A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, December 13, 1986
MALLORY HOTEL
729 Southwest Fifteenth
Portland, Oregon

1. Approval of minutes of meeting held November 8, 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 44 PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS
   Rule 46 FAILURE TO MAKE DISCOVERY; SANCTIONS
   Rule 55 SUBPOENA
   Rule 69 DEFAULT
   Rule 78 ORDER OR JUDGMENT FOR SPECIFIC ACTS

5. Additional requests or proposals (possible amendments to Rules 21, 47, 22, 36, 43, 45, 46, 70)

cc: Members, Council on Court Procedures
Public

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 13, 1986

MALLORY MOTOR HOTEL

729 Southwest Fifteenth

Portland, Oregon

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

(Also present were Douglas A. Haldane, Executive Director, and Gilma J. Henthorne, Management Assistant)

The meeting was called to order at 9:30 a.m.

On motion of Mr. Schroeder, seconded by Judge Jackson, the minutes of the November 8, 1986 meeting were approved as submitted.

As the first order of business, a committee was appointed to approve the final report of the Council to the 1986 Legislative Session prior to its submission. The committee is comprised of Judge Barron, Mr. Foote, Mr. Pratt, and Mr. Starr.

RULE 9. Mr. Schroeder moved, with Mr. Woods' second, to adopt the proposed amendments to Rule 9 which would delete requirements that notices of deposition and requests for production be filed with the court. The motion was adopted by voice vote.

RULE 16. Mr. Schroeder moved, with Judge Jackson's second, to adopt the proposed amendments to Rule 16 which would state explicitly that alternative theories of recovery shall be

identified as counts. The motion was adopted by voice vote.

RULE 39. Mr. Haldane reported that the Bar's Committee on Practice and Procedure had requested that the Council withdraw its prior approval of amendments to Rule 39 which would have established procedures for perpetuation depositions after filing. He reported that the Committee would independently seek amendments by the legislature to the Evidence Code and would submit proposed amendments to Rule 39 in conjunction therewith.

Mr. Starr moved, with Mr. Schroeder's second, that the previously approved amendments to Rule 39 receive final Council approval. Mr. Starr explained that providing a procedure for perpetuation depositions was desirable even in the absence of changes to the Evidence Code and that the Council's amendments were better designed to achieve that purpose than the proposal of the Bar Committee. The motion was adopted by voice vote.

RULE 44. Judge Buttler moved, with Mr. Starr's second, to adopt an amendment to Rule 44 to state explicitly that existing notations are discoverable under Rule 44 C. The intent of the amendment is to make it clear that office and chart notes will be available. The proposal was adopted by voice vote.

RULE 55. Mr. Schroeder moved, with Mr. Woods' second, the adoption of the proposed amendments to Rule 55 which would require notice prior to the inspection of hospital records which had been subpoenaed. Judge Buttler moved, with Mr. Noble's second, to amend the motion by requiring "reasonable notice in writing". The motion to amend was adopted by voice vote. The motion to adopt the amended proposal was also adopted by voice vote. A copy of Rule 55 as amended is attached.

RULE 78. Mr. Schroeder moved, with Judge Jackson's second, the adoption of amendments to Rule 78 which would strike the words "suit money" and "alimony" and substitute references to appropriate statutory sections in Rule 78 C. The motion was adopted by voice vote.

RULE 69. Mr. Haldane summarized prior Council consideration of changes to Rule 69. The problem had been presented when it became apparent that notice to an opposing party or an opposing party's attorney is not required to take an order of default, but only in taking a judgment of default. The opinion was expressed that the rule should require notice prior to taking an order. The opposing views were that the current requirement of notice prior to taking judgment provides disparate treatment of represented and non-represented parties and that sufficient notice to all is contained in the summons. Additionally, no notice should be required except where application for judgment is made and an evidentiary hearing is required. Judge Jackson moved with Mr. Schroeder's second that the proposal to amend

Rule 69 as submitted be adopted, which would not require notice to take an order of default and would only require notice before making application for judgment in the event that an evidentiary hearing was required. The motion was adopted by a vote of 10 in favor and 6 opposed. Those voting in favor were: Mr. Schroeder, Mr. Woods, Mr. Harter, Mr. Starr, Mr. Noble, Judge Tyner, Judge Riggs, Mr. Foote, Judge Tompkins, and Judge Jackson. Those opposed were: Mr. Conboy, Judge Barron, Ms. Rodman, Mr. Pratt, Judge Jones, and Judge Buttler.

