of the writ, may, by replication, [*verified*] **signed as in** an action, controvert any of the material facts set forth in the return, or [*he*] **the plaintiff** may allege therein any fact to show, either that [*his*] imprisonment or restraint **of the plaintiff** is unlawful, or that [*he*] **the plaintiff** is entitled to [*his*] discharge; and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of or against the imprisonment or restraint, and to dispose of the party as the law and justice of the case may require.

Section 74. ORS 34.680 is amended to read:

34.680. The plaintiff may [*demur to*] **move to strike** the return, or the defendant may [*demur to*] **move to strike** any new matter set forth in the replication of the plaintiff, or by proof controvert the same, as upon a direct denial or avoidance. The pleadings shall be made within such time as the court or judge shall direct, and they shall be construed and have the same effect as in an action.

Section 75. ORS 35.255 is amended to read:

35.255. [*(1)*] The complaint shall describe the property sought to be condemned and shall allege the true value of the property sought and the damage, if any, resulting from the appropriation thereof.

[*(2) If the defendant, or either of several defendants, is a nonresident of this state or unknown, service of the summons may be made by publication.*]

Section 76. ORS 35.305 is amended to read:

35.305. (1) Evidence shall be received and the trial conducted in the order and manner prescribed [*by ORS chapter 17*] **for a civil action in the circuit court**, except that the defendant shall have the option of proceeding first or last in the presentation of evidence, if notice of such election is filed with the court and served on the condemner at least seven days prior to the date set for trial. If no notice of election is filed, the condemner shall proceed first in the presentation of evidence. Unless the case is submitted by both sides to the jury without argument, the party who presents evidence first shall also open and close the argument to the jury.

(2) Condemner and defendant may offer evidence of just compensation, but neither party shall have the burden of proof of just compensation.

Section 77. ORS 41.930 is amended to read:

41.930. The copy of the records described in [*ORS 41.920*] **ORCP 55 H.** is admissible in evidence to the same extent as though the original thereof were offered and a custodian of hospital records had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein. The matters stated therein are presumed to be true. The presumption established by this section is a presumption affecting the burden of producing evidence.

Section 78. ORS 41.945 is amended to read:

41.945. ORS [*41.915 to 41.945*] **41.930 and ORCP 55 H.** apply in any proceedings in which testimony may be compelled.

Section 79. ORS 44.040, as amended by section 12a, chapter 677, Oregon Laws 1977, is further amended to read:

44.040. (1) There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases:

(a) A husband shall not be examined for or against his wife without her consent, or a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. The exception does not apply to a civil action[, *suit*] or proceeding[,] by one against the other, or to a criminal action or proceeding for a crime committed by one against the other.

(b) An attorney shall not, without the consent of [*his*] the client, be examined as to any communication made by the client to [*him*] **the attorney**, or [*his*] the advice given by **the attorney** thereon, in the course of professional employment.

(c) A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to [*him*] **the member** in [*his*] the professional character **of the member**. As used in this paragraph, "member of the clergy" means a minister of any church, religious denomination or organization who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.

(d) Subject to [*ORS 44.610 to 44.640*] **ORCP 44**, a regular physician or surgeon shall not, without the consent of [*his*] the patient, be examined in a civil action[, *suit*] or proceeding, as to any information acquired in

attending the patient, which was necessary to enable [*him*] **the physician or surgeon** to prescribe or act for the patient.

(e) A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500.

(f) A stenographer shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment.

(g) A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action[, *suit*] or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

(h) A licensed psychologist, as defined in ORS 675.010, shall not, without the consent of [*his*] **the** client, be examined as to any communication made by the client to [*him*] **the psychologist**, or [*his*] **the** advice given **by the psychologist** thereon, in the course of [*his*] professional employment.

(i) A certificated staff member of an elementary or secondary school shall not be examined in any civil action[, *suit*] or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or [*his*] family **of the student**, and which if disclosed would tend to damage or incriminate the student or [*his*] family. Any violation of the privilege provided by this [*section*] **paragraph** may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(j) A physician licensed to practice medicine by the Board of Medical Examiners for the State of Oregon and a local health authority officer or employe shall not be examined in a civil or criminal court proceeding as to the existence or contents of any records of a person examined or treated for an infectious venereal disease without the consent of the person examined or treated for such disease unless the public interest by clear and convincing evidence requires disclosure in the particular instance.

(k) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in [*his*] **the** official capacity **of the counselor** in any civil action[, *suit*] or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs or alcoholic liquor. Any violation of the privilege provided by this paragraph may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

(L) A clinical social worker registered by the Health Division shall not be examined in a civil or criminal court proceeding as to any communication given him by a client in the course of noninvestigatory professional activity when such communication was given to enable the registered clinical social worker to aid the client, except:

(A) When the client or those persons legally responsible for the client's affairs give consent to the disclosure;

(B) When the client initiates legal action or makes a complaint against the registered clinical social worker to the division;

(C) When the communication reveals the intent to commit a crime or harmful act; or

(D) When the information reveals that a minor was the victim of a crime, abuse or neglect.

(2) If a party to the action[, *suit*] or proceeding **voluntarily** offers [*himself*] **testimony** as a witness, it is deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician or surgeon, stenographer, licensed professional nurse, licensed psychologist, a registered clinical social worker, a certificated staff member, local health authority officer or employe or a certificated school counselor on the same subject.

SECTION 80. The amendment of ORS 44.040 by section 79 of this Act is not intended to affect the provisions of section 15, chapter 677, Oregon Laws 1977.

Section 81. ORS 44.320 is amended to read:

44.320. Every court, judge, clerk of a court, justice of the peace or notary public is authorized to take testimony in any action[, *suit*] or proceeding, as are other persons in particular cases authorized by statute **or the Oregon Rules of Civil Procedure**. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other person in the particular case authorized.

Section 82. ORS 45.050 is amended to read:

45.050. Whenever [*a suit*] **an action tried without a jury** is at issue upon a question of fact, the court may refer it to a referee to take the testimony in the case and report it to the court within such time as the court or judge thereof may order, provided, that in judicial districts composed of one county only and having more than one judge of the circuit court, no [*suit*] **action** shall be referred to a referee without the written and filed consent of all the parties, except in [*suits*] **actions** involving the examination of long and complicated accounts. The court or judge may revoke a reference or change the referee. Special reference may be made to a special referee for taking the testimony of witnesses residing more than 250 miles from the place of holding the court or without the state, and the testimony so taken shall be returned to the court. When [*a suit*] **an action** has gone to final [*decree*] **judgment**, the judge rendering the [*decree*] **judgment** shall, within 10 days after its entry, by proper certificate, identify all the evidence adduced before the referee, whatever its nature. The referee may require the attendance of witnesses and issue subpenas therefor. The testimony so taken shall be reduced to writing, provided, that if it is taken by a stenographer, [*he*] **the stenographer** shall make a transcript of [*his*] **the** notes thereof, and certify to its being true and correct. All documentary evidence or other material object offered shall be preserved and incorporated in the report of the evidence by the referee. If evidence is offered by any party to the [*suit*] **action** and excluded by ruling of the referee, the party offering it may require that it be transcribed or preserved and incorporated in like manner as the evidence received. The party offering any testimony so rejected shall pay for the taking and transcribing thereof, unless the court holds it competent.

Section 83. ORS 45.250 is amended to read:

45.250. (1) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions of this subsection:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party, may be used by an adverse party for any purpose.

(2) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party for any purpose, if the party was present or represented at the taking of the deposition or had due notice thereof, and if the court finds that:

(a) The witness is dead; or

(b) The witness's residence or present location is such that [*he*] **the witness** is not obliged to attend in obedience to a subpena as provided in [*ORS 44.171*] **ORCP 55 E.(1)**, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(c) The witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or

(d) The party offering the deposition has been unable to procure the attendance of the witness by subpena; or

(e) Upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Section 84. ORS 52.120 is amended to read:

52.120. [*(1) The summons shall be served by a person authorized to serve summons under ORS 15.060.*]

[*(2) Compensation to such person serving the summons shall be as prescribed by subsection (3) of ORS 15.060.*]

(1) The summons in an action in a justice's court shall be served by a person authorized to serve summons, who shall be compensated for service of the summons, as provided for the service of summons in civil action in a circuit court.

(2) The summons shall be served in the manner provided for the service of summons in a civil action in a circuit court. The summons shall be returned to the justice by whom it was issued by the person serving it, with proof of service or that the defendant cannot be found.

Section 85. ORS 52.130 is amended to read:

52.130. Whenever it appears to the justice that any process or order authorized to be issued or made will not be served for want of an officer, the justice may appoint any other person authorized by ORS [*15.060*] **52.120**, to serve it. Such an appointment may be made by an indorsement on the process or order, in substantially the following form and signed by the justice with [*his*] **the name of the office of the justice**: "I hereby appoint A B to serve the within process or order," as the case may be.

Section 86. ORS 52.320 is amended to read:

52.320. In all actions instituted in a justice's court a defendant shall have the right to plead a counterclaim in excess of the jurisdiction of the court, whereupon the justice of the peace shall, within 10 days following the filing of the answer, file with the clerk of the circuit court for the county in which the justice's court is located, a transcript of the cause containing a copy of all the material entries in the justice's docket, together with all the original papers relating to the cause. Upon the filing of the transcript with the clerk of the circuit court, the justice of the peace shall proceed no further in the cause, but the cause shall thenceforth be considered as transferred to the circuit court and be deemed pending and for trial therein as if originally commenced in the court. The circuit court shall have jurisdiction of the cause and shall proceed to hear, determine and try the same. In the event of the justice's failure to file the transcript in the circuit court within the time specified, the judge of the circuit court may make an order upon the justice to comply within a specified time with the

provisions of this section. The plaintiff in the action shall have 10 days after the filing of the transcript in the circuit court in which to move against[*, demur*] or reply to defendant's answer. All costs incurred in the transfer of the case, including the fee for filing the same in the circuit court, shall be borne by the defendant and must be tendered by the defendant to the justice of the peace at the time of filing with the justice the counterclaim, and the costs may be recovered by the defendant in the event [*he*] **the defendant** prevails. On failure of the defendant to pay to the justice of the peace the required fee at the time of filing the counterclaim, or within two days thereafter, the justice of the peace shall disregard the counterclaim of the defendant and proceed to try the cause as though the counterclaim had never been filed.

Section 87. ORS 55.070 is amended to read:

55.070. (1) The notice of claim shall be served upon the defendant either by [*the persons*] **a person** provided for in ORS 52.120 or by certified mail, at the option of the justice of the peace.

(2) If served by a person provided for in ORS 52.120, the notice shall be served in the manner provided for in ORS [*52.140*] **52.120**, but no other paper is to be served with the notice. The person serving the notice shall be entitled to receive from the plaintiff compensation for such service as prescribed by [*subsection (3) of*] ORS [*15.060*] **52.120**, which shall be added to any judgment given for plaintiff.

(3) If service by certified mail is attempted, the justice of the peace shall mail the notice by certified mail addressed to the defendant at [*his*] **the last-known mailing address of the defendant** within the territorial jurisdiction of the justice court. The envelope shall be marked with the words "Deliver to Addressee Only" and "Return Receipt Requested." The date of delivery appearing on the return receipt shall be prima facie evidence of the date on which the notice was served upon the defendant. The justice of the peace shall collect from the plaintiff the sum required to pay the expenses of service by certified mail, which shall be added to any judgment given for plaintiff. If service by certified mail is not successfully accomplished, the notice shall be served by a person as provided in subsection (2) of this section.

Section 88. ORS 69.450 is amended to read:

69.450. (1) Each limited partnership which is domiciled without this state shall file a certificate in the office of the Corporation Commissioner in accordance with ORS 69.440 and designate some natural person or corporation as agent of the partnership and the general partners upon whom any process, notice or demand which arises out of the conduct of the partnership affairs and which is required or permitted by law to be served on the limited partnership or any general partner, may be served.

(2) Such process may be served as provided by [*ORS 15.080*] **ORCP 7 D.(3)(b)** on the person designated pursuant to subsection (1) of this section or, in the event that no such person has been designated or the person designated cannot be found, then service may be made as provided by ORS 69.500.

Section 89. ORS 69.500 is amended to read:

69.500. (1) The registered agent shall be an agent of the limited partnership and the general partners thereof upon whom any process, notice or demand which arises out of the conduct of the partnership affairs and which is required or permitted by law to be served upon the limited partnership or any general partner thereof may be served.

(2) The Corporation Commissioner shall be an agent of the limited partnership and each general partner thereof upon whom any such process, notice or demand may be served:

(a) Whenever the limited partnership and its general partners fail to appoint or maintain a registered agent in this state, or

(b) Whenever the registered agent cannot with reasonable diligence be found at the registered office.

(3) Service shall be made on the Corporation Commissioner by:

(a) Service on [*him*] **the Corporation Commissioner** or a clerk on duty in any office of the Corporation Commissioner of a copy of the process, notice or demand with any papers required by law to be delivered in connection with the service, and a $2 fee;

(b) Transmittal by the person initiating the proceedings by certified or registered mail, return receipt requested, of notice of the service on the Corporation Commissioner and a copy of the process, notice or demand and accompanying papers to the registered agent and the limited partnership at the last registered address of the registered agent and the limited partnership as shown by the records on file in the office of the Corporation Commissioner and to all general partners being served at the last-known address of such general partner as shown by the records on file in the office of the Corporation Commissioner; and

(c) Filing with the appropriate court or other body, as part of the return of service, of the return receipt of mailing and an affidavit of the person initiating the proceedings that this section has been complied with.

(4) No default shall be entered against any defendant served under subsection (3) of this section who has not either received or rejected a registered or certified letter containing the notice of such service and a copy of the process, notice or demand and accompanying papers, unless the plaintiff can show that the defendant, after due diligence, cannot be found within or without the state and that fact appears by affidavit to the satisfaction of the court or judge thereof[*, or the judge described in subsection (3) of ORS 15.120*]. Due diligence is satisfied when it appears from such affidavit that the defendant cannot be found at the most recent address given by the defendant to the Corporation Commissioner under this chapter, if it appears from the affidavit that inquiry at such address was made within a reasonable time preceding service on the Corporation Commissioner. Where due diligence is proved to the court by such affidavit, the service upon the Corporation Commissioner shall be sufficient valid personal service upon such defendant notwithstanding that [*he or it*] **the defendant** did not actually receive a notice of such service because of the defendant's failure to notify the Corporation Commissioner of a change in [*his or its*] address as required by this chapter.

(5) The Corporation Commissioner shall keep a record of all processes, notices and demands served upon [*him*] **the commissioner** under this section.

(6) Nothing contained in this section shall limit or affect the jurisdiction of the courts of this state now or hereafter conferred by law, shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served on a limited partnership or the general partners thereof in any other manner now or hereafter permitted by law, or shall enlarge the purposes for which service on the Corporation Commissioner is permitted where such purposes are limited by any other provision of law.

Section 90. ORS 82.120 is amended to read:

82.120. (1) In the trial of any cause involving the defense of usury either party thereto shall be accorded a jury trial [*in action at law*] **if the remedy sought by the plaintiff is legal in nature,** and[,] at the discretion of the court[*, in suits in equity*] **if the remedy sought by the plaintiff is equitable in nature,** upon making timely request therefor to the court or judge thereof wherein the cause is pending.

(2) The burden of proof to establish usury is upon the party interposing that defense, but the question of whether the usurious contract had been made or usury exacted is for determination by the jury [*in law actions*] **if the remedy sought by the plaintiff is legal in nature,** and [*in suits in equity*] by the court or by a jury **if the remedy sought by the plaintiff is equitable in nature,** in the discretion of the court. In either case the verdict of

the jury shall have the same force and effect as in [*law*] **civil** actions, and [*said*] the defense shall be deemed to have been established as in other civil actions when sustained by the preponderance of the evidence in the case. If upon such trial evidence is introduced with respect to the subject matter of the litigation showing the payment of any commission, bonus, fee, premium, penalty or other charge, compensation or gratuity by the borrower to any officer, director or agent of the lender, knowledge thereof is, prima facie, imputed to the lender.

(3) The defense of usury may be interposed not only by the borrower, but by [*his*] **the** accommodation indorser, guarantor or surety **of the borrower**, by any junior mortgagee or lien holder; and by the vendee or grantee of any property involved in, or pledged or mortgaged as security for, the alleged usurious loan. Deduction shall be made from the amount actually received by the borrower of all usurious payments made by [*him*] **the borrower** or for [*his*] **the** account **of the borrower**.

(4) This chapter does not apply to bona fide sales or resales of securities or commercial paper, nor does it apply to interest charges by broker-dealers registered under the Securities Exchange Act of 1934 for carrying a debit balance in an account for a customer if the debit balance is payable on demand and secured by stocks or bonds.

(5) If it is ascertained in any action [*or suit*] brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter in money, property or other valuable thing, or that any gift or donation of money, property or other valuable thing has been made or promised to be made to a lender or creditor, or to any person for [*him*] **the lender or creditor**, either by the borrower or debtor, or by any person for [*him*] **the borrower or debtor**, the design of which is to obtain for money so loaned or for debts due or to become due a rate of interest greater than that specified by the provisions of this chapter, it shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the county school fund of the county wherein such [*suit*] **action** is brought. The court in which such [*suit*] **action** is prosecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, less all payments made by or for account of the borrower, against the defendant and in favor of the state for the use of the county school fund of [*said*] **the** county, and against the plaintiff for costs of [*suit*] **action**.

Section 91. ORS 88.080 is amended to read:

88.080. A decree of foreclosure shall order the mortgaged property sold. Property sold on execution issued upon a decree may be redeemed in like manner and with like effect as property sold on an execution [*issued on a judgment*] **pursuant to ORS 23.410 to 23.600**, and not otherwise. A sheriff's deed for property sold on execution issued upon a decree shall have the same force and effect as a sheriff's deed issued for property sold on an execution [*issued on a judgment*] **pursuant to ORS 23.410 to 23.600**.

Section 92. ORS 92.305 is amended to read:

92.305. As used in ORS 92.305 to 92.495:

(1) "Blanket encumbrance" means a trust deed or mortgage or any other lien or encumbrance, mechanics' lien or otherwise, securing or evidencing the payment of money and affecting more than one interest in subdivided land, or an agreement affecting more than one such lot, parcel or interest by which the subdivider or developer holds such subdivision under an option, contract to sell or trust agreement.

(2) "Commissioner" means the Real Estate Commissioner.

(3) Except as otherwise provided in subsection (2) of ORS 92.325, "developer" means a person who purchases a lot or parcel in a subdivision that does not have a single family residential dwelling or duplex

thereon to construct a single family residential dwelling or duplex on the lot or parcel and to resell the lot or parcel and the dwelling or duplex for eventual residential use purposes. Developer also includes a person who purchases a lot, parcel or other interest in a subdivision that does not have a single family residential dwelling or duplex thereon for resale to another person. "Developer" does not mean a "developer" as that term is defined in ORS 91.505.

(4) "Interest" includes a lot or parcel, and a share, undivided interest or membership which includes the right to occupy the land overnight, and lessee's interest in land for more than three years or less than three years if the interest may be renewed under the terms of the lease for a total period more than three years. "Interest" does not include any interest in a condominium as that term is defined in ORS 91.505 or any security interest under a land sales contract, trust deed or mortgage.

(5) "Negotiate" means any activity preliminary to the execution of a binding agreement for the sale or lease of land in a subdivision, including but not limited to advertising, solicitation and promotion of the sale or lease of such land.

(6) "Person" includes a natural person, a domestic or foreign corporation, a partnership, an association, a joint stock company, a trust and any unincorporated organization. As used in ORS 92.305 to 92.495 and 92.820 the term "trust" includes a common law or business trust, but does not include a private trust or a trust created or appointed under or by virtue of any last will and testament, or by a court [*of law or equity*].

(7) "Real property sales contract" means an agreement wherein one party agrees to lease or to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract.

(8) "Sale" or "lease" includes every disposition or transfer of land in a subdivision, or an interest or estate therein, by a subdivider or a developer, or their agents, including the offering of such property as a prize or gift when a monetary charge or consideration for whatever purpose is required by the subdivider, developer or their agents.

(9) "Subdivided lands" and "subdivision" mean improved or unimproved land or lands divided, or created into interests or sold under an agreement to be subsequently divided or created into interests, for the purpose of sale or lease, whether immediate or future, into 11 or more undivided interests or four or more other interests. "Subdivided lands" and "subdivision" do not mean property submitted to ORS 91.505 to 91.675.

(10) "Subdivider" means any person who causes land to be subdivided into a subdivision for himself or for others, or who undertakes to develop a subdivision, but does not include a public agency or officer authorized by law to make subdivisions.

Section 93. ORS 93.680 is amended to read:

93.680. (1) The following are entitled to be recorded in the record of deeds of the county in which the lands lie, in like manner and with like effect as conveyances of land duly acknowledged, proved or certified:

(a) The patents from the United States or of this state for lands within this state.

