OREGON COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, OR 97403
Telephone: 686-3990

April 7, 1986

TO: Members, COUNCIL ON COURT PROCEDURES:

Joe D. Bailey
Richard L. Barron
John H. Buttler
George F. Cole
Raymond Conboy
John M. Copenhaver
Karen Creason
Jeffrey P. Foote
Harl H. Haas
Lafayette G. Harter
William L. Jackson
Robert E. Jones
Sam Kyle
Ronald Marceau
Richard Noble
Steve H. Pratt
James E. Redman
R. William Riggs
William F. Schroeder
J. Michael Starr
Wendell H. Tompkins
John J. Tyner
Robert D. Woods

FROM: Douglas A. Haldane, Executive Director

RE: COUNCIL MEETING: Saturday, April 12, 1986

Location: The Eugene Holiday Inn-Holidome
225 Coburg Road
Eugene, Oregon

Agenda:

1) Approval of minutes of February 22, 1986 meeting

2) Announcements
September 13, 1986 meeting originally scheduled for Cottage Grove will be held at Marriott Hotel in Portland

3) Old business
a) Conferring on Rule 21 motions
b) Request for production
c) ORCP 71 B. - relief from order
d) ORCP 69
e) Perpetuation depositions

4) New business
a) ORCP 55
b) ORCP 36 and 46
c) ORCP 22

cc: Public

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held April 12, 1986

Eugene Holiday Inn - Holidome

225 Coburg Road, Eugene, Oregon

Present:	Raymond Conboy	James E. Redman
	Lafayette G. Harter	William F. Schroeder
	William L. Jackson	J. Michael Starr
	Robert E. Jones	Wendell H. Tompkins
	Sam Kyle	John J. Tyner
	Ronald Marceau	Robert D. Woods
Absent:	Joe D. Bailey	Jeffrey P. Foote
	Richard L. Barron	Harl H. Haas
	John H. Buttler	Richard P. Noble
	George F. Cole	Steven H. Pratt
	John M. Copenhaver	R. William Riggs
	Karen Creason	

(Also present was Douglas A. Haldane, Executive Director)

Mr. Kyle called the meeting to order at 9:45 a.m. Mr. Haldane announced the change in the meeting schedule to show that the meeting originally scheduled for September 13, 1986 in Cottage Grove will be held at the Marriott Hotel in Portland to accommodate Council members attending the business meeting of the Oregon State Bar Convention and bar members who may wish to appear before the Council.

Under old business, Mr. Haldane reported that he had communicated with Judge Laurie Smith, Chairman of the Uniform Trial Court Rules Committee, regarding the suggestion that those rules require that counsel confer on concerns they have in pleadings prior to the filing of a Rule 21 motion. Judge Smith has indicated that she will bring the suggestion to the attention of her committee. Mr. Haldane stated that he would continue to monitor the action of that committee and would report back to the Council.

The question had been posed at the February 22, 1986 meeting as to whether a letter request for production would be sufficient to comply with discovery rules. Mr. Haldane reported that his review of the rules indicated that there was no formal requirement as to the form of a request for production under ORCP 43. However, if one were to seek sanctions for failure to comply with the request under ORCP 46 D.(2), it would be necessary that the request was properly served. Proper service

would be service in compliance with requirements of ORCP 9, which includes a mailing. ORCP 9 also requires, however, service upon all parties who have appeared in the case and requires a filing of the request with the court with proof of service.

Mr. Haldane's conclusion was that the letter request for production would be sufficient if service and filing were made in accordance with ORCP 9.

Mr. Redman suggested that the requirement of filing would serve no purpose other than cluttering a court file unless the party from whom production was sought should seek a protective order or the party requesting production was required to seek an order compelling discovery or sanctions. It was suggested that in that event the motion for a protective order or the motion to compel discovery or to apply sanctions could include a copy of the request for production, which would be sufficient for the court's purposes. Mr. Haldane was asked to review the matter further and develop a proposal to avoid the necessity of filing every request for production with the court.

Regarding ORCP 71 B. and the suggestion that provision should be provided for setting aside an order as well as setting aside a judgment, Mr. Haldane reported that his review of the current rule indicated that there may be no need for such a provision. The suggestion had arisen in the context of an order granting a motion for summary judgment after which one party had moved for a new trial under the provisions of ORCP 54. The court had responded that since no trial had taken place, a motion for new trial was inappropriate. Mr. Kyle brought to the Council's attention the recent holding of the Supreme Court case of Employees Benefits Incorporated v. Grill, a March 11, 1986 decision in which the Supreme Court had, apparently, held that a motion for new trial would be appropriate following the granting of a motion for summary judgment. Mr. Haldane was asked to review that case and report back to the Council at its next meeting.

Regarding ORCP 69, Mr. Haldane distributed a proposed rule change based upon a proposal developed by the Bar's Procedure & Practice Committee. Mr. Haldane had reworked the Bar's proposal in certain respects. A copy of the proposal distributed by Mr. Haldane is attached to these minutes as Exhibit A.

Mr. Woods questioned whether the notice requirement provided by the proposal was necessary and whether the Council should simply leave Rule 69 as it now is, which requires notice of intent to make application for judgment rather than notice of intent to apply for an order of default. The consensus of the Council appeared to be that notice should be required prior to application for an order of default and that that would be

sufficient to put a party on notice that an application for judgment would be made as well. Mr. Schroeder pointed out some difficulties in draftsmanship where the proposal referred in some instances to an order of default and in others to an entry of default.

Without taking action on the proposal, Mr. Haldane was requested to rework it with a focus on three questions: (1) whether the party seeking default must have written notice or simply knowledge that a party is represented by counsel before the requirement of giving notice of intent to apply for an order of default arises; (2) whether, if there is some generalized knowledge that a party may be represented by counsel, a party should be specifically allowed to serve the party with notice of intent to take an order of default as well as requiring such notice to that party's attorney; and (3) whether the notice of intent to apply for an order of default should be served "personally or by mail" as in the current proposal or whether the proposal should simply refer to "served" which would allow service in any manner specified in ORCP 9. The proposal will be redrafted and submitted for Council consideration at its next meeting.