The Council then turned its attention to proposed rule changes which would meet concerns which have been expressed by the Legislative Task Force on Liability Insurance. A report of the Task Force, as well as a Bill for an Act to amend certain portions of the Oregon Rules of Civil Procedure, was distributed. That Bill for an Act would eliminate summary judgment in all cases not arising under contract, would eliminate requests for production and admission in cases not arising under contract, and would eliminate third party practice entirely. The Task Force also recommended the adoption of language similar to FRCP 11.

Submitted for Council consideration were proposals differing substantially from Task Force recommendations but which were designed to effect what was considered to be the Task Force's purposes. Copies of those proposals amending Rules 17, 21, 22, 43, 46 and 47 are attached to these minutes. Mr. Haldane explained that the changes to Rules 21 and 47 would allow the question of the existence of a duty running from a defendant to a plaintiff in a tort action and the existence of a valid statute of limitations defense to be raised by a motion under Rule 21 A. and considered on the basis of matters outside the pleadings. Motions for summary judgment would be discouraged by the mandatory imposition of costs on any party filing such a motion when that motion was denied.

The proposal regarding Rule 22 would exempt from third party practice any case involving contribution among joint tortfeasors. The effect of the change would be to eliminate third party practice in contribution cases but to retain it in cases for indemnity.

The proposed changes to Rules 43 and 46 would allow the retention of requests for production and requests for admission but would place the burden of establishing a party's right to discovery under those provisions on the party requesting discovery.

The proposal to amend Rule 17 would impose sanctions on an attorney or a party, or both, for signing a pleading or motion which was interposed for harassment, delay, or an increase in the cost of litigation.

Mr. Schroeder suggested that substitution of FRCP 11 for ORCP 17 would address all concerns regarding summary judgment and discovery by imposing sanctions against an attorney or a party who signed any pleading, motion, or other paper, the purpose of which was harassment, delay, or a needless increase in cost of litigation.

The Council recessed briefly while copies of FRCP 11 were reproduced and distributed.

Upon reconvening, Mr. Bailey suggested the Council deal with an issue which appeared relatively simple to resolve involving Rule 1. It has been suggested by many that the use of periods following the capital letter designation of sections throughout the ORCP was cumbersome, particularly in citing the rules. The staff had previously explored the possibility of deleting periods and had determined that the cost of making such a change was prohibitive. Since the problem arises not in the text of the rules or statutes but in the citation form, it was suggested that the problem could be resolved simply by changing the rule on citation form by deleting the periods. Judge Riggs moved, with Mr. Schroeder's second, that Rule 1 be amended to delete the period following "section D." in the phrase "ORCP 7 D.(3)(a)(i)." The motion was adopted by voice vote.

RULE 17. Judge Barron moved, with Mr. Schroeder's second, that FRCP 11 be substituted for current ORCP 17, with the deletion of the fourth sentence of FRCP 11. Mr. Schroeder stated that it was his purpose to meet all of the concerns of the Legislative Task Force regarding the ORCP with the adoption of a new Rule 17 except for concerns regarding third party practice. The motion was adopted with 11 in favor and 4 opposed. Judge Jackson, Mr. Foote, Judge Butler, and Mr. Conboy were opposed.

RULE 46. Mr. Conboy moved, with Mr. Schroeder's second, that no changes be made in the current Rule 46. The motion was adopted by voice vote.