(b) [*Decrees*] **Judgments** of courts [*of equity*] in this state requiring the execution of a conveyance of real estate within this state.

(c) Approved lists of lands granted to this state, or to corporations in this state.

(d) Conveyances executed by any officer of this state by authority of law, of lands within this state.

(2) The record of any such patent, [*decree*] **judgment**, approved lists or deeds recorded, or a transcript thereof certified by the county clerk in whose office it is recorded, may be read in evidence in any court in this state, with like effect as the original.

Section 94. ORS 105.130 is amended to read:

105.130. (1) Except as provided in this section and ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

(2) Upon filing a complaint in the case of a dwelling unit to which ORS 91.700 to 91.895 apply, the clerk shall:

(a) Collect all applicable fees; and

(b) With the assistance of the plaintiff or [*his*] **an agent of the plaintiff**, complete the applicable summons and forward the summons, with sufficient copies, and a true copy of the complaint for service by a person authorized to serve summons [*under ORS 15.060*] **in a civil action in a circuit court**.

Section 95. ORS 105.230 is amended to read:

105.230. If a party having a share or interest in or lien upon the property is unknown[*, or any of the known parties reside out of the state*] or cannot be found [*therein*], and such fact is made to appear by affidavit, the summons may be served on the [*absent or*] unknown **or unlocated** party by publication, directed by the court or judge, as in ordinary cases. When service of the summons is made by publication it must be accompanied by a brief description of the property which is the subject of the suit.

Section 96. ORS 105.505 is amended to read:

105.505. Any person whose property or personal enjoyment thereof is affected by a private nuisance, may maintain an action [*at law*] for damages therefor. If judgment is given for the plaintiff in the action, [*he*] **the plaintiff** may, on motion, in addition to the execution to enforce the judgment, obtain an order allowing a warrant to issue to the sheriff to abate the nuisance. The motion must be made at the term at which judgment is given, and shall be allowed of course, unless it appears on the hearing that the nuisance has ceased or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed [*in equity*] to have the defendant enjoined.

Section 97. ORS 105.705 is amended to read:

105.705. (1) When any dispute or controversy exists between owners of adjacent or contiguous lands in this state, concerning the boundary lines thereof, or the location of the line dividing such lands, any party to the dispute or controversy may bring [*a suit in equity*] **an action** in the circuit court in the county where all or part of the lands are situated, for the purpose of having the controversy or dispute determined, and the boundary line or dividing line ascertained and marked by proper monuments upon the ground where such line is ascertained.

(2) Upon final determination of the dispute by the court, the clerk of the court shall file one copy of the [*decree*] **judgment** in the office of the county surveyor, one copy in the office of the county assessor and one copy in the office of the county officer who keeps the records of deeds for recording in the county deed records.

Section 98. ORS 105.715 is amended to read:

105.715. The mode of proceeding in a boundary [*suit*] **action** is analogous to that of [*other suits in equity*] **an action not triable by right to a jury**. At the time of entering the [*decree*] **judgment** fixing the true location of the disputed boundary or dividing line the court shall appoint three disinterested commissioners, one of whom shall be a practical surveyor, and shall direct the commissioners to go upon the land of the parties and establish and mark out upon the grounds, by proper marks and monuments, the boundary or dividing line as ascertained and determined by the court in its [*decree*] **judgment**.

Section 99. ORS 107.065 is amended to read:

107.065. (1) Except as provided in ORS 107.095 and in subsection (2) of this section, no trial or hearing on the merits in a suit for the dissolution of a marriage shall be had until after the expiration of 90 days from the date of:

(a) The service of the summons and petition upon the respondent; or

(b) The first publication of summons [*under ORS 15.140*].

(2) The court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the rights or interest of any party or person who might be affected by a final decree or order in the proceedings, hold a hearing and grant a decree dissolving the marriage prior to the expiration of the waiting period. In such case the grounds of emergency or necessity and the facts with respect thereto shall be found and recited in the decree.

Section 100. ORS 109.100 is amended to read:

109.100. (1) Any minor child or state agency on behalf of that minor child may, in accordance with [*ORS 13.041*] **ORCP 27 A.**, apply to the circuit court in the county in which [*he*] **the child** resides, or in which [*his*] **the** natural or adoptive father or mother **of the child** may be found, for an order upon such child's father or mother, or both, to provide for the child's support. The minor child or state agency may apply for the order by filing in such county a petition setting forth the facts and circumstances **relied** upon [*which he relies*] for such order. If satisfied that a just cause exists, the court shall direct that a citation issue to the father or mother requiring him or her to appear at a time set by the court to show cause why an order of support should not be entered in the matter. If it appears to the satisfaction of the court that such child is without funds to employ counsel, the court may make an order directing the district attorney to prepare such petition and citation.

(2) The provisions of subsection (3) of ORS 108.110, ORS 108.120 and 108.130 shall apply to proceedings under subsection (1) of this section.

Section 101. ORS 109.330 is amended to read:

109.330. (1) In the cases provided for in ORS 109.314, 109.322 and 109.324, where a parent does not consent to the adoption of [*his*] **the** child, the court shall order citation to be served on [*him*] **the parent** personally, if found in the state, and if not found in the state, then a copy of the citation to be published or served in the manner provided [*by ORS 15.110 to 15.140*] for the service of [*citation*] **summons in a civil action in a circuit court** by publication or [*for*] personal service outside the state, and a copy of the citation to be deposited forthwith in the post office, directed to such parent at [*his*] the place of residence **of the parent**, unless it appears that such residence is neither known to [*the petitioner*] nor can with reasonable diligence be ascertained by [*him*] **the petitioner**. The citation so served need not contain the names of the adoptive parents.

(2) If the child has no living parent and no guardian or next of kin in this state qualified to appear in [*its*] behalf **of the child**, the court may order such notice, if any, to be given as it deems necessary or proper.

Section 102. ORS 111.095 is amended to read:

111.095. (1) The general legal and equitable powers of a circuit court are applicable to effectuate the jurisdiction of a probate court, punish contempts and carry out its determinations, orders[,] and judgments [*and decrees*] as a court of record with general jurisdiction [*in law and equity*], and the same validity, finality and presumption of regularity shall be accorded to its determinations, orders[,] and judgments [*and decrees*], including determinations of its own jurisdiction, as to those of a court of record with general jurisdiction [*in law and equity*].

(2) A probate court has full, legal and equitable powers to make declaratory judgments, as provided in ORS 28.010 to 28.160, in all matters involved in the administration of an estate, including those pertaining to the title of real property, the determination of heirship and the distribution of the estate.

Section 103. ORS 111.105 is amended to read:

111.105. (1) Except as otherwise provided in this section, no issue determined in a probate court shall be tried again on appeal or otherwise reexamined in a manner other than those appropriate to issues determined by a court of record with general jurisdiction [*in law and equity*].

(2) Appeals from a circuit court sitting in probate shall be taken to the Court of Appeals in the manner provided by law for appeals from the circuit court.

(3) Appeals from a county court sitting in probate shall be taken to the circuit court and Court of Appeals in the manner provided by ORS 5.120.

Section 104. ORS 111.205 is amended to read:

111.205. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of [*a suit in equity*] **an action not triable by right to a jury** except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or by [*his*] **the** attorney **for the person**, or in case of a corporation by its agent. The court exercises its powers by means of:

(1) A petition of a party in interest.

(2) A notice to a party.

(3) A subpena to a witness.

(4) Orders and [*decrees*] **judgments**.

(5) An execution or warrant to enforce its orders and [*decrees*] **judgments**.

Section 105. ORS 113.055 is amended to read:

113.055. (1) Upon an ex parte hearing of a petition for the probate of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching [*his*] the affidavit to the will or to a photographic or other facsimile copy of the will, and may identify the signature of the testator and witnesses to the will by use of the will or the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpena, the court may order that the deposition of the witness be taken [*in the manner provided by ORS chapter 45*].

(3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will or of probate thereof in solemn form, proof of any facts shall be made

in the same manner as in [*a suit in equity*] **an action tried without a jury**.

Section 106. ORS 114.425 is amended to read:

114.425. (1) The court may order any person to appear and give testimony [*as provided in ORS chapter 45*] **by deposition** if it appears probable **that the person**:

(a) [*That he*] Has concealed, secreted or disposed of any property of the estate of a decedent;

(b) [*That he*] Has been intrusted with property of the estate of a decedent and fails to account therefor to the personal representative.

(c) [*That he*] Has concealed, secreted or disposed of any writing, instrument or document pertaining to the estate;

(d) [*That he*] Has knowledge or information that is necessary to the administration of the estate; or

(e) [*That,*] As an officer or agent of a corporation, [*he*] has refused to allow examination of the books and records of the corporation that the decedent had the right to examine.

(2) If [*the*] **a** person cited as provided in subsection (1) of this section fails to appear or to answer questions asked [*of him*] as authorized by the order of the court, [*he*] **the person** is in contempt and may be punished as for other contempts.

Section 107. ORS 115.315 is amended to read:

115.315. An action against a decedent commenced before and pending on the date of [*his*] **death of the decedent** may be continued as provided in [*paragraph (b) of subsection (2) of ORS 13.080*] **ORCP 34 B.(2)** without presentation of a claim against the estate of the decedent.

Section 108. ORS 128.110 is amended to read:

128.110. When any trust in real or personal property, or both, has been or shall be created by will, deed or otherwise, and the trustee or trustees, or any person interested in the trust or any person interested in the property embraced in the trust upon the termination thereof, whether such latter interest is by way of a vested or contingent remainder, executory devise, conditional limitation, shifting use or of any other nature, deems it for the interest of all persons who are or may become interested in the property that the same or any part thereof should be sold, mortgaged, improved, exchanged, leased or otherwise dealt with in any other manner, such party or parties may commence a suit for the purpose of obtaining a decree for the sale, mortgaging, leasing, improving, exchanging of or otherwise dealing with the property, or any portion thereof. Any court [*of equity*] **with jurisdiction to grant equitable remedies** in a county in which any of such trust property may be situated shall have jurisdiction to hear the cause of suit and enter the proper decree.

Section 109. ORS 128.130 is amended to read:

128.130. The summons in the suit shall be in the usual form, and in addition it shall contain the following notice as and for the [*succinct*] statement [*of the relief demanded, which is*] required by [*ORS 15.120*] **ORCP 7 D.(6)(b)**: "The object of this suit is to obtain a decree authorizing the trustees of the trust set forth in the complaint herein to sell, mortgage, lease, exchange, improve or otherwise deal with the property embraced in the trust, in accordance with the prayer of the complaint."

Section 110. ORS 128.250 is amended to read:

128.250. All provisions of law relating to the commencement of and procedure in [*suits*] **an action not triable by right to a jury**, including the procedure to obtain jurisdiction of the parties, shall apply to the suits authorized by ORS 128.110 to 128.270, except as otherwise provided in ORS 128.110 to 128.270.

Section 111. ORS 128.260 is amended to read:

128.260. The remedy provided by ORS 128.110 to 128.270 is cumulative and does not limit or abrogate any inherent power of a court [*of equity*] **with jurisdiction to grant equitable remedies**, including the inherent power to authorize the sale, mortgage, exchange, improvement or lease of or otherwise dealing with trust property, or in any manner limit any lawful power, express or implied, conferred upon the trustee by the will, deed or other instrument creating such trust, to sell, mortgage, exchange, improve, lease or otherwise deal with the trust property, or any part thereof.

Section 112. ORS 136.210 is amended to read:

136.210. In criminal cases the trial jury shall consist of 12 persons unless the parties consent to a less number. It shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by [*ORS 17.105, 17.110, 17.120 to 17.135, 17.145, 17.150, and 17.160 to 17.185; provided, however, that*] **ORCP 57 B., D.(1)(a), D.(1)(b), D.(1)(g) and E.** When the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the court, then by the defendant and then by the state. After they have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.

Section 113. ORS 136.330 is amended to read:

136.330. (1) ORS [*17.210, 17.220 to 17.230, 17.255 and 17.305 to 17.360*] **17.230 and 17.315, and ORCP 58 B., C. and D. and 59 B. through F. and G.(1), (3), (4) and (5),** apply to and regulate the conduct of the trial of criminal actions. **The jury in a criminal action may, in the discretion of the court, be polled in writing. If the jury is polled in writing, the written results shall be sealed and placed in the court record.**

(2) [*ORS 17.505 to 17.515 apply*] **ORCP 59 H. applies** to and [*regulate*] **regulates** exceptions in criminal actions.

Section 114. ORS 136.535 is amended to read:

136.535. (1) A motion in arrest of a judgment or a motion for a new trial, with the affidavits, if any, in support thereof shall be filed within five days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

(2) Any counteraffidavits shall be filed by the state within five days after the filing of the motion, or such further time as the court may allow.

(3) The motion shall be heard and determined by the court within 20 days [*from*] **after** the time of the entry of the judgment, and if not heard and determined within that time, the motion shall conclusively be considered denied.

(4) Except as otherwise provided in this section, [*ORS 17.605 to 17.630*] **section 58 of this 1979 Act and ORCP 64 A., B. and D. through G.** shall apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on application of the state.

Section 115. ORS 136.600 is amended to read:

136.600. The provisions of ORS 44.150[, *44.180 to 44.220 and subsections (1) and (2) of ORS 44.230*] **and ORCP 39 B. and 55 E.(2) and G.** apply in criminal actions, examinations and proceedings.

Section 116. ORS 137.285 is amended to read:

137.285. ORS [*10.030, 17.130, 113.092, 113.095, 113.195 and*] 137.275 to 137.285 do not deprive the Assistant Director for Corrections or his authorized agents of the authority to regulate the manner in which these retained rights of convicted persons may be exercised as is reasonably necessary for the control of the

conduct and conditions of confinement of convicted persons in his custody.

Section 117. ORS 171.510 is amended to read:

171.510. (1) The President of the Senate, the Speaker of the House of Representatives, or the chairman or vice chairman of any of the legislative committees referred to in ORS 171.505 upon a majority vote of any such committee, may issue any processes necessary to compel the attendance of witnesses and the production of any books, papers, records or documents as may be required.

(2) Process may be served by a sergeant-at-arms of either house when the Legislative Assembly is in session or by a person authorized to serve summons [*under ORS 15.060,*] and in the manner prescribed for the service of a summons upon a defendant in a civil [*proceeding*] **action in a circuit court**. The process shall be returned to the authority issuing it within 10 days after its delivery to the person for service, with proof of service as for summons or that the person cannot be found. [*A person other than an officer making service shall make proof thereof by his affidavit in the same manner provided in ORS 15.160.*] When served outside of the county in which the process originated, the process may be returned by mail. The person to whom the process is delivered shall indorse thereon the date of delivery.

Section 118. ORS 174.120 is amended to read:

174.120. The time within which an act is to be done, as provided in the civil procedure statutes **but except as otherwise provided in ORCP 10**, is computed by excluding the first day and including the last unless the last day falls upon any legal holiday or on Saturday, in which case the last day is also excluded.

Section 119. ORS 176.765 is amended to read:

176.765. (1) Notwithstanding any other law, information furnished under ORS 176.760 and designated by that person as confidential, shall be maintained as confidential by the Governor and any person who obtains information which he knows to be confidential under ORS 176.750 to 176.805. The Governor shall not make known in any manner any particulars of such information to persons other than those specified in subsection (4) of this section. No subpena or judicial order may be issued compelling the Governor or any other person to divulge or make known such confidential information, except when relevant to a prosecution for violation of subsection (5) of this section.

(2) Nothing in this section prohibits use of confidential information to prepare statistics or other general data for publication, so presented as to prevent identification of particular persons.

(3) Any person who is served with a subpena to give testimony orally or in writing or to produce books, papers, correspondence, memoranda, agreements or other documents or records as provided in ORS 176.750 to 176.805 may apply to any circuit court in Oregon for protection against abuse or hardship in the manner provided in [*ORS 41.618*] **ORCP 36 C**.

(4) References to the Governor in this section include only individuals designated for this purpose in writing by the Governor.

(5) In addition to any penalties under ORS 176.990, a person who discloses confidential information in violation of this section wilfully or with criminal negligence, as defined by ORS 161.085, may be subject, notwithstanding any other law, to removal from office or immediate dismissal from public employment.

Section 120. ORS 179.507 is added to and made a part of ORS chapter 179, and is amended to read:

179.507. (1) Any patient or, in the case of [*his*] incompetence **of a patient**, [*his*] **the legal guardian of the patient** may commence [*a suit*] **an action** for equitable relief in the circuit court for the county in which the patient resides or in which the written accounts referred to in subsection (2) of ORS 179.505 are kept for the

purpose of requiring compliance with ORS 179.495 and 179.505. In [*a suit*] **an action** brought under this section, the court shall order payment of reasonable attorney fees and actual costs and disbursements to the prevailing party.

(2) Any patient or, in the case of [*his*] incompetence **of a patient**, [*his*] **the legal guardian of the patient** may commence an action in the circuit court for the county in which the patient resides or in which the written accounts referred to in subsection (2) of ORS 179.505 are kept for damages for any violation of ORS 179.495 or 179.505 and to restrain future violations. If a violation of ORS 179.495 or 179.505 is proven, the person commencing the action shall recover [*his*] actual damages or $500, whichever is greater. Upon a showing of an intentional violation of ORS 179.495 or 179.505, the patient may receive punitive damages. The prevailing party in an action brought under this subsection shall receive reasonable attorney fees and costs and disbursements actually incurred.

Section 121. ORS 183.484 is amended to read:

183.484. (1) Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has [*his*] a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has [*his*] a principal business office.

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

(3) The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded. The review shall proceed and be conducted by the court without a jury [*as a suit in equity*], and the court shall have such powers as are conferred upon a court of equitable jurisdiction.

(4) In the case of reversal the court shall make special findings of fact based upon the evidence in the record and conclusions of law indicating clearly all aspects in which the agency's order is erroneous.

Section 122. ORS 193.070 is amended to read:

193.070. Proof of publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be made by the affidavit of the owner, editor, publisher, manager or advertising manager of the newspaper or the principal clerk of any of them, or the printer or his foreman, showing the same. The affidavit may be in substantially the form set forth in [*ORS 15.160*] **ORCP 7 F.(2)(b)** and shall have annexed a copy of the document or notice.

Section 123. ORS 197.320 is amended to read:

197.320. (1) The commission shall issue an order requiring a city, county, state agency or special district to take action necessary to bring its comprehensive plan or zoning, subdivision or other ordinance, regulation, plan or program into conformity with the state-wide planning goals if the commission has good cause to believe

(a) A comprehensive plan, or zoning, subdivision or other ordinance or regulation adopted by a city, county not on a compliance schedule is not in conformity with the state-wide planning goals by the date set in ORS 197.250 for such conformity; or

(b) A plan, program or regulation affecting land use adopted by a state agency or special district is not in conformity with the state-wide planning goals by the date set in ORS 197.250 for such conformity; or

(c) A city or county is not making satisfactory progress toward performance of its compliance schedule; or

(d) A state agency is not making satisfactory progress in carrying out its coordination agreement or the requirements of ORS 197.180; or

(e) A city or county has no comprehensive plan, or zoning, subdivision or other ordinance or regulation and is not on a compliance schedule directed to developing such plans, ordinances or regulations.

(2) An order issued under subsection (1) of this section and the copy of the order mailed to the city, county, state agency or special district shall set forth:

(a) The nature of the noncompliance, including but not limited to the contents of the comprehensive plan, zoning, subdivision or other ordinance or regulation, if any, of a city or county that do not comply with state-wide planning goals or the contents of a plan, program or regulation affecting land use adopted by a state agency or special district that do not comply with state-wide planning goals;

(b) The specific lands, if any, within a city or county for which the existing plan, ordinance or regulation, if any, do not comply with the state-wide goals; and

(c) The corrective action decided upon by the commission, including the specific requirements, with which the city, county, state agency or special district must comply.

(3) An order issued under subsection (1) of this section shall state that a hearing may be requested to contest the order. The city, county, state agency or special district affected by the order or any person or group of persons substantially affected by the order may request a hearing to contest the order. The order shall become final 20 days after the mailing unless within such 20-day period the city, county, state agency or special district to which it is directed or person or group of persons substantially affected, files with the commission a request for hearing. Where a hearing is requested, the commission shall set a date for the hearing to be held within 60 days after the receipt of the request, and shall give the city, county, state agency or special district and person or group of persons substantially affected, if any, notice of the hearing at least 30 days prior thereto. Where a hearing has been requested, the order shall become final when there is no right to further hearing before the commission. The hearing and judicial review of a final order shall be governed by the provisions of ORS 183.310 to 183.500 applicable to contested cases except as otherwise stated in this section. The commission's final order shall include a clear statement of findings which set forth the basis for the order. Where a petition to review the order has been filed in the Court of Appeals, the commission shall transmit to the court the entire administrative record of the proceeding under review. Notwithstanding subsection (3) of ORS 183.482 relating to a stay of enforcement of an agency order, an appellate court, before it may stay an order of the commission, shall give due consideration to the public interest in the continued enforcement of the commission's order and may consider testimony or affidavits thereon. Upon review, an appellate court may affirm, reverse, modify or remand the order. The court shall reverse, modify or remand the order only if it finds:

(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal, modification or remand unless the court shall find that substantial rights of any party were prejudiced thereby; or

(b) The order to be unconstitutional; or

(c) The order is invalid because it exceeds the statutory authority of the agency; or

(d) The order is not supported by substantial evidence in the whole record.

