A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, November 8, 1986

Oregon State Bar Offices (Rooms 2 and 3)

1776 Southwest Madison

Portland, Oregon

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1. Approval of minutes of meeting held September 13, 1986

2. Announcements

3. Public comment

4. Proposed amendments to Oregon Rules of Civil Procedure:

   Rule 9 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

   Rule 16 FORM OF PLEADINGS

   Rule 39 DEPOSITIONS UPON ORAL EXAMINATION

   Rule 43 PRODUCTION OF DOCUOMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

   Rule 46 FAILURE TO MAKE DISCOVERY; SANCTIONS

   Rule 47 SUMMARY JUDGMENT

   Rule 55 SUBPOENA

   Rule 69 DEFAULT

   Rule 78 ORDER OR JUDGMENT FOR SPECIFIC ACTS

5. Additional requests or proposals

6. Next meeting - December 13, 1986 (location to be decided at this meeting)

cc: Members, Council on Court Procedures
Public

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held November 8, 1986

Oregon State Bar Offices

1776 Southwest Madison

Portland, Oregon

Present:	Joe D. Bailey	Richard P. Noble
	Richard L. Barron	Steven H. Pratt
	John H. Buttler	William F. Schroeder
	Raymond J. Conboy	J. Michael Starr
	Lafayette G. Harter	Wendell H. Tompkins
	William L. Jackson	John J. Tyner
	Robert E. Jones	Robert D. Woods
	Ronald Marceau	
Absent:	Jeffrey P. Foote	
	James E. Redman	
	R. William Riggs	
	Martha Rodman	

(Also present were: Diana Godwin, Jan Stewart, of the Bar's Practice and Procedure Committee, and Douglas A. Haldane, Executive Director)

The meeting was convened at 9:30 a.m. Judge Jackson moved with Judge Tyner's second to approve the minutes of the September 13, 1986 meeting as submitted. The motion was adopted.

The Council first addressed the question of a meeting location for the December 13, 1986 meeting. Mr. Schroeder suggested that the Council meet in Hood River and there being no opposition, Hood River was established as the meeting location for that date. (NOTE: After the meeting, it was decided that it would be more convenient to hold the meeting at the Mallory Hotel in Portland.)

The Council then discussed its meeting schedule for the upcoming biennium. It was agreed that the Council would continue to meet on the second Saturday of every other month beginning with June 13, 1987. Tentative dates were established for August 8, October 10, and December 12, 1987.

Jan Stewart, of the Bar's Practice and Procedure Committee, expressed that Committee's concerns regarding Council action on

changes to Rule 39. She explained that it was the Committee's intention that the rule be amended to allow the use of perpetuation depositions as testimony at trial when the proposed procedure was followed. Mr. Haldane reviewed the Council's discussion and action on the Rule 39 proposal, pointing out that the reason the Council had taken the action it had on Rule 39 was that the Council was prohibited from making changes in the rules of evidence. By referring back to the rules of evidence, the Council had established a procedure and would then leave it to the Committee to approach the legislature about substantive changes in the rules of evidence.

An invitation was extended to Ms. Stewart to attend or have some other member of her Committee attend the December 13 meeting to speak to the proposal on Rule 39. No further action was taken on the proposal.

Ms. Stewart then addressed her remarks to proposals to amend Rule 69 regarding notice prior to taking an order of default. There was some expression from Council members that Council action on Rule 69 should be reconsidered, but the matter was deferred for consideration at the December 13, 1986 meeting.

The Council then took into consideration the proposed changes to Rule 9 which would remove the current requirement that notices of deposition, requests for production, and requests for admission be filed with the court. Judge Barron suggested that perhaps requests for admission should continue to be filed with the court, as they were a help to the trial judge in reviewing the file for trial. Judge Barron moved the adoption of the proposal, with the stipulation that requests for admission continue to be filed. Mr. Pratt seconded the motion and it was adopted with two Council members voting in opposition.

Regarding Rule 16, Mr. Pratt moved that the proposal be adopted as submitted. The proposal would add language to section B. of Rule 16 stating that "within each claim, alternative theories of recovery shall be identified as separate counts." It was stated that the change would make explicit what is considered proper pleading now. Mr. Starr seconded the motion, which was adopted without opposition.

Regarding Rule 43, the Council deferred any action until a final decision had been made on proposed changes to Rule 9.

Referring to proposed changes to Rule 46, it was suggested that the proposal, while simply designed to remove redundant language, could imply that proper service was not necessary prior to having sanctions applied. Mr. Haldane was asked to review the minutes of the prior meetings when the change was made and report back to the Council at the December 13, 1986 meeting.

The Council then discussed the proposed changes to Rule 47, which would remove summary judgment for any claim for damages based upon tort. The discussion on Rule 47 was wide-ranging, with the views being stated that the rule should be left in its current form and any abuses should be suffered, that judges detected no serious abuse of summary judgment procedure in tort cases, that summary judgment in tort cases presents a terrible burden to plaintiffs with legitimate cases, that summary judgments, while abused, are needed, and that the abuses should be addressed rather than doing away with summary judgments in tort entirely. It was suggested that one method of curing abuses would be to require that costs be imposed upon one who files a summary judgment motion that is unsuccessful.

Mr. Woods then moved that the proposed change to Rule 47 be rejected. That motion was seconded by Mr. Pratt. Mr. Conboy moved to table consideration of Rule 47; his motion was seconded by Mr. Marceau, but failed. The vote on the initial motion to reject the proposed change to Rule 47 was adopted with 9 in favor and 5 opposed.

The Council then turned its attention to a proposal to amend Rule 44 C. by adding the words "or existing notations" after the words "a copy of all written reports". The effective rule change would be to make it clear that chart notes and other existing reports of examinations would be discoverable under the rule. Judge Barron moved that the proposal be adopted. Mr. Marceau seconded the motion, and it was adopted without opposition.

Judge Barron then distributed a proposed amendment to Rule 70 A. regarding form and entry of judgment. Action was deferred on that proposal until the December 13, 1986 meeting.

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS
RULE 44

* * *

C. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports or existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

* * *

COMMENT TO RULE 44

This rule change is proposed as a response to rulings out of the Multnomah County Circuit Court. The current language "written reports" has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding "or existing notations" would seem to broaden the rule to include office and chart notes.

EXHIBIT A TO MINUTES OF 11/8/86 MEETING

RULE 70 FORM AND ENTRY OF JUDGMENT

A. FORM. Every judgment shall be in writing plainly labeled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulation, and exhibits as may be necessary or proper in support of the entry thereof. The judgment shall be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 69 B.(1), by the clerk. No particular form of words is required, but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. [, and if the judgment provides for the payment of money the following shall be succinctly summarized:

1. the name of the judgment creditor and his attorney.

2. the judgment debtor;

3. the amount of the judgment;

4. the interest owed to the date of the judgment;

5. the rate(s) of interest;

6. the balance(s) on which interest accrues;

7. from what date(s) interest at each rate on each balance runs;

8. whether interest is simple or compounded, and if compounded, at what intervals;

9. accrued arrearages plus above information as to pre- and post -judgment interest;

10. required future payments and accrual dates plus above information; and

11. the total of taxable costs and attorney fees, if known at the time of entry of the judgment.]