RULE 47. Mr. Schroeder then moved, with Mr. Pratt's second, that no changes be made in Rule 47. That motion was approved with a vote of 10 in favor and 5 opposed. Voting in opposition were: Judge Riggs, Mr. Foote, Mr. Conboy, Judge Buttler, and Mr. Noble.

RULE 43. Mr. Pratt moved, with Judge Riggs' second, that the proposed amendments to Rule 43 be rejected. The motion was adopted by voice vote.

RULE 22. Schroeder moved, with Mr. Woods' second, to adopt the proposed change to Rule 22, which would exempt cases of contribution from the third party practice rule. Mr. Pratt

raised the question as to the effect of this proposal. The matter was tabled briefly in an attempt to ascertain whether it would be possible to circumvent the intent of the proposal by filing a separate lawsuit for contribution and them moving to consolidate the two cases for trial.

While attempting to ascertain the effect of the proposal, the Council turned its consideration to a proposal to amend Rule 70.

RULE 70. Judge Barron explained that the proposal to amend Rule 70 was submitted at the request of the State Court Administrator's Office. He reported that court clerks had experienced difficulties in ascertaining certain factors regarding judgments and that the proposed rule change would require that specific information be required in each form of judgment submitted. Judge Buttler expressed the concern that if these specific matters became a requirement, the appellate courts would be compelled to consider that no final judgment had been entered if it did not strictly comply with the rule. It was suggested that the concerns of the court clerks were administrative in nature and could be more appropriately addressed by the Chief Justice promulgating a Uniform Trial Court Rule to deal with the problem. Judge Barron moved, with Ms. Rodman's second, that the proposal to amend Rule 70 be adopted. The motion failed, with a vote of 5 in favor and 7 opposed.

RULE 22. The Council was unable to ascertain whether it would be possible to circumvent the intent of the proposed amendments to Rule 22 through a separate action and a motion to consolidate. Mr. Pratt expressed his opinion that it would not be possible to circumvent the rule and, with that understanding, Mr. Schroeder's previous motion to adopt the proposed change to Rule 22 was defeated with 3 in favor and 9 opposed.

Having addressed concerns of the Legislative Task Force, Mr. Haldane requested that he be granted some latitude both in explaining Council action and in working with legislative committees if it became apparent that legislative judgment differed from that of the Council. Mr. Haldane was directed to cooperate as fully as possible with legislative committees in addressing their concerns while presenting and explaining Council actions.

Mr. Haldane stated that the Council is required by statute to have a treasurer. The elected treasurer was Mr. Kyle, who had submitted his resignation. Ms. Rodman was elected by acclamation to serve as treasurer.

Having completed the agenda, Mr. Bailey inquired if there was any further action to be taken. Judge Barron suggested that

Rule 9 A. currently provides no time within which papers must be served prior to submission or filing. His concern was that local court rules provide different times for service of an order prior to submission to the court. He suggested that provisions similar to those contained in Rule 70 C. might be incorporated in Rule 9 A. Judge Riggs moved with Judge Buttler's second to make no changes in Rule 9 A. at this time. The motion was adopted by voice vote.

RULE 17. Mr. Starr suggested that the adoption of a new Rule 17, which the Council had just effected, raised some questions and suggested that the new Rule 17 be amended to state explicitly that the attorney signing the pleading, motion or other paper must be an active member of the Oregon State Bar. His concern was that the language in the current Rule 17 to that effect had been placed in the rule to forestall the ability of non-lawyers to engage in the practice of law. Mr. Starr moved, with Judge Barron's second, that the new Rule 17 as adopted previously be amended to include that requirement. The motion passed by voice vote. A copy of new Rule 17 after final consideration is attached to these minutes.

Mr. Haldane stated that in prior biennia Council meetings during legislative sessions had not been necessary but that, given concerns over discovery, summary judgment, and third party practice, such a meeting might be required during the 1987 Legislative Session. Mr. Bailey set the next meeting of the Council for Saturday, February 21, 1987. The tentative meeting place will be the offices of the Oregon State BAr.