On the question of perpetuation depositions, Mr. Haldane reported that the Bar's Procedure & Practice Committee will be developing a proposal to create an exception to the hearsay rule allowing the use of perpetuation depositions at trial, absent a stipulation of the parties, in certain instances. No detailed proposal has been submitted to the Council at this point. It is thought that the Council may be required to adopt a rule governing procedures for the perpetuation depositions in the event that the legislature does in fact enact an exception to the hearsay rule. Mr. Haldane reported that he will continue to monitor the actions of the Bar's Procedure & Practice Committee on this question and will keep the Council advised.

New Business

Mr. Haldane distributed copies of comments between Senator Frye and Fred Merrill regarding an inspection of hospital records produced under subpoena under ORCP 55 H. A copy of that correspondence is attached to these minutes. Mr. Haldane reported that his initial determination was that, while there may be a theoretical problem, as a practical matter the parties would have access to those records outside the subpoena procedure. The party representing the patient would have access to those records through the permission of the patient himself or herself, whereas the opposing party would typically have access to those records under ORCP 44 E. The problem presented by Senator Frye would arise in the event that hospital records of one not a party to the action or one not making a claim for damages resulting from injuries which were the subject of the

hospital records.

Mr. Haldane then distributed a summary proposed tort reform bill which is being sponsored by an organization known as the Citizens Initiative for Equity in the Legal System. While the bulk of the proposal speaks to issues outside the jurisdiction of the Council, the proposal would apparently seek to amend ORCP 36 to allow the discovery of the identity, qualifications, and opinions of expert witnesses through interrogatories. They would also seek to amend ORCP 46 to provide for sanctions for failure to comply with the discovery requirements. Mr. Haldane briefly described prior Council action regarding the discovery of experts and the Council's prior resistance to attempts to provide for interrogatories in the discovery process. He also indicated that in his communication with the Citizens Initiative for Equity in the Legal System indicated that proposals would be coming from that organization to the Council to effect these changes.

The Bar's Procedure & Practice Committee has proposed a rule change to ORCP 22 C., third party practice, which would allow for sixty days after filing of a third party complaint to effect service on the third party defendant. The current rule provides for filing and service of a third party complaint within ninety days after service of the original summons and complaint on the original defendant. The committee's proposal would continue to require filing within ninety days of the service of the original summons and complaint but would allow sixty days from the date of filing to effect service on the third party defendant. This proposal will be distributed to the full Council and will be the subject of further Council consideration.

Mr. Haldane then distributed copies of correspondence between Chief Judge Joseph of the Oregon Court of Appeals and Fred Merrill wherein Judge Joseph pointed out that ORCP 78 C. refers to "suit money" and "alimony." Judge Joseph pointed out that these terms are archaic and have no current legal meaning in the state of Oregon. The Council agreed that the Chief Judge was probably correct, and Mr. Haldane was directed to submit a proposal to cure this defect in the rules.

Judge Jackson then described a situation with which he had been confronted wherein attorneys sought to use transcripts of prior court proceedings as a part of a submission responding to a motion for summary judgment. ORCP 47 does not specifically contemplate the use of proceedings or the trial court record. It was suggested that ORCP 47 should be amended to specifically allow reference to the trial court record in proceedings on motion for summary judgment. Mr. Haldane was instructed to take a look at ORCP 47 and submit such a proposal.

The meeting was adjourned at 11:30 a.m. and will reconvene at 9:30 a.m. on June 14, 1986 at the Red Lion/Jantzen Beach, 909 North Hayden Island Drive, in Portland.

Respectfully submitted,

Douglas A. Haldane

DAH:gh

DEFAULT
AND JUDGMENT FOR DEFAULT
RULE 69

A. Entry of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, [and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.] the party seeking affirmative relief may apply for an order of default. If the party against whom a default is sought has appeared in the action, or if the party seeking a default has (received notice)/knowledge) that the party against whom a default is sought is represented by an attorney in the pending proceeding, the party against whom a default is sought (or, if represented by an attorney, such party's attorney) shall be served personally or by mail with written notice of the application for default at least 10 days, unless shortened by the court, prior to the entry of the order of default of that party. These facts, along with the fact that the party against whom the default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise and upon such a showing, the clerk of the court shall enter the default of that party in default.

EXHIBIT A TO 4/12/86 MINUTES

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State of

Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i), 7 D.(3)(b)(i), 7 D.(3)(e) or 7 D.(3)(f).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. [If the party against whom judgment by default is sought has appeared in the action or if the party seeking judgment has received notice that the party against whom judgment is sought is represented by an attorney in the pending proceeding, the party against whom judgment is sought (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such

hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Setting aside default. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B. and C.

[C.] D. **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled t the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

[D.] E. **"Clerk" defined.** Reference to "clerk" in this rule shall include the clerk of court or any person performing

the duties of that office.

NOTE: UNDERLINED LANGUAGE IS NEW; BRACKETED LANGUAGE IS TO BE DELETED.

UNIVERSITY OF OREGON

April 3, 1986

William F. Frye
Frye & Veralrud, Lawyers
303 Centre Court
44 West Broadway
Eugene, Oregon 97401

Dear Bill:

It does not take me too long to answer letters--only over five months on this one. I am sorry, but after we finished the dean search we had to prepare for an ABA accreditation inspection. We have five inspectors present at the Law School this week, and it took preparation of about 14 pounds of questionnaires and reports to get ready for it. Anyway, I finally got the decks clear and am trying to catch up.

As you know, almost all of 55 H. was copied verbatim out of an existing statute, ORS 41.915 (repealed 1979). The one change that the council made is the one you discuss, the opportunity to inspect prior to the deposition and trial. As I remember, the change was suggested by Pinky Gronso and most of the discussion related to subpoenas of hospital records for trial, not depositions. That is probably why the procedure for prior examination at the deposition is not clearly stated. I agree with your interpretation that, as worded, the rule requires that for an examination prior to deposition the records must be taken to the clerk's office and opened. I also read the requirement that all persons be present at the opening as applying both to the opening during the trial or deposition or to a prior opening. Neither provision is a model of clear drafting. The requirement for the presence of all parties at the prior opening makes sense, but not the requirement that a prior opening be only before the court clerk in a deposition situation. After all, the person administering the oath has custody of the document and it is opened outside the presence of the court or clerk. The requirement that all parties be present would assure that nothing improper would happen at the prior opening even if the court clerk was not supervising.