(4) If the commission finds that in the interim period during which a city, county, state agency or special district would be bringing itself into compliance with the commission's order under subsection (1) or (3) of this section it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of some or all categories of land conservation and development actions in one or more specified geographic areas, it may, as part of its order, require that such actions not be taken or allowed.

(5) The commission may institute **actions or proceedings** [*at law or in equity*] **for legal or equitable remedies** in the Circuit Court for Marion County or in the circuit court for the county to which the commission's order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of any order issued under this section or to restrain violations thereof. Such **actions or proceedings** may be instituted without the necessity of prior agency notice, hearing and order on an alleged violation.

Section 124. ORS 226.570 is amended to read:

226.570. Upon the adoption by the governing body of a municipal corporation of an ordinance or resolution, as provided by ORS 226.540 and 226.550, such governing body shall have the authority, by [*a suit in equity*] **an action** filed in the circuit court of the State of Oregon for the county in which such municipal corporation is located, to condemn any cemetery subject to condemnation by the provisions of ORS 226.510 to 226.630.

Section 125. ORS 226.590 is amended to read:

226.590. (1) The summons in [*said suit*] **the action** shall be served on all named defendants who, by diligent search, can be found [*within the State of Oregon*], in a like manner as service of summons in a **civil action.** [*suit in equity, and if any of the named defendants cannot be found within the State of Oregon, and when that fact appears by affidavit to the satisfaction of the court in which the suit is brought or judge thereof, and it also appears that a good cause of suit exists against the defendants, the court or judge thereof shall grant an order that service be made by publication of summons.*] **Service of summons on named defendants who cannot be found may be made by publication as provided in ORCP 7.** Service of summons on the defendants included in the complaint as "all other persons or parties having or claiming any right, title, estate or interest" may [*likewise*] be made by publication.

[*(2) When an order for publication of summons shall have been made, such order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and if there be no newspaper published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for four successive weeks.*] The manner of making publication in the case of those defendants designated as "all other persons or parties having or claiming any right, title, estate or interest" shall be the same as provided in the order for publication of summons in the case of named defendants, except that no [*affidavit or other*] order shall be required.

[*(3) In case of publication of summons on named defendants, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant, at his place of residence, unless it shall appear by affidavit of the plaintiff that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him, in which case mailing of summons and complaint is not required. The summons shall always specify the time prescribed in the order for publication, and the date of the first publication. The time prescribed in the order shall begin to run from the day of first publication, and the defendant shall appear and answer on or before the last day of the time so prescribed, and if he does not so appear he may be declared in default.*]

Section 126. ORS 261.610 is amended to read:

261.610. (1) The proceedings shall be in the nature of a proceeding in rem, and the practice and procedure therein shall follow the practice and procedure of [*suits in equity*] **an action not triable by right to a jury**, so far as consistent with the determination sought to be obtained, except as provided in ORS 261.605 to 261.635.

(2) The jurisdiction of the district and of qualified voters therein shall be obtained by publication of notice directed to the district, and to the qualified voters individually. The notice shall be served on all parties in interest by publication thereof for at least once a week for three successive weeks in some newspaper of general circulation published in the county where the proceeding is pending. Jurisdiction shall be complete within 10 days after the full publication of the notice as provided in this section.

(3) Any person interested may at any time before the expiration of such 10 days appear and contest the validity of the proceeding, or of any of the acts or things therein enumerated.

(4) The proceedings shall be speedily tried and judgment rendered declaring the matter so contested to be either valid or invalid.

(5) Any order or judgment in the course of the proceeding[*, or any final decree therein,*] may be made and rendered by the judge of the circuit court in vacation. For the purpose of any such order[*,*] or judgment [*or decree*], the court shall be deemed at all times in session and the act of the judge in making such order[*,*] or judgment [*or decree*] shall be the act of the court.

Section 127. ORS 271.310 is amended to read:

271.310. (1) Except as provided in subsection (2) of this section, whenever the state or any political subdivision thereof possesses or controls real property not needed for public use, or whenever the public interest may be furthered, the state or political subdivision may sell, exchange, convey or lease for any period not exceeding 99 years all or any part of their interest in the property to or with the state or any political subdivision of the state or the United States of America or any agency thereof or private individual or corporation. The consideration for the transfer or lease may be cash or real property, or both.

(2) If the ownership, right or title of the state or political subdivision to any real property set apart by deed, will or otherwise for a burial ground or cemetery, or for the purpose of interring the remains of deceased persons, is limited or qualified or the use of such real property is restricted, whether by dedication or otherwise, the state or political subdivision, as the case may be, may, after the commission, board, county court or other governing body thereof has first declared by resolution that such real property is not needed for public use, or that the sale, exchange, conveyance or lease thereof will further the public interest, file a complaint in the circuit court for the county in which such real property is located against all persons claiming any right, title or interest in such real property, whether the interest be contingent, conditional or otherwise, for authority to sell, exchange, convey or lease all or any part of such real property. The resolution is prima facie

evidence that such real property is not needed for public use, or that the sale, exchange, conveyance or lease will further the public interest. The [*suit*] **action** shall be commenced and prosecuted to final determination in the same manner as [*other suits in equity*] **an action not triable by right to a jury**. [*The defendants may be designated as provided in ORS 13.010 to 13.170.*] The complaint shall contain a description of such real property, a statement of the nature of the restriction, qualification or limitations, and a statement that the defendants claim some interest therein. The court shall make such [*decree*] **judgment** as it shall deem proper, taking into consideration the limitation, qualifications or restrictions, the resolution, and all other matters pertinent thereto. Neither costs nor disbursements may be recovered against any defendant.

(3) Real property needed for public use by the state or by any political subdivision thereof owning or controlling the property shall not be sold, exchanged, leased or conveyed under the authority of ORS 271.300 to 271.370, except that it may be exchanged for property which is of equal or superior useful value for public use. Any such property not immediately needed for public use may be leased if, in the discretion of the governing body having control of the property, it will not be needed for public use within the period of the lease.

(4) The authority to lease property granted by this section includes authority to lease property not owned or controlled by the state or political subdivision at the time of entering into the lease. Such lease shall be conditioned upon the subsequent acquisition of the interest covered by the lease.

Section 128. ORS 275.220 is amended to read:

275.220. (1) In case of breach of condition or other default in performance of any contract made pursuant to ORS 275.180 or 275.200, the county court may, by order made and entered in its records, declare such breach or default and cancel such contract or enter into a new agreement in writing. If the contract is canceled, a certified copy of the order shall be served as a summons is served by the sheriff upon the holder of such canceled contract if [*he*] **the holder** is found within the county, and if [*he*] **the holder** is not so found, then by mailing it to [*him*] **the holder** by registered mail at [*his*] **the** last-known address **of the holder**. Return of such service shall be made upon such copy of order.

(2) Within 20 days after the service of the order of cancellation upon [*him*] **the holder**, the holder of the canceled contract may appeal from such order to the circuit court for the county in which the land is located. The appeal shall be tried by the court as [*a suit in equity*] **an action not triable by right to a jury**. If appeal is not so taken or if it results upon trial in an affirmance of the order of cancellation, such order shall become absolute and the real property so forfeited again may be sold, without notice.

Section 129. ORS 276.242 is amended to read:

276.242. All actions and proceedings shall be brought in the name of the state, and the pleadings shall be [*verified*] **signed** by the Director of the Department of General Services. All conveyances of lands, or water and water rights, franchises and privileges, shall be made directly to the state, and all leases and contracts shall be made by the department in the name of and for the use and benefit of the state.

Section 130. ORS 280.390 is amended to read:

280.390. Subject to any contractual limitation binding upon the holders of any issue of revenue bonds, or a trustee therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of bonds, or any trustee therefor, for the equal benefit and protection of all bondholders similarly situated, may:

(1) By [*suit,*] action or proceeding [*at law or in equity*] **for legal or equitable remedies**, enforce [*his or its*] **their** rights against the state and any of its officers, agents and employes, and may require and compel the state

or any such officers, agents or employes to perform and carry out its and their duties and obligations under ORS 280.310 to 280.390 and its and their covenants and agreements with bondholders;

(2) By action require the state to account as if [*they were the trustees*] **it was the trustee of** an express trust;

(3) By action enjoin any acts or things which may be unlawful or in violation of the right of the bondholders;

(4) Bring [*suit*] **action** upon the bonds;

(5) Foreclose any mortgage or lien given under the authority of ORS 280.310 to 280.390 and cause the property standing as security to be sold under any proceedings permitted by law or equity; and

(6) Exercise any right or remedy conferred by ORS 280.310 to 280.390 without exhausting and without regard to any other right or remedy conferred by ORS 280.310 to 280.390 or any other law of this state, none of which rights and remedies is intended to be exclusive of any other, and each is cumulative and in addition to every other right and remedy.

Section 131. ORS 280.480 is amended to read:

280.480. Subject to any contractual limitation binding upon the holders of any issue of revenue bonds, or a trustee therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of bonds, or any trustee therefor, for the equal benefit and protection of all bondholders similarly situated, may:

(1) By [*suit,*] action or proceeding [*at law or in equity*] **for legal or equitable remedies,** enforce [*his or its*] **their** rights against the city and any of its officers, agents and employes, and may require and compel the city or any such officers, agents or employes to perform and carry out its and their duties and obligations under ORS 280.410 to 280.485 and its and their covenants and agreements with bondholders;

(2) By action, require the city to account as if [*they were the trustees*] **it was the trustee of** an express trust;

(3) By action, enjoin any acts or things which may be unlawful or in violation of the right of the bondholders;

(4) Bring [*suit*] **action** upon the bonds;

(5) Foreclose any mortgage or lien given under the authority of ORS 280.410 to 280.485 and cause the property standing as security to be sold under any proceedings permitted by law or equity; and

(6) Exercise any right or remedy conferred by ORS 280.410 to 280.485 without exhausting and without regard to any other right or remedy conferred by ORS 280.410 to 280.485 or any other law of this state, none of which rights and remedies is intended to be exclusive of any other, and each is cumulative and in addition to every other right and remedy.

Section 132. ORS 280.990 is amended to read:

280.990. Any unlawful diversion or over-expenditure of the fund referred to in ORS 280.140 as the result of the vote by any public official having charge, control or administration of the fund shall render [*him*] **the official** civilly liable for the return of the money in the amount over-expended or diverted, with interest thereon at the legal rate until repaid, by [*suit*] **action** of any taxpayer of the subdivision concerned or by [*suit*] **action** of the district attorney of the county, or the attorney for the subdivision, wherein the offense was committed. The [*suit*] **action** shall be tried as [*a proceeding in equity*] **an action not triable by right to a jury** and more than one alleged unauthorized diversion, misuse of or overdraft from the fund, by vote or direction of the defendant, may be pleaded in the same [*suit*] **action**.

Section 133. ORS 287.334 is amended to read:

287.334. Subject to any contractual limitations binding upon the holders of any issue of refunding bonds, or trustee therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of refunding bonds, or trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of refunding bonds similarly situated, to:

(1) Enforce, by mandamus or other [*suit,*] action or proceeding [*at law or in equity*] **for legal or equitable remedies,** [*his*] **their** rights against the municipality and its governing body and any of its officers, agents and employes and to require and compel such municipality or such governing body or any such officers, agents or employes to perform and carry out its and their duties and obligations under ORS 287.302 to 287.342 and its and their covenants and agreements with bondholders.

(2) Require, by action [*or suit*], the municipality and the governing body thereof to account as if they were the trustee of an express trust.

(3) Enjoin, by action [*or suit*], any acts or things which may be unlawful or in violation of the rights of the bondholders.

(4) Bring [*suit*] **action** upon the refunding bonds.

Section 134. ORS 305.130 is amended to read:

305.130. (1) The Department of Revenue may be made a party in any [*suit*] **action** in any court of this state or of the United States having jurisdiction of the subject matter to quiet title to, to remove a cloud from the title to, or for the foreclosure of a mortgage or other lien upon, any real property or personal property, or both, upon which the State of Oregon has or claims to have a lien under ORS 314.430, 315.630 or 321.075, and the [*decree*] **judgment** in such [*suit*] **action** shall be conclusive and binding upon the State of Oregon and such department.

(2) The complaint in such [*suit*] **action** shall set forth with particularity the nature of any such lien had or claimed by the State of Oregon. The summons in such [*suit*] **action**, together with a copy of the complaint therein, shall be served on such department in the manner prescribed by [*ORS 15.080*] **ORCP 7 D.(3)(d)**, and such summons shall require such department to appear and answer the complaint within 60 days from the date of such service.

Section 135. ORS 308.240 is amended to read:

308.240. (1) Real property may be described by giving the subdivision according to the United States survey when coincident with the boundaries thereof, or by lots, blocks and addition names, or by giving the boundaries thereof by metes and bounds, or by reference to the book and page of any public record of the county where the description may be found, or by designation of tax lot number referring to a record kept by the assessor of descriptions of real properties of the county, which record shall constitute a public record, or in such other manner as to cause the description to be capable of being made certain. Initial letters, abbreviations, figures, fractions and exponents, to designate the township, range, section or part of a section, or the number of any lot or block or part thereof, or any distance, course, bearing or direction, may be employed in any such description of real property.

(2) If the owner of any land is unknown, such land may be assessed to "unknown owner," or "unknown owners." If the property is correctly described, no assessment shall be invalidated by a mistake in the name of the owner of the real property assessed or by the omission of the name of the owner or the entry of a name other than that of the true owner. Where the name of the true owner, or the owner of record, of any parcel of real property is given, the assessment shall not be held invalid on account of any error or irregularity in the

description if the description would be sufficient in a deed of conveyance from the owner, or is such that, in [*a suit*] **an action** to enforce a contract to convey[,] employing such description, a court [*of equity*] **with jurisdiction to grant equitable remedies** would hold it to be good and sufficient.

(3) Any description of real property which conforms substantially to the requirements of this section shall be a sufficient description and designation in all proceedings of assessment for taxation, levy and collection of taxes, foreclosure and sale for delinquent taxes or assessments, and in any other proceeding related to or connected with the taxation of such property.

Section 136. ORS 308.560 is amended to read:

308.560. (1) The assessment roll for the companies assessed under ORS 308.505 to 308.730 shall be prepared in a manner prescribed by the Department of Revenue.

(2) Upon the assessment roll shall be placed, after the name of each of the companies assessed under ORS 308.505 to 308.730, a general description of the properties assessed in the name of each such company as provided in ORS 308.517, which descriptions shall be deemed to include all the properties of the companies liable to assessment for taxation under ORS 308.505 to 308.730. The description may be in the language contained in ORS 308.510, or otherwise, or may refer to an order or a memorandum of the Department of Revenue containing such description, which order or memorandum shall constitute a public record.

(3) No assessment shall be invalidated by a mistake in the name of the company assessed or by an omission of the name of the owner, or the entry of a name other than that of the true owner, if the property is generally correctly described. If the name of the true owner, or the name of the owner of record, lessee, or user of any property assessable under ORS 308.505 to 308.730 is given, the assessment shall not be held invalid on account of any error or irregularity in the description, if the description would be sufficient in a deed or conveyance from the owner, or on account of which in a contract to convey, a court [*of equity*] **with jurisdiction to grant equitable remedies** would [*decree*] **require** a conveyance to be made, reading the description in connection with the definition of property assessable under ORS 308.505 to 308.730.

(4) Whenever possible, there shall be placed on the assessment roll, under the name of the company, under an appropriate heading, the aggregate track mileage, miles of wire, pipe or pole line or of operational route, as the case may be, within the State of Oregon.

Section 137. ORS 312.060 is amended to read:

312.060. (1) Application for judgment and decree foreclosing any tax lien shall be in writing, **shall** be verified, [*as pleadings in civil actions*] and shall contain a succinct statement of the cause of suit. All amendments may be made which are permissible in any [*suit in equity*] **civil action**. The application for judgment and decree, together with a certified copy of the foreclosure list, shall be filed with the county clerk on the day of the first publication of the foreclosure list.

(2) No assessment of property or charge for taxes shall be considered invalid because of:

(a) An irregularity in an assessment roll.

(b) An assessment roll not having been made, completed or returned within the time prescribed by law.

(c) The property having been listed or charged in an assessment or tax roll without any name, or with a name other than that of the owner.

(3) No error or informality on the part of any officer in connection with assessment, equalization, levy or collection shall vitiate or affect the assessment of the property or the taxes thereon.

(4) Any such irregularity, informality, omission or other error may, in the discretion of the court, be corrected to conform to law.

Section 138. ORS 345.060 is amended to read:

345.060. (1) Every applicant for a license to act as agent for a vocational school not domiciled in this state shall be held to have appointed the superintendent such applicant's agent to accept service of all summonses, pleadings, writs and processes in all actions[, *suits*] or proceedings brought against such applicant in this state. Such service upon the superintendent shall be taken and held in all courts to be as valid and binding as if personal service thereof had been made upon such applicant within this state. Any application for an agent's license by a corporation shall be accompanied by a duly certified copy of the resolution of the board of directors or other managing board of such applicant authorizing such appointment.

(2) When any summons, pleading, writ or process is served on the superintendent, service shall be by duplicate copies. One of the duplicates shall be filed in the office of the superintendent and the other immediately forwarded by certified mail to the applicant thereby affected or therein named, at the applicant's last-known post-office address. If service is of a summons, the plaintiff therein shall also cause the applicant to be served therewith [*by publication or*] in [*the*] a manner provided by [*ORS 15.110*] **ORCP 7**.

Section 139. ORS 348.855 is amended to read:

348.855. Any decision made by the Oregon Educational Coordinating Commission refusing any school or institution of learning permission to confer degrees or revoking the right to confer degrees, shall be subject to the right of review by [*a suit*] **an action** brought in the circuit court of the county in which the school or institution of learning is located. Such review shall be tried as [*a suit in equity*] **an action not triable by right to a jury**.

Section 140. ORS 418.327 is amended to read:

418.327. (1) An annual review of private schools or other organizations offering residential programs for children may be conducted by the Children's Services Division. The Children's Services Division shall consult with representatives of the private schools and organizations in developing the standards that shall be the basis for any annual reviews.

(2) Upon finding that the facilities and operation of a school or organization described in subsection (1) of this section meet the standards of the Children's Services Division for the physical health, care and safety of the children, the division shall issue a certificate of approval.

(3) No person or organization shall operate a facility described in subsection (1) of this section without having a current, valid certificate of approval issued by the Children's Services Division.

(4) Any person, including the Assistant Director for Children's Services, may file a complaint with the Children's Services Division alleging that children attending a private school which provides boarding or residential programs, or that children within the control of any other organization which provides boarding or residential programs, are not receiving shelter, food, guidance, training or education necessary to the health, safety, welfare or social growth of the children or necessary to serve the best interests of society.

(5) The Children's Services Division shall investigate complaints made under subsection (4) of this section and, if a reasonable basis for sustaining the complaint appears, shall set a hearing to examine publicly the complaint. The Children's Services Division shall conduct its investigation under the standards and authority provided under ORS 418.215 to 418.325. Except as provided in subsection (7) of this section, at least two weeks' written notice of the hearing and substance of the complaint and the evidence in support thereof shall be

provided to the operator of the school or organization. The parents of the child or children involved shall be notified if such persons can be conveniently located. Notice shall be served personally on the operator of the school or organization, but may be served by mail at the last-known or determined address of the parent or other adult responsible for the child.

(6) The hearing shall comply with the provisions of ORS [*chapter 183*] **183.310 to 183.500** as to procedures, findings and orders. Where the evidence at the hearing justifies such an order, the Children's Services Division is authorized to order the private school or organization to correct the conditions not in conformity with standards and is empowered to make any other lawful orders necessary to the protection of the child or children involved.

(7) Where a condition exists that immediately endangers the health or safety of a child, the Assistant Director for Children's Services may issue an interim order without any notice, or with such notice as is practical under the circumstances, requiring the school or organization to alter the conditions under which the child lives or receives schooling. Such interim emergency order shall remain in force until a final order after hearing, as provided in subsection (5) of this section, is entered.

(8) Any school or organization shall cooperate with the Children's Services Division in investigating any complaint made under this section.

(9) The Superintendent of Public Instruction shall cooperate with the division upon request by advising the Children's Services Division as to whether or not the educational program conducted at the school or organization meets minimum standards required of public educational institutions.

(10) Nothing in this section applies to public or private institutions of higher education, community colleges, common or union high school districts that provide board and room in lieu of transportation or any other child-caring program already subject to state licensing procedures by any agency of this state.