The meeting was adjourned at 12:55 p.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

[SIGNATURE OF PLEADINGS]
SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS
RULE 17

[A. **Signature by party or attorney; certificate.** Every pleading shall be signed by each party or by that party's attorney who is an active member of the Oregon State Bar. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.]

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

A. Signing by party or attorney; certificate. **Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state that party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature constitutes a certification that the person signing has read the**

pleading, motion, or other paper; that to the best of that person's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

B. Pleadings, motion, and other papers not signed. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

C. Sanctions. If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

SIGNATURE OF PLEADINGS
RULE 17

A. Signature by party or attorney; certificate. Every pleading ~~shall~~ or motion be signed by each party or by that party's attorney who is an active member of the Oregon State Bar. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment ~~or~~ delay, or a needless increase in the cost of litigation.

B. Pleadings not signed. Any pleading not duly signed may, on motion of the adverse party, be stricken out of the case. [CCP 12/2/78; amended by 1979 c.284 §14; §A amended by CCP 12/8/84]

C. If a pleading or motion is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an award to the other party of reasonable expenses incurred because of the filing of the pleading or motion, including a reasonable attorney's fee.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that ~~the pleading shows that~~ the action has not been

Rule 21

commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a repsonsive pleading or motion. If, on a motion to dismiss asserting the above defenses ~~(1) through (9)~~, the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

B. Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C. Preliminary hearings. The defenses specifically denominated (1) through (9) in section A. of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B. of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

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

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules,

Rule 21

upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F. of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

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

Rule 21

G.(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action. [CCP 12/2/78; §§F,G amended by 1979 c.284 §§15, 16; §F amended by CCP 12/13/80; §A amended by CCP 12/4/82; §E amended by 1983 c.763 §58; §E amended by CCP 12/8/84]

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS RULE 22

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.

Rule 22

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.

→ Except for a claim for contribution among joint tortfeasors, and

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"

Rule 22

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. [CCP 12/2/78; §D amended by 1979 c.284 §17; §A amended by CCP 12/13/80; §C amended by CCP 12/4/82]

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

B. Procedure. The request may be served upon 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 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.

or give notice of an intention not to comply

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. [CCP 12/2/78; §A amended by 1979 c.284 §26]

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

Rule 46

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 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

Rule 46

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

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(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 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. [CCP 12/2/78, §§A(2), b~~ amended by CCP 12/13/80] *

SUMMARY JUDGMENT
RULE 47

A. For claimant. A party seeking to recover upon a claim, 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, 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

Rule 47

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,

Rule 47

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. [CCP 12/2/78; §D amended by 1979 c.284 §31; §G amended by 1981 c.898 §6; amended by CCP 12/4/82; §C amended by CCP 12/8/84]

NEW SECTION I.

I. Costs of motion. If a motion for summary judgment is denied, or the granting of such a motion is reversed upon appeal, the party resisting the motion shall be entitled to recover from the party asserting the motion all costs incurred as a result of resisting the motion, including reasonable attorney fees.

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 reasonable in writing 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.

MEMORANDUM

December 8, 1986

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane, Executive Director

RE: ADDITIONAL PROPOSALS FOR CONSIDERATION AT DECEMBER 13, 1986 MEETING

I am including with this memorandum some additional proposed rule changes to address the problems that have been brought to my attention.

At the last Council meeting, I was asked to attend the final meeting of the Legislative Task Force on Liability Insurance to determine what that organization would be recommending regarding any changes to the Oregon Rules of Civil Procedure. That group has voted to recommend substantial changes in the field of civil procedure and primarily in the areas of summary judgment, third party practice, and discovery.

The Task Force will recommend that ORCP 47 be amended to eliminate summary judgment in any case not arising under contract. This, of course, is a broader proposal than that which the Council had under consideration which would have eliminated summary judgment in cases involving tort. The Task Force proposal would restrict summary judgment to contract cases only.