I also think your suggestion about service of a subpoena duces tecum on all parties makes sense. As you point out, a notice for production of documents must be served on everyone, including parties who are not requesting or producing. ORCP 55 B. also recognizes the complexity and danger of abuse in subpoenas duces tecum by providing for special cover orders for such subpoenas.

EXHIBIT "B" TO 4/12/86 MINUTES

I am furnishing a copy of your letter and this letter to Douglas Haldane, who is presently the executive director of the Council on Court Procedures. He can call the suggestions to the attention of the Council.

Very truly yours,

Fredric R. Merrill

FRM/bms

[redacted]

FRYE & VERALRUD, LAWYERS
A PROFESSIONAL CORPORATION
303 CENTRE COURT
44 WEST BROADWAY
EUGENE, OREGON 97401

WILLIAM F. FRYE
GREGORY E. VERALRUD

345-3333
AREA CODE 503

October 25, 1985

Fredric R. Merrill, Dean
School of Law
University of Oregon
Eugene, OR 97403

Re: ORCP

Dear Fred:

I'm having some difficulty interpreting parts of ORCP 55 H., relating to the subpoenaing of hospital records. By definition, a subpoena requires a person to appear at a particular time and place to testify as a witness (55 A.). Under 55 B., the subpoena may also command the person to produce tangible things. So far this is simple.

The custodian of hospital records may comply with a subpoena duces tecum by mailing or delivering copies of the records. The way I read 55 H.(2)(b), the sealed records are addressed either to the clerk of the court, or, in the case of deposition, to the officer administering the oath. Still pretty easy to understand.

Comes now 55 H.(2)(c). According to the staff comment, this paragraph "allows inspection of the sealed documents by parties or attorneys prior to the trial or deposition." I suggest this is a little open-ended. Looking at that provision we find that after "filing" (whatever that means), the records may be inspected in the presence of the clerk as custodian of the court files, but otherwise they are opened only at the time of trial or deposition. So, if the records are sent to the reporter who is going to take the deposition, I say they cannot be inspected prior to the deposition unless they are carried before the court clerk and opened.

If they are opened before the clerk, should all parties have an opportunity to be present? To what situation does the following apply: "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"? It doesn't make any sense to me to say that a sealed record in the custody of the court clerk can be inspected by any party prior to a deposition or trial without a requirement that all parties be present, while applying such a requirement to the opening of the records when in the course of a trial or deposition.

I think there is another shortcoming in ORCP 55 relating to a subpoena duces tecum. That is that it can be served upon a person with no requirement that its contents be disclosed in advance to the adverse party. While a court may quash or modify the subpoena for stated reasons (55 B.), most people served with subpoenas are not lawyers and would have no reason to know that a subpoena could be attacked. Only when the records are finally opened does the adverse party know what they contain.

What do you think about adding a requirement that a copy of a subpoena duces tecum must be served upon the adverse party? Note that if the records are called for under Rule 44 E., notice must be given to the opposing counsel. Because of their sensitivity, production of medical records should be subject to court oversight. This is not possible if they are subpoenaed and available for unilateral inspection.

I would appreciate any comments you might have.

Very truly yours,

FRYE & VERALRUD

William F. Frye

WFF:tlk

STATE OF OREGON
COURT OF APPEALS
STATE JUSTICE BUILDING
SALEM, OREGON
97310

GEORGE M. JOSEPH
CHIEF JUDGE

February 20, 1986

Acting Dean Fredrick R. Merrill
University of Oregon
School of Law
Eugene, OR 97403-1221

Subj: ORCP 78C

Dear Fred:

A few weeks ago I was a speaker at a domestic relations conference in Portland. In the question-and-answer period, a lawyer used the term "suit money." I hadn't heard that term in years and years--and neither had any of my colleagues here. Today Judge Richardson pointed out that ORCP 78C not only refers to "suit money" but to "alimony." So far as I am aware, neither term has any "legal" meaning in the state of Oregon. Don't you agree?

Sincerely,

George

George M. Joseph

GMJ/jk

c: Judge Richardson
Judge Buttler

UNIVERSITY OF OREGON

April 2, 1986

George M. Joseph
Chief Judge
State of Oregon
Court of Appeals
State Justice Building
Salem, Oregon 97310

Dear George:

I am sorry it took so long to respond to your letter of February 20th. We are undergoing our seven year ABA accreditation inspection, which has taken an immense amount of time. Fortunately, we are almost done and I can catch up on other matters.

I agree that the reference to suit money and alimony in ORCP 78 C should be changed. The council just took the language from ORS 23.020(3) without looking too closely at it. The language came from a statute passed in 1923 amending the prior list of orders punishable by contempt. Or. Laws 1923, Ch. 165 sec. 1. It has never been changed despite changes in the domestic relations laws. Suit money should probably be changed to "all costs, including attorneys' fees, necessary to prosecute dissolution proceedings pendente lite," or to specifically refer to those sections in ORS ch. 107 authorizing such awards. Alimony probably should be changed to "spousal support" or to refer to specific ORS sections.

I am passing a copy of your letter and this letter to Doug Haldane who is the executive director of the Council on Court Procedures. I assume they are considering what to submit to the next Legislature.

Very truly yours,

Fredric R. Merrill

FRM:bms

cc: Douglas Haldane

ATTACHMENTS TO 4/12/86 MINUTES

715 P.2d 491

300 Or. 587

EMPLOYEE BENEFITS INSURANCE COMPANY, a California corporation, Respondent on Review,
v.
George A. GRILL and Darlene R. Grill, Petitioners on Review,
and
State of Oregon, Department of Revenue, Respondent on Review.

83-10-368; CA A36740; SC S32468.

Supreme Court of Oregon,
In Banc.

March 11, 1986.

David Gernant, Portland, for petitioners on review. With him on the petition were John G. McLaughlin & Associates and Kelly T. Hagan, Portland.

No appearance contra.

[300 Or. 589] MEMORANDUM OPINION.

The claim for relief was for judgment of foreclosure of trust deeds. The trial court allowed plaintiff's motion for summary judgment and entered judgment accordingly. Defendants Grill moved to set aside the judgment, expressly basing the motion on ORCP 71 B, while arguing that their motion was based on evidence available only after the ruling on the motion for summary judgment. The trial court denied the motion to set aside the judgment.