(11) Subject to ORS chapter 183, the Children's Services Division may adopt rules to implement this section.

(12) In addition to remedies otherwise provided under this section and under ORS 418.990, the Children's Services Division may commence [*a suit in equity*] **an action** to enjoin operation of a private school or other organization offering residential programs for children:

(a) If the school or organization is being operated without a valid certificate of approval issued under subsection (2) of this section; or

(b) If the private school or organization fails to correct the conditions not in conformity with standards, as set out in an order issued under subsection (6) of this section, within the time specified in the order.

Section 141. ORS 419.488 is amended to read:

419.488. (1) Summons or other process issuing from the juvenile court may be served without further indorsement in any county of the state by an officer of the county in which the proceeding is pending, by an officer of the county in which the person to be served is found or by any person authorized by the court to serve the process. Except as otherwise provided in ORS 419.472 to 419.590, 419.800 to 419.840 and subsection (2) of 419.990, the provisions of law or the **Oregon Rules of Civil Procedure** applicable to summons in civil cases apply to summons issued from juvenile court.

(2) If [*the*] **any** parent[*, parents*] or guardian required to be summoned as provided in subsection (4) of ORS 419.486 cannot be found within the state, summons may be served on [*him or them*] **the parent or guardian** in any of the following ways:

(a) If the address of the parent or guardian is known, by sending [*him*] **the parent or guardian** a copy of the summons by registered mail with a return receipt to be signed by the addressee only.

(b) By personal service outside the state [*in the manner provided in ORS 15.110*].

(c) If, after reasonable inquiry, the whereabouts of the parent or guardian cannot be ascertained, by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending. In lieu of the brief statement of facts required by subsection (2) of ORS 419.486, the published summons shall simply state that a proceeding concerning the child is pending in the court and an order making an adjudication will be entered therein. The summons shall be published once a week for a period of three weeks, making three publications in all. If the names of one or both parents or the guardian are unknown, [*he or*] they may be summoned as "The parent(s) or guardian of (naming or describing the child), found (stating the address or place where the child was found)."

(3) Service as provided in this section shall vest the court with jurisdiction over the parents or guardian in the same manner and to the same extent as if the person served were served personally within this state.

(4) The court may authorize payment of travel expenses of any person summoned, as provided in ORS 136.603.

Section 142. ORS 419.515 is amended to read:

419.515. (1) An order of support entered pursuant to ORS 419.513 may be enforced by execution or in the manner provided by law for the enforcement of [*the decrees of a court of equity*] **a judgment granting an equitable remedy**.

(2) In addition to the remedies provided in subsection (1) of this section, the court may issue an order to any employer, trustee or financial agency or custodian of the parents, or either of them, or other person legally obligated to support the child, directing that the employer, trustee, agent or custodian withhold and pay over to the court money due or to become due the parent or other person legally obligated to support the child in an amount not in excess of the lesser of the following:

(a) The amount ordered to be paid for the child's support.

(b) One-fourth of the amount due or becoming due the parent or other person at each regular or usual pay day or day of disbursement.

(3) An order pursuant to subsection (2) of this section shall be treated in the same manner as a notice of garnishment.

(4) No property of the child's parents, or either of them, or other person legally obligated to support the child is exempt from levy and sale or other process to enforce collection of the amounts ordered by the court to be paid toward the support of the child.

Section 143. ORS 433.770 is amended to read:

433.770. (1) In addition to and not in lieu of the maintenance of other actions [*or suits*] for any violation of ORS 433.745, the district attorney for the county in which an outdoor mass gathering is to be held may maintain [*a suit*] **an action** in any court of general equitable jurisdiction to prevent, restrain or enjoin any violation of ORS 433.745.

(2) Cases filed under the provisions of this section or an appeal therefrom shall be given preference on the docket over all other civil cases except those given equal preference by statute.

Section 144. ORS 443.991 is amended to read:

443.991. (1) Violation of ORS 443.015 is punishable as a Class C misdemeanor.

(2) Violation of any provision of ORS 443.400 to 443.455 is a Class B misdemeanor. In addition, the department may commence [*a suit in equity*] **an action** to enjoin operation of a residential facility:

(a) When a residential facility is operated without valid licensure; or

(b) After notice of revocation has been given and a reasonable time for placement of individuals in other facilities has been allowed.

Section 145. ORS 448.250 is amended to read:

448.250. (1) Whenever a community, public utility, municipal or public water supply system or part thereof presents or threatens to present a public health hazard requiring immediate action to protect the public health, safety and welfare, the assistant director may request the district attorney of the county wherein the system is located to institute [*a suit in equity*] **an action**. The [*suit*] **action** may be commenced without the necessity of prior administrative procedures or hearing and entry of an order or at any time during such administrative proceedings, if such proceedings have been commenced. The [*suit*] **action** may petition for a mandatory injunction compelling the person or governmental unit responsible for the operation of the system to cease and desist operation or to make such improvements and corrections as are necessary to remove the public health hazard or threat thereof.

(2) Cases filed under provisions of this section or any appeal therefrom shall be given preference on the docket over all other civil cases except those given an equal preference by statute.

(3) Nothing in this section is intended to prevent the maintenance of actions [*at law or suits in equity*] **for legal or equitable remedies** relating to private or public nuisance or for recovery of damages brought by private persons or by the state on relation of any person.

Section 146. ORS 454.020 is amended to read:

454.020. The Environmental Quality Commission may require each user of the treatment works of a municipality to comply with the toxic and pretreatment effluent standards and inspection, monitoring and entry requirements of the Federal Water Pollution Control Act, as enacted by Congress, October 18, 1972, and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto. The commission may institute **actions or** proceedings [*at law or in equity*] **for legal or equitable remedies** to enforce such compliance.

Section 147. ORS 454.030 is amended to read:

454.030. (1) A municipality is authorized to adopt a system of charges and rates to assure that each recipient of treatment works services within the municipality's jurisdiction or service area will pay its proportionate share of the costs of operation, maintenance and replacement of any treatment works facilities or services provided by the municipality.

(2) A municipality is authorized to require industrial users of its treatment works to pay to the municipality that portion of the cost of construction of the treatment works which is allocable to the treatment of such industrial user's wastes. The Department of Environmental Quality is authorized to determine whether the payment required of the industrial user for the portion of the cost of the construction of the treatment works is properly allocable to the treatment of the industrial user's wastes.

(3) A municipality is authorized to retain the amounts of the revenues derived from the payment of costs by industrial users of its treatment works services and expend such revenues, together with interest thereon, for:

(a) Repayment to applicable agencies of government of any grants or loans made to the municipality for construction of the treatment works; and

(b) Future expansion and reconstruction of the treatment works; and

(c) Other municipal purposes.

(4) A municipality shall keep records, financial statements and books regarding its rates and charges and amounts collected on account of its treatment works and how such revenues are allocated. The Department of Environmental Quality may inspect such records, financial statements and books, audit them, or cause them to be audited, at such intervals as deemed necessary.

(5) In the event a municipality fails, neglects or refuses when required by the Environmental Quality Commission to adopt the system of charges and rates authorized by this section, or fails, neglects or refuses to comply with ORS 454.010 to 454.060, the commission may adopt a system of charges and rates as provided for in subsection (1) of this section and collect, administer and apply such revenues for the purposes of subsection (3) of this section.

(6) In lieu of proceeding in the manner set forth in subsection (5) of this section, the commission may institute **actions or** proceedings [*at law or in equity*] **for legal or equitable remedies** to enforce compliance with, or restrain violations of, ORS 454.010 to 454.060.

Section 148. ORS 454.645 is amended to read:

454.645. (1) Whenever a subsurface sewage disposal system, alternative sewage disposal system or a nonwater-carried sewage disposal facility or part thereof presents or threatens to present a public health hazard creating an emergency requiring immediate action to protect the public health, safety and welfare, the Department of Environmental Quality may institute [*a suit in equity*] **an action**. The [*suit*] **action** may be commenced without the necessity of prior administrative procedures, or at any time during such administrative proceedings, if such proceedings have been commenced. The [*suit*] **action** shall be in the name of the State of Oregon and may petition for a mandatory injunction compelling the person or governmental unit in control of the system or facility to cease and desist operation or to make such improvements or corrections as are necessary to remove the public health hazard or threat thereof.

(2) Cases filed under provisions of this section or any appeal therefrom shall be given preference on the docket over all other civil cases except those given an equal preference by statute.

(3) Nothing in this section is intended to prevent the maintenance of actions [*at law or suits in equity*] **for legal or equitable remedies** relating to private or public nuisances or for recovery of damages brought by private persons or by the state on relation of any person.

Section 149. ORS 456.205 is amended to read:

456.205. An obligee of an authority, in addition to all other rights conferred on [*him*] **the obligee**, subject only to any contractual restrictions binding upon [*him*] **the obligee**, may:

(1) By mandamus[, *suit,*] **or other** action or proceeding [*at law or in equity*] **for legal or equitable remedies**, compel the authority and its commissioners, officers, agents or employes to perform each and every term, provision and covenant contained in any contract of the authority with or for the benefit of such obligee, and require the carrying out of all covenants and agreements of the authority and the fulfillment of all duties imposed upon the authority by the Housing Authorities Law.

(2) By [*suit,*] action or proceeding [*in equity*], enjoin any acts or things which may be unlawful, or the violation of any [*of his*] rights **of the obligee**.

Section 150. ORS 459.690 is amended to read:

459.690. Whenever it appears to the department that any person is engaged or about to engage in any acts or practices which constitute a violation of ORS 459.410 to 459.690 or the rules and orders adopted thereunder or of the terms of the license, without prior administrative hearing, the department may institute **actions or** proceedings [*at law or in equity*] **for legal or equitable remedies** to enforce compliance therewith or to restrain further violations thereof.

Section 151. ORS 465.020 is amended to read:

465.020. (1) The Attorney General or the district attorney of the county wherein a common nuisance under ORS 465.010 exists, is kept or maintained, or where such nuisance has existed but has temporarily ceased and there is good and sufficient cause to believe that such nuisance will be maintained in the future, may institute [*a suit in equity*] **an action** in the circuit court for such county in the name of the state to abate and temporarily and permanently to enjoin such nuisance.

(2) The court may make temporary and final orders, as in other injunction proceedings.

(3) The plaintiff is not required to give bond in such [*suit*] **action**.

Section 152. ORS 465.120 is amended to read:

465.120. Whenever a nuisance exists under ORS 465.110, the district attorney shall or any taxpayer of the county may maintain [*a suit in equity*] **an action** in the name of the state to perpetually enjoin such nuisance, the persons conducting or maintaining the same, and the owner, lessee or agent of the building or ground upon which the nuisance exists.

Section 153. ORS 468.100 is amended to read:

468.100. (1) Whenever the commission has good cause to believe that any person is engaged or is about to engage in any acts or practices which constitute a violation of ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter, or any rule, standard or order adopted or entered pursuant thereto, or of any permit issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405, 454.425, 454.505 to 454.535, 454.605 to 454.745 and this chapter, the commission may institute **actions or** proceedings [*at law or in equity*] **for legal or equitable remedies** to enforce compliance thereto or to restrain further violations.

(2) The proceedings authorized by subsection (1) of this section may be instituted without the necessity of prior agency notice, hearing and order, or during said agency hearing if it has been initially commenced by the commission.

(3) A regional authority formed under ORS 468.505 may exercise the same functions as are vested in the commission by this section in so far as such functions relate to air pollution control and are applicable to the conditions and situations of the territory within the regional authority. The regional authority shall carry out these functions in the manner provided for the commission to carry out the same functions.

(4) The provisions of this section are in addition to and not in substitution of any other civil or criminal enforcement provisions available to the commission or a regional authority. The provisions of this section shall not prevent the maintenance of actions [*or suits*] **for legal or equitable remedies** relating to private or public nuisances brought by any other person, or by the state on relation of any person without prior order of the commission.

Section 154. ORS 469.080 is amended to read:

469.080. (1) The director may obtain all necessary information from producers, suppliers and consumers of energy resources within Oregon, and from political subdivisions in this state, as necessary to carry out ORS 176.810, 192.500, 192.690, 453.765, 469.010 to 469.580, 469.990, 469.992, 757.710 and 757.720. Such information may include, but not be limited to:

(a) Sales volume;

(b) Forecasts of energy resource requirements;

(c) Inventory of energy resources; and

(d) Local distribution patterns of information under paragraphs (a) to (c) of this subsection.

(2) In obtaining information under subsection (1) of this section, the director with the written consent of the Governor may subpena witnesses, material and relevant books, papers, accounts, records and memoranda, administer oaths, and may cause the depositions of persons residing within or without Oregon to be taken in the manner prescribed for depositions in civil actions in circuit courts, to obtain information relevant to energy resources.

(3) In obtaining information under this section the director:

(a) Shall avoid eliciting information already furnished by a person or political subdivision in this state to a federal, state or local regulatory authority that is available to the director for such study; and

(b) Shall cause reporting procedures, including forms, to conform to existing requirements of federal, state and local regulatory authorities.

(4) Any person who is served with a subpena to give testimony orally or in writing or to produce books, papers, correspondence, memoranda, agreements or the documents or records as provided in ORS 176.810, 192.500, 192.690, 453.765, 469.010 to 469.580, 469.990, 469.992, 757.710 and 757.720, may apply to any circuit court in Oregon for protection against abuse or hardship in the manner provided in [*ORS 41.618*] **ORCP 36 C**.

Section 155. ORS 471.630 is amended to read:

471.630. The Attorney General, the commission or its administrators, or the district attorney of the county wherein a nuisance as defined in ORS 471.620 exists, or where it has existed but has temporarily ceased and there is good and sufficient cause to believe that it will be maintained in the future, may institute [*a suit in equity*] **an action** in the circuit court for such county in the name of the state to abate, and to temporarily and permanently enjoin, such nuisance. The court has the right to make temporary and final orders as in other injunction proceedings. The plaintiff shall not be required to give bond in such [*suit*] **action**.

Section 156. ORS 481.095 is amended to read:

481.095. Subject to a compliance with the motor vehicle law of this state, [*and the acceptance of the provisions of ORS 15.190 and 15.200,*] owners and operators of motor vehicles are granted the privilege of using the highways of this state.

Section 157. ORS 481.950 is amended to read:

481.950. (1) Except as provided in ORS 481.943 or 481.952, all moneys received by the division under the provisions of this chapter shall be deposited in the State Treasury and credited to a suspense account, along with the moneys received under [*ORS 15.190 and 15.200.*] ORS chapters 319, 482 and 486, and any other statute administered by the division. Refunds authorized by any statute administered by the division, when approved

by the division, shall be paid out of the suspense account. Moneys subject to subsection (2) of ORS 319.410, ORS 481.480, subsection (3) of 481.890 and subsections (4) and (5) of 482.250, and moneys collected for or dedicated to any other purpose or fund except the State Highway Fund, shall be paid out of the suspense account after deducting the expenses of collection and transfer incurred by the division.

(2) Except for moneys subject to subsection (2) of ORS 319.410, ORS 481.480, subsection (3) of 481.890 and subsections (4) and (5) of 482.250, and moneys collected for or dedicated to any other purpose or fund except the State Highway Fund, moneys in the suspense account, including amounts deducted for expenses under subsection (1) of this section, remaining at the close of business on the last day of each month shall, on or before the 15th day of the following month, be credited to an account in the General Fund to be known as the Motor Vehicle Division Account.

(3) After paying out of the money so deposited in the Motor Vehicle Division Account, the expenses incurred by the division in administering this chapter, ORS chapters 319, 482 and 486 and any other statute and any amounts authorized by law to be charged against such account, the money remaining at the close of business on the last day of each month shall, on or before the 15th day of the month following, upon certification to the State Treasurer by the division, be transferred to the State Highway Fund.

(4) However, upon receiving a certificate from the director, certifying as to the amount of principal or interest of highway bonds due on any particular date, the division may turn over and make available for the payment of such interest or principal, such sum or sums as may be necessary to the extent of the moneys on hand available for the State Highway Fund, regardless of the dates above specified.

Section 158. ORS 481.957 is amended to read:

481.957. Whenever any bank check, issued in payment of any vehicle license or registration fee or other fee required by this chapter, and ORS chapters [*15,*] 319, 482 and 486, is returned to the Motor Vehicles Division of the Department of Transportation as uncollectible, the division may charge the person presenting the check a fee not to exceed $3, plus all protest fees to cover the cost of collection. If the fee and the charge for collecting it are not then paid, the division may suspend or cancel any registration or license in payment of which the check was presented, and may delegate authority to any division employe or police officer to seize and recover any registration plates or other evidence of the suspended registration or license. Thereafter any vehicles, other than campers, mobile homes and travel trailers, affected by such registration and having had a situs in the State of Oregon on January 1 of that year shall be subject to assessment and taxation as personal property for such year. The division shall furnish the names and addresses of the registered owners on such suspended registrations to the assessor of the appropriate county, who shall cancel any exemption given for such year under ORS 481.270, and, with the tax collector, take such steps as are necessary to assess and tax the property. Immediately upon suspension or cancellation of any registration or license of a mobile home, the registration or license fee is delinquent and the provisions of ORS 481.490 shall apply.

Section 159. ORS 484.725 is amended to read:

484.725. (1) The court in which the complaint is filed shall enter an order, which incorporates the abstract and is directed to the person named therein, to show cause why [*he*] **the person** should not be barred as a habitual offender from operating a motor vehicle on the highways of this state. A copy of the show cause order shall be served on the person named therein in the manner prescribed [*by law*] for the service of [*notices*] **summons in a civil action**. [*Service thereof on any nonresident of the state may be made by the administrator of the division as provided by ORS 15.190.*]

(2) If the person denies [*he was*] **having been** convicted of any offense necessary for a holding that [*he*] **the person** is a habitual offender, and if the court cannot, on the evidence available to it, make a determination of the issue, the court may certify the issue to the court in which the conviction was made. The court to which the certification is made shall forthwith conduct a hearing to determine the issue and send a certified copy of its final order determining the issue to the court in which the complaint was filed.

Section 160. ORS 498.464 is amended to read:

498.464. (1) Whenever the commission has cause to believe that any person is engaged in or is about to engage in any acts or practices that constitute a violation of ORS 498.400 to 498.464 and 498.993, or any rule promulgated pursuant thereto, that requires immediate action to protect the wildlife resources of this state, the commission shall institute **actions or** proceedings [*at law or in equity*] **for legal or equitable remedies** to restrain the violation or threatened action.

(2) The **actions or** proceedings authorized by subsection (1) of this section may be instituted without necessity of a prior administrative proceeding, or at any time during an administrative proceeding if a proceeding has been commenced.

Section 161. ORS 509.910 is amended to read:

509.910. (1) The State Fish and Wildlife Commission may maintain [*a suit in equity*] **an action** for an injunction to enjoin and restrain any person, municipal corporation, political subdivision or governmental agency of this state from violating any of the provisions of ORS 509.130, 509.140, 509.505, 509.605, 509.610, 509.615 and 509.625.

(2) Any [*suit*] **action** authorized by this section shall be tried in the circuit court of the county in which the violation occurs.

(3) If the defendant is a corporation with its principal office and place of business in a county other than in which the waters flow or are situated, such [*suit*] **action** shall be deemed [*a suit*] **an action** of local nature and service of summons made on a corporation in any county where the corporation has its principal office and place of business. If it is a foreign corporation, service may be made on the statutory agent but if there is no such statutory agent then upon the Corporation Commissioner as in other cases provided by [*the*] law.

Section 162. ORS 520.175 is amended to read:

520.175. (1) Whenever it appears that any person is violating or threatening to violate any provision of this chapter or any rule, regulation or order of the board, the board shall bring [*suit*] **an action** against such person in the circuit court of any county where the violation occurs or is threatened, to restrain such person from continuing such violation. [*Upon the filing of any such suit, summons issued to such person may be directed to the sheriff of any county of this state for service by such sheriff upon such person.*] In any such [*suit*] **action**, the court shall have jurisdiction to grant to the board, without bond or other undertaking, such temporary restraining orders or final prohibitory and mandatory injunctions as the facts may warrant, including any such orders restraining the movement or disposition of oil or gas.

(2) If the board fails to bring [*suit*] **an action** to enjoin a violation or threatened violation of any provision of this chapter or of any rule, regulation or order of the board, within 15 days after receipt of a written request to do so by any person who is or will be adversely affected by such violation, then the person making such request may bring [*suit in his own behalf*] **an action** to restrain such violation or threatened violation in any court in which the board might have brought such [*suit*] **action**. The board shall be made a party defendant in such [*suit*] **action** in addition to the person or persons [*aforesaid*] **bringing the action** and the action shall proceed and

injunctive relief may be granted without bond in the same manner as if [*suit*] **the action** had been brought by the board.