The discussion within the Council seemed to recognize the abuses in the use of summary judgment in tort cases. The opinions were expressed that summary judgment should be retained as a valuable procedure even if that required suffering certain abuses; that summary judgment should be eliminated in tort cases completely, even if that meant foregoing the procedure in particular situations in tort cases where it may well be appropriate; and attempting to deal directly with the abuses rather than doing away with the procedure itself.

I am enclosing with this memorandum two rules changes which would attempt to deal with the abuses in the use of summary judgment but would retain the procedure.

The first is an amendment to ORCP 21 A. That rule sets out nine separate defenses which may be raised by motion. The first seven of those defenses may be raised in a Rule 21 motion and supported by evidentiary materials outside the pleadings. Defenses (8) and (9), failure to state ultimate facts sufficient to constitute a claim and that the pleading shows that the action has not been commenced within the time limited by statute,

are considered strictly by looking to the face of the pleadings themselves. The proposed amendment to Rule 21 A. would strike the language "the pleading shows that" in defense (9) and would further amend to allow going beyond the pleadings when a motion to dismiss is filed on either one of these grounds. A copy of Rule 21 as it would exist after amendment is attached.

It has been stated that two areas where a motion for summary judgment would be appropriate in tort cases are those areas where (1) there was a valid statute of limitations defense or (2) there is no duty running from the defendant to the plaintiff. By allowing a court to beyond the pleadings on a Rule 21 motion in these two areas, it would be possible to have an early consideration of these defenses without going through a summary judgment procedure.

The second proposal is an amendment to Rule 47 itself. The procedure under Rule 47 would remain the same and would still be available in all cases, including those sounding in tort. The abuse is addressed by providing an award of costs, including attorney fees, against the party bringing a motion for summary judgment that is denied. This award would not contain any language regarding a frivolous motion for summary judgment and would be mandatory in any instance in which a motion for summary judgment was filed and denied. It is designed to build in an element of substantial risk in bringing such a motion.

The attached proposal for an amendment to Rule 22 is also designed to meet a recommendation of the Legislative Task Force. That Task Force would eliminate Rule 22 C. in its entirety, thus doing away with the third party practice. Again, the complaint regarding third party practice seems to be in tort cases where the belief is both that it is burdensome to a plaintiff and increases defense costs. The proposal would amend Rule 22 C. by adding the language, "Except for a claim for contribution among joint tortfeasors, and", as a lead-in to the beginning of that paragraph. The intention is to eliminate third party practice in cases involving joint tortfeasors but retaining it in cases of indemnity. Indemnity cases often arise out of contractual or quasi-contractual actions.

It is still not clear what the Legislative Task Force has done regarding discovery. The initial proposals would have done away with requests for production and requests for admission completely. I am now informed that those proposals have been restricted to any case not arising under contract. Again, the intent seems to be to eliminate these discovery devices in tort cases. I hope to have the final draft of the Task Force recommendations available for distribution to the Council at the December 13, 1986 meeting. Once I have those proposals before me, I will prepare alternative proposals that attempt to address what are viewed as abuses in discovery procedures but will try

to avoid throwing out whatever efficiency these discovery rules do provide.

Judge Jones has relayed to me a request from Judge Linde that the period marks after the capital letters and before the parenthetical numbers in the rules should be removed. This proposal was brought before the Council during the beginning of this biennium but was tabled when it was determined that the cost of completely reproducing the ORCP to eliminate all the periods was prohibitive. It was a good suggestion, and the Council may wish to consider it; however, it remains to be seen how extensive revisions to the ORCP will be this biennium and whether the cost is justified.

I received a communication from Jane Edwards, Corporation Commissioner, suggesting that the Council eliminate constructive service on the Corporation Commissioner. She points out that the staff comment to ORCP 7 states: "The service is a useless act which is burdensome and expensive for the officials and litigants." She has prepared a draft article for the Oregon State Bar Bulletin which addresses this question and, although she recommends elimination of the service requirement, there may be some obstacles in ORCP 4 and ORCP 7 to that elimination. I will have a summary of her article and a proposed rule change available at the December 13, 1986 meeting.