Within 30 days of the entry of the order denying the motion to set aside the judgment but more than 30 days after judgment, defendants Grill appealed from the judgment and the order denying the motion to set aside the judgment. Plaintiff moved to dismiss the appeal from the judgment as being not timely. Defendants Grill opposed the motion, relying on Cooley v. Roman, 286 Or. 807, 810-11, 596 P.2d 565 (1979), and an argument that their motion to set aside the judgment, despite its text, was actually a motion for a new trial under ORCP 64. The Court of Appeals allowed the motion to dismiss the appeal from the judgment as being not timely and entered an order dismissing the appeal from the judgment.

In Cooley v. Roman, supra, we held that a motion to set aside a summary judgment qualifies as a motion for a new trial within the meaning of ORS 19.026(2). The order of dismissal is reversed and the cause is remanded to the Court of Appeals.

MARCH 11, 1986

CITIZEN'S INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM

SUMMARY OF PROPOSED TORT REFORM BILL

SECTION 1

This Section of the Act sets forth the definitions of "economic" and "non-economic" damages. Generally, the definition of economic and non-economic damages parallels the present structure of general and special damages. The special damages would be viewed as the "economic" portion and general damages would be viewed as the "non-economic" portion. Taken together, the effect of the definitions when considered with other sections of the Act, generally parallel present law with the exception of the caps placed on the "non-economic" portion of any award.

SECTION 2

With the exception of workers' compensation claims and injuries which fall under the State Tort Claims Act, this section of the Act caps out the "non-economic" portion of any award at $100,000. It has been suggested by a number of individuals and organizations that the unlimited recovery of the "non-economic" damages has resulted in substantial personal injury verdicts which recently have been rendered throughout the U.S. It is the belief of many organizations that such a cap will ultimately result in a reduction in the cost of liability insurance. Whether or not the capping of "non-economic" damages results in a reduction in the cost of liability insurance remains to be seen. Based upon California's experience with its Tort Reform Bill (limited to medical malpractice) there is some suggestion that the number of covered losses has dropped since its passage and that the California Act has had a tendency to hold down liability insurance rates. However, we are unaware of any hard data which supports those positions.

SECTION 3

Under the present law, where recovery is sought against two or more defendants, each defendant is jointly and severely liable for all damages awarded the plaintiff. Thus, a defendant who is found to be 1% in fault could, theoretically, be made to pay 100% of plaintiff's recovery. There have been recent cases in Oregon where one of the defendants had the protection of the State Tort Claims Act and the remaining defendants were required to pay a larger share of the plaintiff's recovery than they would have been responsible for, but for the statutory limitation.

Section 3 would <u>not</u> change existing law except in the area of

Distributed at 4/2/86 Council Meeting

"non-economic" damages. In the case of "non-economic" damages, each defendant would be severely liable only for his or her actual negligence.

SECTION 4

The language of this Section of the Act and its concept essentially parallels the California Tort Reform Act. In this particular case, the Act covers all torts involving bodily injury, wrongful death, loss of consortium and property damage. Under Section 2 (a), after entry of a verdict and upon request of one of the parties, the court shall enter judgment ordering future damages to be paid in periodic payments. The court can impose the condition that such payments be made out of either a trust fund or by annuity. The Act provides that the amount of periodic payments ultimately paid shall not exceed the judgment originally entered against the defendant.

The unique feature of this Section of the Act provides that if the judgment creditor dies from a cause unrelated to the original injury complained of that all periodic payments for future damages shall cease. The reasoning behind this Section is that future payments were intended for the medical care, lost wages and pain and suffering incurred by the judgment creditor. If the judgment creditor dies from any cause which is not related to the original injury, the judgment creditor's heirs should not, because of an unfortunate death, reap a windfall.

The Act further provides that if the judgment creditor dies from a cause related to the original injury complained of that, to the extent of remaining periodic payments, the judgment creditor's estate will be reimbursed for its pecuniary loss and the surviving spouse and dependents shall receive the support which the decedent would have contributed to them had he lived. This essentially is the same measure of damages as in a wrongful death action. It should be pointed out that if the decedent's death is due to his own negligence or the negligence of the surviving spouse or dependents, the extent of such negligence shall be deducted from any award.

This Section of the Act provides a mechanism by which any of the parties can petition the court to determine the cause of death and how remaining funds should be distributed. If after all periodic payments have been made or because of the untimely death of the judgment creditor funds remain in the annuity and/or trust fund, such funds will be converted into cash and returned to the judgment debtor or the judgment debtor's successors or assigns.

SECTION 5

Section 5 of the proposed bill relates to the periodic payment

provisions of Section 4. Under present law, a judgment constitutes a lien upon all real property of the defendant or in the county where the judgment is rendered. Plaintiffs generally docket judgments in various counties in the state to tie up all the defendant's real property. Because periodic payments are primarily for the benefit of insurance companies, Section 5 is an attempt to amend ORS 18.350 to make it clear that if a court directs that periodic payments shall be made through an annuity or trust fund, any judgment specifying periodic payments shall not constitute a lien upon a defendant's real property and the judgment against the judgment debtor shall be satisfied. The purpose of this requirement is to avoid an adverse impact on the judgment debtor's credit rating where a periodic payment plan would take quite some time to pay off.

SECTION 6

Section 6 of the Act is an attempt to fairly distribute fault among all tort feasors including "phantom defendants".

Under present procedures, a plaintiff can chose to name only those defendants from whom plaintiff wishes to recover leaving out of the law suit the most culpable party. Under Oregon's joint and several liability statute, the named defendants are fully liable for any recovery if they are found to be at fault in any regard. They would have a statutory right of contribution and/or indemnity against a non-named "phantom defendant" but would be required to file either a separate third party action in the primary law suit or file a second law suit after judgment was rendered against them. The purpose of Section 6 is to allow the named defendants to show that in fact a third party was partially at fault and for the jury to consider that fault and reduce any judgment awarded the plaintiff.

The affect of Section 6 will be to require plaintiffs to be more realistic as to who shall be named as defendants and to bring in all of the "culpable" parties. Such a result is not necessarily bad. All of the negligent parties will be before the court and it will be much easier to attribute fault and/or settle the claim.

This Section also constitutes a major change in the present law of "inter family tort immunity". Presently if a passenger spouse is injured in a car wreck and the driver spouse is partially at fault, the negligent third party is required to pay 100% of the injured spouse's damages even though the other spouse is partially at fault. This is because of the so called "inter family tort immunity" doctrine of Oregon. Under the proposed Bill, the negligence of the driver spouse would be deducted from any recovery by the injured spouse.