EXHIBIT B TO MINUTES OF 11/8/86 MEETING

MEMORANDUM

November 3, 1986

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane, Executive Director

RE: November 8, 1986 meeting

Enclosed you will find a packet of proposals which are before the Council for its consideration on November 8, 1986. A comment is attached to each of the proposed rule changes explaining its current status and the effect of the amendments.

Also enclosed are some materials under the letterhead of the Joint Interim Task Force on Liability Insurance, including a letter to the Task Force from Wendell Gronso and a rough draft of a proposed Bill for an Act which would amend ORCP 22, 36, 46, and 47 and repeal ORCP 43 and 45. I just received these materials in today's mail. The Joint Interim Task Force was unable to provide me with a redrafted Bill for an Act, thus the rough draft which I am now distributing does not have any changes which would be made pursuant to Mr. Gronso's suggestion in his letter of September 30.

These changes, if adopted, would do away with third party practice, requests for admission, and requests for production, as well as summary judgment in any cases not arising under contract. They are far-reaching suggestions.

The Legislative Task Force has not yet made any decision regarding whether these changes will be presented as Task Force recommendations; however, I understand that Mr. Gronso has been very persuasive with the Task Force, and these proposals may well be recommended to the legislature.

I will keep Council members informed as I receive more information on the actions of this Task Force.

DAH:gh

Enclosures

cc: Public (w/encs.)

WENDELL GRONSO
Attorney At Law
709 Ponderosa Village
Burns, Oregon 97720
(503) 573-2550

Legal Assistant
Donna J. Stampke

June 16, 1986

TO: Fellow Members of Legislative Task Force on Insurance

For about 15 years I have been on a one-person crusade, trying to contain the cost of litigation. Prior to about 1970, cases were tried by what many lawyers called "gamesmanship" in Oregon. Each party would prepare their own respective cases with little or no knowledge of what the other party had in mind or what evidence the other party had, with the exception of what knowledge we gained from depositions. The Federal Courts have always had the massive discovery that Oregon has gradually been adopting.

The time involved in the preparation of a lawsuit has probably increased by at least threefold in the last 15 years. It is the cost of defense, not the percentage the plaintiff's lawyer takes, that have had the dramatic effect on the cost of insurance. After all, what difference does it make to the cost to the insurance company as to how the plaintiff and their lawyer divide their award? The direct cost to the insurance company is the amount it pays for its defense. The system is simply pricing itself out of existence.

I have been attempting everytime someone from CNA appeared before us to find out how much of its money has been spent on

defense costs as against the amount paid in total claims, whether it be in settlements or judgments. They have not seen fit to come forth with that information. I have, however, obtained from Farmers Insurance Group their actual figures on their hospital liability insurance. I am attaching a copy of their figures from 1975 through 1985 showing the actual amounts paid in losses and the actual amounts paid in defense costs, amongst other things, for the respective years. If you will take a look at that, each year they spent more than 50% as much on defense costs as they actually paid out in claims, and in 1978 they paid more in defense costs than they did in claims. It would appear to me that if from 25% to 50% of the defense costs could be eliminated, that this would make an immediate savings to the insurance industry and certainly should be reflected in their premiums. I honestly believe that this could be done by merely reinstating the discovery procedure and other procedural matters that I am about to discuss, back to the 1970 level. Procedure is set forth in the Oregon Rules of Civil Procedure which was primarily drafted by the Council on Court Procedures which was formed sometime in the mid-1970s. The Council on Court Procedures was a group of lawyers and judges who the Legislature appointed to revise our procedure. I was a member of that council during the first six

years of its existence and I watched with dismay the adoption of many of the rules. The theory of these rules that I am about to discuss sounds good, but when you put into practice, they do nothing but cost time and money. Unfortunately, the Council on Court Procedures consisted of too many intelligent people and not enough practical people.

I am attaching to this letter a copy of Rules 36, 43, 45, 46, 47 and 22. I will discuss each of those rules and the practical effect they have had on the cost of litigation.

RULE 36

If you will turn to Rule 36B(1), I have spent countless hours on nearly every case that I am involved in now having the other side dig through my files and me digging through their files. Many cases will consist of several boxes of material. This is extremely frustrating, especially since there are certain things such as the attorney's work product that is not discoverable. Therefore, before you let the other side start rummaging through your files, you have to strip your files of the things you consider are your work product. An unscrupulous attorney will go through the files and remove other things that would be damaging to his case. There is practically no way to ever discover what they have removed from the files. Therefore,

it puts the honest, forthright attorney at a disadvantage as against the attorney who has no scruples. Unfortunately, we have some of the latter in our midst.

Then, we turn to 36B(3) and following and discover that when the battle starts to brew, then all parties go before the Court. This takes more time and takes the Court's time.

To give you an example of the thing that can be expected soon after a case is filed, I am enclosing a Motion for Discovery in a very simple case that I recently filed. From looking at the request for discovery, you can see that many hours of time are immediately involved. You cannot fault the individual lawyer for taking advantage of everything that the rules allow. I find myself more and more taking advantage of these discovery rules since, if I do not, and by some outside chance I miss something, I could be guilty of malpractice.

I would have no objections to leaving 36B(2) in place. The insurance policy is easy to find and probably should be discoverable and, on top of that, it probably does assist in settlements.

Rule 42 should also be repealed. It merely expands on Rule 36.

RULE 45 REQUEST FOR ADMISSIONS

In nearly every case, Requests for Admissions are made.

This rule has merit if used properly. However, the lawyers continually take advantage of the rule and I see no way to stop it. A Request for Admission is made. The opposing party refuses to admit. The other party then has to put his proof on at the trial. Then, the party who had to put the proof on can go before the court and ask for sanctions. This really doesn't work, because the party that refused to make the admission will have some lame excuse as to why he did not admit the particular point and most courts just do not have enough meanness in them to impose sanctions when there was some excuse for not making the admission. The end result is several more hours of time spent by the opposing attorney and the court on each case without really accomplishing anything.

RULE 47 - SUMMARY JUDGMENT

This is probably the most abused rule that we have. The theory behind the summary judgment was, for example, a claim is filed in court on a promissory note. The defendant has no defense whatsoever. The thought was that the plaintiff could go into court with a motion for summary judgment alleging by affidavit that the money was owing, that the defendant's signature was genuine and, therefore, the plaintiff was entitled to prevail. If the defendant did not come forth under oath with

some sort of defense, the plaintiff would then be entitled to the summary judgment and that time would be saved. However, once again, this rule has been abused and is being abused on a daily basis.

For example, I had a case pending in Vale, Oregon, which was a malpractice case against an engineer. A Portland law firm was defending the engineer. They filed a motion for summary judgment with a long affidavit stating that the engineer had done everything that was usual and proper for an engineer to do under like or similar circumstances. I then had to file an affidavit setting forth the things that I was prepared to prove showing that the engineers did not use that standard of care. A hearing was set. Two lawyers from a Portland firm flew from Portland to Boise, rented a car in Boise and drove to Vale. I drove from Burns to Vale. We had a two hour hearing, after all of the preparation for the hearing. The court denied the motion for summary judgment. But how much did that cost the litigants and the taxpayers in court's time?