Section 163. ORS 526.332 is amended to read:

526.332. (1) Any owner of land classified under ORS 526.328 or 526.340 who is aggrieved by the classification may, within 30 days after the date of the order making the classification, appeal to the circuit court for the county. The appeal shall be taken by serving the notice of appeal on the secretary of the committee or, if the classification was made under ORS 526.340, on the State Forester, and by filing such a notice with the county clerk.

(2) The appeal shall be tried by the circuit court as [*a suit in equity*] **an action not triable by right to a jury**.

Section 164. ORS 536.560 is amended to read:

536.560. Any person, public corporation or state agency [*who deems himself*] aggrieved by any order, rule or regulation of the Water Policy Review Board under chapter 707, Oregon Laws 1955, may appeal from the same to the circuit court of the county in which the property affected by such order, rule or regulation or any part of such property is situated. The appeal may be carried from the circuit court to the [*Supreme Court, and*] **Court of Appeals. The appeal** shall be governed by the practice in [*suits in equity*] **an action not triable by right to a jury**.

Section 165. ORS 539.150 is amended to read:

539.150. (1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in [*a suit in equity*] **an action not triable by right to a jury**, except that any proceedings, including the entry of a [*decree*] **judgment**, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by [*his*] **the** attorney **for the exceptor**, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or [*his*] **the** attorney **for the exceptor** upon each such adverse party in person, or upon [*his*] **the** attorney if [*he*] **the adverse party** has appeared by attorney, or upon [*his*] **the** agent **of the adverse party**. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to [*him*] **that party** by registered mail, addressed to [*his*] **the** place of residence **of that party**, as set forth in [*his*] **the** proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a [*decree*] **judgment** affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose[*, as in a suit in equity*]. Upon completion of the testimony and its report to the director, [*he*] **the director** may be required to make a further determination.

(4) After final hearing the court shall enter a [*decree*] **judgment** affirming or modifying the order of the director, and may assess such costs as it may deem just. [*Appeals*] **An appeal** may be taken to the [*Supreme*] **Court of Appeals** from the [*decrees*] **judgment** in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the [*decree*] **judgment**.

Section 166. ORS 541.660 is amended to read:

541.660. (1) In lieu of penal enforcement proceedings, proceedings to abate alleged public nuisances under ORS 541.645 may be instituted at law or in equity, in the name of the State of Oregon, upon relation of the Director of the Division of State Lands.

(2) However, notwithstanding any other provisions of law, the director, without the necessity of prior administration procedures or hearing and entry of an order or at any time during such administrative proceedings if such proceedings have been commenced, may institute [*a suit at law or in equity*] **an action for legal or equitable remedies** in the name of the State of Oregon to abate or restrain threatened or existing nuisances under ORS 541.645, whenever such nuisances or threatened nuisances create an emergency that requires immediate action to protect the public health, safety or welfare. In any [*suit*] **action** brought under this section, the director may seek and the court may award a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from an existing public nuisance under ORS 541.645. No temporary restraining order or temporary injunction or abatement order shall be granted unless the defendant is accorded an opportunity to be heard thereon at a time and place set by the court in an order directing the defendant to appear at such time and place, and to then and there show cause, if **the defendant has** any [*he has*], why a temporary restraining order or temporary injunction or abatement order should not be granted. The order to show cause, together with affidavits supporting the application for such temporary restraining order, temporary injunction or abatement order, shall be served on the defendant as a summons. The defendant may submit counteraffidavits at such time and place. The director shall not be required to furnish any bond in such proceeding. Neither the State Land Board nor the Director of the Division of State Lands or the employes or duly authorized representatives of the division, shall be liable for any damages defendant may sustain by reason of an injunction or restraining order or abatement order issued after such hearing.

(3) Cases filed under this section shall be given preference on the docket over all other civil cases except those given an equal preference by statute.

Section 167. ORS 545.256 is amended to read:

545.256. (1) The appellant and all persons appearing shall make a statement in writing of the grounds of appeal, and no further pleadings shall be necessary. The cause shall be tried in one [*suit*] **action** by the circuit court as [*a suit in equity*] **an action not triable by right to a jury**.

(2) Upon the entry of final [*decree*] **judgment** any person aggrieved by the [*decree*] **judgment** may appeal to the [*Supreme*] Court **of Appeals** in the manner provided in [*suits*] **other cases** in equity. Notice of appeal shall be served on those appearing in the circuit court or their attorneys. The cause shall be tried de novo by the [*Supreme*] Court **of Appeals** as expeditiously as possible after such appeal is perfected. Upon return of the mandate from the [*Supreme*] Court **of Appeals**, the circuit court shall enter such [*decree*] **judgment** as is directed by the [*Supreme*] Court **of Appeals**.

(3) If the resolution of the board of directors is affirmed it shall be deemed an assessment against all the lands described therein for the amount of the assessment and payable at the times therein specified, as well as a final determination of the total benefits accruing to the parcels of land described therein from the existing or

proposed improvements. If the resolution is modified in any respect the court shall specify the proper resolution to be entered, which shall be entered accordingly. If no appeal is taken from any such resolution, it shall become final.

Section 168. ORS 547.030 is amended to read:

547.030. (1) At the hearing the court shall hear and consider any evidence that may be presented for or against the petition or any objection thereto.

(2) Thereupon the court shall make its findings upon the facts alleged in the petition or objections and any other facts necessary and proper for the determination of the propriety of the organization of the district, which findings shall be entered on the journal of the court.

(3) If it appears to the court that the prayer of the petition should be granted, the court shall, by its order entered of record, declare [*and decree*] the drainage district organized.

(4) If it appears to the court that the prayer of the petition should not be granted, the proceedings shall be dismissed and the costs adjudged against the signers of the petition in proportion to the acreage represented by each.

(5) In making such findings and [*decree*] **decision**, the court shall disregard any error, irregularity or omission which does not affect substantial rights, and no such error, irregularity or omission shall affect the validity of the organization or any proceedings taken thereon.

(6) Appeal may be taken **de novo** from the decision of the court to the circuit court [*in the same manner as appeals are taken in equity cases*].

Section 169. ORS 548.110 is amended to read:

548.110. (1) The proceedings shall be in the nature of a proceeding in rem. The practice and procedure therein shall follow the practice and procedure of [*suits in equity*] **an action not triable by right to a jury**, so far as they are consistent with the determination sought to be obtained, except as otherwise provided in ORS 548.105 to 548.115. The jurisdiction of the irrigation district or drainage district and of all the freeholders, assessment payers and legal voters therein shall be obtained by publication of notice directed to the district, and to "all freeholders, legal voters and assessment payers within the district," without naming them individually. The notice shall be served on all parties in interest by publication for at least once a week for three successive weeks in some newspaper of general circulation published in the county where the proceeding is pending. Jurisdiction shall be complete within 10 days after full publication.

(2) Any person interested may at any time before the expiration of the 10 days appear and contest the validity of the proceeding, or of any of the acts or things therein enumerated. The proceedings shall be speedily tried and judgment rendered declaring the matter so contested to be either valid or invalid. Any order or judgment in the course of the proceeding[*, or any final decree therein,*] may be made and rendered by the judge of the court in vacation. For the purpose of any such order[*,*] **or** judgment [*or decree*] the court shall be deemed at all times to be in session, and the act of the judge in making such order[*,*] **or** judgment [*or decree*] shall be the act of the court.

(3) Any party may appeal to the [*Supreme*] Court **of Appeals** at any time within 30 days after rendition of the final judgment [*or decree*]. The appeal must be heard and determined within three months from the time of taking the appeal.

(4) The court, in inquiring into the regularity, legality or correctness of any of the proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to the

court proceedings, and may approve the proceedings in part and disapprove and declare invalid other or subsequent proceedings in part. The costs of the court proceedings may be allowed and apportioned between the parties in the discretion of the court.

Section 170. ORS 548.355 is amended to read:

548.355. The procedure in the circuit court under the provisions of ORS 548.340 to 548.350 shall be in the nature of an [*equitable proceeding*] **action** in rem **not triable by right to a jury**. Any holders of any evidences of indebtedness affected by any such court procedure provided for in those sections, or any other interested party, may appeal to the [*Supreme*] Court **of Appeals** at any time within 30 days after the rendition of the [*decree*] **judgment** of the circuit court. The court inquiring into the regularity, legality or correctness of any of such proceedings shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties, and may approve the proceedings in part and disapprove the remainder. Costs in the proceeding may be allowed and apportioned between the parties in the discretion of the court.

Section 171. ORS 548.935 is amended to read:

548.935. Proceedings in the circuit court upon the petition shall be in the nature of a proceeding in rem and shall be conducted as [*a suit in equity*] **an action not triable by right to a jury** and any [*decree,*] judgment or final order of the circuit court shall be subject to appeal in the same manner as [*suits*] **other cases** in equity. The court may appoint masters or referees as it considers desirable and shall have complete jurisdiction to approve, disapprove, amend or change the plan proposed or to adopt any amendments, changes or other plans proposed by any interested party which the court finds to be equitable and reasonable to protect the rights of any party, or may [*decree*] **direct** that the district shall continue in existence and operation without dissolution or reorganization. The [*decree*] **judgment** may include provisions for sale, transfer or conveyance of all or part of the assets of the district to corporations, other districts, municipal corporations or governmental bodies or agencies then in existence, or to be organized in accordance with the terms of the [*decree*] **judgment**, which will continue to furnish some or all of the services furnished by the district. As a condition of such sale, transfer or conveyance the court may require such transferee or transferees to assume part or all of the indebtedness of the district. The court may determine the validity of any sales or assessments, the amount of any assessments due upon the various parcels and lots of real estate within the district, the amounts of any assessments theretofore paid upon such parcels and lots and may determine and adjust the liabilities of all parties. The court may adjudicate any water rights of the district and the lands therein and may [*decree*] **direct** the sale of any assets of the district, either in one lot or in parcels, at public or private sale, as the court finds best. The [*decree*] **judgment** shall make provision for the payment of all indebtedness of the district.

Section 172. ORS 548.940 is amended to read:

548.940. (1) Jurisdiction of all interested parties may be had by the publication of summons in the manner provided by [*ORS 15.140*] **ORCP 7**. Copies of the summons and the petition of the district shall be mailed to each qualified elector and landowner at [*his*] **the** mailing address as shown by the records of the county clerk, the county tax collector and the county assessor, and to all known creditors of the district.

(2) The Water Resources Director shall be a necessary party and shall be served with a copy of the summons and petition.

Section 173. ORS 554.150 is amended to read:

554.150. If the board of directors neglects to make any assessment provided by ORS 554.010 to 554.340 for 30 days after the time when it is required to be made, any member of the corporation or any creditor thereof

who is likely to be injured thereby may bring [*a suit in equity*] **an action** to compel the assessment to be made. In any such case the costs and expenses thereof may be assessed to the directors who were wilfully negligent in failing to make the same and judgment rendered against them jointly and severally by the court in the same [*suit or proceeding*] **action**. In such [*suit*] **action** the corporation and the directors shall be parties defendant.

Section 174. ORS 570.175 is amended to read:

570.175. (1) Whenever any public nuisance as described in ORS 570.170 exists at any place in the state on property of any owner upon whom notice has been served and who has failed or refused to abate such nuisance within the time and in the manner specified in such notice, or when any such nuisance exists on the property of a nonresident or on any property the owner of which cannot be served with notice in the manner provided in ORS 570.190, after diligent search within the county in which such nuisance exists, the department shall make a report to the district attorney of the county in which the nuisance exists, or if the nuisance exists on property which lies in two or more counties, to the district attorney of any of such counties, setting forth the description of the property upon which the nuisance exists and naming the pest or other condition which renders such property a nuisance. The district attorney shall prepare from such report and any other available information a petition to the circuit court of [*his*] **the** county, signed [*and verified*] in manner and form [*now*] required for a complaint in [*equity*] **a civil action**, in which the property or premises sought to be declared a nuisance shall be described with reasonable certainty. The petition shall set forth the names of each owner, encumbrancer or other person interested in such property or premises so far as the same can be ascertained from the public records, and pray that the court enter an order declaring such premises or property a public nuisance and directing the abatement of such nuisance by destruction or otherwise.

(2) Such [*suit*] **action** shall be brought in the name of the State of Oregon by the Director of Agriculture in [*his*] the official capacity **of director** and shall proceed as [*a suit in equity*] **an action not triable by right to a jury**.

(3) Service of summons shall be made in the manner provided [*by law*] for service of summons in a [*suit in equity*] **civil action**; provided, that where service is had by publication, the period of publication required shall be shortened to once a week for two consecutive weeks, and such service by publication is deemed complete upon the expiration of 21 days from and after the date of the first publication of such notice. The person or persons so served by publication shall appear and answer within 31 days from the date of the first publication of such notice.

(4) The court may, upon the application of any party, or upon its own motion, and for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected.

(5) At the time and place appointed for hearing the petition, or to which the hearing may have been adjourned, if the court has satisfactory proof that all parties interested in the property or premises have been duly served with notice as prescribed in this section, and further satisfied by competent proof that the conditions of such premises or property warrant its being declared a public nuisance, it shall enter an order condemning such property as a public nuisance and directing that the owner or other person ordered by the court shall destroy such property or abate such nuisance in such other manner as the court shall direct. If the nuisance is abated by any person other than the owner, then in the order of the court directing the abatement of the nuisance the court shall further order that an accurate account of the cost and expense necessary to the abatement be kept and a report made to the court within five days after the completion of the abatement of the nuisance. The report shall be in writing, verified by the one making it and shall be served and filed as a cost bill

in a civil [*suit*] **action**. Objections to the statement, if any, shall be made, served, filed and determined as objections to a cost bill in a civil [*suit*] **action**. The [*decree*] **judgment** which orders the abatement of a nuisance shall also provide that the owner or owners of the property upon which the nuisance exists pay the expense of abating the nuisance, that it shall be a judgment lien on the property prior to all other liens and, if not paid within 60 days after the statement of expense is filed, execution may issue.

Section 175. ORS 583.096 is amended to read:

583.096. (1) A judicial review of the audit findings of the department, as provided by this section, shall be permitted only after any party claiming to be aggrieved by such findings has exhausted [*his*] remedies under ORS 583.086.

(2) Within 30 days after the date the department mails a copy of its reaudit findings as provided by paragraph (b) of subsection (3) of ORS 583.086, any party aggrieved thereby may secure judicial review thereof by commencing an action in the Circuit Court for Marion County or in the circuit court for the county in which the aggrieved party resides or has [*his*] a principal business office. If an appeal is filed in the wrong county, the court shall enter an order transferring it to the proper county.

(3) In such action, the complaint shall name the department as defendant. A copy of such complaint shall be served by the sheriff or by certified mail on the department. It shall state the nature of the aggrieved party's interest, the facts showing how such person or persons are aggrieved by the decision or findings of the department, and the ground or grounds upon which such person or persons contend that the decision or findings should be reversed and set aside.

(4) Within 30 days after service of the complaint, or within such further time as the court may allow, the department shall file its answer with the court and transmit to such court the original or certified copies of all findings, decisions, documents, records and other papers related to such audit and reaudit.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence as to the matters in controversy in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the department, the court may order that the additional evidence be taken before the department upon such conditions as the court deems proper. The department may modify its findings and decision by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision, or its certificate that it elects to stand on its original findings or decision, as the case may be.

(6) The hearing and review shall be conducted by the court **as an action tried** without a jury [*as a suit in equity*] and shall be given precedence on the docket over all other cases except those given equal status by statute.

(7) The court may adopt, modify or set aside the decision and the findings of the department. In the actual reversal or modification, the court shall make special findings of fact based upon evidence in the record and conclusions of law indicating clearly all respects in which the decision and the findings of the department are erroneous.

(8) (a) If the court affirms findings of the department which require a handler or person to make payment for milk or if the court modifies such findings, the court shall also at the same time order that such amounts be paid

(b) If the court affirms the findings of the department that violations of law or regulations exist, or if the court modifies such findings, the court shall also order that the handler or person shall be enjoined from further violating such law or regulations. Future similar violation of such law or regulations is subject to contempt action as provided by paragraph (a) of this subsection.

(9) An appeal may be taken from the order or [*decree*] **judgment** of the circuit court to the [*Supreme*] Court **of Appeals** as in other cases, regardless of the amounts involved. The court may in its discretion assess costs to the prevailing party.

Section 176. ORS 585.047 is amended to read:

585.047. (1) Upon default of a wholesale produce dealer under any condition of the bond required by ORS 585.045, the department shall:

(a) Give reasonable notice to growers to file claims with the department.

(b) Fix a reasonable time within which such filing shall be done.

(c) Investigate each claim filed and reasonably verify the circumstances under which the claims accrued and the good faith of the claimants.

(2) With the approval of the claimants who filed claims, the department may settle such claims with the surety, without filing legal action. Such settlement, unless appealed to the circuit court within 30 days as provided by law, is final between the surety and all claimants covered by the bond.

(3) If any claimant does not agree with the findings of the department, the department shall file a declaratory judgment action [*in equity*] **without right to jury trial** in the circuit court in the name of the State of Oregon for the benefit of the claimants as authorized by ORS chapter 28. Unless appealed [*to the Supreme Court*] as prescribed by law, the order of the court shall be final between the surety and all claimants covered by the bond.

Section 177. ORS 586.527 is amended to read:

586.527. (1) If the department considers the appointment of a receiver or other action provided by ORS 586.525 inadvisable or inexpedient in the case of depositors of grain in a public warehouse operated by a warehouseman who is in default as to any condition of [*his*] bond, it may obtain settlement for such depositors as provided in this section.

(2) The department shall:

(a) Give reasonable notice to persons holding warehouse receipts or other evidence of deposit issued by the defaulting warehouseman, to file claims with the department.

(b) Fix a reasonable time within which such filing shall be done.

(c) Investigate each claim so filed and reasonably verify the circumstances under which the claims accrued and the good faith of the claimants.

(3) With the approval of the claimants who filed claims, the department may settle such claims with the surety without filing legal action. Such settlement unless appealed to the circuit court within 30 days as provided by law, is final between the surety and all claimants covered by the bond.

(4) If any claimant or the surety does not agree with the findings of the department, the department shall file a declaratory judgment action [*in equity*] **without right to jury trial** in the circuit court in the name of the State of Oregon for the benefit of the claimants as authorized by ORS chapter 28. Unless appealed [*to the Supreme Court*] as prescribed by law, the order of the court shall be final between the surety and all claimants covered by the bond.

Section 178. ORS 599.251 is amended to read:

599.251. (1) Upon default of a licensee as to any condition of [*his*] **the** bond [*as*] required by ORS 599.245, the department shall:

(a) Give reasonable notice to persons to file claims with the department.

(b) Fix a reasonable time within which such filing shall be done.

(c) Investigate each claim so filed and reasonably verify the circumstances under which the claims accrued and the good faith of the claimants.

(2) With the approval of the claimants who filed claims, the department may settle such claims with the surety, without filing legal action. Such settlement unless appealed to the circuit court within 30 days as provided by law, is final between the surety and all claimants covered by the bond.

(3) If any claimant, or the surety, does not agree with the findings of the department, the department shall file a declaratory judgment action [*in equity*] **without right to jury trial** in the circuit court in the name of the State of Oregon for the benefit of the claimants as authorized by ORS chapter 28. Unless appealed [*to the Supreme Court*] as prescribed by law, the order of the court shall be final between the surety and all claimants covered by the bond.

Section 179. ORS 604.180 is amended to read:

604.180. (1) In all [*suits at law or in equity*] **actions for legal or equitable remedies**, or in any criminal proceedings, when the title or right of possession is involved, the brand of any animal shall be prima facie evidence that the animal belongs to the owner of the brand, and that such owner is entitled to possession of the animal at the time of the action, if such brand has been recorded as provided by ORS 604.140.

(2) Proof of the right of any person to use such brand shall be made by a copy of the record, certified to by the department in accordance with ORS 604.150, or the original certificate issued to [*him*] **the person** by the department or by the former state veterinarian. Parol evidence is inadmissible to prove the ownership of a brand.

Section 180. ORS 604.190 is amended to read:

604.190. No evidence of ownership of stock by brands shall be permitted in any court of this state unless the brand has been recorded as provided by ORS 604.140. However, in the case of goats and hogs, evidence of ownership may be considered in any [*suit at law or in equity*] **action for legal or equitable remedies**, or in any criminal proceeding, as provided by ORS 604.230. On the trial of any person charged with the violation of any of the stock laws, the prosecution may prove, as tending to show conversion by the accused, that the animal was branded into a brand, or marked into a mark, claimed by the accused to be [*his*] **the** brand or mark **of the accused**, although neither such brand or mark is recorded.

Section 181. ORS 604.230 is amended to read:

604.230. The owners of animals other than goats or hogs in this state may use earmarks and they shall be taken in evidence in connection with the owner's recorded brand in all [*suits at law or in equity*] **actions for legal or equitable remedies**, or in any criminal proceedings, when the title to such property is involved, or proper to be proved. Owners of goats or hogs may also use earmarks. However, in no case shall the person using such earmarks cut off more than one-half the ear so marked, nor cut the ear on both sides to a point. In the case of goats or hogs, the earmarks, as well as the paint, wool or tattoo brand thereon, shall be considered in evidence

in all [*suits at law or in equity*] **actions for legal or equitable remedies**, or in any criminal proceeding, when the title to such property is involved, or proper to be proved, whether or not the brand has been recorded under ORS 604.140.