You will recall that at the November 8, 1986 meeting Jan Stewart discussed proposed changes to ORCP 39 as proposed by the Bar's Practice and Procedure Committee. Ms. Stewart informs me that she has taken the Council's comments back to the Committee and that the Committee is withdrawing its request that the Council adopt changes to ORCP 39. Apparently, they will be seeking legislative approval of a change to the evidence code and appropriate revisions to ORCP 39 as a single package before the legislature. They did not see much sense in the Council adopting a procedure for something the legislature may well turn down.

That Committee continues to urge adoption of a rule change to ORCP 69 which would require the giving of notice to opposing counsel prior to applying for an order of default.

The agenda for the December 13, 1986 meeting if fairly full and is getting more full as each day goes by. I anticipate that the meeting will last beyond the noon hour. We have made provisions for preparation and duplication of proposed rule changes at the meeting in order that amended drafts can be produced on the spot for Council consideration and action.

DAH:gh
Enclosures
cc: Public (w/encs.)

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that ~~the pleading shows that~~ the action has not been

Rule 21

commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a repsonsive pleading or motion. If, on a motion to dismiss asserting the above defenses ~~(1) through (9)~~, the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

B. Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C. Preliminary hearings. The defenses specifically denominated (1) through (9) in section A. of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B. of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

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

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules,

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upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F. of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

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

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G.(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action. [CCP 12/2/78; §§F,G amended by 1979 c.284 §§15, 16; §F amended by CCP 12/13/80; §A amended by CCP 12/4/82; §E amended by 1983 c.763 §58; §E amended by CCP 12/8/84]

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS RULE 22

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.

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C. Third party practice. → Except for a claim for contribution among joint tortfeasors, and

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"

Rule 22

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. [CCP 12/2/78; §D amended by 1979 c.284 §17; §A amended by CCP 12/13/80; §C amended by CCP 12/4/82]

SUMMARY JUDGMENT
RULE 47

A. For claimant. A party seeking to recover upon a claim, 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, 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

Rule 47

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,

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Rule 47

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. [CCP 12/2/78; §D amended by 1979 c.284 §31; §G amended by 1981 c.898 §6; amended by CCP 12/4/82; §C amended by CCP 12/8/84]

NEW SECTION I.

I. Costs of motion. If a motion for summary judmgnet is denied, or the granting of such a motion is reversed upon appeal, the party resisting the motion shall be entitled to recover from the party asserting the motion all costs incurred as a result of resisting the motion, including reasonable attorney fees.

MEMORANDUM

January 2, 1987

TO: Members, COUNCIL ON COURT PROCEDURES

FROM: Douglas A. Haldane, Executive Director

Enclosed is the draft report of the Council to the 1987 Legislative Assembly. The final report will carry a transmittal letter from the Council Chairman to Mr. Kitzhaber and Ms. Katz. The report will be submitted to the legislature by January 13, 1987.

I would appreciate it if you would bring any mistakes or inaccuracies in the report to my attention as soon as possible.

The Council is currently scheduled to meet at 9:30 a.m., February 21, 1987, at the offices of the Oregon State Bar. I will advise you of any change.

DAH:gh
Enc.

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January 2, 1987

The Honorable John Kitzhaber
President of the Senate
State Capitol
Salem, OR 97310

The Honorable Vera Katz
Speaker of the House
State Capitol
Salem, OR 97310

Dear Mr. Kitzhaber and Ms. Katz:

Enclosed with this letter are amendments to the Oregon Rules of Civil Procedure which were promulgated by the Council on Court Procedures on December 13, 1986. This action was taken pursuant to ORS 1.735, and this material is submitted to the Legislative Assembly through your good offices pursuant to that statute.

ORS 1.735 provides that these amendments will go into effect on January 1, 1988, unless the Legislative Assembly, by statute, takes action to amend, repeal, or modify.