This happens in, I would guess, more than 50% of the cases that I try and seldom, if ever, is the summary judgment allowed and even if it is allowed, it is usually upset on appeal. But again, you cannot really blame the lawyer for moving for a

summary judgment if there is any outside chance that it will be granted, because if he loses the case eventually, he possibly could be sued for malpractice for not using every tool available to him. (Excuse me for using the male gender in this letter, but it seems that it is the male lawyers that are always pulling this type of trick.)

I could go on for hours on this subject, but I am trying to keep this letter short enough that some of you will read it and I will be glad to have any of you quiz me at a later date.

RULE 42 - THIRD PARTY PRACTICE

Third party practice is relatively new in the State of Oregon and was first allowed in ORCP Rule 22D. Prior to the adoption of ORCP Rule 22, Oregon did allow indemnity and contribution which are the most common reasons that third party practice is used by the defendants. An example of the use of third party practice is where a complaint is filed against a manufacturer, for example, Ford Motor Company, for a defective wheel which caused an accident injuring someone. The plaintiff would sue Ford Motor Company in a products case. Assume that Ford Motor Company bought the wheel from a third party manufacturer. Ford Motor Company would have a right to file a third party complaint against the manufacturer of the wheel.

Then, the treadmill of discovery would start. The case is slowed up and hampered by the additional defendant brought in. Eventually, the case is tried and the jury finds that there was no defect in the wheel, thus the plaintiff lost its case against Ford Motor Company. All the work between Ford Motor Company and the manufacturer of the wheel will then go for naught.

Prior to the adoption of ORCP Rule 22, Ford Motor Company could have either (1) tendered the defense of the lawsuit to the manufacturer of the wheel and the case would have proceeded, or (2) the manufacturer of the wheel could have rejected the tender and Ford Motor Company would have had to defend on its own. But then, assuming Ford Motor Company had lost the product liability case, it could have filed a separate case against the manufacturer for indemnity.

I have no idea of how many hundreds of thousands of dollars have been spent on expert witnesses and attorneys fees on third party claims for indemnity or contribution where they all became moot by reason of the plaintiff's failure to prove its original case. These cases are not only time-consuming for all parties involved, but they are time-consuming for the courts, and manage to inject so many side issues that the juries do have a tough time following the issues.

One of the reasons that our jury system has worked so well through the years is that we have, until recently, kept the issues presented to the jury relatively simple.

I am involved in a case right now where I filed a complaint against one defendant. The defendant filed a third party complaint against six defendants. That makes eight lawyers in the case that should have been a simple case. The case has been filed for more than one year and we have not yet taken depositons, because the eight lawyers have not found a single time when we would all be available for depositions. Probably, forty hours has been spent on trying to schedule depositions. All parties have an absolute right to have their lawyer present at all depositions.

This is only a minor part of the frustration brought upon by third party practice and, once again, should I lose the case against the original defendant, all of these extra motions will be for naught.

Then, to add insult to injury, the Legislature, in its infinite wisdom or lack thereof, passed a number of laws a couple of years ago which consolidated all the courts in the State of Oregon giving the Supreme Court much more power over the trial courts. Pursuant to that legislation, the Chief Justice of the

Supreme Court of the State of Oregon saw fit to adopt and enforce the Uniform Trial Court Rules. This was another lofty idea that a true scholar would propose who has lost track of reality. The Circuit Court in Harney County just cannot operate on the same rules as the Circuit Court in Multnomah County. The Chief Justice finally acknowledged this to be the case so he allowed circuit courts to adopt rules in addition to the statewide rules which had been the case before. In other words, each circuit court had its own local rules. Now, there are two sets of rules for each circuit court, the statewide rules and the local rules. More traps for lawyers to get caught up in and more time spent checking rules.

I cannot think of any case that I have been involved in that the outcome of the case has been materially changed by reason of the rules that I have discussed above. But the outcome has been many months later in coming and much more expensive to obtain since the rules discussed above have been adopted.

I would truly like to see this Committee recommend to the Legislature the changes in the procedural rules before we take any action on the so-called Tort Reform. With the indulgence of each of you, I would like to comment upon some of the things that have been proposed. I am taking the liberty of doing this in

this letter, since it appears that I will be in trial during our next meeting.

I realize that I have already covered the points that the Co-Chairman requested that I discuss. Therefore, please feel free to disregard the rest of this letter, if you so choose. But in case I am unable to attend the meeting when these matters are discussed, I would appreciate it if my thoughts expressed hereinafter were taken into consideration.

COLLATERAL SOURCE

The bare proposition that no person should collect twice for the same injury certainly makes sense and if, in fact, there is a collateral source wherein a party is receiving remuneration that does not have to be paid back, I believe that it would be just that the court, after the verdict, subtract the amount of the collateral source from the total verdict. However, this would happen only on rare occasions.

A person is injured on the job, for example, by the negligence of a third party. The person collects Workers' Compensation. He then has a right by statute to sue the person that injured him. He sues for the entire amount of his damages. This sounds like the person is going to collect twice. However, this is not the case. The Workers' Compensation carrier is

entitled as a matter of law to be compensated up to the amount that it has expended on that person out of any award. This is only just, the Workers' Compensation carrier should not be penalized when it is the fault of a third party. It is also just that the injured party does not collect twice.

Blue Cross does not have a subrogation per se in their policy but their policy says that if there is any other source available, they will not pay. On many occasions, Blue Cross has paid when there is a lawsuit pending, but before they pay under these circumstances, they make the party agree to reimburse them for the amounts paid out of any settlement. I have personally handled cases in the past few years wherein Blue Cross has been repaid many thousands of dollars out of settlements or judgments. Medicare had a subrogation clause in it. Right off hand, I cannot think of any true collateral source.

For example, a 40 year old man has taken out life insurance when he is 20 years of age. He is killed by the wrongdoing of a party at age 40 and there is $100,000.00 worth of life insurance that his widow and children are going to receive because he had the foresight to take that out and has paid the premium. Should that be deducted from the wrongful death award against the person who killed him? I would doubt it.

There are many union contracts wherein the employer is required to pay the employee when injured off-the-job for a fixed period of time, usually five to ten days per year, known as sick leave. This sick leave is cumulative and if not used, in many of the contracts, the worker is entitled to collect his unused sick leave upon retirement. If the worker has accumulated 100 days of sick leave, is injured by the negligence of the defendant, should he be able to collect his wages from the defendant as well as his employer? This would appear to be a collateral source. However, the worker has lost the accumulated sick leave and will not get paid for it upon retirement or severance from the job.

CAPS FOR PAIN AND SUFFERING

Actually, I do not believe that there are enough cases in the State of Oregon where an award exceeds any given figure for pain and suffering to make any difference on the overall picture. I believe that we will find, if a survey was made, that 90% of the money paid out would have a total verdict of less than, say $200,000.00, which also would be including the economic loss. Once again, if a cap was placed on pain and suffering, I believe we would see the cost of trials go up by leaps and bounds.

Any plaintiff's lawyer worth his salt can turn much of the pain and suffering award into economic loss. Let me give you an example.