Section 182. ORS 604.323 is amended to read:

604.323. (1) All proceeds of sale impounded as provided in ORS 604.320 shall be subject to claim and proof of ownership thereof during a period not to exceed 60 days from the date of impounding. If a person claiming ownership of the proceeds of sale in the custody of the department provides satisfactory evidence of ownership of the proceeds and as of such time no other persons have presented adverse claims to the department, the proceeds shall be paid to [*him*] **that person**. If more than one person, each claiming adversely to the other, makes claim to proceeds of sale impounded by the department during the 60 days and the proceeds have not been paid out as authorized by this subsection, the right, if any, of such persons as to the proceeds shall be determined as provided in this section.

(2) Upon notice that several persons claim the right to receive the proceeds, the department shall give notice to the adverse claimants and to other persons the department believes may be interested or concerned therein. The notice to each claimant shall be forwarded in duplicate with one copy being forwarded by certified mail and one copy by regular mail. In its notice the department shall establish a final date, which shall not be less than 30 days after the mailing date thereof, on or before which all persons described in this subsection may file or personally present evidence or testimony to the department as to their reasons or claim to the proceeds. The department through its livestock police officers, personnel or other persons shall investigate the claims of all such persons and other matters relating thereto.

(3) Within 15 days [*from*] **after** the final date provided in subsection (2) of this section, the department shall give written notice to persons who have filed claims, one copy forwarded by certified mail and one copy by regular mail, as to the department's opinion and determination as to which, if any, of the claimants or other persons [*who*] should be paid all or a part of the impounded proceeds. If the department in its review of all evidence and testimony believes that justice would be best served and the intent and purpose of the brand law more reasonably and fairly carried out in a particular situation, it may determine that a part of such impounded proceeds shall be paid to more than one claimant.

(4) The determination by the department shall become final unless any of the persons who have filed claims shall, within 30 days after the date the determination and opinion is mailed by the department, file [*a suit in equity*] **an action for equitable remedies** against the department. The department shall not pay out any of the impounded proceeds until after the 30-day period has expired and if [*suit*] **action** is filed the department shall continue to hold the proceeds pending final order of the court.

(5) At the expiration of the three-year holding period, if the department has not been able to dispose of the impounded proceeds as authorized by this section, the proceeds shall be transferred to and may be expended by the department in carrying out and enforcing this chapter.

Section 183. ORS 625.340 is amended to read:

625.340. Any defendant in an action or suit brought under the provisions of ORS 625.310 to 625.350 may be required to testify under the provisions of ORS 45.050[*, 45.140, 45.150, 45.160, 45.170, 45.210, 45.220, 45.230, 45.240, 45.310 and 45.380;*] **or by deposition.** In addition, the books and records of any such defendant may be brought into court and introduced into evidence. [*, except that*] No information so obtained may be used against

the defendant as a basis for a [*misdemeanor*] **criminal** prosecution under [*the provisions of ORS 625.310 to 625.350*] **subsection (2) of ORS 625.990**.

Section 184. ORS 646.170 is amended to read:

646.170. Any defendant in an action brought under the provisions of ORS 646.140 to 646.160 may be required to testify under the provisions of ORS 45.050[*, 45.140, 45.150, 45.160, 45.170, 45.210, 45.220, 45.230, 45.240, 45.310 and 45.380*] **or by deposition**. In addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence. No information so obtained may be used against the defendant as a basis for a criminal prosecution under subsection (1) of ORS 646.990.

Section 185. ORS 650.020 is amended to read:

650.020. (1) Any person who sells a franchise is liable as provided in subsection (3) of this section to the franchisee if **the seller**:

(a) [*He*] Employs any device, scheme or artifice to defraud; or

(b) [*He*] Makes any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(2) It shall be an affirmative defense to any action [*or suit*] **for legal or equitable remedies** brought under subsection (1) of this section if the franchisee knew of the untruth or omission.

(3) The franchisee may recover any amounts to which [*he*] **the franchisee** would be entitled upon [*a suit in equity*] **an action** for a rescission, reasonable attorney fees at trial and on appeal and court costs.

(4) Every person who directly or indirectly controls a franchisor liable under subsection (1) of this section, every partner, officer or director of the franchisor, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the sale of a franchise is also liable jointly and severally to the same extent as the franchisor, unless the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of the facts on which the liability is based.

(5) [*A suit*] **An action** may not be commenced under this section more than three years after the sale.

(6) A corporation which is liable under this chapter shall have a right of indemnification against any of its principal executive officers, directors and controlling persons whose wilful violation of any provision of this [*law*] **chapter** gave rise to the liability. All persons liable under this chapter shall have a right of contribution against all other persons similarly liable, based upon each person's proportionate share of the total liability, except:

(a) A person wilfully misrepresenting or failing to disclose shall not have any right of contribution against any other person guilty merely of a negligent violation; and

(b) A principal executive officer, director, or controlling person shall not have any right of contribution against the corporation to which [*he*] **the person** sustains that relationship.

Section 186. ORS 650.060 is amended to read:

650.060. (1) For the purpose of any investigation or proceeding under this chapter, the commissioner or any officer designated by [*him*] **the commissioner** may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the commissioner considers relevant or material to the investigation or proceeding.

(2) Any person who is served with a subpena or is subject to an order to give testimony orally or in writing or to produce books, papers, correspondence, memoranda, agreements or other documents or records as

provided in this chapter may apply to any circuit court in Oregon for protection against abuse or hardship in the manner provided in [*ORS 41.618*] **ORCP 36 C**.

(3) Except to the extent judicial relief may have been granted under subsection (2) of this section, if any person disobeys a subpena issued under subsection (1) of this section, or if any witness refuses to testify or produce evidence before the commissioner on any matter on which the witness may be lawfully interrogated, the circuit court of any county, upon application of the commissioner, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpena issued from such court or a refusal to testify therein.

Section 187. ORS 656.285 is added to and made a part of ORS 656.283 to 656.301, and is amended to read:

656.285. [*ORS 41.618*] **ORCP 36 C**, shall apply to workers' compensation cases, except that the referee shall make the determinations and orders required of the court in [*ORS 41.618*] **ORCP 36 C.**, and in addition attorney fees shall not be declared as a matter of course but only in cases of harassment or hardship.

Section 188. ORS 662.090 is amended to read:

662.090. (1) The hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property. However, if a complainant also alleges that, unless a temporary restraining order is issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of the five days.

(2) No temporary restraining order or temporary injunction shall be issued except on condition that complainant first files an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs, together with a reasonable attorney's fee and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(3) The undertaking mentioned in subsection (2) of this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a [*decree*] **judgment** may be rendered in the same [*suit*] **action** or proceeding against the complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the complainant and surety submitting themselves to the jurisdiction of the court for that purpose. This section does not deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue [*his*] **the** ordinary remedy **of the party** by [*suit at law or in equity*] **action for legal or equitable remedies**.

Section 189. ORS 662.825 is amended to read:

662.825. Notwithstanding any other provision of law, the circuit court for the county in which such unlawful picketing is conducted has jurisdiction to enjoin any violation of ORS 662.805 to 662.825 by appropriate order or [*decree*] **judgment**. The proceedings shall be conducted as in the case of [*a suit in equity*]

an action not triable by right to a jury but shall be given precedence over all other civil actions.

Section 190. ORS 663.185 is amended to read:

663.185. (1) A complaint may be amended by the board in its discretion at any time before the issuance of an order based thereon.

(2) The person so complained of may file an answer to the original or amended complaint and appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the board, any other person may be allowed to intervene in the proceeding and to present testimony.

(3) The proceeding, so far as practicable, shall be conducted in accordance with the rules of evidence applicable to civil actions [*at law and suits in equity*].

Section 191. ORS 676.220 is amended to read:

676.220. (1) If at any time the board suspending or revoking the license of any licentiate of any of the healing or corrective arts determines that such licentiate is continuing to practice the healing or corrective art notwithstanding, the board shall in its own name bring [*a suit in equity*] **an action** to enjoin such licentiate.

(2) If the court shall find that the licentiate has been or is continuing the practice of the healing or corrective art for which [*his*] **the** license has been revoked or suspended it shall issue an injunction restraining [*him*] **the licentiate**. The commission of a single act constituting the practice of the respective corrective or healing art shall be prima facie evidence warranting the issuance of such injunction.

Section 192. ORS 679.027 is amended to read:

679.027. The board may, in its own name, maintain [*a suit*] **an action** for an injunction against any person violating any provision of subsection (1) of ORS 679.020, subsection (1) of ORS 679.025, ORS 679.170 or 679.176. [*The suit shall be commenced and prosecuted in the same manner as other suits in equity.*] Any person who has been so enjoined may be punished for contempt by the court issuing the injunction. An injunction may be issued without proof of actual damage sustained by any person. An injunction shall not relieve a person from criminal prosecution for violation of any provision of subsection (1) of ORS 679.020, subsection (1) of ORS 679.025, ORS 679.170 or 679.176.

Section 193. ORS 686.270 is amended to read:

686.270. If at any time the board concludes that any person is violating the Oregon veterinary medical laws the board may, in its own name, bring [*a suit in equity*] **an action** to enjoin that person from continuing such practice. The [*suit*] **action** shall be commenced and prosecuted in the same manner as [*other suits in equity*] **an action not triable by right to a jury**. If, after trial, the court finds that the defendant has been or is violating, or is threatening to violate, the Oregon veterinary medical laws it shall enter a permanent injunction restraining the defendant from so doing. In any such [*suit*] **action** it shall not be necessary to show that any person is especially injured by the acts complained of. The violation of any such temporary or permanent injunction may be punished by contempt as in other cases. Neither the bringing of such [*suit*] **action** nor any injunction entered therein, nor the punishment for contempt for violating any order or [*decree*] **judgment** entered in such [*suit*] **action**, shall prevent or prejudice the prosecution of any criminal action for any violation of this chapter.

Section 194. ORS 696.545 is amended to read:

696.545. (1) The commissioner may investigate either upon complaint or otherwise whenever it appears that an escrow agent is conducting [*his*] business in an unsafe and injurious manner or that any person is engaging in the escrow business without being licensed under the provisions of ORS 696.505 to 696.585.

(2) If upon investigation it appears that such agent is so conducting [*his*] business or an unlicensed person is engaged in the escrow business the commissioner may, in addition to any other remedies, bring [*suit*] **action** in the name and on behalf of the State of Oregon against such person and any other person or persons concerned in or in any way participating in or about to participate in such unsafe or injurious practices or acting in violation of ORS 696.505 to 696.585, to enjoin such person and such other person or persons from continuing such practices or engaging therein or doing any act or acts in furtherance thereof or in violation of ORS 696.505 to 696.585.

(3) The circuit court of any county of this state [*hereby*] is vested with jurisdiction [*in equity*] to restrain unsafe, injurious or illegal practice or transactions and may grant injunctions to prevent and restrain such illegal practices or transactions, in addition to the penalties and other remedies provided in ORS 696.505 to 696.585. The court shall have power, during the pendency of the proceedings before it to issue such preliminary restraining orders as may appear to be just and proper, and the findings of the commissioner shall be deemed to be prima facie evidence and sufficient ground, in the discretion of the court, for the issue ex parte of a preliminary restraining order.

(4) In any such court proceedings the commissioner may apply for and on due showing be entitled to have issued the court's subpena requiring forthwith the appearance of any defendant and [*his*] employes **of the defendant** and the production of documents, books and records as may appear necessary for the hearing of such petition, to testify and give evidence concerning the acts or conduct or things complained of in such application for injunction.

Section 195. ORS 709.330 is amended to read:

709.330. (1) When a sale or transfer of assets or liabilities becomes effective, as provided in ORS 711.205, the purchasing corporation shall succeed to all the rights, obligations and relations of the selling corporation to or in respect to any person, estate, creditor, depositor, trustee or beneficiary of any trust and in respect to any fiduciary relation, and the rights, obligations and relations shall remain unencumbered.

(2) The sale or transfer of assets shall not effect a renunciation or revocation of any letters of administration, letters testamentary, letters of guardianship or any other fiduciary relationship.

(3) If any trust requires the approval of the court to a change of the fiduciary, within 90 days after the change becomes effective the successor fiduciary shall file notice of the change with the court having jurisdiction and serve notice of the change upon each beneficiary. The notice may be served in the manner provided in [*ORS 16.760 to 16.820*] **ORCP 9** or, if the residence of a beneficiary is not known, notice may be published in the manner provided [*by law*] for the publication of summons.

(4) A beneficiary or other person interested in the trust or estate may, within 90 days after the service of the notice, apply to the appropriate court for a change of fiduciary or such other relief as may be proper.

Section 196. ORS 709.400 is amended to read:

709.400. (1) Upon the filing of the petition under ORS 709.390, the court shall make an order requiring all persons having claims against the deposits to start action in the circuit court hearing the superintendent's petition within six months after the date of the order. Any claim not filed within the six-month period is barred. The petition or the order need not give the names of any beneficiary or the nature of the trusts protected by the deposit.

(2) A copy of the order shall be published in a newspaper designated by the court, having a general circulation in the county of the principal place of business of the trust company or national bank at least once a week for as many consecutive weeks as the court orders, but not less than four weeks nor more than 12 weeks. If a newspaper is not published in the county, the copy of the order shall be published in a newspaper designated by the court. Proof of publication shall be made in the same manner as proof of publication of summons is made [*under ORS 15.160*] and the proof shall be filed with the clerk of the court.

(3) The filing of the petition, under ORS 709.390, and the making and entering of the order and the publishing of a copy of the order under this section gives the court exclusive jurisdiction of deposited securities and of all parties having an interest in or claim upon the securities.

(4) A court shall require the superintendent to mail, by registered mail, postage prepaid, a copy of the order to each living trustor of all private trusts in which the trust company or national bank is trustee and which have not been closed or to the directly participating beneficiaries of all private trusts in which there is no living trustor. The notice shall be mailed to the last-known address of each trustor or participating beneficiary as shown by the records of the trust company or national bank. Proof of mailing shall be in the form required by the court. Failure to mail the notice or the nonreceipt of the notice by any trustor or participating beneficiary shall not affect the jurisdiction of the court or invalidate any order or [*decree*] **judgment** made in the proceedings.

(5) The appearance of minors or other incompetents by guardians ad litem or otherwise is not necessary.

Section 197. ORS 756.598 is amended to read:

756.598. (1) Court review of any findings of fact, conclusions of law or order referred to in ORS 756.580, shall be conducted by the court without a jury, [*as a suit in equity*] but the court shall not substitute its judgement for that of the commissioner as to any finding of fact supported by substantial evidence. The review shall be confined to the record and no additional evidence shall be received except as provided in ORS 756.600 or except to show alleged irregularities in procedure before the commissioner not shown in the record. The court may affirm, modify, reverse or remand the order.

(2) Errors in procedure shall not be cause for reversal or remand unless the court finds that substantial rights of the plaintiff were prejudiced thereby. In the case of a modification or reversal the court shall make special findings of fact based upon evidence in the record and conclusions of law indicating clearly all respects in which the commissioner's order is erroneous.

Section 198. ORS 758.465 is amended to read:

758.465. In the event a contract approved by the commissioner is breached or in the event an allocated territory is served by a person not authorized by such contract, or order of the commissioner, the aggrieved person or the commissioner may file [*a suit*] **an action** in the circuit court for any county in which is located some or all of the allocated territory allegedly involved in said breach or invasion, for an injunction against said alleged breach or invasion. The trial of such [*suit*] **action** shall proceed as in [*other suits in equity*] **an action not triable by right to a jury**. Any party may appeal to the Court of Appeals from the court's decree, as in other equity cases. The remedy provided in this section shall be in addition to any other remedy provided by law.

SECTION 199. ORS 11.010, 11.020, 11.050, 11.060, 13.010, 13.020, 13.030, 13.041, 13.051, 13.060, 13.070, 13.080, 13.090, 13.110, 13.120, 13.130, 13.140, 13.150, 13.161, 13.170, 13.180, 13.190, 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.320, 13.330, 13.340, 13.350, 13.360, 13.380, 13.390, 14.010, 14.020, 14.035, 15.010, 15.020, 15.030, 15.040, 15.060, 15.070, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.190, 15.200, 15.210, 15.220, 16.010, 16.020, 16.030, 16.040,

16.050, 16.060, 16.070, 16.080, 16.090, 16.100, 16.110, 16.120, 16.130, 16.140, 16.150, 16.210, 16.221, 16.240, 16.250, 16.260, 16.270, 16.280, 16.290, 16.305, 16.315, 16.320, 16.325, 16.330, 16.340, 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, 16.430, 16.460, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540, 16.610, 16.620, 16.630, 16.640, 16.650, 16.660, 16.710, 16.720, 16.730, 16.740, 16.760, 16.765, 16.770, 16.780, 16.790, 16.800, 16.810, 16.820, 16.830, 16.840, 16.850, 16.860, 16.870, 16.880, 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.033, 17.035, 17.040, 17.045, 17.050, 17.055, 17.105, 17.110, 17.115, 17.120, 17.125, 17.130, 17.135, 17.140, 17.145, 17.150, 17.155, 17.160, 17.165, 17.170, 17.175, 17.180, 17.185, 17.190, 17.205, 17.210, 17.215, 17.220, 17.225, 17.235, 17.240, 17.245, 17.255, 17.305, 17.310, 17.320, 17.325, 17.330, 17.335, 17.340, 17.345, 17.350, 17.355, 17.360, 17.405, 17.410, 17.415, 17.420, 17.425, 17.431, 17.435, 17.441, 17.505, 17.510, 17.515, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630, 18.020, 18.105, 18.140, 18.210, 18.220, 18.230, 18.240, 18.250, 18.260, 18.310, 20.030, 23.010, 29.040, 29.510, 30.350, 35.225, 41.616, 41.617, 41.618, 41.620, 41.622, 41.626, 41.631, 41.635, 41.915, 41.920, 41.925, 41.935, 41.940, 44.110, 44.120, 44.130, 44.140, 44.160, 44.171, 44.180, 44.190, 44.200, 44.210, 44.220, 44.230, 44.610, 44.620, 44.630, 44.640, 45.030, 45.110, 45.120, 45.140, 45.151, 45.161, 45.171, 45.185, 45.190, 45.200, 45.230, 45.240, 45.280, 45.320, 45.325, 45.330, 45.340, 45.350, 45.360, 45.370, 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470, 45.910, 46.110, 46.155, 46.160, 52.140, 52.150, 52.160 and 441.810 are repealed.

SECTION 200. This Act amends statute sections repealed by chapter 842, Oregon Laws 1977. Any statute section amended by this Act that is repealed by chapter 842, Oregon Laws 1977, remains subject to the operative date of the repeal in chapter 842, Oregon Laws 1977, if the repeal becomes operative, and to applicable provisions of sections 50 and 51, chapter 842, Oregon Laws 1977, and ORS 182.605 to 182.635.

SECTION 201. Sections 4 to 200 of this Act first become operative on January 1, 1980.

SECTION 202. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

April 17, 1979

TO: ROBERT W. LUNDY
JIM McCANDLISH
DENNIS BROMKA

Dear Dennis, Jim, and Bob:

Enclosed are the changes to the ORCP agreed upon by the Joint Committee. They are set out by section and if correct are ready for incorporation in the Bill. Those changes marked with an asterisk were not considered by the Joint Committee but are matters of form which Bob Lundy turned up.

I will be in Salem Friday afternoon and would like to get together to make sure these are correct. I will call Thursday to see what your time availability is for that day.

Sincerely,

Fredric R. Merrill
Executive Director

COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.

OREGON RULES OF CIVIL PROCEDURE

DRAFT OF CHANGES

Adopted By

JOINT SENATE AND HOUSE JUDICIARY COMMITTEE

April 16, 1979

Rule 1

C. Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date[.], except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 64. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice, and procedure established by ORS 1.745, or promulgated under ORS 1.735, 2.130, and 305.425, unless otherwise defined or limited. Except for the Oregon tax court, these rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

[D.]E. Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), as ORCP 7 D. (3)(a)(i).

Rule 4

K. Certain marital and domestic relations actions.

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

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

K.(3) [In a filiation proceeding under ORS Chapter 109] In any proceeding to establish paternity under ORS Chapters 109, 110, or 419, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act [or acts] of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state [and the child resides in this state].

Rule 7

A. [Plaintiff and defendant defined.] Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint with a certificate upon the copy signed by an attorney of record, or if there is no attorney, by a party which indicates that the copy is exact and complete.