SECTION 7

Section 7 is a restatement of Oregon's Wrongful Death Statute. The amendments set forth in the proposed Bill place a dollar cap on "non-economic damages" suffered by the decedent and/or the decedent's estate.

Sub paragraph 3 of Section 7 is an attempt to limit any recovery by the decedent or the decedent's personal representative by the amount of comparative fault of the decedent or the comparative fault of any person who shall share in the recovery by the decedent's estate.

The proposed revision to sub paragraph 3 will eliminate some confusion which presently exists under Oregon's Wrongful Death Statute. As presently written, there is a question of whether the negligence of a beneficiary of the estate should be attributable to the estate and deducted from the total award or deducted only from the share received by the negligent heir. The purpose of the proposed language is to make it clear that the negligence of an heir is to be attributed to the estate to reduce the total award obtained from the defendant(s).

SECTION 8 (Transition Language)

SECTION 9

This Section of the Bill attempts to do away with the so called "collateral source rule". Under present law, evidence that a person has received compensation from a third party source for the injuries or death alleged in the complaint are not admissible. In some instances, this results in a double recovery by the plaintiff. However, many third party payors now assert a lien on any recovery by the plaintiff and are repaid out of the proceeds of the law suit. The philosophy behind Section 9 is to put in front of the jury the fact that the plaintiff or the decedent's estate has received substantial payments from other sources. A jury should be completely informed when determining what amount of damages should be assessed against the defendant. This becomes particularly important in wrongful death cases where the decedent's estate or beneficiaries have received large sums from life insurance.

The plaintiff bar's basic response is that such a rule penalizes those persons who are financially responsible enough to take out insurance to cover health and life benefits. They suggest that any information relative to collateral source simply is put into the record to prejudice the jury. However, the philosophy of the civil justice system is to lay all the facts out so a reasoned opinion and judgment may be entered. It is the belief of the defense bar that the "collateral source rule" is an artificial barrier which keeps a jury from considering all facts relevant to the injury/death and damages suffered as a result thereof.

SECTION 10 (Transition Language)

SECTION 11

Section 11 of the Act deals with punitive damages. As proposed, punitive damages would be eliminated in all cases except where statutorily imposed.

SECTION 12

Section 12 of the Bill relates to those situations where punitive damages are allowed by statute. In those instances, the amount of damage shall only be determined by a court and shall be based upon intentional conduct. Any recovery of punitive damages shall go to the General Fund and the plaintiff's attorney shall not be allowed to recover a contingency fee from such an award. It will be within the discretion of the court to allow the attorney to receive a fee based upon the usual and customary hourly charge of attorneys for such work.

Additionally, the defendant against whom punitive damages are claimed may present evidence that the bona fide attempt was made at least thirty days prior to the hearing on the punitive damage issue to settle that claim out of court. If the plaintiff is not successful in recovering punitive damages, this Section of the Bill specifies that the defendant shall recover costs, including attorney fees, incurred in defense of the punitive damage claim. The amount of costs and attorney fees shall be determined by the court.

SECTION 13

Section 13 of the Act provides that where punitive damages were sought in a jury trial, the jury is only to determine whether the defendant was negligent and whether such negligence caused the harm alleged. Once basic liability has been established, it will be up to the court to decide whether punitive damages should be imposed. By structuring the case in this way, the jury will not hear any testimony relative to the financial worth of the defendant and will avoid any potential for prejudice against the defendant due to the defendant's wealth.

SECTION 14

Section 14 needs little explanation. It is an attempt to limit the percent of attorneys' fees which may be charged under a contingency fee agreement.

Under present law, there is no specific limit as to the amount of fees which can be charged under a contingency fee agreement

except in the area of medical malpractice. ORS 752.150 presently limits contingency fees in medical malpractice cases to 33 1/3% of any recovery.

SECTION 15

The purpose of this Section is to require the court to instruct the jury relative to any defendant's statutory limitation of liability. Presently, where there are multiple defendants, the jury usually is not told that one or more of the defendant's liability is limited statutorily. Section 14 will require such an instruction.

Additionally, we suggest that the language of Section 14 be modified to further inform the jury that because of Oregon's Joint and Several Liability Law the remaining defendants will have to bear the burden of any judgment against the defendant with limited liability which exceeds the dollar amount set by statute.

SECTION 16

Section 16 of the Bill limits the civil liability of private individuals who serve without compensation on political-type boards and commissions or as an officer or director of certain types of private corporations (profit or non-profit) and unincorporated associations.

Under this Bill, the liability of a director or officer of such an entity would be limited to the coverage afforded by an insurance policy issued to the entity. If there is no such insurance policy then the officer or director would have no liability for damages. On the other hand, this Bill does not affect the liability entity for the negligence of the officer or director in carrying out his or her duties.

Presently it is virtually impossible for small corporations and political bodies to bear the cost of directors and officers of liability insurance. This portion of the Bill is an attempt to address that problem.

SECTION 17

Oregon presently follows the minority "English Rule" which requires that before an action for malicious prosecution and/or wrongful use of civil proceedings will lie, the plaintiff must prove that he or she has suffered special injury beyond the trouble, cost and other consequences normally associated with defending oneself against unfounded legal charges. The case which set that standard is O'Toole v. Franklin, et al, 279 Or 593 (1977). Section 16 reflects the "majority rule" in the

United States and would allow recovery of damages, including the cost of defense and injury to reputation (business or personal) where the other elements of malicious prosecution and/or wrongful use of civil proceedings were established.

SECTION 18

Presently under Oregon law, prior to trial, the qualifications and opinions of experts are not discoverable. Section 17 proposes to amend ORCP 36 to allow such discovery through interrogatories. That discovery would take place prior to trial.

As a practical matter, the defense bar has in the past opposed interrogatories and may very well oppose this Section of the Bill. However, it is advantageous not only from the stand point of trial preparation but also for purposes of settlement to know what type of testimony a person is going to be faced with at the time of trial.