Let us assume a 25 year old man earning his living by some sort of hard manual labor. He is injured by the negligence of a party. As a result of the accident, he has $20,000.00 in medical bills, $20,000.00 in lost wages and ends up with a trick knee that will go out on him from time to time, and the evidence is clear that the knee is going to give him this type of trouble in the future. He also has a painful and disfiguring scar on his face and a bad shoulder which is painful and it is going to be painful for the rest of his life. Normally, this case would be tried by presenting it to the jury through the testimony of his treating physician, his own testimony and his wife telling about the pain that he suffers. The lawyer would then argue the life expectancy and the agony that this person is going to go through the rest of his life. Let us say that the award is $400,000.00. He has only shown $40,000.00 in so-called economic loss. He is back to work, doing the job, making as much money as he did before. But it is painful for him to do the job. If there were a cap on pain and suffering, the plaintiff would then merely call an employment expert at the cost of, maybe $1,000.00, maybe $3,000.00. The employment expert would testify based upon the study that he had made, all of the various jobs that this man might have to turn down in the future and how he might not be promoted in the future because of his physical limitations.

Then, at a cost of $1,500.00 to $3,500.00, an economist could be called and the economist could project the income loss based upon the employment expert's testimony. Then, the future pain and suffering would be turned into economic loss.

The defendant would then have to, in self defense, call his own employment expert or job counselor and economist to dispute the testimony of the plaintiff which would add a couple of days to the trial and probably $10,000 or $12,000 to the cost of the trial, taking into consideration the cost of the experts and the additional time spent by the attorneys.

In addition to all of the things outlined above we are getting, a cap on pain and suffering would be getting at the wrong end of the problem. The costly cases are the run-of-the-mill cases. It is rare that a person is severely injured when the pain and suffering award would exceed $100,000.00, $250,000.00, or any other arbitrary figure that might be set.

Let us take an example of an injury caused by somebody's fault when the pain and suffering award should be large.

Let us assume we have a 21 year old lady who is steadily employed, making good wages in a manufacturing plant where no one sees her. She is attractive and single. She hopes to eventually marry and have a family, in addition to keeping her job. An

explosion removes one ear, burns both breasts to the point that one has to be removed and the other is badly scarred and disfigured. There are keloid scars on her face and both legs are badly scarred and disfigured. However, she is physically able to continue her job in a manufacturing plant. Would it be fair to put a cap on her pain and suffering and emotional damages, but still allow pain and suffering of, say $1,000.00, for, say a smashed toe that is extremely painful for a period of six months, then there is a complete recovery?

LIMITATION ON ATTORNEY FEES

This certainly is an area that should be explored. I have covered it in other portions of this report that the cost of litigation is too high. The proposals that have been made by the people representing the insurance industry is to put a fixed cap on the percentage that the plaintiff's lawyer can take on a contingent fee. I have a little trouble seeing where this could in any way affect insurance rates, since the plaintiff's fee, when it is on a contingent fee, is out of the award and the award is the same no matter how it is divided between the plaintiff and the plaintiff's attorney.

Going back to the Farmers figures, they paid out in losses on their hospital liability insurance in that 11 years the sum of

$4,516,570. During the same period of time they paid out $2,864,373 in defense costs. If my arithmetic is correct, Farmers, as a carrier, paid in addition to its losses 63.4% in defense costs. We must remember that this money is paid out of the insurance company's pot in addition to the losses.

The plaintiff already had a handicap since in every lawsuit the plaintiff must prove each and every allegation in their complaint by a preponderance of the evidence, and if the plaintiff fails in any one of those things, the defendant wins. Therefore, there is more burden at this time upon the plaintiff than there is on the defense. Frankly, I would rather defend any day than be plaintiff, as far as my win-loss record goes. It is much easier to obtain a defense verdict, since the defendant only has to punch one hole in the plaintiff's case and the plaintiff has the burden of proving everything by a preponderance of the evidence. The court instructs the jury that a preponderance of the evidence is greater weight of the evidence. It is such evidence that, when weighted with that opposed to it, has more convincing forces and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the

proof rests. Therefore, the plaintiff goes into trial with a handicap. It certainly would not be fair to allow the defendant to pay its lawyers an unlimited amount while limiting the amount the plaintiff is allowed to pay.

At this time the standard contingent fee agreement is 25% of the amount recovered if recovered without filing suit; 1/3 of the recovery if the case is settled after suit has been filed and before the trial commences, and 40% after the trial has commenced, and 50% on appeal. I have no idea of the number of cases that Farmers, for example, settled before a complaint was filed or at some time after the complaint was filed and before the trial, as against those who go to trial or are eventually appealed. However, I do know that there is about one case in ten that is actually tried.

If there is a cap on attorneys fees, we must also figure out a way to cap the defense costs. Otherwise it would be totally unfair for one party to have unlimited resources and limit the resources of the other side by law. I suppose a law could be passed that no insurance company shall pay, nor no insurance company's lawyer shall bill, more than the amount allowed by law to the plaintiff's attorney. This might go a long way toward settling cases and cutting the cost of litigation.

I have always considered the ultimate goal to be reached in any lawsuit is fairness. The thing that we are looking for in this committee is ways to cut insurance costs. If the insurance carriers are successful in having the State regulate the amounts attorneys can charge, the only logical step to go with this is that the State regulate the amount an insurance company can charge. Therefore, the Insurance Commissioner should set the insurance companies rates, or maybe the Legislature should just set the insurance companies rates without a hearing. The insurance companies are asking that the attorneys rates be regulated by statute so it might be fair that the Legislature merely pass a statute that all insurance companies rates are to be reduced by 40% and that is the rate that they can charge from here on. However, the hue and cry would naturally get loud and violent which would mean that a bureaucracy would have to be set up. If we set up a bureaucracy for setting insurance companies rates, there would be endless hearings which would not only cost the taxpayers of the State of Oregon but it would also cost the insurance companies and I am sure that they would somehow get the additional cost of their rate hearing built into their rates.

My basic feeling is that we live in a free enterprise society and the lawyer should be able to charge what he feels is

fair and we have enough lawyers in the state that the marketplace should take care of the lawyers rates as well as the insurance companies rates but if we regulate part of it, it only follows that everything should be regulated.

As a trial lawyer, I am certainly speaking against my own interests when I suggest that any lawyer's fees should be regulated, but I will accept regulation probably more gracefully than the insurance companies will accept regulation, and if that is the only way that we can solve the problem, I will, for my part, accept regulation. Of course, you must remember that I am 64 years of age and these young lawyers that Judge Robert P. Jones was talking about who are inexperienced and have a lifetime ahead of them probably would not agree with me, whether they work for insurance companies or for plaintiffs. I actually believe that the cost of legal fees will adjust themselves if we adopt the procedural changes that I have recommended in this report and we put some teeth in settlements as I recommended in my first letter to the committee shortly after our first meeting.

PUNITIVE DAMAGES

I really do not know how punitive damages get into the insurance problem. In most cases punitive damages are not covered. The insurance policies may exclude punitive damages if

they so desire. If this really is a problem to the insurance industry I believe that the Legislature should enact a law which merely states that it shall be unlawful to insure against punitive damages. After all, punitive damages are for the purpose of punishing the defendant for conduct that society frowns upon and it is to punish the defendant not an insurance company.