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After considering the recommendations of the Task Force the Council concluded that requests for production under ORCP 43 and requests for admissions under ORCP 45 are valuable procedures that, when properly used, serve to limit and control costs, rather than to increase them. Instances of increased costs stemming from these procedural devices can be attributed to their abuse, but not to their mere availability.

The Council also concluded that the ORCP 47 motion for summary judgment remains a valuable procedural device, even in tort cases. Most tort cases involve genuine issues of disputed fact and motions for summary judgment are, therefore, not often appropriate, and when they are inappropriate, they are routinely denied. Concern has been expressed that the filing of such motions, well-founded or not, increases costs. This is apparently of concern both to those making claims for injuries and to insurers. The Council on Court Procedures perceives that one of the concerns of the Legislature's Task Force on Liability Insurance is the claims costs of insurers. To the extent that costs to insurers are increased through the filing of ill-founded motions for summary judgment, the control over those increased costs is within the power of the insurance industry.

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It is the considered opinion of the Council on Court Procedures that increases in costs of litigation that result from the use of procedural mechanisms is most often the result of abuse of those mechanisms. It is for that reason that the Council, rather than

eliminating valuable mechanisms, has chosen to direct is attention to the abuses through the imposition of sanctions upon those who would use the ORCP for harassment, for delay, or simply to increase the economic burden upon one's adversary.

We recognize that no procedural code is without flaw and that our code must be constantly monitored. This is the function of the Council on Court Procedures. The enclosed amendments are the result of the Council's own monitoring and its application of its judgment to the suggestions of other groups and individuals over the last two years.

Respectfully submitted,

JOE D. BAILEY
Chairman, Council on Court Procedures

JDB/jmh
JDBFRM/3
Enclosures

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 13, 1986

COUNCIL ON COURT PROCEDURES

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1987 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1988, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1985-87 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Underscoring denotes new language while bracketing indicates language to be deleted.

The Council expresses its appreciation to the bench and the bar for the comments and suggestions it has received. The Council held public meetings on December 14, 1985 in Portland; February 22, 1986 in Salem; April 12, 1986 in Eugene; June 14, 1986 in Portland; July 16, 1986 in Bend; September 13, 1986 in Portland; November 8, 1986 in Portland, and December 13, 1986 in Portland.

Special thanks are due, once again, to the Oregon State Bar Committee on Practice and Procedure for its helpful suggestions. Additionally, proposals of the Legislative Task Force on Liability Insurance required the Council to consider closely the rules regarding discovery, summary judgment, and third party practice. That consideration has led to rule changes reflected herein.

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January 2, 1987

The Honorable John Kitzhaber
President of the Senate
State Capitol
Salem, OR 97310

The Honorable Vera Katz
Speaker of the House
State Capitol
Salem, OR 97310

Dear Mr. Kitzhaber and Ms. Katz:

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JOE D. BAILEY
Chairman, Council on Court Procedures

JDB/jmh
JDBFRM/3
Enclosures

SCOPE; CONSTRUCTION;
APPLICATION; RULE; CITATION
RULE 1

* * *

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

COMMENT

When citing the ORCP, proper citation form does not require a period following the capital letter designation of sections.

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 Rule 43, 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

The amendment to Rule 9 would halt the filing of notices of deposition and requests for production with the court. If some court action becomes 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.

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; paragraphs; 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 statements 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.

COMMENT

Denominating alternative theories of recovery within a claim as "counts" is currently considered good pleading. The rule change to ORCP 16 B is designed to codify and make uniform what is widely practiced.

[SIGNATURE OF PLEADINGS]
SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS
RULE 17

[A. Signature by party or attorney; certificate. Every pleading shall be signed by each party or by that party's attorney who is an active member of the Oregon State Bar. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.]