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

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

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

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

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

Rule 7

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party [pursuant to Rule 22 D.]to respond to a counterclaim under Rule 22 D.(1) and (2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." [This paper] The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

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

C.(3)(b) Service [on maker of contract] for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.[(2)](1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." [This paper] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.[(3)](2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." [This paper] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

Rule 7

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

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

D.(2)(b) Substituted service. Substituted service may be made by delivering a [certified] true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff [immediately] , as soon as reasonably possible, shall cause to be mailed a [certified] true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed by these rules, substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a [certified] true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff [immediately], as soon as reasonably possible, shall cause to be mailed a [certified] true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office

service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a [certified] true copy of the summons and a [certified] true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time allowed by these rules, service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

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

D.(3)(a) Individuals.

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

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

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

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

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association[.] or by personal service upon any clerk on duty in the office of the registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found [and does not have an office] in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to [a registered agent, officer, director, general partner, or managing agent.] the last registered office of the corporation, limited partnership, or association, if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation, limited partnership, or association is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation, limited partnership, or association, and, in any case to any address, the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

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

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

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads, highways, and streets -- service by mail. In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, may be served with summons by mail except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) to the most recent address furnished by the defendant to the administrator of the Motor Vehicles Division, and (iii) to any other address of the defendant known to the plaintiff, which might result in actual notice.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highway, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the administrator of the Motor Vehicles Division of any change of such defendant's address within three years of such accident or collision.

D.[(4)](5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D.[(5)](6) [Service by publication or mailing to a post office address; other service by court order.] Court order for service; service by publication.

D.[(5)](6)(a) [Order for publication or mailing or other service.] Court order for service by other method. On motion upon a showing by affidavit that service cannot be made by any [other] method [more reasonably calculated to apprise the defendant of the existence and pendency of the action] specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: [by publication; or at the discretion of the court,] publication of summons; [by] mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or [by any other method] posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D.[(5)](6)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "This paper must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.[(5)](6)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.[(5)](6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.[(5)](6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

*D.[(5)](6)(f) [Defending after judgment]. Defending before or after judgment. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but tht title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.[(5)](6)(g) Completion of service. Service shall be complete at the date of the last publication.

Rule 7

F. Return; proof of service.

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

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

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

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

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

F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.

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

Affidavit of Publication

State of Orégon)
: ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation [as defined by ORS 193.010 and 193.020] published at _____ in the

aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues:

(here set forth dates of issues in which the same was published).

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

_____
Notary Public for Oregon

My commission expires
____ day of _____, 19 ___.

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

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

Rule 7

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

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address.[or, if no address is known, by leaving it with the clerk of the court.] Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing.

Rule 9

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

Rule 13

B. Pleadings allowed. There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff, including a party joined under Rule 22 D., and a cross-claim against a defendant[.], including a party joined under Rule 22 D. A pleading against any person joined under Rule 22 C. is a third party complaint. There shall be an answer to a cross-claim and a third party complaint. There shall be a reply to a counterclaim denominated as such and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer. There shall be no other pleading unless the court orders otherwise.

Rule 14

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

Rule 15

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint [or] and the reply to a counterclaim or answer to a cross-claim of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by Rule 7 C.(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

Rule 17

A. [Subscription]Signature by party or attorney; certificate. Every pleading shall be [subscribed] signed by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading may be [subscribed] signed by at least one of such parties or one resident attorney. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The [subscription of a pleading] signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.

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

Rule 21

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, [that a plaintiff has not legal capacity to sue,] that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, [or that the party asserting the claim is not the real party in interest,] is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F. of this rule, or (b) if [it] the defense is neither made by motion under this rule nor included in a responsive pleading [or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however,] The defenses [denominated (2) and (5) of section A. of this rule] referred to in this subsection shall not be raised by amendment.

G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G.[(2)](3) A defense of failure to state ultimate facts constituting a claim, [a defense that the action has not been commenced within the time limited by statute,] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.[(3)](4) 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.

Rule 22

[D. Joinder of Persons in contract actions.]

[D.(1) As used in this section of this rule:]

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

[D.(1)(b) "Contract" includes any instrument or document evidencing a debt.]

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

D. Joinder of additional parties.

D.(1) 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 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D.[(4)](3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

Rule 24

* B. Forcible entry and detainer and rental due. If a claim of forcible entry and detainer and a claim for rental due are joined, the defendant shall have the same time to appear as is provided by [law] rule or statute in actions for the recovery of rental due.

* Rule 27

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

A.(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A.(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by [law] these rules or other rule or statute for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person, who has a conservator of such person's estate or a guardian, is a party to any action,

the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

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

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by [law] these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

Rule 29

[D. State agencies as parties in governmental administration actions. In any action 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.]

Rule 33

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

Rule 34

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be shown upon the record by a written statement of a party signed in conformance with Rule 17 and the action shall proceed in favor of or against the surviving parties.

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.

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

Rule 38

* C. Foreign depositions.

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

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

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes [in form or substance] which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with

the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

Rule 43

*A. Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, and translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

Rule 44

A. Order for examination. When the mental or physical condition [(including the blood group)] or the blood relationship of a party [or of a], or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Rule 44

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with [the hospitalization of the injured person.] any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

Rule 45

* A. Request for admission. After commencement of an action, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B. specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."

B. Response. [The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Each matter of which an admission is requested shall be separately set forth.] The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon such defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtain-

able by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C., deny the matter or set forth reasons why the party cannot admit or deny it.

*D. Form of affidavits; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this [section] rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E. and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B.(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of

such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 54

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

Rule 55

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. It also requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, he is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

* H. Hospital records.

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

H.(2) Mode of compliance with subpoena of hospital records.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within

five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

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

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part

of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian of records.

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

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

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required.

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

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

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. [The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.] The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.

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

Rule 59

B. Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or [If] if in the opinion of the court it is desirable, the charge shall be reduced to writing, and then read to the jury by the court. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations. The clerk shall file the instructions in the court file of the case.

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

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

[B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.]

B.[(6)](5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.[(7)](6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

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

April 17, 1979

Representative David Frohnmayer
Chairman, House Judiciary Subcommittee
Room H 377
State Capitol
Salem, Oregon 97310

Senator Vernon Cook
Chairman, Senate Judiciary Committee
Room S 211
State Capitol
Salem, Oregon 97310

Gentlemen:

At the April 7, 1979, meeting of the Council on Court Procedures an attorney in attendance suggested that by promulgating the existing class action statutes as ORCP Rule 32 without any change, the Council was indicating that it recommended no change in class action procedure be considered by the legislature. It was suggested that I, as Chairman of the Council, clarify the action of the Council relating to this area.

During the period it has been in existence, the Council had not received any criticism of the procedure provided for class actions in ORS Section 13.210 et seq. The Council was aware that the statute was a modification of Rule 23 of the Federal Rules of Civil Procedure, drafted to accommodate a variety of competing interests in the state relating to class actions. It noted that these statutes had been recently enacted (1973) after extensive legislative hearings.

A member of the Oregon State Bar Committee on Uniform Laws suggested the adoption of the uniform act. That item was placed on the agenda for one of the earlier meetings of the Council. At that time the Council was faced with a strong and clearly defined need to reorganize, clarify, and modify the procedural statutes in a number of areas, and hoped to accomplish the same before the present Session convened. The Council felt that that need had priority over consideration of the procedures governing class actions.

Certainly class actions are within the generally accepted definition of procedure as that term is used in ORS 1.735. I believe they logically fit within the joinder section of the proposed Oregon rules of Civil Procedure as Rule 32.

In conclusion, the Council believes that a reasonable approach was to incorporate the existing statutes as Rule 32 in the proposed rules, and defer consideration of the Uniform Act.

Very truly yours,

Donald W. McEwen
Chairman, Council on
Court Procedures

DWM:lam

cc: Mr. Frederic R. Merrill
The Honorable William M. Dale, Jr.

April 17, 1979

Rep. Mark Gardner
Chairman, House Judiciary
H 474, State Capitol
Salem, OR 97310

Dear Mark:

You expressed concern that Rules 4 E.(1) and 4 E.(3) of the Oregon Rules of Civil Proedure were on the borderline of constitutionality. As I explained to you last week, the United States Supreme Court seldom decides "minimum contacts" cases. I am therefore unable to provide you with authority that will resolve all doubts. What follows is a discussion of the policy of the Council and the type of authority it considered.

The Council rejected the California approach which merely states that its courts have jurisdiction where it is constitutionally permissible. For the reasons indicated in this comment to an earlier draft, the Wisconsin long-arm statute was used as a model:

> The Wisconsin statute goes in the opposite direction by specifically describing a number of situations that would fit within a Constitutional standard. The greatest virtue of the Wisconsin statute, in addition to the breadth of activities covered, is that it generally describes activities in fairly specific language, rather than focusing on legal conclusions, such as, committing a tort, contracting, or transacting business. The Oregon court has had substantial difficulty with the Oregon long arm statute because frequently the same conduct is alleged to be tortious and a breach of contract, and different tests have been developed for different sections of the existing long arm statute. In addition, most non-tortious conduct somehow must be fit into the abstraction of "transacting business."* * *Therefore, in general, the Wisconsin statute best conforms to the committee's decision to expand long arm jurisdiction as far as possible, while maintaining a fair amount of predictability and guidance for attorneys.

The direction of the Council was three-pronged. It sought to eliminate the possibility of a plaintiff being cut off from asserting a good cause of action because there was no statute, even though jurisdiction would have been

constitutionally permissible. Amenability to long-arm jurisdiction requires both a statute and constitutional minimum contacts. Walker v. Newgent, 583 F.2d 163, 166 (5th Cir. 1978). Second, the Council wanted to establish guidelines more useful than the present "transacting business" statute which doesn't even mention contracts. And finally, they wanted to satisfy the U.S. Supreme Court's apparent desire to have the state's interests in trying cases in its courts articulated, expressed in Shaffer v. Heitner, 433 U.S. 186, 214 (1977), and Kulko v. Superior Ct., 46 L.W. 4421, 4425 (1978). In Kulko, the Court showed the inadequacy of the California approach when it stated as one reason for its decision that "[the state] has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute."

Rules almost exactly like Oregon's are in force in Wisconsin, North Carolina, and Alaska. In addition, about two-thirds of the states have adopted a statute like the Uniform Interstate and International Procedure Act, § 1.03 (a)(2), which reads: "contracting to supply services or things in this state."

The constitutionality of the rule as written is supported by the following cases:

McGee v. Int. Life Ins. Co., 78 S.Ct. 199, 355 U.S. 220 (1957). Insurance company never solicited or did any business in forum, other than mail an insurance contract into the state to plaintiff, mail premium notices and accept premiums. The court held that due process was satisfied, relying on the contacts and the need to provide insurance claimants with a convenient forum.

Midland Forge, Inc. v. Letts Industries, Inc., 395 F.Supp. 506 (N.D. Iowa 1975). Defendant was a West German corporation not licensed to do business in Iowa. Plaintiff purchased a drop forge hammer from another out of state distributor manufactured by defendant. The distributor had no connection with defendant, but bought and resold the products of several firms. Plaintiff sued defendant on an implied warranty of fitness and merchantability and express warranties contained in advertising brochures and an express warranty passed on by the distributor. The court held that defendant was subject to jurisdiction on an economic loss breach of warranty claim. It cited as minimum contacts: (1) the presence of defendant's products in Iowa, (2) communications when problems developed with the forger, (3) world-wide distributor of advertising brochures, and (4) sending personnel into the state to attempt to correct the problem. Note: that (2) and (4) occurred after the cause of action arose.

Pugh v. Okla. Farm Bureau Mut. Ins. Co., Inc., 159 F. Supp. 155 (E.D. La. 1958). Insurer in Oklahoma insures an Oklahoma driver. Insured is involved in an automobile accident in Louisiana. The

court held that due process permitted jurisdiction to be exercised over the insurer (insured was not involved) where the only contact with the state was the presence of the risk in the state at the time of the accident (a promise to defend and a duty to indemnify).

Vinita Broadcasting Co. v. Colby, 320 F.Supp. 902 (N.D. Okla. 1971). An Oklahoma plaintiff contracts with an out of state attorney to perform legal services in connection with an FCC hearing to be held in Oklahoma. Defendant breaches by not showing. The contract was signed in some other state since "Defendant asserts that he was never physically present in Oklahoma." The court held due process to be satisfied.

Doug Sanders Golf, etc. v. American Manhattan Industries, Inc., 359 F.Supp. 918 (E.D. Wisc. 1973). Plaintiff acquired the rights to an exclusive golf franchise in Wisconsin from two out of state defendants. The court does not say where the negotiations took place or the contract was executed. The court held that due process was satisfied since the defendants breached their promises to provide training and instruction in Wisconsin.

As I said before, the case law does not remove all doubts. Ultimately, there is a policy issue here as to how far the state should go in permitting or encouraging litigants to go to the limits of due process. There are four alternatives which should be considered: (1) leaving sections 4 E.(1) and 4 E.(3) untouched; (2) amending those sections to require additional contacts (see enclosed Draft Amendment); (3) deleting those sections and inserting another section dealing with contracts (this would be difficult to draft); or (4) adding a forum non conveniens rule (Wisconsin could provide a model).

I think that you will find the Draft Amendment makes the sections clearly constitutional. It lumps (1) and (3) into one subsection and adds the requirement of additional contacts. Subsections (2), (4) and (5) of the present rule are prima facie constitutional. The (6) which I added simply codifies Wisconsin case law. The Council has not considered the amendment, but I have discussed it with Fred Merrill and he agrees that it would eliminate any doubt.

Thank you for your patience in working through this letter. I realize it violates Flo's "two sentence" rule, but it couldn't be helped.

Very truly yours,

Bruce C. Hamlin

BCH:gh

DRAFT AMENDMENT

Rule 4

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

E.(1) Arises out of a promise [,] which is accompanied by related minimum contacts sufficient to satisfy due process requirements, which promise is made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant: [to perform services within this state, to pay for services to be performed in this state by the plaintiff, or to guarantee payment for such services; or]

E.(1)(a) To perform services within this state, to pay for services to be performed within this state by the plaintiff, or to guarantee payment for such services; or

E.(1)(b) To deliver or receive within this state or to send from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents of title, or things of value.

E.[(2)](3) Arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant or payment for such services was guaranteed by the defendant; or

[E.(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents, or things; or]

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

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

E.(6) As used in this section, money payment is not a "thing of value."

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503/686-3837

May 6, 1979

Representative Dave Frohnmayer
Rm. H 377
State Capitol
Salem, Oregon 97310

In re: HB 3086

Dear Dave:

I received the copy of HB 3086 which you sent. Service by mail was considered by the Council and rejected except for a secondary method of serving corporations. There probably is no constitutional problem with mail service; ten states or so do allow this. The Council, I believe, felt that there was sufficient doubt about reliability of mail service that they did not wish to make it the primary service method. It was suggested that mailmen commonly will deliver to anyone who answers the door at the address and will allow them to sign the addressee's name for an ordinary certified letter. This may even be done with "Deliver to Addressee Only" mail.

The Bill deals only with district court and could reasonably operate under ORCP 1, as a specific ORS section that overrules the general provisions of Rule 7. The Bill has a number of technical problems.

1. ORS 46.110 has been superseded by the ORCP and will be repealed by the Joint Committee Bill. Some adjustment needs to be made for that.

2. The cross references to 15.020 to 15.160 in 46.110 are wrong. It should be ORCP Rule 7.

3. References to ORS 15.080 in 46.110(2) should be to ORCP 7 D.(3). The Bill refers to an "appropriate mailing address" under ORS 15.080. What is that? The address where you would serve defendant personally or some mailing address. The only mailing address described in 15.080 is part of substituted service by mailing to "the usual place of abode."

4. Does this apply only to individual defendants? If not, where do you mail for a corporation or a public agency?

5. Why is service limited to an address "in state"? If this is desirable, it would be even more desirable for defendants residing outside the state. There is no reason for the limitation and it is inconsistent with Rule 7.

6. What does the next to the last sentence of ORS 46.110(2) mean? ORCP 7 D.(2)(d) provides that for purposes of default or other procedural rules, service is complete upon mailing (with 3 days added to any time periods given by virtue of Rule 10 C.). Completion for limitation purposes is governed by ORS 12.020, which does not say when mail service is complete. Since the Joint Committee Bill amends 7 D.(2)(d) by making clear what is meant by "complete", the sentence in this Bill probably would be interpreted as applying only to limitations. Is this what would be meant?

In short, if the legislature wants to do this, the Bill needs a lot of work. I suspect Bob Harris will be after it anyway, but perhaps whoever is pushing this ought to try the Council during the next biennium.

Very truly yours,

Fredric R. Merrill
Executive Director

COUNCIL ON COURT PROCEDURES

FRM:gh

cc: Dennis Bromka

OREGON LEGISLATIVE ASSEMBLY--1979 Regular Session

House Bill 3086

Sponsored by COMMITTEE ON STATE GOVERNMENT OPERATIONS (at the request of Ted Clausen)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Authorizes service of summons by certified mail, return receipt requested, in civil actions or proceedings in district courts. Prescribes procedure for service by certified mail and method of proof of service. Authorizes service of notice and claim by certified mail, return receipt requested, in all small claims actions in district courts, instead of only where amount or value claimed is less than $50.

A BILL FOR AN ACT

Relating to civil procedure; amending ORS 46.110 and 46.445.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 46.110 is amended to read:

46.110. (1) **Except as provided in subsection (2) of this section,** the summons in district courts shall be issued, served, published and returned in the same manner and with the same effect as provided in ORS 15.020 to 15.080, 15.100 to 15.120, and 15.140 to 15.160, with respect to proceedings in the circuit courts.

(2) In a civil action or proceeding in a district court the plaintiff or attorney for the plaintiff may cause the summons to be served upon the defendant by certified mail. If service by certified mail is attempted, a copy of the summons, with a certified copy of the complaint, shall be mailed by certified mail addressed to the defendant or other person to be served as provided in ORS 15.080 at the appropriate mailing address within this state as provided in ORS 15.080. The envelope shall be marked with the words "Return Receipt Requested." Proof of service shall be the return receipt signed by the defendant or other person to be served, or if the certified mail envelope is addressed to the defendant or other person to be served at the usual place of abode of the defendant or other person to be served, signed by any person over 14 years of age who resides at the abode. The date of delivery appearing on the return receipt shall be prima facie evidence of the date on which the summons and complaint were served upon the defendant. If service by certified mail is not successfully accomplished, the summons and complaint shall be served as provided in subsection (1) of this section.

Section 2. ORS 46.445 is amended to read:

46.445. (1) Upon the filing of a claim, the clerk shall issue a notice in the form prescribed by the court.

(2) The notice shall be directed to the defendant, naming him, and shall contain a copy of the claim.

[*(3) If the amount or value claimed is $50 or more, the notice and claim shall be served upon the defendant in the manner provided for the service of summons and complaint in proceedings in the circuit courts.*]

[*(4) If the amount or value claimed is less than $50,*] **(3)** The notice and claim shall be served upon the defendant either in the manner provided for the service of summons and complaint in proceedings in the circuit courts or by certified mail, at the option of the plaintiff. If service by certified mail is attempted, the clerk shall mail the notice and claim by certified mail addressed to the defendant at his last-known mailing address within the territorial jurisdiction of the court. The envelope shall be marked with the words [*"Deliver to Addressee*

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION.**

Only" and] "Return Receipt Requested." The date of delivery appearing on the return receipt shall be prima facie evidence of the date on which the notice and claim was served upon the defendant. If service by certified mail is not successfully accomplished, the notice and claim shall be served in the manner provided for the service of summons and complaint in proceedings in the circuit courts.

[*(5)*] (4) The notice shall include a statement in substantially the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS CAREFULLY!

Within 14 DAYS after receiving this notice you MUST do ONE of the following things:

Pay the claim plus fees and service expenses paid by plaintiff OR

Demand a hearing OR

Demand a jury trial

If you fail to do one of the above things within 14 DAYS after receiving this notice, then upon written request from the plaintiff the clerk of the court will enter a judgment against you for the amount claimed plus fees and service expenses paid by the plaintiff.

If you have questions about this notice, you should contact the clerk of the court immediately.

SENATE COMMITTEE ON THE JUDICIARY
ROOM 347, STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8833

May 14, 1979

Donald W. McEwen
Chairperson, Council on Court Procedure
Hardy, McEwen, Newman, Faust & Hanna
1408 Standard Plaza
Portland OR 97204

Dear Mr. McEwen:

On May 10, 1979, the Committee declined to pass out that portion of Senate Bill 813 which would have established a uniform procedure for awarding attorney fees in all trial court proceedings. It is the sentiment of the Committee that an overhaul of this area of the law is appropriate, but should be undertaken by the Council on Court Procedures.

The Committee would therefore request that the Council undertake review of the various procedures governing the award of attorney fees at the trial level for the purpose of adopting a rule or rules establishing a uniform practice. And further, the Committee requests that any such rule or rules be available for its review at the next session of the legislature.