Punitive damages are often sought and seldom awarded, but they certainly have a place in our system of justice. For example, the Ford Motor Company case where it was proven that the Board of Directors of Ford Motor Company were presented with a problem on the manufacture of the Pinto automobile. It was going to cost $9.00 per car additional to remedy a defect which caused the car to erupt in flames when it was struck from the rear. The Board of Directors reasoned, with the aid of their computer, that there would be a given number of fatal accidents if the defect were not remedied. Their computer told them that the average verdict for a wrongful death in the United States was $28,000.00. The computer also told them the number of deaths to expect from this defect. They multiplied the number of deaths by $28,000 and that came to less money than the additional $9.00 per car to remedy the defect would amount to, therefore, they made a cold

hard calculated business judgment that it was cheaper to cremate a given number of persons than to spend the extra $9.00 per car. The jury that tried the case was incensed at this type of reasoning and allowed $125,000,000 in punitive damages. The case was later settled for $6,000,000 in punitive damages. The $125,000,000 made headlines and very few people know that the actual settlement was $6,000,000. However, it is apparent that this type of publicity and this type of award does more towards making a manufacturer be safety conscious in the manufacture of a product than all of the governmental regulations added together.

No matter what type of civilization we have, we always have a few people and a few corporations who will totally disregard the rights, feelings, safety and health of their fellow person and punitive damages, I can assure you, are one of the best ways to deter the type of conduct for which punitive damages are designed.

JOINT AND SEVERAL LIABILITY

I have mixed emotions on joint and several liability. Certainly, it is wrong for the defendant who was say one percent at fault to be stuck for the entire amount of damages. However, our present law does limit the liability of certain defendants to the percentage that they were negligent. For example, if the

plaintiff is forty percent at fault and each defendant is thirty percent at fault the law allows the plaintiff to recover, since his negligence was not more than fifty percent, but as to each defendant under our present law, their liability would be limited to the percentage of the total award that their negligence contributed to the damages. In other words, thirty percent each. The flaw, as I see it in our present law, is that if the plaintiff was not negligent in any way and one defendant was ninety-nine percent at fault and another defendant was one percent at fault, the one percent defendant would be required to respond for the total amount if the other defendant were judgment proof, since the one percent defendant's negligence did exceed that of the plaintiff. Probably, there should be some change made in this regard.

With your indulgence, I am going to give you an example which will only add to the confusion in all of our thinking.

Several years ago I represented a two year old boy who had been run over in a tractor accident. His spinal column was injured at the belt level and he was paralyzed from the waist down and will be paralyzed for life. His father was a $900 per month ranch hand with five other children. This little boy was in need of constant physical therapy which was necessary,

otherwise sores would develop on the lower half of his body and his legs would not grow with the rest of his body. He was also in need of wheel chairs and other expensive devices. it was a very expensive situation.

The injury was caused by the negligence of the driver of the tractor and a defect in the shifting mechanism of the tractor, which was produced by Ford Motor Company. The driver of the tractor was no doubt more negligent than was Ford Motor Company. However, had it not been for the defect in the shifting mechanism of the tractor, the boy would have never been injured. The driver of the tractor was either aware or should have been aware of the problem in the shifting mechanism. The defect was that when the tractor was put in neutral, sometimes it would still be in gear, thus when the foot was removed from the clutch the tractor would travel ahead. As it happened in this particular case, the driver of the tractor was covered by a large insurance policy. A substantial structured settlement was worked out with the insurance carrier of the driver carrying the lion's share and Ford Motor Company paying its fair share. The boy is now in a position where he has an income for life and it is substantial enough that it will provide him with many of the necessities of life and hopefully enough that he can become well educated.

In this particular case, had the driver of the tractor not been insured, would it have been fair to all parties concerned to have let Ford Motor Company pay, for example, 25% of the boy's injuries and the balance go uncompensated? Had that been the case, the boy would not have been able to have obtained the medical care and the other devices that he is going to need throughout the rest of his life, to say nothing of getting an education and being able to live. The family was in no position to pay for the cost of the things this baby was going to need the rest of his life. It certainly can be argued that Ford Motor Company should not have been required to pay over 25% of the loss this young boy suffered. On the other hand, had it not built a tractor that had this defect this young man would not have suffered his injury. I believe that I will probably eventually come to a conclusion that if the fault of one party was substantial and the injury would not have occurred had it not been for that particular defendant's fault, that joint and several liability should not be abolished. However, other cases can certainly be cited where it would not be fair for the deep pockets theory to take over and control the case when the deep pocket was, say only one or two percent at fault.

When attempting to make a decision on this problem, we must

remember that accidents do not happen. They are caused. And they are usually caused by the neglect or inattentiveness of one or more people or companies.

In addition to abolishing the discovery, summary judgment and third party practice rules that I have suggested, I do believe that we need some more teeth in the law towards forcing settlements. I have already outlined them to the members of the committee in my letter of February 27, 1986, and in case you threw that letter away, I am attaching another copy of my first letter on putting some real teeth into settling cases.

UNAVAILABILITY OF INSURANCE

All of the above still does not make insurance readily available at reasonable cost to certain segments of our society, such as bars, daycare centers, fuel trucks and organizations sponsoring the Strawberry Fair, the Azalea Festival and the Rose Festival. I really believe that the problem there is the lack of a mass market. All companies like the homeowner's policy or the auto policy. There is a mass market, it's easy to figure rates and it is easier to train adjusters and claims people.

I propose that a statute be enacted that would provide that when the Insurance Commissioner finds that liability insurance is not readily available for any given risk, that the Insurance

Commissioner set a rate for the risk, then appoint one company that is writing liability insurance in the state to provide that insurance at a rate set by the Commissioner, the company appointed receive twenty percent of the gross premium for administrative costs. The balance of the premium be paid to all other companies writing liability insurance in the State of Oregon in direct proportion to each company's percentage of the total liability premium collected in the state. In other words, if one company is collecting ten percent of the gross liability premiums for all risks in the state that company would receive ten percent of the balance of the premium set by the Commissioner. When a loss occurred, the company designated by the Commissioner to administer that particular line of insurance would then call upon all of the other companies to pay their respective proportionate share of the loss. This would be mandatory and any company writing liability insurance in the state would be required to take its share of this type of risk. After several years of experience, the Commissioner could re-examine the rate that had been set for that particular risk and the rates could then be adjusted accordingly.

The only alternative to this would be a State-owned insurance company but this would be unfair to the taxpayers of

the State of Oregon for the State-owned insurance company to only take the risk that the other companies did not want and if a State-owned company is set up it would, in order to remain profitable, have to compete in all lines of insurance. I really believe that the carriers writing insurance in Oregon would prefer the first solution.

I know that these suggestions are not going to sit well with many lawyers in the State. If my procedural suggestions should, by any chance, be adopted there probably wouldn't be any unemployed lawyers but there would certainly be some under-employed lawyers, but it is not the purpose of this committee to find full employment for lawyers. Should the Legislature want to do something for the lawyers they could always tinker with the Workers' Compensation law a little more and put them back to work. I am tempted to tell you of horror stories from statements that I have heard from defense lawyers as to why we cannot settle this case now because we have to run up the bill, but that probably should be left for another forum.