As an aside, this Section of the Bill should be presented to the Council on Court Procedures which is empowered under ORS Chapter 1 to advise the legislature relative to court rules in the State of Oregon. If that body should refuse to recommend the change set forth in Section 17, it is likely that the legislature will reject any separate attempt throug[redacted]

SECTION 19

Section 19 is an amendme[redacted]nctions in the event any party to the liti[redacted]se to answer the interrogatories served under the proposed amendment to ORCP 36.

SECTION 20

Section 20 is the emergency clause which requires the Bill to take effect upon its passage.

CITIZENS' INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM

P.O. Box 69349
Portland, Oregon 97201

PRESENTATION BEFORE

THE JOINT INTERIM TASK FORCE ON LIABILITY

MARCH 21, 1986

BY SCOTT GALLANT

REPRESENTATIVE SHIPRACK, SENATOR THORNE AND MEMBERS OF THE TASK FORCE. FOR THE RECORD MY NAME IS SCOTT GALLANT. I AM DIRECTOR OF PUBLIC AFFAIRS FOR THE OREGON MEDICAL ASSOCIATION. I APPEAR THIS MORNING AS A REPRESENTATIVE OF THE CITIZENS INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM (OR COALITION).

I HAVE BEEN ASKED TO BRIEFLY DISCUSS THE MAJOR CONCEPTS WHICH THE COALITION CONSIDERS ESSENTIAL TO A LONG TERM SOLUTION TO THE LIABILITY CRISIS WHICH OREGONIANS PRESENTLY CONFRONT.

THE COALITION REALIZES THAT THE LIABILITY CRISIS IS COMPLEX AND MULTI-FACETED. THEREFORE, WE HAVE LIMITED OUR EFFORTS AND RESOURCES TO INVESTIGATING ONE DIMENSION OF THIS PRESSING SOCIAL AND ECONOMIC ISSUE.

IN OUR OPINION, REASONABLE REVISIONS TO OREGON'S TORT SYSTEM WILL HAVE A MEANINGFUL AND POSITIVE IMPACT ON LIABILITY INSURANCE COSTS. IN ADDITION, WE CONTEND THAT NONE OF THE CONCEPTS DISCUSSED TODAY PROHIBIT INJURED VICTIMS FROM SEEKING LEGAL REDRESS. NEITHER DO THEY INFRINGE ON A CITIZEN'S RIGHT TO TRIAL BY JURY NOR DO THEY DENY AN INDIVIDUAL ACCESS TO COUNSEL.

OUR FIRST SUGGESTED REVISION RELATES TO LIMITING NONECONOMIC DAMAGES. CURRENTLY, PLAINTIFFS ARE ENTITLED TO RECEIVE MONETARY REIMBURSEMENT FOR TWO TYPES OF INJURY: ECONOMIC AND NONECONOMIC.

NONECONOMIC DAMAGES INCLUDE SUBJECTIVE, NONMONETARY LOSSES SUCH AS, PAIN AND MENTAL SUFFERING; INCONVENIENCE; EMOTIONAL DISTRESS; LOSS OF CARE, COMFORT, COMPANIONSHIP, AND SOCIETY, ETC. THERE IS PRESENTLY NO LIMITATION ON EITHER OBJECTIVELY VERIFIABLE ECONOMIC LOSSES OR SUBJECTIVE NONECONOMIC DAMAGES AWARDED TO A PLAINTIFF.

THERE IS A SOUND POLICY BASIS AND CONVINCING INDEPENDENT EVIDENCE FOR LIMITING NONECONOMIC DAMAGES AND THEREBY DIRECTLY REDUCING THE SEVERITY OF AWARDS. IN STATES WHICH HAVE ADOPTED SUCH LIMITATIONS, THE CIVIL JUSTICE INSTITUTE NOTES A 19 PERCENT REDUCTION IN CLAIM SEVERITY WITHIN TWO YEARS. IN ADDITION, THE NOTED ACTUARIAL FIRM OF MILLIMAN AND ROBERTSON PROJECTS THAT A LIMIT ON NONECONOMIC DAMAGES CAN RESULT IN A 12 PERCENT REDUCTION IN MALPRACTICE CLAIM SEVERITY.

OUR RECOMMENDATION FOR LIMITS ON NONECONOMIC DAMAGES IS NOT ORIGINAL. RECENTLY, THE STATES OF WASHINGTON AND MISSOURI ADOPTED SUCH LIMITS AND COLORADO AND SOUTH DAKOTA ARE AMONG OTHER JURISDICTIONS NEARING SIMILAR ACTION. IN ALL OF THESE CASES, LEGISLATORS HAVE BEEN CONVINCED THAT REASONABLE LIMITS ON SUBJECTIVE NONMONETARY LOSSES ACCOMPLISH TWO ENDS:

1) THEY PROVIDE A MORE STABLE BASE ON WHICH TO CALCULATE INSURANCE RATES; AND

2) THEY CAN PROMOTE SETTLEMENTS BY ELIMINATING THE CHANCE OF HUGE AWARDS FOR SUBJECTIVE LOSSES WHICH MAKE LENGTHY LITIGATION A CALCULATED BUT COSTLY GAMBLE.

SECONDLY, THE COALITION BELIEVES THAT THE TIME HAS ARRIVED FOR SERIOUS CONSIDERATION OF FUNDAMENTAL REVISIONS TO THE CONCEPT OF JOINT AND SEVERAL LIABILITY.

CURRENTLY, DEFENDANTS WHO ARE LIABLE TO A PLAINTIFF ON AN INDIVISIBLE CLAIM ARE JOINTLY AND SEVERALLY LIABLE FOR ALL DAMAGES NOT ATTRIBUTABLE TO A PLAINTIFF'S OWN FAULT. THIS MEANS THAT A PLAINTIFF MAY RECOVER FROM ONE DEFENDANT ALL DAMAGES CAUSED BY OTHER LESS SOLVENT DEFENDANTS REGARDLESS OF THE PROPORTIONATE SHARE OF THAT DEFENDANT'S FAULT. HENCE, THE EUPHEMISM 'DEEP POCKET.'

THE COALITION RECOMMENDS THAT THE TASK FORCE GIVE SERIOUS CONSIDERATION TO ELIMINATING JOINT AND SEVERAL LIABILITY IN ITS ENTIRETY.