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

A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state that party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature constitutes a certification that the person signing has read the

pleading, motion, or other paper; that to the best of that person's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

B. Pleadings, motions, and other papers not signed. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

C. Sanctions. If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

COMMENT

Rule 17 has been substantially rewritten. A modified rendition of FRCP 11 has been substituted for the old ORCP 17. The amended rule applies to motions and other papers filed by a party, as well as pleadings. To this extent, it expands the numbers and types of documents to which the rule applies. The new rule applies sanctions in the form of reasonable expenses and attorney fees against a party or that party's attorney when a document is filed in violation of the rule.

It is the intent of the new Rule 17 to apply sanctions when pleadings, motions, or other papers are used to abuse the rules of civil procedure. The Council on Court Procedures is of the opinion that procedures established under the ORCP provide for an efficient and cost-effective method of resolving disputes. Any set of rules or procedures, however, is subject to abuse. When abused, the effect can be an increase in costs of litigation. The application of sanctions is viewed by the Council as the most effective means of halting those abuses and assuring the prompt, efficient, and cost-effective resolution of disputes.

The new rule is specifically directed to, but not limited to, abuses in the use of rules regarding discovery, summary judgment, and third party practice.

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 evidence 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

The amendment to 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," and would have allowed the admission of such a deposition. Some concern had been expressed regarding interpretation of the phrase "in a practical sense."

The Council on Court Procedures may not adopt rules of evidence, ORS 1.735. In the Council's view, the original proposal would appear to effect a change in the hearsay rule and would be beyond its jurisdiction.

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.

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 <u>or existing notations</u> of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

* * *

COMMENT

The amendment to Rule 44 was made 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" is intended to broaden the rule to include office and chart notes.

SUBPOENA
RULE 55

* * *

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 reasonable notice in writing 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

The procedure established in ORCP 55 for subpoenaing hospital records allowed the inspection of those records prior to the trial, hearing, or deposition.

The amendment requires giving written notice within a reasonable period of time before inspection takes place.

ORCP 44 E requires that notice be given prior to seeking access to hospital records. This amendment requires an additional notice prior to inspection when access is gained through subpoena.

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 the party against whom judgment by default is sought has appeared in the action or if the party seeking judgment has received notice that the party against whom judgment is sought is represented by an attorney in the pending proceeding, the party against whom judgment is sought (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. **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 application for judgment at least 10 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

It is the custom among Oregon attorneys to provide notice of an intent to take an order of default to an opposing party when they are aware that the opposing party is represented by counsel. This notice is an outgrowth of professional courtesies among members of the Bar. It is not uncommon for one attorney to grant an extension of time for making an appearance to another attorney and to then notify that attorney when extensions of time will no longer be granted. It is believed that the extension of these professional courtesies assists in the efficient handling of disputes and fosters the professionalism of the Bar.

ORCP 69 has long been read to require the provision of notice prior to seeking an order of default. The Oregon Supreme Court in Denkers v. Durham Leasing, 299 Or. 544 (1985), analyzed ORCP 69 and concluded that notice prior to taking an order of default is not required. Notice is required only when making application for a default judgment when the party in default has either appeared or is represented by counsel. It was suggested to the Council on Court Procedures that ORCP 69 should require notice of intent to take a default order when a party has either appeared or is represented by counsel. The Council was concerned that disparate treatment of represented and non-represented litigants in the ORCP presented problems of constitutional dimension.

This amendment requires that notice be given to all parties who have appeared but against whom a default order has been taken prior to application for judgment only in the event that it is necessary to receive evidence prior to entering judgment.

Litigants receive notice of the time within which they must appear to avoid default in the summons, ORCP 7. The extensions of courtesies among members of the Bar are not subject to regulation by the ORCP, and such attempts could make the procedural right of litigants rise or fall, depending on whether they are represented by counsel.

The Council supports these extensions of courtesy among members of the Bar and recognizes the responsibility of all lawyers to abide by established custom and practice, Code of

Professional Responsibility, DR 7-106(C)(5), and Ainsworth v. Dunham, 235 Or. 225 (1963). The Council does not believe, however, that such courtesies can or should be the subject of procedural requirement.

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

"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 by the bench and bar as suit money or alimony, and the proposed amendment would clarify the rule.