Very truly yours,

Wendell Gronso

WG:ds

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gal Assistant
Donna J. Stampke

September 30, 1986

Ms. Katherine Webber
Joint Interim Task Force on Liability Insurance
346 State Capitol
Salem, OR 97310

Re: Discovery

Dear Katherine:

I am looking over what Legislative Counsel did. I thought I had best write this letter to try to explain in a little more detail.

Rule 22 - We should keep Sec. A(1). Counter claims have always been part of our system.

We should also keep A(2).

I really see no problem in retaining Rule 22 B(1) Cross claims amongst defendants. This does not really muddy the water. Then on things, such as a Promissory Note, the accommodation signer could cross claim against the maker of the note.

I have had no particular problem with Rule 22 B(1), (2), and (3). It is Rule 22 C that causes the problems when you bring in everybody else under the sun. Rule 22 C should be repealed in its entirety.

Rule 22 D should be repealed.

Rule 38 E for separate trial should probably be kept striking out the words "or third party claims so alleged." Leave that as Legislative Counsel has amended it.

Rule 36 would be fine. Only inspection of land, physical and mental examinations and insurance policies.

Probably some thought should be given to keeping some of the things that I am suggesting should be deleted in Tort causes of actions for commercial litigation. I think that inspections of documents and requests for admissions do serve a useful purpose in commercial litagation, such as a mortgage foreclosure, a request for admissions that the note is genuine, etc. I would like to have someone who handles commercial

litigation look over my recommendations since my field of law is primarily Tort. I feel that these things I am suggesting to be removed serve no useful prupose in Tort litigation.

Summary Judgment Rule 47 as amended is OK, but should reinstate Counter Claims.

This is kind of a rambling letter, but I hope that it gives you a little more guidelines so that Legislative Counsel can dress up some of these matters.

Very truly yours,

Wendell Gronso

WG:jmc

JOINT INTERIM TASK FORCE
ON LIABILITY INSURANCE
346 State Capitol
Salem, OR 97310
(503) 378-8830

ACTION TAKEN THROUGH SEPTEMBER 16

TORT ISSUES

1. CAPS ON DAMAGES...

The Task Force voted to:
1. Limit noneconomic damages to $500,000.
2. Exclude cases of serious physical impairment and serious disfigurement.

2. ADDITUR AND REMITTITUR...

This measure would allow judges to increase or decrease jury verdicts. It would require a constitutional amendment. Vote was delayed until later.

3. JOINT/SEVERAL LIABILITY...

The Task Force has not completed voting on this topic. It has voted to recommend limiting joint liability to economic damages only; that is, it recommends no "Deep Pockets" for the noneconomic share of a judgment.

A second proposal to further limit "Deep Pockets" will be voted at the next hearing.

4. COLLATERAL SOURCE...

Current law does not require payments to the plaintiff from sources other than the defendant or the defendant's insurance company be deducted from a judgment.

The Task Force voted to recommend that all payments from collateral sources must be used to reduce the judgment except:
1. Life insurance.
2. Any payment that the plaintiff is obligated to repay, such as blue cross/blue shield payments, workers' compensation, other subrogation agreements.
3. Privately purchased insurance plans.
4. Retirement or pension plan benefits.

3. Privately purchased insurance plans.
4. Retirement or pension plan benefits.

5. PUNITIVE DAMAGES...

The Task Force voted to make punitive damages non-insurable as a matter of public policy.

The Task Force also voted not to allow evidence of a defendant's net worth to be introduced into evidence in a trial for punitive damages until a case for punitive damages is made. (Keeps plaintiff from obtaining a strategic advantage).

The Task Force also voted not to recommend punitive damage awards be paid to the state fund; and not to change the definition of punitive damages.

6. FELONY RULE...

The Task Force voted to prohibit a person injured while committing a class A or B felony from recovering from a defendant when the felony is related to the injury and the defendant is charged with ordinary negligence.

7. CAP ON PLAINTIFF ATTORNEY FEES...

The Task Force voted not to cap plaintiff's attorneys fees. This leaves the 1/3 cap on contingent fees in medical malpractice awards in effect.

The Task Force voted to require that all contingency fee agreements be in writing with full disclosure.

NOT COMPLETED: Recommendations to limit liability for directors of nonprofit boards; to limit liability for directors of profit making boards; and to allow the court to order periodic payments.

COURT PROCESSES

1. FRIVOLOUS SUITS...

The Task Force voted to adopt Federal Rule 11 which requires the court to assess attorneys' fees, court costs and other costs against the attorney (personally) and/or the client for filing frivolous lawsuits.

2. ARBITRATION...

The Task Force voted to require arbitration for all cases up to $25,000 in courts which have adopted arbitration programs.

3. PREJUDGMENT INTEREST...

The Task Force recommended requiring courts to order prejudgment interest when the defendant fails to meet a settlement demand from the plaintiff, and the defendant fails to best the

offer at trial. Interest would be assessed at the statutory amount and run from the date of filing the claim.

4. WRONGFUL USE OF CIVIL PROCEEDINGS...

The Task Force approved changes in the measure of damages making it easier for defendants who have been wrongfully sued to recover from plaintiffs filing those wrongful suits.

5. COURT RECORDS...

One of the major constraints facing the Task Force has been lack of data on the number and kinds of jury awards to determine whether jury awards have increased or not.

The Task Force has recommended changes in the recording and reporting of verdicts and other information for future use.

6. THE PRAYER...

The Task Force rejected a recommendation to discontinue use of the "prayer". The prayer is the part of the complaint that states the amount of money a plaintiff is seeking and is the source of news media information on the size of suits.

7. DISCOVERY AND SUMMARY JUDGMENTS...

The Task Force agreed to continue discussion at the next meeting on a suggestion to abolish several rules of discovery and the use of summary judgments in tort cases.

8. ATTORNEY SPECIALIZATION...

The Task Force voted not to require attorneys to be certified in specified areas to practice. The Task Force recommended instead that the Bar develop a process to certify lawyers as specialists. This certification would be required to advertise as specialists.

The Bar will report in April to the session committee on its progress on both specialization and on adopting continuing education requirements.

INSURANCE

ALTERNATIVE FORMS

1. STATE LIABILITY INSURANCE FUND...

This proposal has been discussed twice, and twice the Task Force has decided to delay voting until other measures have been voted on to evaluate the continuing need for a state fund.

2. MAPS AND JUA...

The Task Force voted to give the Insurance Commissioner authority to create a Market Assistance Plan (MAPS) and a Joint Underwriting Association (JUA). A MAPS is a super-marketing group made up of insurance companies that try to locate or provide insurance for those not able to find coverage themselves.

The JUA is an organization with mandatory participation of insurance companies which writes insurance found by the Commissioner to be unavailable and necessary in Oregon. All companies writing in a designated area would assume a percentage of any loss sustained by the JUA.

3. ARCHITECTS FUND...

The Task Force approved a recommendation to allow the Board of Architects to create their own insurance fund modeled on the lawyers professional liability fund.

4. GROUP LIABILITY INSURANCE/BUSINESS RISK RETENTION...

The Task Force approved several measures that would allow businesses to purchase group liability coverage, to form risk retention groups and to obtain a state income tax deduction for premiums and assessments made by such a pool.