SOME OPPONENTS TO SUCH A MODIFICATION RETREAT TO HISTRIONICS BY CLAIMING THAT THE ELIMINATION OF JOINT AND SEVERAL LIABILITY RESTRICTS THE RIGHTS OF VICTIMS THAT HAVE BEEN PART OF OUR LEGAL SYSTEM SINCE THE SIGNING OF THE MAGNA CARTA. LET ME SET THE RECORD STRAIGHT.

HISTORICALLY, THE COMMON LAW RULE OF CONTRIBUTORY NEGLIGENCE PREVENTED A CLAIMANT WHO WAS EVEN 1 PERCENT AT FAULT FROM RECOVERING ANYTHING. THIS CENTURIES-OLD RULE WAS ELIMINATED BY THE OREGON LEGISLATURE IN THE EARLY 1970'S TO CORRECT WHAT THE LEGISLATURE BELIEVED WERE HARSH RESULTS TO PLAINTIFFS IN SOME CASES.

IN DOING SO, 'DEEP POCKET' DEFENDANTS BECAME RESPONSIBLE FOR THE DAMAGES OF LESS SOLVENT CO-DEFENDANTS. THE COALITION SUGGESTS THAT IN LIGHT OF THE CHANGES TO COMMON LAW DOCTRINE ALREADY INITIATED BY THIS LEGISLATURE ONE FINAL MODIFICATION MUST BE INSTITUTED TO RESTORE EQUITY AND BALANCE IN THE ADJUDICATION OF TORT CLAIMS.

THE COALITION'S THIRD RECOMMENDATION IS THE ELIMINATION OF THE COLLATERAL SOURCE RULE.

UNDER PRESENT LAW, EVIDENCE THAT A PERSON HAS RECEIVED COMPENSATION FROM A THIRD PARTY SOURCE - SUCH AS MEDICAL INSURANCE, LIFE INSURANCE OR AUTO INSURANCE WITH MEDICAL COVERAGE - FOR THE INJURIES OR DEATH ALLEGED IN THE COMPLAINT ARE NOT ADMISSIBLE. WE FIND THIS PROVISION ARCHAIC AND CONTEND THAT JURIES SHOULD BE FULLY INFORMED WHEN DETERMINING WHAT AMOUNT OF DAMAGES SHOULD BE ASSESSED AGAINST THE DEFENDANT.

THIS BECOMES PARTICULARLY IMPORTANT IN WRONGFUL DEATH CASES WHERE THE DECEDENT'S ESTATE OR BENEFICIARIES HAVE RECEIVED LARGE SUMS FROM THIRD PARTIES.

THE TASK FORCE SHOULD NOTE THAT OUR RECOMMENDATION IS NOT SO RADICAL AS TO SUGGEST A MANDATORY OFFSET OF COLLATERAL SOURCE BENEFITS FROM JURY AWARDS. RATHER, WE EMBRACE A FUNDAMENTAL PRECEPT OF THE CIVIL JUSTICE SYSTEM: ENCOURAGING THE DISCLOSURE OF ALL THE FACTS TO THE JURY SO THAT A REASONED OPINION AND JUDGMENT MAY BE ENTERED. THE COALITION FINDS THE COLLATERAL SOURCE RULE TO BE AN ARTIFICIAL IMPEDIMENT TO CONSIDERING ALL FACTS RELEVANT TO THE INJURY OR DEATH AND DAMAGES SUFFERED AS A RESULT THEREOF.

MANDATORY OFFSETS ARE DOCUMENTED TO HAVE SIGNIFICANT IMPACT ON LIABILITY COSTS. THE INSTITUTE FOR CIVIL JUSTICE FINDS A 50 PERCENT REDUCTION IN CLAIM SEVERITY AND THE MILLIMAN-ROBERTSON INVESTIGATION PREDICTS AN 8 PERCENT REDUCTION IN MEDICAL MALPRACTICE COSTS.

CLEARLY, OUR RECOMMENDATION CONCERNING THE COLLATERAL SOURCE RULE WILL NOT ACHIEVE REDUCTIONS AS SIGNIFICANT AS THESE. NONETHELESS, WE BELIEVE WHEN ALL RELEVANT ECONOMIC FACTS ARE MADE AVAILABLE TO JURIES, REASONABLE AND JUST DECISIONS WILL RESULT.

THE FOURTH TORT REVISION ADVOCATED BY THE COALITION IS COURT-SUPERVISED PERIODIC PAYMENTS FOR FUTURE DAMAGES EXCEEDING $100,000.

CURRENTLY, A PLAINTIFF IS USUALLY AWARDED A LUMP SUM FOR DAMAGES INCLUDING ITEMS SUCH AS FUTURE LOSS OF EARNINGS AND MEDICAL EXPENSES. WHEN DAMAGES INCLUDE FUTURE EXPENSES, THE AWARD FOR THESE DAMAGES IS USUALLY REDUCED TO PRESENT VALUE.

THE COALITION PROPOSAL FOR PERIODIC PAYMENTS PARALLELS THE CALIFORNIA TORT REFORM ACT (SOMETIMES REFERRED TO AS MICRA):

AFTER ENTRY OF A VERDICT, AND UPON THE REQUEST OF ONE OF THE PARTIES, THE COURT SHALL ENTER JUDGMENT ORDERING FUTURE DAMAGES TO BE PAID IN PERIODIC PAYMENTS. THE COURT CAN IMPOSE THE CONDITION THAT SUCH PAYMENTS BE MADE EITHER BY TRUST FUND OR ANNUITY. OUR RECOMMENDATION ALSO PROVIDES THAT THE AMOUNT OF PERIODIC PAYMENTS ULTIMATELY PAID SHALL NOT EXCEED THE JUDGMENT ORIGINALLY ENTERED AGAINST THE DEFENDANT.

COURT-SUPERVISED PERIODIC PAYMENTS ASSURE THAT A PRIMARY PUBLIC POLICY GOAL IS ATTAINED; THAT IS, THE FUTURE NEEDS OF AN INJURED CLAIMANT ARE PROVIDED FOR. INCIDENTALLY, THE MILLIMAN AND ROBERTSON INVESTIGATION FORECASTS A 6 PERCENT REDUCTION IN MEDICAL MALPRACTICE COSTS WHEN PERIODIC PAYMENTS ARE IN PLACE.

FIFTH, OREGON'S PUNITIVE DAMAGE STATUTES SHOULD ALSO BE MODIFIED.