I would like to take this opportunity both personally and on behalf of the Committee to express appreciation to the members and staff of the Council for the excellent work done this session.

Sincerely,

Vern Cook, Chairperson
Senate Judiciary Committee

CC: Frederic R. Merrill, Council on Court Procedures
Keith Burns, State Bar Association
Rep. Dave Frohnmayer

HARDY, MCEWEN, NEWMAN, FAUST & HANNA
(FOUNDED AS CAKE & CAKE-1886)
ATTORNEYS AT LAW
1408 STANDARD PLAZA
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HERBERT C. HARDY
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JEFFREY W. BOCK
DIANE M. HICKEY

TELEPHONE 226-7321
AREA CODE 503

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

May 17, 1979

Senator Vern Cook
Chairman, Senate Judiciary Committee
Room S 211
State Capitol
Salem, Oregon 97310

Dear Senator Cook:

I have your letter of May 14, 1979, advising that the Committee declined to pass out the portion of Senate Bill 813. The portion in question is one which would have established a uniform procedure for the recovery of attorney's fees in civil actions at the trial court level. You advise that the consensus of the committee was that uniformity was desirable, and that it should be attained by rule promulgated by the Council on Court Procedures and recommended to the Legislature at its next session. The matter will be placed on the agenda of matters the Council will take action upon during the next biennium, and a rule or rules of civil procedure providing for a uniform practice in this matter will be submitted to the Legislature at its next session.

I thank you for your kindness in expressing appreciation personally and on behalf of the Committee for the labors and efforts of the Council and its staff.

Sincerely,

Donald W. McEwen
Chairman, Council on
Court Procedures

DWM:lam

cc: Representative David Frohnmayer
Mr. Frederic R. Merrill
The Honorable William M. Dale, Jr.

Patrick A. Reagan
ATTORNEY AT LAW
45 N.E. 122ND AVE.
PORTLAND, OR. 97230
(503) 254-6213

June 8, 1979

Please consider this under venue Dennis Bozanich

Mr. Tom Mason
State Representative
House of Representatives, 285
Salem, Oregon 97310

which section?

Re: Domestic relations; amendment to Chapter 107, ORS.

Dear Tom,

As per our telephone conversation June 7, 1979 regarding a proposed amendment to Chapter 107, ORS, I stated that I was involved in a domestic relations matter at this time which indicates that that chapter of the ORS should be amended.

In brief, a client of mine recently filed a Petition for Unlimited Separation in Multnomah County and effected service on his wife in Lane County. Subsequent to that, his wife filed a Petition for Dissolution of Marriage in Lane County, while the separation Petition is still pending. We attempted, by Motion to Quash Service of Process on my client, to stop the Lane County dissolution suit. Our ground for that Motion being that venue was already established in Multnomah County. However, the Court in Lane County denied our Motion, ruling that the ORS does not prevent simultaneous suits involving the same marriage from existing in separate counties in the State of Oregon. The effect is that, at present, we are involved in two separate suits in two separate counties. Neither side wishes to relinquish their suit in order to obtain a single forum for the contest hearing.

Therefore, I feel, quite strongly, that, in order to provide predictability of forum and in order to minimize the possible expense to the parties in such matters, the ORS should be amended. The present and invariable judicial rule in such matters in the Circuit Court, Domestic Relations Department, of Multnomah County is that "the first party to file establishes venue in the county of that first filing". Circuit Court Judge Harlow F. Lenon of the Domestic Relations Department in Multnomah County requests to be quoted on that rule. The amendment could further provide for a form of relief, should two filings be made. I would propose that a motion for dismissal of that second or subsequent suit involving the same marriage, made in the county of that second or subsequent filing, would be appropriate.

That judicial rule in Multnomah County should be followed, by mandate of the Legislature, throughout Oregon. That rule would reduce the costs, which are inherent in the filing of two suits in two different counties, both to the parties involved and to the Courts.

I strongly urge that the Judiciary Committee give thoughtful consideration to that matter before the end of the current legislative session.

It is my understanding that it is too late to introduce such an amendment as "new legislation" this session. However, I also understand that such an amendment could be made a "rider" on an appropriate, existing amendment to ORS. Please do what you can to facilitate passage of that proposed amendment.

If the Committee desires further input or assistance in that matter, I would be glad to do whatever I am able to do.

Thanks very much, Tom, for your concern and, in advance, for your efforts in that matter.

Please keep me informed.

Kindest regards.

Very truly yours,

Patrick A. Reagan

Rep. Tom Mason
Judge Harlow F. Lenon
Rep. Jane Cease
Sen. Jim Gardner
fc

SENATE COMMITTEE ON THE JUDICIARY
ROOM 347 STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8833

June 8, 1979

Donald McEwen, Chairperson
Council on Court Procedures
1408 Standard Plaza
1100 SW 6th Avenue
Portland OR 97204

Dear Chairperson McEwen:

On May 28, 1979, the Senate narrowly failed to pass A-Engrossed Senate Bill 904, which proposed three basic changes to the present class actions law.

(1) Elimination of the post-judgment claim form; (2) Express authority to a court to require a defendant to pay or share the costs of pre-judgment class notice if the court finds that plaintiffs have a substantial probability of prevailing on the merits; and (3) Elimination of the notice requirement to class members who can be identified through reasonable efforts, and whose potential recovery is $100 or less. Senator Smith of our Committee led the opposition to SB 904 on the floor, arguing effectively that this subject is more appropriately handled by the Council.

On behalf of the Committee, I request that the Council undertake a thorough review during the next interim of our class actions law, including the specific issues addressed in A-Engrossed Senate Bill 904, and report your findings and proposals to the 1981 Legislature.

Thank you very much for your cooperation and consideration in this matter.

Sincerely,

Vern Cook, Chairperson
Senate Judiciary Committee

VCrmg
cc:Frederic R. Merrill, Council on Court Procedures
School of Law, University of Oregon, Eugene OR 97403
Dave Frohnmayer, H 377 State Capitol, Salem OR 97310
Keith Burns, Oregon State Bar, Lobby Message Center, Salem OR 97310

EXHIBIT "A"

HARDY, MCEWEN, NEWMAN, FAUST & HANNA
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DIANE M. HICKEY

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

June 14, 1979

Senator Vern Cook
Chairman, Senate Judiciary Committee
Room 347
State Capitol
Salem, Oregon 97310

Dear Senator Cook:

I have your letter of June 8, 1979, advising that Senate Bill 904 failed to pass by a narrow margin. Pursuant to your request the Council on Court Procedures will undertake a thorough review of our class action statutes, and will report its findings and recommendations to the 1981 Legislature.

I know you appreciate that some of the proposed changes in the class action law may be substantive rather than procedural. These include the proposals for the so-called "fluid" recovery, and provisions relating to the imposition of costs prior to a determination of liability. If they are in fact substantive, I believe they can be appropriately dealt with by the Legislature during the next session.

Yours sincerely,

Donald W. McEwen
Chairman, Council on
Court Procedures

DWM:lam

cc: Representative David Frohnmayer
Mr. Frederic R. Merrill
The Honorable William M. Dale, Jr.

EXHIBIT "B"

Senate Bill 904

Sponsored by COMMITTEE ON JUDICIARY (at the request of Henry Carey)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Modifies authorization, requirements and procedures for class actions. Deletes existing law and adopts Uniform Class Actions Act.

A BILL FOR AN ACT

Relating to civil procedure; creating new provisions; and repealing ORS 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.310, 13.320, 13.330, 13.340, 13.350, 13.360, 13.370, 13.380, 13.390, 13.400 and 13.410.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 21 of this Act, "court" means a circuit court or district court.

SECTION 2. One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

(1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and

(2) There is a question of law or fact common to the class.

SECTION 3. (1) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(2) The court may certify an action as a class action, if it finds that:

(a) The requirements of section 2 of this Act have been satisfied;

(b) A class action should be permitted for the fair and efficient adjudication of the controversy; and

(c) The representative parties fairly and adequately will protect the interests of the class.

(3) If appropriate, the court may:

(a) Certify an action as a class action with respect to a particular claim or issue;

(b) Certify an action as a class action to obtain one or more forms of relief, equitable, declaratory or monetary; or

(c) Divide a class into subclasses and treat each subclass as a class.

SECTION 4. (1) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under subsection (3) of section 3 of this Act, the court shall consider, and give appropriate weight to, the following and other relevant factors:

(a) Whether a joint or common interest exists among members of the class;

(b) Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION.**

establish incompatible standards of conduct for a party opposing the class;

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

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

(e) Whether common questions of law or fact predominate over any questions affecting only individual members;

(f) Whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(g) Whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(h) Whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(i) Whether the class action involves a claim that is or has been the subject of a class action, a government action or other proceeding;

(j) Whether it is desirable to bring the class action in another forum;

(k) Whether management of the class action poses unusual difficulties;

(L) Whether any conflict of laws issues involved pose unusual difficulties; and

(m) Whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(2) In determining under subsection (2) of section 3 of this Act that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(a) The attorney for the representative parties will adequately represent the interests of the class;

(b) The representative parties do not have a conflict of interest in the maintenance of the class action; and

(c) The representative parties have or can acquire adequate financial resources, considering section 18 of this Act, to assure that the interests of the class will not be harmed.

SECTION 5. (1) The order of certification shall describe the class and state:

(a) The relief sought;

(b) Whether the action is maintained with respect to particular claims or issues; and

(c) Whether subclasses have been created.

(2) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in subsection (1) of section 4 of this Act.

(3) An order certifying or refusing to certify an action as a class action is appealable.

(4) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

SECTION 6. (1) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may establish subclasses, eliminate from the class any class member who was included in the class as certified, provide for an adjudication limited to certain claims or issues, change the relief sought or make any other appropriate change in the order.

(2) If notice of certification has been given pursuant to section 8 of this Act, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.

(3) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(4) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

SECTION 7. (1) A court of this state may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(a) A basis for jurisdiction exists or would exist in a suit against the person under the law of this state; or

(b) The state of residence of the class member, by class action law similar to subsection (2) of this section, has made its residents subject to the jurisdiction of the courts of this state.

(2) A resident of this state who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this state.

SECTION 8. (1) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(2) The notice, based on the certification order and any amendment of the order, shall include:

(a) A general description of the action, including the relief sought, and the names and addresses of the representative parties;

(b) A statement of the right of a member of the class under section 9 of this Act to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(c) A description of possible financial consequences on the class;

(d) A general description of any counterclaim being asserted by or against the class, including the relief sought;

(e) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(f) A statement that any member of the class may enter an appearance either personally or through counsel;

(g) An address to which inquiries may be directed; and

(h) Other information the court deems appropriate.

(3) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(4) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(5) For members of the class not given personal or mailed notice under subsection (4) of this section, the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice,

notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest or other appropriate groups.

(6) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted, the expense of notice shall be allocated as the court orders in the interest of justice.

(7) The court may order that steps be taken to minimize the expense of notice.

SECTION 9. (1) A member of a plaintiff class may elect to be excluded from the action unless:

(a) He is a representative party;

(b) The certification order contains an affirmative finding under paragraph (a), (b) or (c) of subsection (1) of section 4 of this Act; or

(c) A counterclaim under section 12 of this Act is pending against the member or his class or subclass.

(2) Any member of a plaintiff class entitled to be excluded under subsection (1) of this section who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(3) The elections shall be made a part of the record in the action.

(4) A member of a defendant class may not elect to be excluded.

SECTION 10. (1) The court on motion of a party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following:

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

(b) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of any step in the action, the proposed extent of the judgment, or the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action;

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

(d) Inviting the Attorney General to participate with respect to the question of adequacy of class representation;

(e) Making any other order to assure that the class action proceeds only with adequate class representation; and

(f) Making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(2) A class member not a representative party may appear and be represented by separate counsel.

SECTION 11. (1) Discovery under applicable discovery rules may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(2) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

SECTION 12. (1) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class or a claim the court certifies as a class action against a subclass.

(2) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under section 8 of this Act.

(3) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.

(4) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(5) A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under section 9 of this Act.

(6) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

SECTION 13. (1) Unless certification has been refused under section 3 of this Act, a class action, without the approval of the court after hearing, may not be dismissed voluntarily, dismissed involuntarily without an adjudication on the merits, or compromised.

(2) If the court has certified the action under section 3 of this Act, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.

(3) Notice given under subsection (2) of this section shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, any payments made or to be made in connection with the dismissal or compromise, the anticipated effect of the dismissal or compromise on the class members, any agreement made in connection with the dismissal or compromise, a description and evaluation of alternatives considered by the representative parties and an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(4) On the hearing of the dismissal or compromise, the court may:

(a) As to the representative parties or a class certified under section 3 of this Act, permit dismissal with or without prejudice or approve the compromise;

(b) As to a class not certified, permit dismissal without prejudice;

(c) Deny the dismissal;

(d) Disapprove the compromise; or

(e) Take other appropriate action for the protection of the class and in the interest of justice.

(5) The cost of notice given under subsection (2) of this section shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

SECTION 14. In a class action certified under section 3 of this Act in which notice has been given under section 8 or 13 of this Act a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under section 9 of this Act. The judgment shall name or describe the members of the class who are bound by its terms.

SECTION 15. (1) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(2) The court shall apportion the liability for costs assessed against a defendant class.

(3) Expenses of notice advanced under section 8 of this Act are taxable as costs in favor of the prevailing party.

SECTION 16. (1) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary or other relief to individual members of the class or the class in a lump sum or instalments.

(2) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.

(3) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(a) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(b) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(c) The court may order steps taken to minimize the expense of identification.

(d) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(e) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(f) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: Any unjust enrichment of the defendant; the wilfulness or lack of wilfulness on the part of the defendant; the impact on the defendant of the relief granted; the pendency of other claims against the defendant; any criminal sanction imposed on the defendant; and the loss suffered by the plaintiff class.

(g) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(h) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall give written

notice of its intention to make distribution to the Attorney General of the state of the residence of any person given notice under section 8 or 13 of this Act and shall afford the Attorney General an opportunity to move for an order requiring payment to the state.

SECTION 17. (1) Attorney fees for representing a class are subject to control of the court.

(2) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney fees from a defendant class, the court may apportion the fees among the members of the class.

(3) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

(4) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(5) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

(a) The time and effort expended by the attorney in the litigation, including the nature, extent and quality of the services rendered;

(b) Results achieved and benefits conferred upon the class;

(c) The magnitude, complexity and uniqueness of the litigation;

(d) The contingent nature of success;

(e) In cases awarding attorney fees and litigation expenses under subsection (4) of this section because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(f) Appropriate criteria in the Code of Professional Responsibility of the Oregon State Bar.

SECTION 18. (1) Before a hearing under subsection (1) of section 3 of this Act or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees; and a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or any attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

(2) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.

SECTION 19. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

(1) Upon his filing an election of exclusion;

(2) Upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;

(3) Except as to representative parties, upon entry of an order under section 3 of this Act refusing to certify the action as a class action; and

(4) Upon dismissal of the action without an adjudication on the merits.

SECTION 20. Sections 1 to 21 of this Act shall be construed and applied to effectuate their general purpose to make uniform the law with respect to the subject of sections 1 to 21 of this Act among states enacting them.

SECTION 21. Sections 1 to 21 of this Act may be cited as the Uniform Class Actions Act.

SECTION 22. ORS 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.310, 13.320, 13.330, 13.340, 13.350, 13.360, 13.370, 13.380, 13.390, 13.400 and 13.410 are repealed.

SECTION 23. Oregon Rule of Civil Procedure 32, promulgated on December 2, 1978, and submitted to the Legislative Assembly at its 1979 Regular Session by the Council on Court Procedures pursuant to ORS 1.735, is repealed.

SENATE AMENDMENTS TO SENATE BILL 904

By COMMITTEE ON JUDICIARY

May 22

On page 1 of the printed bill, line 2, after the second semicolon delete the rest of the line and lines 3 and 4 and insert "amending ORS 13.260; and declaring an emergency.".

Delete lines 6 through 29 and pages 2 through 8 and insert:

"Section 1. ORS 13.260 is amended to read:

"13.260. In any class action maintained under paragraph (c) of subsection (2) of ORS 13.220:

"(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort **and whose potential monetary recovery or liability is estimated to exceed $100.** The notice shall advise each member that:

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

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

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

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

"(3) [*Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing his claim without prejudice to his right to maintain an individual, but not a class, action for such claim.*] **The court may order that the cost of any notice under this section be paid by the plaintiff or the defendant or by the parties jointly, as it deems fair and equitable. At the request of any party, the court shall conduct a hearing to determine who shall pay the cost of notice. Prior to ordering the defendant to pay any portion of the cost of notice, the court shall make a finding that there is a substantial probability that the plaintiff will prevail on the merits.**

"(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the

class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation or regulation.

"Section 2. If the Oregon Rules of Civil Procedure promulgated on December 2, 1978, and submitted to the Legislative Assembly at its 1979 Regular Session by the Council on Court Procedures pursuant to ORS 1.735 become effective, on the date those rules become effective, section 1 of this Act is repealed, and ORCP 32 G. is amended to read:

"G. Notice required; content; [*statements*] **claim forms** of class members; [*required; form; content; amount of damages; effect of failure to file required statement;*] **payment of notice cost;** stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

"G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort **and whose potential monetary recovery or liability is estimated to exceed $100.** The notice shall advise each member that:

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

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

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

"G.(2) Prior to the final entry of a judgment against a defendant the court [*shall*] **may** request members of the class to submit a [*statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage*] **claim form. The court shall not require a claim form if the party opposing the class can reasonably identify the majority of the class members and the amount owing to or claimed by them.** [*The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.*]

"G.(3) [*Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.*] **The court may order that the cost of any notice under this section be paid by the plaintiff or the defendant or by the parties jointly, as it deems fair and equitable. At the request of any party, the court shall conduct a hearing to determine who shall pay the cost of notice. Prior to ordering the defendant to pay any portion of the cost of notice, the court shall make a finding that there is a substantial probability that the plaintiff will prevail on the merits.**

"G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the

class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

"**SECTION 3.** This Act shall apply to actions commenced after the effective date of this Act.

"**SECTION 4.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.".

G.(3) [*Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.*] **The court may order that the cost of any notice under this section be paid by the plaintiff or the defendant or by the parties jointly, as it deems fair and equitable. At the request of any party, the court shall conduct a hearing to determine who shall pay the cost of notice. Prior to ordering the defendant to pay any portion of the cost of notice, the court shall make a finding that there is a substantial probability that the plaintiff will prevail on the merits.**

G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

SECTION 3. This Act shall apply to actions commenced after the effective date of this Act.

SECTION 4. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

A-Engrossed

Senate Bill 904

Ordered by the Senate May 22
(Including Amendments by Senate May 22)

Sponsored by COMMITTEE ON JUDICIARY (at the request of Henry Carey)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[*Modifies authorization, requirements and procedures for class actions. Deletes existing law and adopts Uniform Class Actions Act.*] **Requires court to give individual notice to members of a class whose potential monetary recovery or liability is estimated to exceed $100. Specifies that the court shall not require a claim form if party opposing the class can reasonably identify the majority of the class members and the amount owing to or claimed by them. Permits court to order the appropriate party to pay for costs of any notice. Requires court to find there is a substantial probability that plaintiff will prevail on the merits before ordering the defendant to pay any portion of notice costs. Applies to actions commenced after effective date of this Act.**

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to civil procedure; creating new provisions; amending ORS 13.260; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 13.260 is amended to read:

13.260. In any class action maintained under paragraph (c) of subsection (2) of ORS 13.220:

(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort **and whose potential monetary recovery or liability is estimated to exceed $100**. The notice shall advise each member that:

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

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

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

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

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION.**

(3) [*Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing his claim without prejudice to his right to maintain an individual, but not a class, action for such claim.*] **The court may order that the cost of any notice under this section be paid by the plaintiff or the defendant or by the parties jointly, as it deems fair and equitable. At the request of any party, the court shall conduct a hearing to determine who shall pay the cost of notice. Prior to ordering the defendant to pay any portion of the cost of notice, the court shall make a finding that there is a substantial probability that the plaintiff will prevail on the merits.**

(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation or regulation.

Section 2. If the Oregon Rules of Civil Procedure promulgated on December 2, 1978, and submitted to the Legislative Assembly at its 1979 Regular Session by the Council on Court Procedures pursuant to ORS 1.735 become effective, on the date those rules become effective, section 1 of this Act is repealed, and ORCP 32 G. is amended to read:

G. Notice required; content; [*statements*] **claim forms** of class members; [*required; form; content; amount of damages; effect of failure to file required statement;*] **payment of notice cost;** stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort **and whose potential monetary recovery or liability is estimated to exceed $100.** The notice shall advise each member that:

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

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

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

G.(2) Prior to the final entry of a judgment against a defendant the court [*shall*] **may** request members of the class to submit a [*statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage*] **claim form. The court shall not require a claim form if the party opposing the class can reasonably identify the majority of the class members and the amount owing to or claimed by them.** [*The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.*]