NOT DECIDED: Allowing banks into insurance/reinsurance market.

INSURANCE REPORTING REQUIREMENTS

1. REPORTS OF OREGON DATA...

The Task Force approved a draft to require all insurance companies to report Oregon profit and loss data.

2. PRODUCT LIABILITY/MEDICAL MALPRACTICE CASES...

It also recommended changes in the product liability and medical malpractice claims reporting law and approved a $5,000 fine for failure to report.

RATES AND COVERAGE

1. PRIOR APPROVAL OF RATES...

The Task Force recommends requiring prior approval of all rates that either increase or decrease by more than 20% percent.

2. BURDEN OF PROOF ON RATES...

Under the current file and use system, the Insurance Division must prove that a filed rate is too high, too low or discriminatory in order to stop its use. The Task Force recommends that the Commissioner be given authority to immediately

stop a "bad" rate. This change would also require that the insurance company prove that the rate is a "good" rate. In effect, it shifts the burden of proving whether the rate should be used or not from the Division to the insurance company.

3. CANCELLATION AND NONRENEWAL OF POLICIES...

The Task Force recommends insurance companies be required to give notice and specify reasons for cancellation and nonrenewal both of individual policies and whole lines of insurance. Reasons for cancellation and nonrenewal are specified. Sanctions are specified for non compliance.

4. OREGON EXPERIENCE IN RATE SETTING...

The Task Force approved in concept, a draft requiring rates be set using Oregon data unless such data is not sufficient to establish a rate.

5. AGENTS FEES...

The Task Force recommended allowing agents to charge a fee for service in lieu of commission for accounts with over $100,000 in premiums.

6. DEFENSE COST/POLICY LIMITS...

The Task Force voted to prohibit policies which deduct costs for defending a case from the stated policy limits.

INSURANCE DIVISION

1. DEPARTMENT OF INSURANCE ...

The Task Force approved the creation of a Department of Insurance to replace the Insurance Division.

2. STAFFING...

A recommendation to request Ways and Means give priority funding to Insurance Division staffing and support services was approved in concept with some additional information requested.

3. ADVISORY BOARD...

The Task Force recommended creating an advisory board on liability insurance with 5 members appointed by the Governor and confirmed by the senate.

REGULATION

1. UNFAIR TRADE PRACTICES EXEMPTION; UNFAIR CLAIMS SETTLEMENT...

The Task Force voted not to approve a recommendation that would have removed the insurance industry's exemption to the Unfair Trade Practices Act. It also rejected a recommendation to make Unfair Claims Settlements Practices an Unfair Trade Practice.

2. CAPACITY TEST...

The Task Force approved a "resolution" requesting Commissioner Driscoll to request that the National Association of Insurance Commissioners seek a change in the Capacity Test ratio.

3. PRICING CYCLE, CAPACITY AND SOLVENCY...

Recommendations for a session or interim committee to study has not yet been voted on.

LIQUOR LIABILITY

1. POLICE REPORTS/ NOTICE OF CLAIMS...

The Task Force recommends that police investigating alcohol related accidents notify servers (bars) if it is alleged the driver had been drinking at their establishment.

2. INTOXICATION...

The Task Force recommends that the servers' liability be limited to service of those visibly intoxicated from alcohol (not drugs).

3. INSURANCE...

The Task Force recommended requiring all claims against liquor liability insurance be reported to the OLCC.

NOT COMPLETED: several other measures in this area have not yet been voted on.

###

FOR MORE INFORMATION CALL:

CATHERINE WEBBER 378-8830

Rough Draft
LC 975
9/16/86 (dp)

MEASURE SUMMARY

A BILL FOR AN ACT

Relating to procedure in civil court proceedings; amending ORCP 22, 36, 46 and 47; and repealing ORCP 43 and 45.

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

SECTION 1. ORCP 22 is amended to read:

RULE 22

COUNTERCLAIMS[, CROSS-CLAIMS, AND THIRD PARTY CLAIMS]

[A. Counterclaims.]

[A.(1)] Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

[A.(2)] A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

[B. Cross-claim against codefendant.]

[B.(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.]

[B.(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.]

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

[C. Third party practice.]

[C.(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a

party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.]

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

[D. Joinder of 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.(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.(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.]

[E. Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.]

SECTION 2. ORCP 36 is amended to read:

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

A. Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; [production of documents or things or] permission to enter upon land or other property, for inspection and other

purposes; and physical and mental examinations[; and requests for admission].

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

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

B.[(2)] Insurance agreements or policies.

B.[(2)(a)] (1) 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] 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 subsection as provided in section C. of this rule.]

B.[(2)(c)] (3) 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)] (4) As used in this [subsection] 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, 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.]

[C. Court order limiting extent of disclosure. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.]

[If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.]

SECTION 3. ORCP 46 is amended to read:

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

A.(2) Motion. If a party fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.[(2)], [or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested,] the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

[If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.]

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

A.(4) Award of expenses of motion. If the motion is granted, the court [may] shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court [may] shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court [may] shall apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the deposition is being taken, the failure may be considered a contempt of court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which

the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

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

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

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

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.]

[D] C. Failure of party to attend at own deposition [or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy]. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails [(1)] to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, [or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request,] the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.]

SECTION 4. ORCP 47 is amended to read:

RULE 47

SUMMARY JUDGMENT

A. For claimant. A party seeking to recover upon a claim[,] or counterclaim[, or cross-claim] or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim[,] or counterclaim[, or cross-claim] is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be

rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; defense required. Except as provided by section E. of this rule, 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 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.

E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit

shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

H. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

I. No judgment on tort. A summary judgment may not be rendered in respect to any claim or counterclaim or any declaratory judgment sought that concerns any breach of a legal duty resulting in damages, other than those duties created by contract.

SECTION 5. ORCP 43 and 45 are repealed.

PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

FOR CONSIDERATION AT

NOVEMBER 8, 1986 MEETING

PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

SERVICE AND FILING
OF PLEADINGS AND
OTHER PAPERS
RULE 9

* * *

C. Filing; proof of service. Except as provided by section D. of this rule, [All] 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. When filing not required. Notices of deposition, requests made pursuant to Rules 43 and 45, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial.

[D]E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse

upon such pleading or paper the time of day, the day of the month, 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 are legible.

COMMENT TO RULE 9

If adopted, the proposed amendment to Rule 9 would halt the filing of notices of deposition, requests for production, and requests for admission. If some court action became necessary, for instance, a motion to compel discovery or a motion for protective order, the document could be used as an exhibit or as evidence on the motion.

The purpose of this amendment is to avoid cluttering the court file with papers for which the court really has no need. The proposed amendment is modeled on Rule 120-4 of the local rules of the United States District Court for the District of Oregon.

The Council previously adopted amendments to Rule 43 (Requests for Production). If the amendment to Rule 9 is adopted, the previously-approved changes to Rule 43 become unnecessary.

Amending Rule 9 in this fashion avoids the necessity of amending Rules 39, 43, and 45 and further allows the retention of the service requirement under each of those rules while doing away with the filing requirement.