THE CURRENT RULE IN OREGON ESSENTIALLY RECOGNIZES THAT PUNITIVE DAMAGES ARE ONLY PROPER IN THOSE INSTANCES WHERE THE VIOLATION OF SOCIETAL INTERESTS IS SUFFICIENTLY GREAT TO WARRANT AN ADDITIONAL PENALTY.

THE OREGON COURT OF APPEALS RECENTLY DESCRIBED THE CURRENT STATE LAW ON PUNITIVE DAMAGES AS "AT WORST, ... INCONSISTENT AND SCHIZOPHRENIC."

WASHINGTON STATE, WHICH REJECTED THE COMMON LAW DOCTRINE OF PUNITIVE DAMAGES 95 YEARS AGO, HAS NOT, TO OUR KNOWLEDGE, SEEN AN INCREASE IN UNDESIRABLE CONDUCT BECAUSE OF THE LACK OF THE SO-CALLED "DETERRENT EFFECT" OF THESE TYPES OF AWARDS.

THE COALITION WOULD SUGGEST THAT THE TASK FORCE CONSIDER ALLOWING PUNITIVE DAMAGES FOR THOSE CASES WHICH ARE ALLOWED BY STATUTE. IN ADDITION, IF THE COURT DETERMINES THERE IS SUFFICIENT EVIDENCE TO AWARD THESE DAMAGES, THE RECOVERY SHOULD GO TO THE GENERAL FUND. AND, THE PLAINTIFF'S ATTORNEY SHOULD BE PAID FOR THE ACTUAL TIME SPENT IN PROVING PUNITIVE DAMAGES AS APPROVED BY THE COURT.

THIS PROPOSAL STOPS SHORT OF TOTAL ELIMINATION OF PUNITIVE DAMAGES. SOCIETY REMAINS PROTECTED FROM FLAGRANTLY IRRESPONSIBLE BEHAVIOR, BUT PLAINTIFFS WOULD NOT BE THE BENEFICIARIES OF WINDFALL AWARDS WHICH ARE UNASSOCIATED WITH OBJECTIVELY VERIFIABLE DAMAGES.

THE COALITION'S SIXTH MAJOR RECOMMENDATION RELATES TO COUNTERSUITS FOR MALICIOUS AND FRIVOLOUS ACTIONS.

OREGON PRESENTLY FOLLOWS THE MINORITY "ENGLISH RULE" WHICH REQUIRES THAT BEFORE AN ACTION FOR MALICIOUS PROSECUTION AND/OR WRONGFUL USE OF CIVIL PROCEEDINGS WILL LIE, THE PLAINTIFF MUST PROVE THAT HE HAS SUFFERED SPECIAL INJURY BEYOND THE TROUBLE, COST AND OTHER CONSEQUENCES NORMALLY ASSOCIATED WITH DEFENDING ONESELF AGAINST UNFOUNDED LEGAL CHARGES.

OREGON SHOULD ADOPT THE "MAJORITY RULE" OF THE UNITED STATES, THEREBY ALLOWING RECOVERY OF DAMAGES INCLUDING THE COST OF DEFENSE AND INJURY TO REPUTATION WHERE THE OTHER ELEMENTS OF MALICIOUS PROSECUTION AND/OR WRONGFUL USE OF CIVIL PROCEEDINGS IS ESTABLISHED.

THE LAST MAJOR RECOMMENDATION THE COALITION WOULD REQUEST THE TASK FORCE TO CONSIDER IS MODIFICATION OF THE SYSTEM UNDER WHICH ATTORNEY FEES MAY BE CHARGED PURSUANT TO THE CONTINGENCY FEE AGREEMENT.

PRESENT LAW ONLY LIMITS CONTINGENT FEES FOR MEDICAL MALPRACTICE CASES (ORS 752.150). THE COALITION RECOMMENDS THAT STATUTORILY DEFINED CONTINGENT FEE APPLY TO ALL PERSONAL INJURY CASES.

WE STRONGLY SUPPORT THE ABILITY OF THOSE IN SOCIETY WHO ARE UNABLE, DUE TO THEIR ECONOMIC CIRCUMSTANCES, TO HAVE ACCESS TO LEGAL COUNSEL. A DESCENDING PERCENTAGE CONTINGENCY FEE, EXCLUDING COSTS, WILL NOT IMPAIR VICTIMS' ACCESS BUT IT WILL REASONABLY REIMBURSE ATTORNEYS FOR PROFESSIONAL SERVICES.

FOR EXAMPLE, IT WOULD SEEM REASONABLE FOR COUNSEL TO RECEIVE IN A JUDGMENT OF $100,000 - $35,000 IN COMPENSATION - NOT COUNTING COSTS. LIKEWISE, $240,000 APPEARS REASONABLE REMUNERATION FOR AN AWARD OF $2,000,000 (NOT COUNTING COSTS).

THE RAND STUDY INDICATES THAT LIMITS ON CONTINGENT FEES CHARGED BY AN ATTORNEY FOSTER SETTLEMENTS (THAT IS, REDUCING THE NUMBERS OF CASES GOING TO VERDICT), AND THEY ALSO REDUCE THE AVERAGE SETTLEMENT BY ABOUT 9 PERCENT.

MILLIMAN AND ROBERTSON'S FINDINGS CONCUR. IT IS THE COALITION'S BELIEF THAT THE VICTIM WOULD BENEFIT BY RECEIVING A LARGER PORTION OF AN AWARD - USING THE PREVIOUS EXAMPLE, A FEE OF $660,000 VERSUS $240,000 WOULD BE A NET BENEFIT OF $420,000 FOR THE PLAINTIFF.

WE ANTICIPATE THAT THE TASK FORCE WILL CAREFULLY BALANCE THE BEST INTERESTS OF VICTIMS AND THEIR ATTORNEYS.

IN CONCLUSION, I HAVE TRIED TO DESCRIBE THE MAJOR COMPONENTS OF A RESPONSIBLE REVISION IN OREGON'S TORT LAW SYSTEM.

THE COALITION HAS CONSCIOUSLY AVOIDED RADICAL PROPOSALS WHICH WOULD ONLY EXACERABATE AN ALREADY HEATED DEBATE.

TO RECAP, THE CITIZENS INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM BELIEVES THAT TORT REVISION IS AN INTEGRAL PART OF A LONG-TERM SOLUTION TO THE LIABILITY CRISIS.