FORM OF PLEADINGS
RULE 16

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

B. **Concise and direct statement; paragrpahs; separate statement of claims or defenses.** Every pleading shall consist of plain and concise statements in paragraphs consecutively numbered throughout the pleading with Arabic numerals, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each separate claim or defense shall be separately stated. **Within each claim alternative theories of recovery shall be identified as separate counts.**

C. **Consistency in pleading alternative statements.** Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact

is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both. All statement shall be made subject to the obligation set forth in Rule 17.

D. **Adoption by reference.** Statements in a pleading may be adopted by reference in a different part of the same pleading.

DEPOSITIONS UPON
ORAL EXAMINATION
RULE 39

(NEW SECTION)

I. Perpetuation of testimony after commencement of action.

I.(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I.(2) The notice is subject to subsections C.(1)-(7) of this rule and shall additionally state:

I.(2)(a) a brief description of the subject areas of testimony of the witness; and

I.(2)(b) the manner of recording the deposition.

I.(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that the witness may be unavailable as defined in ORS 40.465(1) for the trial or hearing, or that other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken

shall be admissible at any subsequent trial or hearing in the case, subject to the Oregon Rules of Evidence.

I.(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than fourteen days' notice, unless good cause is shown.

I.(5) To the extent that a discovery deposition is allowed by law, any party other than the one giving notice may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I.(6) The perpetuation examination shall proceed as set forth in subsection D. herein. All objections to any testimony or evience taken at the deposition shall be made at the time and noted upon the transcription or recording. The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived.

COMMENT TO RULE 39

The proposal to amend Rule 39 involves the addition of a new section I. to govern the procedure to be used upon taking perpetuation depositions after filing of an action. The proposal, as originally submitted to the Council by the Bar's Practice and Procedure Committee, would have allowed the taking and use of a perpetuation deposition when a showing was made that a witness was unavailable for trial "in a practical sense." At its September 13, 1986 meeting, the Council adopted the proposal in its present form which, for the definition of "unavailability", refers back to the Oregon Evidence Code.

It was the stated intention of the Council that it was not speaking to the admissibility of a perpetuation deposition, nor was it in any way attempting to effect a change in the rules of evidence. The Council's action merely reflects the Council's desire to establish a procedure for the taking of perpetuation depositions. The question of admissibility, as well as "unavailability" at the time of trial, would be left to the court as governed by the Oregon Evidence Code.

PRODUCTION OF
DOCUMENTS AND THINGS
AND ENTRY UPON LAND
FOR INSPECTION AND
OTHER PURPOSES
RULE 43

A. Scope. Any party may [serve on any other party a request] request that any other party: (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] made; 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] made for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. Procedure. The request may be [served upon] made of the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by

individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been [served] **made** shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. **Writing called for need not be offered.** Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

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

COMMENT TO RULE 43

The Council adopted the changes to Rule 43 which are present in the attached proposal. Should the Council choose to adopt the amendments to Rule 9 which have been previously discussed, the changes to Rule 43 would no longer be necessary. By using the word "make" rather than "serve" when describing the request for production, the change to Rule 43 did away with the filing requirement. Since that requirement would no longer be present under the amended Rule 9, the original language of Rule 43 should probably be retained to keep the service requirement intact.

FAILURE TO MAKE DISCOVERY; SANCTIONS RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

A.(2) Motion. If a party fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. when taking a deposition on oral examination, the proponent of the question may complete or

adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

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

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or

that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the deposition is being taken, the failure may be considered a contempt of court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with

the claim of the party obtaining the order;

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

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

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

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney

advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or c., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. **Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is

to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, [after proper service of the request], the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act r the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT TO RULE 46

The only change in Rule 46 is to strike language which was unnecessary in section D. The thought was that sanctions certainly would not be applied unless proper service of a request had been made and thus the language referring to proper service of the request should be stricken.

If the Council is to follow this reasoning consistently, the Council should also strike the language "after being served with the proper notice" earlier in that same sentence.

SUMMARY JUDGMENT
RULE 47

A. **For claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim, **other than a claim, counterclaim or cross-claim for damages for injury based upon tort,** or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. **For defending party.** A party against whom a claim, counterclaim, or cross-claim, **other than a claim, counterclaim or cross-claim for damages for injury based upon tort,** is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

* * * *

COMMENT TO RULE 47

The proposal to amend Rule 47 is that submitted by Mr. Conboy, with the exception that it no longer contains his original language regarding costs in a motion for summary judgment. It was suggested at the September 13, 1986 meeting that if summary judgment is no longer available in tort, then the cost provision would probably become unnecessary. Mr. Conboy agreed with that suggestion, and thus the proposal to amend Rule 47 is submitted in its present form.

In addition to Mr. Conboy's suggestion on Rule 47, the Council members should refer to the materials from the Joint Interim Task Force on Liability Insurance, including the rough draft dated 9/16/86 of a Bill for an Act to Amend various portions of the ORCP, including Rule 47. The Task Force proposal would seem to be somewhat broader than Mr. Conboy's proposal.

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 **and after giving notice to all parties who have appeared of the time and place of inspection**, 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.

COMMENT TO RULE 55

The proposed amendment to Rule 55 H.(2)(c) would require that prior to inspecting hospital records delivered to the court pursuant to subpoena, a party would have to give notice to all other parties who have appeared in the action of the time and place of inspection. Some concern has been expressed that hospital records could be subpoenaed and inspected with no one else in the action knowing about it and thus having no opportunity to seek any kind of protective order or to challenge the inspection. With notice provided under 55 H., the problem would seem to be taken care of.

DEFAULT ORDERS AND JUDGMENTS
ORCP 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] **order** the default of that party.

B. **Entry of default judgment.**

B.(1) By the court or the clerk. The **court or 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).

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, 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. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the applicatin for judgment at least ten days, unless shortened by the court, prior to the hearing on such application.

B.(3) Amount of judgment. 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.[3](4) 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 order 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 to 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.

COMMENT TO RULE 69

The proposal being submitted to amend ORC9 69 is that which was submitted as Proposal No. 5 with amendments at the September 13, 1986 Council meeting. It is being resubmitted in the form adopted at that meeting.

ORDER OR JUDGMENT
FOR SPECIFIC ACTS
RULE 78

A. Judgment requiring performance considered equivalent thereto. A 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 with the judgment, be deemed to be equivalent thereto.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt as provided in ORS 33.010 through 33.150.

C. Application. Section B. of this rule does not apply to [a] an order or judgment for the payment of money, except orders and judgments for the payment of [suit money, alimony,] **sums ordered pursuant to ORS 107.095 and ORS 107.105(1)(h),** and money for support, maintenance, nurture, education, or attorney fees, in:

C.(1) Actions for dissolution or annulment of marriage or separation from bed and board.

C.(2) Proceedings upon support orders entered under ORS chapter 108, 109, 110 or 419 and ORS 416.400 to 416.470.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010 through 33.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

D.(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

C.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

D.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

COMMENT TO RULE 78

The amendment to Rule 78 was made pursuant to a suggestion by Chief Judge Joseph. He suggested that "suit money" and "alimony" have no meaning in Oregon law. The sums ordered under ORS 107.095 and 107.105(1)(h) would seem to cover what is understood as suit money or alimony, and the proposed amendment would clarify the rule.